

GLOBAL CORRUPTION

GLOBAL CORRUPTION

ITS REGULATION UNDER INTERNATIONAL CONVENTIONS,
US, UK, AND CANADIAN LAW AND PRACTICE

Volume 1

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GERRY FERGUSON



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TESTIMONIALS

Global Corruption is the Canadian (and arguably US and UK) definitive text on ABAC. Like Hogg on constitutional law, but for anticorruption. Throughout the day [of publication], my counterparts from the other banks emailed back their thanks and great surprise at the sheer wealth of the resource that Ferguson has provided.

Daryl Davis (H.B.A., B.C.L. & LLB.) – *Chief Advisor Sanction and Anti-Corruption Program Management National Bank of Canada*

In *Global Corruption*, Ferguson provides a rich analysis of the nature, scope and extent of global corruption by canvassing international requirements and UK, US and Canadian law on a vast array of topics from the investigation, prosecution and sanctioning of corruption, money laundering and the recovery of corruption proceeds to laws and policies on preventative mechanisms such as the regulation of public procurement, lobbying, campaign financing, whistleblowing and other corruption risks.

Dr. Leonardo Borlini – *Department of Law Bocconi University & Co-author of Corruption: Economic Analysis and Law*

This book by Ferguson is an invaluable resource for the international community as he provides an amazing wealth of information and analysis for students and practitioners on the scope and details of the international standards against corruption, including the UN and OECD conventions as well as the various ways in which the laws of US, UK and Canada attempt to combat corruption.

Dr. Nikos Passas – *Professor of Criminology & Criminal Justice, Northeastern University. Senior Fellow of the Financial Integrity Institute, Case Western Reserve School of Law*

The 2022 edition of *Global Corruption*, expanded and updated to include new content from a variety of subject matter experts, provides impressive coverage of a range of issues spanning the field of anti-corruption. It offers a comprehensive yet remarkably accessible set of resources for those interested and engaged in tackling corruption. Whether you are approaching the topic of corruption as an interested citizen, an affected businessperson, a seasoned advisor, or a government policy-maker, you will find this book to be full of valuable material.

Anthony Cole, *Partner, National Lead – White Collar Crime and Government Investigations, Dentons Canada LLP and Chair of Legal Committee, Transparency International Canada*

The 2022 edition of *Global Corruption* is a comprehensive view of the disastrous impact of corruption on the most marginalized globally, under a Canadian political, legal and regulatory lens. The practical comparisons between the applicable systems in Canada with other jurisdictions puts the Canadian response to corruption into a global context. A handy reference guide to anyone with an interest in how Canada's anticorruption framework stacks up globally.

Peter Dent, *Partner and President of Deloitte Forensic Inc and past Chair of Transparency International-Canada*

*To the women in my life
for all their love and support*

*Sharon, Debbie and Lori
and
Alexa, Jessica and Kailyn*

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TABLE OF ACRONYMS

AAA	American Arbitration Association
ABA	American Bar Association
ABMS	ISO 37001 Anti-bribery Management System standard for organizations
ACA	Anti-corruption agency
ACC	Association of Corporate Counsel
ACC	Bangladesh, Anti-Corruption Commission
ACoBA	UK, Advisory Committee on Business Appointments
AECA	<i>Arms Export Control Act</i>
AFAR	Arab Forum on Asset Recovery
AFMLS	Asset Forfeiture and Money Laundering Section
AIT	Agreement on Internal Trade
ALACs	Transparency International, Advocacy and Legal Advice Centres
AMF	Quebec, Canada, Autorité des marchés financiers
AML	Anti-Money Laundering
APEC	Asia-Pacific Economic Cooperation
APPC	UK, Association of Professional Political Consultants
ASEM	Asia-Europe Meeting
ASMLS	Asset Forfeiture and Money Laundering Section
AU	African Union
AU Convention	African Union Convention on Preventing and Combating Corruption
BITs	bilateral investment treaties
BSA	US, <i>Bank Secrecy Act</i>
BOTA	BOTA Foundation
BOO	build-own-operate
BPI	Bribe Payers Index
CBA	Canadian Bar Association
CBA Code	Canadian Bar Association Code of Professional Conduct
CCIR	EC, Code of Conduct for Interest Representatives
CDA	US, <i>Contract Disputes Act of 1978</i>
CED	Committee for Economic Development
CETA	Canada-European Union, Comprehensive Economic and Trade Agreement
CFT	combating the financing of terrorism
CFPOA	Canada, <i>Corruption of Foreign Public Officials Act</i>
CICA	US, <i>Competition in Contracting Act</i>

CICIG	International Commission against Impunity in Guatemala
CIPR	UK, Chartered Institute of Public Relations
COC	UK, Code of Conduct (for Members of Parliament)
COE	Council of Europe
COIA	Canada, <i>Conflict of Interest Act</i>
COIC	Canada, Conflict of Interest Code (for Members of the House of Commons)
CPI	Corruption Perceptions Index
CPS	UK, Crown Prosecution Service
CSC	UK, Civil Service Commission
CSP	corporate social performance
CSPL	UK, Committee on Standards in Public Life
CSR	corporate social responsibility
CTRs	currency transaction reports
CUSAGP	Canada-US Agreement on Government Procurement
DAEO	US, designated agency ethics official
DFAIT	Canada, Department of Foreign Affairs and International Trade
DFID	UK, Department for International Development
DNA	Romanian Anti-Corruption Authority
Dodd-Frank Act	US, <i>Dodd-Frank Wall Street Reform and Consumer Protection Act</i>
DOJ	US, Department of Justice
DOJ-AFF	US, Department of Justice Asset Forfeiture Funds
DPAs	US, UK, Deferred Prosecution Agreements
DPOHs	Canada, designated public office holders
DPP	Canada, Director of Public Prosecutions
DTR5	UK, Transparency Directive Review
EA	Canada, <i>Evidence Act</i>
EBOs	US, Executive Branch Officials
EBRD	European Bank for Reconstruction and Development
EC	European Commission
ECHR	European Court of Human Rights
ECNEC	Bangladesh, Executive Committee of National Economic Council
ECT	Energy Charter Treaty
EFCC	Nigeria, Economic and Financial Crimes Commission
EGA	US, <i>Ethics in Government Act</i>
EITI	Extractive Industries Transparency Initiative
EP	European Parliament
ESTMA	Canada, <i>Extractive Sector Transparency Measures Act</i>
EU Convention	The Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States

EU Directive	EU Directive on Public Procurement
FACFOA	Canada, <i>Freezing Assets of Corrupt Foreign Officials Act</i>
FAIR	Canada, Federal Accountability Initiative for Reform
FAR	US, Federal Acquisition Regulation
FATF	US, Financial Action Task Force
FCA	US, <i>False Claims Act</i>
FCPA	US, <i>Foreign Corrupt Practices Act</i>
FDI	Foreign Direct Investment
FAA	Canada, <i>Federal Accountability Act</i>
FIFA	Fédération Internationale de Football Association
FinCEN	US, Financial Crimes Enforcement Network
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
FIU	Financial Intelligence Unit
FLSC	Federation of Law Societies of Canada
FLS Model Code	Canada, Federation of Law Society's Model Code of Professional Conduct
FIPPA	Ontario, Canada, <i>Freedom of Information and Protection of Privacy Act</i>
FRO	UK, Financial Reporting Order
FTC	US, Federal Trade Commission
GAO	US, Government Accountability Office
GCB	Global Corruption Barometer
GDP	Gross Domestic Product
GOPAC	Global Organization of Parliamentarians Against Corruption
GPSA	Gas Purchase and Sales Agreement
GRECO	Group of States against Corruption
HCE	US, House Committee on Ethics
HKIAC	Hong Kong International Arbitration Centre
HLOGA	US, <i>Honest Leadership and Open Government Act</i>
IACU	International Anti-Corruption Unit
IBRD	International Bank for Reconstruction and Development
ICAC	Hong Kong, Independent Commission Against Corruption
ICAR	International Centre for Asset Recovery
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFBTF	International Foreign Bribery Task Force
IFC	International Finance Corporation
IG	US, Inspector General
IIA	<i>Interinstitutional Agreement on the Transparency Register</i>

IIAs	international investment agreements
ISO	International Organization for Standardization
ITAR	<i>International Traffic in Arms Regulations</i>
ITO	Information to Obtain
ITT	Invitation to Tender
JITs	UK, Joint Investigation Teams
JVA	Joint venture agreement
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LA	Canada, <i>Lobbying Act</i>
LBOs	US, Legislative Branch Officials
LCC	Canada, <i>Lobbyists' Code of Conduct</i>
LCIA	London Court of International Arbitration
LDA	US, <i>Lobbying Disclosure Act</i>
LRA	Canada, <i>Lobbyists Registration Act</i> (renamed the <i>Lobbying Act</i>)
M&A	Mergers and Acquisitions
MACCIH	Support Mission Against Corruption and Impunity in Honduras
MASH	Municipalities, Academic Institutions, Schools and Hospitals
MDBs	Multilateral Development Banks
MIGA	Multilateral Investment Guarantee Agency
MLA	Mutual Legal Assistance
MLACMA	Canada, <i>Mutual Legal Assistance in Criminal Matters Act</i>
MLAT	Mutual Legal Agreement
MLPP	Model Law on Public Procurement (UNCITRAL)
MOJ	UK, Ministry of Justice
MOUs	memoranda of understanding
MPs	Members of Parliament
MSG	UK, Multi Stakeholder Group
NAFTA	North American Free Trade Agreement
NCA	UK, National Crime Agency
NCB	Non-Conviction Based (forfeiture)
NGO	Non-Governmental Organization
NILE	US, National Institute for Lobbying and Ethics
NORAD	Norwegian Agency for Development Cooperation
NPA	US, Non-Prosecution Agreements
OAG	Attorney General of Switzerland
OAS	Organization of American States
OCDETF	Organized Crime Drug Enforcement Task Force
OCE	US, Office of Congressional Ethics
OCHRO	Canada, Office of the Chief Human Resources Officer
OPCS	UK, Office of the Parliamentary Commissioner for Standards
OECD	Organisation for Economic Co-operation and Development

OGE	US, Office of Government Ethics
OM	operate and maintain arrangement
OSC	US, Office of the Special Counsel
OSC	Ontario Securities Commission
P3s	Public-Private Partnership
PACI	World Economic Forum Partnering Against Corruption Initiative
PATT	Proactive Asset Targeting Team
PCA	Permanent Court of Arbitration
PCR	UK, Public Contracts Regulations
PEPs	Politically exposed persons
PIDA	UK, <i>Public Interest Disclosure Act</i>
PIM System	Public investment management system
POCA	UK, <i>Proceeds of Crime Act 2002</i>
POs	US, Public Officials
POHs	Canada, public office holders
PPP Canada	Public Private Partnership Canada
PPSC	Public Prosecution Service of Canada
PQ	Canada, Parti Québécois
PRCA	UK, Public Relations Consultants Association
PRII	Public Relations Institute of Ireland
PSA	UK, <i>Public Services (Social Value) Act 2012</i>
PSCs	People who have significant control over the company
PSDPA	Canada, <i>Public Servants Disclosure Protection Act</i>
PWGSC	Public Works and Government Services Canada
RCMP	Royal Canadian Mounted Police
RFP	Request for Proposal
RFQ	Request for Quotation
RFQu	Request for Qualifications
RFSO	Request for Standing Officer
RICO	US, <i>Racketeering Influenced and Corrupt Organizations Act</i>
SARs	Suspicious Activity Reports
SBEE	UK, <i>Small Business Enterprise & Employment Act 2015</i>
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCE	US, Senate Committee on Ethics
SCPO	UK, Serious Crime Prevention Order
SEC	US, Securities and Exchange Commission
SEMA	<i>Special Economic Measure Act</i>
SFO	UK, Serious Fraud Office
SIAC	Singapore International Arbitration Center
SMEs	Small and Medium Sized Enterprises
SOCA	UK, Serious Organised Crime Agency

SOCPA	UK, <i>Serious Organised Crime and Police Act</i>
SOX	US, <i>Sarbanes-Oxley Act of 2002</i>
SPV	Special Purpose Vehicle
SRA Code	UK, Solicitor Regulations Authority Code of Conduct
STRs	suspicious transaction reports
StAR	Stolen Asset Recovery Initiative (WB/UNODC)
TFF	US, Treasury Forfeiture Fund
TI	Transparency International
TI Canada	Transparency International Canada
TI UK	Transparency International United Kingdom
TIPs	treaties with investment provisions
TLA	UK, <i>Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014</i>
TR	EC/EP, Transparency Register
TRO	Temporary restraining order
UEFA	Union of European Football Associations
UKFIU	UK, Financial Intelligence Unit
UKLR	UK Lobbying Register
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
UPAC	Quebec, the Unité permanente anticorruption / Permanent Anticorruption Unit
USC	United States Code
US DOJ	United States Department of Justice
UKFIU	UK, Financial Intelligence Unit
VIAC	Vienna International Arbitration Centre
WB	World Bank
WDF	World Duty Free
WGB	OECD'S Working Group on Bribery
WGI	Worldwide Governance Indicators
WJP	US, World Justice Project
WPA	US, <i>Whistleblower Protection Act</i>
WPEA	US, <i>Whistleblower Protection Enhancement Act</i>
WTO-AGP	World Trade Organization Agreement on Government Procurement

ABOUT THE EDITOR

Gerry Ferguson is a University of Victoria Distinguished Professor of Law who specializes in criminal law. He is also a senior associate with the International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver. Professor Ferguson is a member of the United Nations Office on Drugs and Crime Anti-Corruption Academic Development Initiative (ACAD) devoted to the creation of anti-corruption academic materials and the teaching of university courses on global corruption. He is co-editor and co-author (with Douglas Johnston) of *Asia-Pacific Legal Development* (UBC Press, 1998), was a co-leader of the CIDA-funded Canada-Vietnamese Legislative Drafting and Management Program, 1994-95, and a team member of the CIDA-funded Canada-China Procuratoracy Project, 2003-2008, under the direction of the ICCLR. He is the co-author, with Justice Dambrot and Professor Michelle Lawrence, of the annually updated two-volume book, *Canadian Criminal Jury Instructions*. Professor Ferguson has taught criminal law as a Visiting Professor at the University of Hong Kong, the University of Auckland, Monash University, the University of Malaya and the University of Airlangga in Indonesia. He has given guest lectures at various law schools in South Africa, China, Vietnam, Thailand, Singapore, Australia, New Zealand, Ireland and Europe. Professor Ferguson is a former member of the National Advisory Council of the Law Commission of Canada and an active participant in the Canadian Bar Association, Law Society, and Continuing Legal Education Society activities. His teaching and scholarly interests include transnational and comparative criminal law and procedure, sentencing and mental health law. Professor Ferguson may be contacted at gferguso@uvic.ca.

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PREFACE TO THE FOURTH EDITION

This fourth edition marks the transformation of *Global Corruption: Its Regulation under International Conventions, US, UK, and Canadian Law and Practice* from a single-authored work to a collectively authored one. I am excited to introduce 15 anti-corruption experts as authors and co-authors of various chapters. The edition also contains two new chapters entitled Collective Action (Chapter 15) and The Role of NGOs (Chapter 16). Many new and emerging corruption topics are introduced into the updated, fourth edition.

Gerry Ferguson

February 2022

ACKNOWLEDGMENTS

I am deeply indebted to Rachael Carlson for her exemplary work as my chief research and editorial assistant in producing this edition and to Chloe Ducluzeau who joined our team as a Dentons Fellow half way through the updating of this edition. My thanks also go to Erin Jackes who joined the team and did an excellent job in the past few months pushing us over the goal line. This book would not have been produced without their dedication and diligence. I would also like to thank the Canadian Foundation for Legal Research and to the University of Victoria, Internal Research and Creative Projects Fund for their economic support in paying for my research assistants. Finally, I would like to thank Inba Kehoe (Manager, ePublishing Services), Yenny Lim and Mary MacLeod from UVic Libraries for their careful and professional skills in the editorial production and formatting of this fourth edition.

PREFACE TO THE THIRD EDITION

I am most grateful to Inba Kehoe, Copyright Officer & Scholarly Communication Librarian at the University of Victoria Libraries, for suggesting that I produce an open-access print version of my 2017 electronic version of *Global Corruption: Law, Theory and Practice*. This edition includes a number of significant anti-corruption developments that have occurred in the past year, but not all changes and developments. Thus this edition is comprehensively updated to January 2017 and selectively updated to February 2018. This edition also adds a new Chapter 13 entitled “Campaign Finance Laws: Controlling the Risks of Corruption and Public Cynicism” and a Table of Acronyms.

Gerry Ferguson

February 2018

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I am deeply indebted to Mary Wallace for her dedication and diligence in helping to transform the electronic version to this print version and to Leyla Salmi for her research assistance on various topics in the early stages of producing this edition. Likewise, I am equally indebted to Inba Kehoe, Stephanie Boulogne and Yenny Lim for the care and attention that they have put into the editorial production and the design, including cover, of this version.

PREFACE TO THE SECOND EDITION

It has only been 18 months since the first edition of this book was published. But the frequency of corruption and the social, legal, economic and political responses to corruption continue to increase at a dizzying pace.

While organized on the same model as the first edition, the second edition includes references to up-to-date anti-corruption laws, policies, best practices and excellent research resources such as books, articles and reports by NGOs, government bodies, academics and practitioners. In addition, several topics have been either introduced or significantly expanded in each chapter. The detailed Table of Contents following the Preface to the first edition indicates the scope of the topics covered in this book.

Gerry Ferguson

January 2017

ACKNOWLEDGMENTS

As with the first edition, this book would not have seen the light of day without the contributions of a dedicated team of legal research assistants. This is especially true in the case of the chief editor, Mary Wallace, who painstakingly reviewed and edited the entire book. I am deeply indebted to the following students who researched and updated various chapters: Connor Bildfell, Sarah Chaster, Dmytro Galagan, David Gill, Laura Ashley MacDonald, Madeline Reid and Matthew Spencer. I am also very grateful to Dmytro Galagan and Jeremy Henderson who added new sections to Chapters 7 and 12 and to Victoria Luxford, Joseph Mooney and Jeremy Sapers who updated their Chapters (9, 10 and 12). Finally I am very grateful to the CBA Law for the Future Fund, the Law Foundation of British Columbia and the Foundation for Legal Research who generously funded my research assistants for this book.

PREFACE TO THE FIRST EDITION

In the beginning there was no corruption but Adam got greedy, abused his position of privilege by going for the apple and things have gone downhill ever since. Corruption is now an inescapable reality of modern life.

Purpose of this Book

No Canadian law school (prior to UVic Law in September, 2015) had a course on global corruption, and relatively few law schools around the world have such a course. This book has been specifically created to make it easier for professors to offer a law school course on global corruption. This book is issued under a creative commons license and can be used for free in whole or in part for non-commercial purposes. The first chapter sets out the general context of global corruption: its nature and extent, and some views on its historical, social, economic and political dimensions. Each subsequent chapter sets out international standards and requirements in respect to combating corruption – mainly in the UN Convention Against Corruption (UNCAC) and the OECD Bribery of Foreign Officials Convention (OECD Convention). The laws of the United States and United Kingdom are then set out as examples of how those Convention standards and requirements are met in two influential jurisdictions. Finally, the law of Canada is set out. Thus, a professor from Africa, Australia, New Zealand or English speaking countries in Asia and Europe has a nearly complete coursebook – for example, that professor can delete the Canadian sections of this book and insert the law and practices of his or her home country in their place.

While primarily directed to a law school course on global corruption, I expect that this coursebook, or parts of it, will be of interest and use to professors teaching courses on corruption from other academic disciplines and to lawyers and other anti-corruption practitioners.

Genesis of this Book

The United Nations Office on Drugs and Crime (UNODC) is responsible for promoting the adoption of and compliance with UNCAC. Chapter II of UNCAC is focused on Prevention of Corruption. Educating the lawyers, public officials and business persons of tomorrow on anti-corruption laws and strategies is one preventative strategy. Recognizing this, the UNODC set up an Anti-Corruption Academic Initiative (ACAD) to promote the teaching of corruption in academic institutions by collecting and distributing materials on corruption. As a member of the ACAD team, this coursebook is my contribution to that worthy goal.

Where to Next

As a first edition, there is room for improvement in this book. I hope to update and repost this book annually. In future editions, I would like, for example,

- to provide an index
- to expand chapter 8 on the “Role of Lawyers in Advising Business Clients on Corruption and Anti-Corruption Issues”

- to include a chapter on corruption and political parties and campaign financing
- and perhaps to add a few chapters on corruption in specific business sectors such as extractive industries, infra-structure projects etc.

I would be very pleased to hear from users of this book especially in regard to the inevitable errors and omissions that I have made in trying to describe and comment on the vast field of global corruption under UNCAC and the OECD Anti-Bribery Convention, and the laws of United States, United Kingdom and Canada.

Finally, I would like to thank the many NGOs and government agencies that have produced an incredible volume of excellent studies and reports on corruption/anti-corruption issues and for making those studies and reports, many of which are used in this book, publicly available.

Gerry Ferguson

September 2015

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This book would not have been completed without a host of angels and archangels and a few generous funders to keep them fed. All these angels provided excellent, high quality research and writing assistance and I am most grateful to all of them. Some of the angels became archangels due to the extent of their research and writing contributions to this book. The archangels include Katie Duke for her work on chapters 1 to 3, Ashley Caron and Martin Hoffman for their work on chapters 4 and 5, James Parker for his work on chapters 1 and 6 and Madeline Reid for her editing contributions to the whole book. Chapters 9 to 12 would not have been possible without the excellent research and writing of Joseph Mooney, Jeremy Sapers, Mollie Deyong, Erin Halma and Victoria Luxford. Other indispensable angels included Laura MacDonald, Courtney Barnes, Lauryn Kerr and Ryan Solcz. I would like to sincerely thank the following organizations for helping to fund the research students: Law Foundation of British Columbia, University of Victoria Learning and Teaching Centre, Canadian Bar Association Law for the Future Fund, the Foundation for Legal Research and Dentons LLP.

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CHAPTER 1

CORRUPTION IN CONTEXT: SOCIAL, ECONOMIC, AND POLITICAL DIMENSIONS

GERRY FERGUSON*

* The author thanks Chloe Ducluzeau for her superb research and writing assistance with this chapter.

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The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. WHY CORRUPTION MATTERS

1.1 A Pressing Global Issue

Corruption, according to former World Bank President Jim Yong Kim, is “public enemy number one” in the developing world, and “every dollar that a corrupt official or corrupt business person puts in his or her pockets is a dollar stolen from a pregnant woman who needs healthcare, or from a girl or boy who deserves an education, or from communities that need water, roads and schools.”¹ Recently, it has been estimated that as much as \$1 trillion annually is siphoned off from developing countries by corruption, tax evasion, and other large financial crimes.² The World Bank has estimated that as much as \$40 billion in foreign aid to the world’s poorest countries has been lost to corruption in recent years.³ And it is estimated that 3.6 million people die from inadequate health care and living conditions each year in part because corruption has resulted in the theft of significant amounts of development aid.⁴ Volkan Bozkir, the President of the UN General Assembly, commented that “corruption corrodes public trust, weakens the rule of law, seeds conflict, destabilizes peacebuilding efforts, undermines human rights, impedes progress on gender equality and hinders efforts to achieve the targets of the 2030 Agenda for Sustainable Development. It also hits the poor, the marginalized and the most vulnerable the hardest. For all those reasons, the world cannot — and will not — allow corruption to continue.”⁵ On June 2, 2021, the G7 foreign ministers stated that they “recognize that corruption is a pressing global issue”⁶ which they fully intend to address. And on June 10, 2021 Integrity Initiatives International, an NGO, announced that “more than 100 world leaders from over 40

¹ World Bank, Press Release, 2014/272/ECR, “Corruption is ‘Public Enemy Number One’ in Developing Countries, Says World Bank Group President Kim” (19 December 2013), online: <<https://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim>>.

² Angel Gurría, “International Anti-Corruption Academy: High Level Panel on Corruption and Sustainable Development”, Remarks, (Paris: 1 September 2020), online: <<https://www.oecd.org/about/secretary-general/high-level-panel-on-corruption-and-sustainable-development-september-2020.htm>>.

³ While this figure may be a significantly inflated number, and we may not be able to accurately estimate the precise amount of bribery and corruption, all experts agree on one thing: “whatever the exact amount is, it’s a lot!” And there is no doubt that it facilitates and contributes to a massive amount of harm.

⁴ “Corruption ‘Impoverishes and Kills Millions’”, BBC News (3 September 2014), online: <<https://www.bbc.com/news/world-29040793>>.

⁵ United Nations, Meeting Coverage, GA/12329, “Opening Special Session on Corruption, General Assembly Adopts Political Declaration with Road Maps to Help Countries Tackle Bribery, Money-Laundering, Abuse of Power” (2 June 2021), online: *UN Meetings Coverage & Press Releases* <<https://www.un.org/press/en/2021/ga12329.doc.htm>>.

⁶ US Department of State, Press Release, “G7 Ministers’ Statement on the UN General Assembly Special Session Against Corruption” (2 June 2021), online: <<https://www.state.gov/g7-ministers-statement-on-the-un-general-assembly-special-session-against-corruption/>>.

countries”⁷ have signed a declaration for the creation of an International Anti-Corruption Court to prosecute, punish and deter kleptocrats and others engaged in grand corruption.

During his tenure as Vice President in 2014, Joe Biden declared that “corruption is a cancer, a cancer that eats away at a citizen’s faith in democracy. [It] diminishes the instinct for innovation and creativity, already-tight national budgets, crowding out important national investments. It wastes the talent of entire generations. It scares away investments and jobs.”⁸ He then added “most importantly it denies the people their dignity. It saps the collective strength and resolve of a nation. Corruption is just another form of tyranny.”⁹ Former UK Prime Minister David Cameron also stated in 2014 “don’t let anyone keep corruption out of how we tackle poverty.”¹⁰ In 2016, the former US Secretary of State John Kerry warned about the dangers of corruption, stating “[c]orruption is not just a disgrace and a crime. It is also dangerous. There is nothing more demoralizing, more destructive, more disempowering to a citizen than the belief that the system is rigged against them, the belief that the system is designed to fail them, and that people in positions of power, to use a diplomatic term, are ‘crooks’ — crooks who are embezzling the future of their own people.”¹¹ In his first year in office, President Biden has reaffirmed his stance against corruption by issuing a memorandum setting out anti-corruption efforts as a national security concern; in doing so, he also noted that “corruption ... contributes to national fragility, extremism, and migration; and provides authoritarian leaders a means to undermine democracy worldwide.”¹² In light of all the above, there should be little doubt that corruption is a pressing global issue that needs much more attention in all parts of the world.

1.2 Illustration of the Impact of Corruption

“SNC and a Bridge for Bangladesh” is a shocking investigative report by CBC TV into the cancellation of World Bank funding (\$1.2 billion loan) for a major bridge proposal (worth nearly \$3 billion) in Bangladesh.¹³ The bridge is critical to both the economic growth of the

⁷ AP News for Business Wire, Press Release, “100-Plus World Leaders Call for an International Anti-Corruption Court” (10 June 2021), online: <<https://apnews.com/press-release/business-wire/joe-biden-cddcae7e575241b39221244d801a8145>>.

⁸ Joe Biden, “Remarks by Vice President Joe Biden to Romanian Civil Society Groups and Students”, Remarks, (21 May 2014), online: <<https://obamawhitehouse.archives.gov/the-press-office/2014/05/21/remarks-vice-president-joe-biden-romanian-civil-society-groups-and-stude>>.

⁹ *Ibid.*

¹⁰ Stella Dawson, “World Must Tackle Corruption to End Poverty – Cameron”, *Reuters* (24 September 2014), online: <<https://www.reuters.com/article/uk-foundation-un-corruption-idAFKCN0HK0EC20140925>>.

¹¹ Secretary of State John Kerry, “Remarks on Community Building and Countering Violent Extremism”, Remarks, (14 September 2016), online: *US Embassy & Consulate in Nigeria* <<https://ng.usembassy.gov/secretary-state-john-kerry-remarks-community-building-countering-violent-extremism/>>.

¹² Memorandum from President Joe Biden (3 June 2021), “Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest”, online: <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>>.

¹³ CBC, “SNC and a Bridge for Bangladesh” (15 May 2013), online (video): CBC <<https://www.cbc.ca/player/play/2385471721>>.

country and the safety of thousands of poor Bangladesh citizens who cross the Padma River daily in crowded, unsafe boats. The World Bank cancelled funding for the bridge project because very senior politicians and officials in the Bangladesh government allegedly solicited bribes from bidding companies. SNC-Lavalin allegedly agreed to pay those bribes in order to get the engineering contract (worth \$50 million) to supervise the bridge construction. SNC-Lavalin, a Canadian-based company, operates in over 100 other countries and was at that time one of the five largest, international engineering firms in the world.

Background on Padma Bridge Corruption Scandal

When allegations of bribery concerning the awarding of the engineering contract to SNC-Lavalin arose, the World Bank (WB) instituted an investigation by an external evaluation panel in the Fall of 2012. According to the WB Panel report, there was evidence that in late March of 2011 two members of the Bangladesh Bridge Project Evaluation Committee (BPEC) unlawfully informed senior SNC-Lavalin officers in Bangladesh that SNC-Lavalin was second behind another firm, Halcrow, in the bidding process, but that no final recommendation had been made. In addition to BPEC's recommendation, the awarding of the engineering contract would also have to be approved by Minister Syed Abul Hossain of the Bangladesh government. SNC-Lavalin officers allegedly took several steps to improve the company's ranking on BPEC's list. Mohammad Ismail, Director of a SNC-Lavalin subsidiary in Bangladesh was the main representative in the bidding process, along with SNC-Lavalin local consultant Md Mostafa. Ismail and Mostafa dealt directly with Zulfiqar Bhuiyan, Secretary of the Bridge Authority, as well as a member of BPEC and Minister Hossain. Bhuiyan indicated that he and the Minister expected to have a face-to-face meeting with a top SNC-Lavalin executive to "seal the project." Ramesh Shah was a Vice-President of SNC-Lavalin International Inc. (SLII) and reported to Kevin Wallace, Senior Vice-President of SLII and the executive assigned to the Padma Bridge project. SLII was a relatively small subsidiary or division of the SNC-Lavalin Group of companies. Its head office was located in Oakville, Ontario.

In May 2011, Ramesh Shah and Kevin Wallace flew to Bangladesh for a face-to-face meeting with Bhuiyan and Minister Hossain. The meeting was facilitated by an influential government Minister, Abul Hasan Chowdhury, whom the prosecution alleges was also an agent of SNC-Lavalin. After the meeting, Ramesh Shah wrote in his notebook, "PADMA PCC ... 4% Min ... 1% Secretary" in respect to the \$50 million bridge supervision contract. "PCC" was SNC-Lavalin's internal notation for "project consultancy or commercial costs" which apparently was used in SLII's accounts to refer to bribery payments.¹⁴ "Min" presumably referred to Minister Hossain and "Secretary" presumably referred to Secretary Bhuiyan. Two weeks later, SNC-Lavalin International Inc. was awarded the contract.

As noted, the World Bank "suspended" its funding for Padma Bridge in 2012 pending an external evaluation of alleged corruption by a WB Investigative Panel. After completing its initial evaluation, the WB panel recommended corruption charges be laid against several persons, including Minister Hossain. Bangladesh's Anti-Corruption Commission (ACC) laid

¹⁴ See e.g., Dave Seglins, "SNC-Lavalin International Used Secret Code for 'Bribery' Payments", *CBC* (13 May 2015), online: <<https://www.cbc.ca/news/canada/snc-lavalin-international-used-secret-code-for-bribery-payments-1.1386670>>.

conspiracy to bribe charges against seven persons, but they adamantly refused to include Minister Hossain. The World Bank threatened to cancel the Padma Bridge loan agreement due to this refusal to conduct a “full and fair” corruption inquiry of all suspects. In January 2013, before the World Bank formally cancelled its loan, Bangladesh “withdrew” its formal request to the World Bank for funding of the bridge.

Meanwhile the Bangladesh ACC continued to investigate the charge of conspiracy to bribe by seven persons: three Bangladesh officials (including the Prime Minister’s nephew, Ferdous, Zaber and Bhuiyan), three SNC officials (Wallace, Shah, and Mohammad Ismail), and SNC’s local agent Mostafa. Remarkably, the ACC, in its final report in September 2014, concluded that there was not sufficient evidence to proceed with a charge of conspiracy to bribe against any of these men. The ACC also reported that Ministers Hossain and Chowdhury had no involvement in the alleged bribery scheme (see Chapter 6, Section 3.2 for further discussion on the Bangladesh ACC). The ACC report was then filed with the Bangladesh court and on October 30, 2014, the Court acquitted all seven persons of conspiracy to bribe.

The bridge was originally scheduled for completion in 2014. According to Bangladesh news sources, work on the bridge began again in 2015 using domestic financing and apparently a \$2 billion investment from China. The government of Bangladesh initially claimed the bridge would be complete by 2018. In January of 2016, the Executive Committee of the National Economic Council (ECNEC) approved a third revision to the Padma Bridge project raising the total project cost to more than Tk80 billion (roughly \$1.02 billion) over budget. As of June 2021, the bridge is said to be 87 percent finished, the estimated cost has now ballooned to over \$8 billion¹⁵ and the expected completion date is now set for somewhere between April and June 2022.¹⁶ The Bangladesh Bridge Authority claimed that the increased budget is due to delayed implementation and associated factors including rising costs for construction materials, consultancy services, land, and the recruitment of more people to speed up the process.¹⁷ Independent sources have suggested that the climbing costs were also at least in part due to further bribery and corruption, and that in order to fund the project the Bangladesh government had to divert resources from essential services like health care.¹⁸

¹⁵ It has been reported that “[t]he bridge’s road section, which costs U.S. \$3.87 billion, is being funded by Bangladesh’s government and being built by China Railway Major Bridge Engineering, a state-run company. The Chinese government agreed to finance 85 percent of the cost of the \$4.8 billion rail portion through a loan to Bangladesh”: “Bangladesh Installs Last Span of Ambitious Chinese-Backed Bridge Project”, *Radio Free Asia* (10 December 2020), online: <<https://www.rfa.org/english/news/china/bridge-12102020163031.html>>.

¹⁶ See Anowar Hossain’s “Plan to Complete Padma Bridge by April Next Year”, *Prothomalo* (2 July 2021), online: <<https://en.prothomalo.com/bangladesh/plan-to-complete-padma-bridge-by-april-next-year>>.

¹⁷ “Tk 8,286cr Rise in Padma Bridge Cost Okayed”, *The Independent* (6 January 2016), online: <http://www.eindependentbd.com/arc/next_page/2016-01-06/20>.

¹⁸ Daniel Binette, “When Should Corruption Be Tolerated? The Case of the Padma Bridge” (6 November 2016), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2015/11/06/when-should-corruption-be-tolerated-the-case-of-the-padma-bridge/>>.

Adverse Consequences for Citizens of Bangladesh

Cancellation of funding from the World Bank meant that construction of the Padma Bridge was halted. The bridge was at that time estimated to cost \$3 billion and was to be completed in 2014. Due to the discovery of the bribery agreement between SNC and Bangladesh officials, there has been at least a seven-year delay in constructing the bridge. Due to this delay, hundreds of poor Bangladesh citizens continue to drown trying to cross the Padma River in unsafe boats.¹⁹ The construction delay has also prevented the promises of economic growth for the poor people of this region. And who will pay for the increased costs of the bridge, now estimated at more than double its original cost? Ultimately the citizens of Bangladesh will! They are already paying by reason of the government's diversion of resources for public services, such as healthcare to pay for the inflated cost of the bridge due to bribery, and they will also have to eventually repay the inflated loan the government took out to build the bridge. In addition, the ACC's adamant refusal to charge Minister Hossain with conspiracy to bribe and the conclusion by the ACC and the court in Bangladesh that there was insufficient evidence to try the Bangladesh officials and the SNC officials involved in the bribery scheme, leaves the citizens of Bangladesh more cynical than ever as to the impartiality, honesty, and fairness of its leaders, its ACC, and its courts. The severe adverse consequences of the World Bank withdrawal of its funding for the Padma Bridge has resulted in some commentators suggesting that the World Bank should have carried on with its funding, despite the bribery, and simply increased its integrity supervision of the bridge going forward.²⁰

¹⁹ See e.g., Jane Onyanga-Omara, "Bangladesh Ferry Disaster Death Toll Reaches 70", *USA Today* (23 February 2015), online: <<https://www.usatoday.com/story/news/world/2015/02/23/bangladesh-ferry-disaster/23879313/>>. "Boat Accident in Bangladesh leaves at Least 25 People Dead", *The Guardian* (3 May 2021), online: <<https://www.theguardian.com/world/2021/may/03/boat-accident-bangladesh-padma-river>> reports that an accident occurred in May 2021 in the Padma River, killing 26 individuals and injuring others. *The Guardian* also mentions "construction work has slowed ferry transport on the river, prompting many to take the journey on less safe speedboats, which take only about 15 minutes to make the crossing in contrast to up to two hours on safer ferries." Julfikar Ali Manik, "27 Killed as Cargo Ship Collides with Ferry in Bangladesh", *New York Times* (05 April 2021), online: <<https://www.nytimes.com/2021/04/05/world/asia/bangladesh-ferry-crash.html>> reported that "hundreds of people have died in accidents on Bangladesh's rivers in recent decades. More than 30 people drowned in June after two ferries collided in Dhaka. In 2015, a cargo ship struck a ferry east of the capital, killing 69 people. In 2014, an overloaded ferry capsized in the Padma River, killing more than 100 people."

²⁰ For example, Daniel Binette presents some of the arguments supporting the view that the World Bank should have continued its financial support for the Padma Bridge project despite the SNC Lavalin corruption:

First, as indicated by the mounting costs and delays in the bridge's construction, the World Bank's total disengagement may have had the adverse effect of simply substituting SNC Lavalin with a more corrupt enterprise. Perhaps the World Bank's additional level of oversight, and commitment to fighting corruption, could have reduced the scale of corruption, even if that meant accepting some degree of graft.

Second, even putting the corruption issue to one side, the delay in constructing the Padma Bridge due to the World Bank's disengagement has a significant human cost. Bangladesh is

Back Home in Canada

The Padma Bridge bribery scandal has also created cynicism in the eyes of Canadians and other global citizens in respect to the extent of foreign bribery engaged in by Canadian corporate giants, by the reluctance of Canadian governments to investigate and prosecute them, and by the widespread public feeling that even in Canada, economically powerful persons and organizations somehow find ways to avoid conviction for their corporate crimes. That cynicism has been multiplied many times over in respect to SNC-Lavalin's ten years of corruption in Libya involving the Gaddafi family. The Libya corruption case demonstrates the outrageous behaviour of SNC executives, the ineffectiveness of Canadian law enforcement personnel, and Prime Minister Trudeau's improper efforts to influence Attorney General Jody Wilson-Raybould to offer SNC-Lavalin a remediation agreement instead of proceeding with criminal charges of fraud and foreign bribery.²¹

Based on the evidence of alleged corruption in regards to the Padma Bridge contract collected by the World Bank, SNC-Lavalin Group Inc. and the World Bank signed a Negotiated Resolution Agreement in April 2013, in which SNC-Lavalin International Inc. (SLII) and over 100 SNC-Lavalin Group Inc. affiliates were debarred from bidding on World Bank funded projects for ten years.²² The Agreement also provides that the remainder of SNC-Lavalin Group Inc. will be debarred if SNC-Lavalin does not comply with the terms of the settlement in relation to improving their internal compliance program. It is hard to determine what portion of total SNC-Lavalin work is likely to be affected by the World Bank

an extremely poor country. The Padma Bridge, once completed, would be a boon to the economy, linking the capital city, Dhaka, to the poor and underserved southwest of the country. At present, the Padma River, which is five kilometers wide, is a significant barrier to developing the southwest of the country, as freight and passenger transportation to the rest of the country is grossly inadequate at present. The World Bank's mission is first and foremost to end extreme poverty. While fighting corruption is another priority of the World Bank, to the extent that continued World Bank involvement would have seen the bridge constructed sooner, and presumably at a lower cost, one can view the disengagement as a mistake.

Binette did, however, conclude that "the Bank ultimately did the right thing in pulling out of the Padma Bridge project": Daniel Binette, "When Should Corruption be Tolerated? The Case of the Padma Bridge" (6 November 2015), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2015/11/06/when-should-corruption-be-tolerated-the-case-of-the-padma-bridge/>>.

²¹ See Mario Dion, Office of the Conflict of Interest and Ethics Commissioner, the *Trudeau II Report*, (Ottawa: Parliament of Canada, 2019), online (pdf): <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf>>. and Chapter 6 at Section 1. For a brief overview of the SNC-Libya bribery case, see Chapter 7 at Section 6.6 under the heading "SNC-Lavalin Group Inc." and Chapter 9 at Section 3.4.2 under the heading "Judicial Guidance".

²² World Bank, Press Release, 2013/337/INT, "World Bank Debars SNC-Lavalin Inc and its Affiliates for 10 Years" (17 April 2013), online: <<https://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>>. The 10-year ban was the longest debarment period ever agreed to in a settlement.

debarment; however, SNC-Lavalin stated that World Bank-funded projects made up less than one percent of its revenues at that time.²³

The World Bank also alerted the RCMP to evidence of possible corruption it had uncovered. After its investigation, the RCMP initially laid bribery charges against two top SLII executives, Mohammad Ismail and Ramesh Shah. They are both Canadian citizens. Then, in September 2013, the RCMP laid bribery charges against three more persons: Canadian citizens, Wallace and Bhuiyan and former Minister Abul Hassan Chowdhury, a Bangladeshi national. One can legitimately ask why the public prosecutor's office did not also charge SNC-Lavalin, as a separate legal entity, with similar offences, or at least explain why they did not. A preferred indictment was filed on October 28, 2013, alleging one count of bribery by all five men committed between December 1, 2009 and September 1, 2011, contrary to section 3(1)(b) of the *Corruption of Foreign Public Officials Act (CFPOA)*. Chowdhury brought an action to stay the proceedings against him on the grounds that there was no jurisdiction to prosecute him, a Bangladeshi citizen who had never been in Canada, and whose alleged unlawful conduct occurred in Bangladesh. Canada has no extradition treaty with Bangladesh and had not attempted to have Bangladesh surrender Chowdhury for prosecution in Canada.²⁴ Chowdhury was successful in his court challenge and the charges against him were stayed.²⁵ Charges against Mohammad Ismail were subsequently dropped, while the remaining three continued to await trial on the bribery charge.²⁶

In an important pre-trial issue in *World Bank Group v Wallace*, the Supreme Court of Canada unanimously ruled that the World Bank does not have to disclose its investigative reports and similar matters to the four accused.²⁷ The SCC held that any other result would have

²³ "SNC-Lavalin [Inc] Agrees to 10-Year Ban from World Bank Projects", *CBC* (17 April 2013), online: <<https://www.cbc.ca/news/business/snc-lavalin-agrees-to-10-year-ban-from-world-bank-projects-1.1316719>>.

²⁴ I was not able to find any government explanation of why the government did not pursue the surrender of Chowdhury. They may have assumed that it was very unlikely that the Bangladesh government would voluntarily surrender Chowdhury in a case allegedly reaching into the Prime Minister's office and family.

²⁵ *Chowdhury v The Queen*, 2014 ONSC 2635. See Chapter 3 on the jurisdiction to prosecute offences committed extra-territorially.

²⁶ Dave Seglins, "What's at Stake for the RCMP, Prosecutors in the SNC-Lavalin Case", *CBC* (27 February 2019), online: <<https://www.cbc.ca/news/politics/rcmp-bribery-snc-lavalin-case-1.5031712>>.

²⁷ *World Bank Group v Wallace*, 2016 SCC 15 [*Wallace* (2016)]. The World Bank received emails from tipsters suggesting that there had been corruption in regard to the bridge supervision contract. The World Bank did its investigation and found evidence of corruption. After SNC-Lavalin Group Inc. agreed to be debarred from bidding on World Bank-sponsored projects for ten years, the World Bank shared the tipsters' emails, its own investigative reports and other documents with the RCMP. The RCMP used that information to obtain a warrant to intercept private communication (a wiretap warrant) and a search warrant to obtain certain documents from SNC-Lavalin offices. After the conspiracy to corrupt charge was laid, the accused persons brought an application before an Ontario Superior Court trial judge to quash the wiretap authorization and thereby exclude from trial the evidence collected by wiretap. As part of the wiretap challenge, the accused sought an order requiring production of certain World Bank investigative documents to them. The trial judge concluded that certain World Bank documents were "likely relevant" to the accused's right to a fair trial and therefore ordered those documents be produced for *review before the court*. However, on further application to the Supreme Court of Canada, the production order was quashed by the SCC

hampered the investigation and would have been a significant blow to future cooperation from agencies such as the World Bank.

A Shocking Conclusion

On January 6, 2017 the trial judge, Justice Nordheimer, threw out all the wiretap evidence in the case against Wallace, Bhuiyan, and Shah on the basis, amongst others, that the information provided in the Information to Obtain (ITO) was nothing more than “speculation, gossip and rumour.”²⁸ If that was true, what does that say about the experience and competence of the senior RCMP officers who sought the wiretap, and of any prosecutor who may have assisted in obtaining it?²⁹ If the trial judge’s overall characterization of the ITO was incorrect, why didn’t the Public Prosecution Service of Canada (PPSC) appeal that decision? Barely one month later, the Crown elected to not call any witnesses at the trial on the grounds that “we had no reasonable prospect of conviction based on the evidence.”³⁰ As a result, all three accused were acquitted.³¹ If the wiretap evidence was as legally suspect as Justice Nordheimer found, why didn’t the PPSC pursue the other available evidence before the trial began that would have supported the continuation of the prosecution. The PPSC had already dropped charges against Mohammad Ismail in exchange for his testimony in respect to the bribe.³² In addition, the PPSC could have pursued a plea agreement or a non-prosecution agreement with one of the original conspirators in exchange for their cooperation and testimony? It is in the public interest to ask whether the RCMP officers and prosecutors were up to the task of investigating and prosecuting this foreign bribery case? A judicial inquiry and subsequent public explanation of why this important *CFPOA* case fell

on two grounds. First, the World Bank was granted immunity from such disclosure under the Articles of Agreement setting up the World Bank, Articles which Canada and some 185 countries have agreed to. Second, even if the World Bank did not have immunity, the documents sought did not pass the “likely relevant” test, and therefore a court could not lawfully order their disclosure.

²⁸ “The fact that a particular investigation may be difficult, does not lower the standard that must be met in order to obtain a Part VI authorization. Reduced to its essentials, the information provided in the ITO was nothing more than speculation, gossip, and rumour. Nothing that could fairly be referred to as direct factual evidence, to support the rumour and speculation, was provided or investigated. The information provided by the tipsters was hearsay (or worse) added to other hearsay”: *R v Wallace*, 2017 ONSC 132 at para 71.

²⁹ For more details concerning allegations of SNC-Lavalin’s involvement in corruption of Bangladeshi public officials, World Bank’s investigation and subsequent withdrawal from funding the project, and the RCMP investigation into this matter, see World Bank, Press Release, 2012/545/EXT, “World Bank Statement on Padma Bridge” (29 June 2012), online: <<http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge>> and *Wallace* (2016), *supra* note 27.

³⁰ Jacques Gallant, “Judge Acquits SNC-Lavalin Execs, Says RCMP Relied on ‘Gossip’”, *Toronto Star* (10 February 2017), online: <<https://www.thestar.com/news/gta/2017/02/10/judge-acquits-snc-lavalin-exec-says-rcmp-relied-on-gossip.html>>; and Janet McFarland, “Former SNC Executives, Businessman Acquitted in Corruption Case”, *The Globe and Mail* (10 February 2017), online: <<http://www.theglobeandmail.com/report-on-business/former-snc-lavalin-executives-businessman-acquitted-in-corruption-case/article33979762/>>.

³¹ *Ibid.*

³² Seglins, *supra* note 26, where Seglins states “[c]harges were dropped against engineer Mohammad Ismail who became a witness, turning over evidence of a widespread system of secret payments used by the SNC-Lavalin division.”

apart should have been demanded by all anti-corruption supporters. Such an inquiry would not only be very helpful in uncovering weaknesses in the current investigations and prosecutions of foreign corruption in Canada, but may also help reduce the damage done to Canada's reputation by the dismissal of all charges against all persons involved in the Padma Bridge corruption case. But sadly, there have been no public voices demanding an inquiry, and therefore, no inquiry has been established. Indeed, a second judicial inquiry is needed even more into the "three-ring circus" surrounding the charges that SNC-Lavalin engaged in ten years of bribery of members of the Gaddafi regime in Libya.³³

Criticism of World Bank

It should be noted that some commentators are highly critical of the World Bank's lending practices. For example, Paul Sarlo³⁴ argues that the World Bank facilitates large scale corruption by making huge development loans to notoriously corrupt governments without imposing a regime of adequate due diligence to ensure the loan is used for the intended project.³⁵ This lack of due diligence opens the door to theft of 20-40% of loans by corrupt leaders or through the companies they hire to complete the project. Ultimately it is the citizens of the corrupt borrowing country who pay. They are responsible for full repayment of the loan with interest, even if part of the loan is stolen.

The next several sections of this chapter will look at the nature, causes, and consequences of corruption that have motivated world leaders to denounce, and to varying degrees, take action to fight corruption at both national and global levels.

1.3 Four Initial Concerns

The Organization for Economic and Cooperative Development (OECD) prepared a background brief in 2013 entitled *The Rationale for Fighting Corruption* as part of the

³³ Mark Gollom, "What You Need to Know About the SNC-Lavalin Affair", *CBC* (13 February 2019), online: <<https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271>>; Kathleen Harris, "Top Civil Servant Denies 'Inappropriate' Pressure Against Wilson-Raybould in SNC-Lavalin Case", *CBC* (21 February 2019), online: <<https://www.cbc.ca/news/politics/lametti-justice-committee-snc-lavalin-1.5027617>>. But see Jody Wilson-Raybould, "'In that Moment, I Knew He Wanted Me to Lie.' Jody Wilson-Raybould Recalls a Tension-Filled Meeting with Justin Trudeau", *The Globe and Mail* (11 September 2021), online: <<https://www.theglobeandmail.com/opinion/article-in-that-moment-i-knew-he-wanted-me-to-lie-jody-wilson-raybould-recalls/>>, excerpted from her book *"Indian" in the Cabinet: Speaking Truth to Power* (Toronto: HarperCollins Publishers, September 2021).

³⁴ Paul Sarlo, "The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank's Lending Practices" (2014) 45:4 *Geo J Intl L* 1293.

³⁵ For example, the World Bank lent Indonesia \$30 billion during the thirty-year rule of notoriously corrupt General Suharto. The International Monetary Fund has been subject to similar criticism related to irresponsible lending. Serving as an example of this critique, a portion of an IMF loan to Russia was used by Boris Yeltsin for his re-election campaign in 1996: Clare Fletcher & Daniela Herrmann, *The Internationalisation of Corruption* (Farnham, Surrey; Burlington, VT: Gower, 2012) at 68.

organization's CleanGovBiz: Integrity in Practice Initiative.³⁶ The initiative seeks to involve civil society and the private sector in anti-corruption strategies. The brief provides an overview of the reasons why everyone should be concerned about corruption. The text of this brief is set out in the following excerpt:

BEGINNING OF EXCERPT

The Rational for Fighting Corruption

The costs of corruption for economic, political and social development are becoming increasingly evident. But many of the most convincing arguments in support of the fight against corruption are little known to the public and remain unused in political debates. This brief provides evidence that reveals the true cost and to explain why governments and business must prioritise the fight against corruption.

What is Corruption?

Corruption is the abuse of public or private office for personal gain. It includes acts of bribery, embezzlement, nepotism or state capture. It is often associated with and reinforced by other illegal practices, such as bid rigging, fraud or money laundering. [Transparency International describes corruption as "the abuse of entrusted power for private gain."]

What does Corruption Look Like?

It could be a multinational company that pays a bribe to win the public contract to build the local highway, despite proposing a sub-standard offer. It could be the politician redirecting public investments to his hometown rather than to the region most in need. It could be the public official embezzling funds for school renovations to build his private villa. It could be the manager recruiting an ill-suited friend for a high-level position. Or, it could be the local official demanding bribes from ordinary citizens to get access to a new water pipe. At the end of the day, those hurt most by corruption are the world's weakest and most vulnerable.

Why Fight Corruption?

Corruption is one of the main obstacles to sustainable economic, political and social development, for developing, emerging and developed economies alike.

Overall, corruption reduces efficiency and increases inequality. Estimates show that the cost of corruption equals more than 5% of global GDP (US\$ 2.6 trillion, World Economic Forum) with over US\$ 1 trillion paid in bribes each year (World Bank). It is not only a question of ethics; we simply cannot afford such waste.

³⁶ OECD, CleanGovBiz Initiative, *The Rationale for Fighting Corruption*, (Paris: OECD, 2013), online (pdf): <<https://maritimecyprus.files.wordpress.com/2017/09/oecd.pdf>>.

1. Corruption increases the cost of doing business

First, bribes and drawn-out negotiations to bargain them add additional costs to a transaction. Second, corruption brings with it the risk of prosecution, important penalties, blacklisting and reputational damage. Third, engaging in bribery creates business uncertainty, as such behaviour does not necessarily guarantee business to a company; there can always be another competing company willing to offer a higher bribe to tilt the business in its favour.

On the macro level, corruption distorts market mechanisms, like fair competition and deters domestic and foreign investments, thus stifling growth and future business opportunities for all stakeholders. IMF research has shown that investment in corrupt countries is almost 5% less than in countries that are relatively corruption-free. The World Economic Forum estimates that corruption increases the cost of doing business by up to 10% on average. Siemens, the German engineering giant, had to pay penalties of US\$ 1.6 billion in 2008 to settle charges that it routinely engaged in bribery around the world. A significant negative impact of corruption on a country's capital productivity has been proven.

2. Corruption leads to waste or the inefficient use of public resources

As a result of corruption, investments are not allocated to sectors and programmes which present the best value for money or where needs are highest, but to those which offer the best prospects for personal enrichment of corrupt politicians. Thus resources go into big infrastructure projects or military procurement where kickbacks are high, to the detriment of sectors like education and health care. Moreover, public tenders are assigned to the highest bribe payer, neglecting better qualified companies not willing to bribe, which undermines the quality of the projects carried out. In some instances public funds are simply diverted from their intended use, embezzled and exploited for private enrichment. Corruption also slows down bureaucratic processes, as inefficient bureaucracies offer more leverage for corrupt public officials: the longer the queue for a service, the higher the incentive for citizens to bribe to get what they want. Finally, nepotism - in both private and public organisations - brings incompetent people into power, weakening performance and governance.

Several studies provide evidence of the negative correlation between corruption and the quality of government investments, services and regulations. For example, child mortality rates in countries with high levels of corruption are about one third higher than in countries with low corruption, infant mortality rates are almost twice as high and student dropout rates are five times as high (Gupta et al. 2011). Numbers on the monetary loss due to corruption vary, but are alarming. The African Union (2002) estimates that 25% of the GDP of African states, amounting to US\$148 billion, is lost to corruption every year. The US health care programmes Medicare and Medicaid estimate that 5% to 10% of their annual budget is wasted as a result of corruption.

3. Corruption excludes poor people from public services and perpetuates poverty

The poor generally lack privileged access to decision makers, which is necessary in corrupt societies to obtain certain goods and services. Resources and benefits are thus exchanged among the rich and well connected, excluding the less privileged. Moreover, the poor bear the largest burden [proportionate to their income] of higher tariffs in public services imposed by the costs of corruption.... They might also be completely excluded from basic services like health care or education, if they cannot afford to pay bribes which are requested illegally. The embezzlement or diversion of public funds further reduces the government's resources available for development and poverty reduction spending.

The significant impact of corruption on income inequality and the negative effect of corruption on income growth for the poorest 20% of a country have been proven empirically (Gupta et al. 2002). The World Bank (Baker 2005) estimates that each year US\$ 20 to US\$ 40 billion, corresponding to 20% to 40% of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas. Transparency International (Global Corruption Report 2006) found that about 35% of births in rural areas in Azerbaijan take place at home, because poor people cannot afford to pay the high charges for care in facilities where care was supposed to be free. [The relationship between corruption and poverty is further analyzed in this chapter at Section 1.5.]

4. Corruption corrodes public trust, undermines the rule of law and ultimately delegitimizes the state

Rules and regulations are circumvented by bribes, public budget control is undermined by illicit money flows and political critics and the media are silenced through bribes leveraging out democratic systems of checks and balances. Corruption in political processes like elections or party financing undermines the rule of the people and thus the very foundation of democracy. If basic public services are not delivered to citizens due to corruption, the state eventually loses its credibility and legitimacy.

As a result, disappointed citizens might turn away from the state, retreat from political processes, migrate – or – stand up against what they perceive to be the corrupt political and economic elites. The global uprisings from the Arab world to India, Brazil and occupy Wall Street are proving that business as usual can no longer be an option for a number of countries. [footnotes omitted]

END OF EXCERPT

1.4 Additional Concerns

In addition to the four concerns described in the excerpt, several other concerns are worthy of specific note, namely corruption's impact on (i) gender equality, (ii) climate change and environmental degradation, (iii) global security and (iv) human rights.

1.4.1 Gender Equality

Corruption affects women differently than men and carries adverse implications for gender equality. According to the UNDP report *Corruption, Accountability and Gender: Understanding the Connections*, corruption “exacerbates gender-based asymmetries in empowerment, access to resources and enjoyment of rights.”³⁷ Reasons for corruption’s disproportionate effects include the fact that women make up most of the global poor, who suffer most from corruption, and the fact that women have lower levels of literacy and education in most parts of the world, which can adversely affect their knowledge of their rights. The report summarizes the effects of corruption on women as follows:

The data suggests that ‘petty’ or ‘retail’ corruption (when basic public services are sold instead of provided by right) affects poor women in particular and that the currency of corruption is frequently sexualized – women and girls are often asked to pay bribes in the form of sexual favours. Women’s disempowerment and their dependence on public service delivery mechanisms for access to essential services (e.g., health, water and education) increases their vulnerability to the consequences of corruption-related service delivery deficits. In addition, women’s limited access to public officials and low income levels diminishes their ability to pay bribes, further restricting their access to basic services. Therefore, corruption disproportionately affects poor women because their low levels of economic and political empowerment constrain their ability to change the status quo or to hold states accountable to deliver services that are their right.³⁸

The report provides more specific examples of the ways women and girls experience corruption in various countries and settings. For example, in many countries, women and girls bear water-gathering responsibilities—corruption prevents the construction of more convenient water infrastructure. In the arena of education, women and girls might face sexual extortion in order to be graded fairly or pay for school, as illustrated in Botswana.³⁹ The report also describes the disproportionate impact of corruption on women entrepreneurs, who often lack the resources to make bribe payments for licences and permits to start a business. Other corruption-related issues for women include increased vulnerability to sexual violence in the context of police and judicial corruption and blocked access to maternity hospitals when staff members demand bribes. Sextortion, in particular, is a specific form of corruption involving an abuse of authority and an exchange of sexual activities under the influence of coercion.⁴⁰ Sextortion is markedly common. TI’s Global

³⁷ Naomi Hossain, Celestine Nyamu Musembi & Jessica Hughes, *Corruption, Accountability and Gender: Understanding the Connections*, (New York: UNDP & UNIFEM, 2010) at 7, online (pdf): <<https://www.undp.org/content/dam/aplaws/publication/en/publications/womens-empowerment/corruption-accountability-and-gender-understanding-the-connection/Corruption-accountability-and-gender.pdf>>.

³⁸ *Ibid* at 5.

³⁹ *Ibid* at 12.

⁴⁰ Hazel Feigenblatt, *Breaking the Silence Around Sextortion: The Links Between Power, Sex and Corruption*, (Berlin: Transparency International (TI), 2020) at 8, online: <<https://www.transparency.org/en/publications/breaking-the-silence-around-sextortion>>.

Corruption Barometer 2019, in both the Latin America region and the Middle East and North Africa region, found that “one in five people experienced or knows someone who experienced sexual extortion when accessing government services.”⁴¹

Lower literacy rates among women facilitate a weaker understanding of their legal rights and put them at a greater risk of situations involving corruption and sextortion.⁴² Women also face further adversity when they attempt to report corruption; for example, respondents in the Dominican Republic, Honduras, and Guatemala believe that corruption complaints are taken more seriously when filed by men.⁴³ In India, the state of Jammu and Kashmir became one of the first administrations to introduce sextortion as a unique offence in its criminal code.⁴⁴ Although legislative recognition of the gendered effects of corruption promises progress for affected individuals, the typical barriers related to reporting corruption and seeking redress remain in place. In fact, as of 2020, there has not been a single sextortion case prosecuted in Jammu and Kashmir.⁴⁵

1.4.2 Climate Change and Environmental Degradation

Corruption in the area of climate change holds the potential to cause wide-ranging effects. Corrupt avoidance of climate change standards can sap projects of their effectiveness in mitigating climate change, leading to adverse consequences for future generations. The resultant failure or reduced success of mechanisms designed to mitigate the impacts of climate change will also disproportionately affect vulnerable, poor populations, who are expected to bear the brunt of the effects of climate change.

Enforcement of heightened climate change standards will require good governance at both international and national levels. As stated by TI in *Global Corruption Report: Climate Change*:

[a] robust system of climate governance – meaning the processes and relationships at the international, national, corporate and local levels to address the causes and effects of climate change – will be essential for ensuring that the enormous political, social and financial investments by both the public sector and the private sector made in climate change mitigation and adaptation are properly and equitably managed, so that responses to climate change are successful.⁴⁶

⁴¹ *Ibid* at 11.

⁴² *Ibid* at 19.

⁴³ Coralie Pring & Jon Vrushi, *Latin America and the Caribbean 2019*, (Berlin: TI, 2019) at 20, online: <<https://www.transparency.org/en/gcb/latin-america/latin-america-and-the-caribbean-x-edition-2019>>.

⁴⁴ Arun Sharma, “Sextortion: New Offence in J&K, Non-Bailable, Jail up to 5 Years”, *The Indian Express* (15 December 2018), online: <<https://indianexpress.com/article/india/jk-becomes-first-state-to-have-law-explicitly-banning-sextortion-5493751/>>.

⁴⁵ Lucas Amin & José María Marín, *Recommendations on Women Against Corruption for OGP Action Plans*, (Berlin: TI, 2020) at 8, online: <<https://www.transparency.org/en/publications/recommendations-on-women-against-corruption-for-ogp-action-plans>>.

⁴⁶ Gareth Sweeney et al, eds, *Global Corruption Report: Climate Change*, (London; Washington, DC: Earthscan/TI, 2011) at xxv, online (pdf): <https://images.transparencycdn.org/images/2011_GCRclimatechange_EN.pdf>.

TI explains why climate change initiatives are uniquely vulnerable to corruption. Responses to climate change will involve massive amounts of money (investment in mitigation efforts should reach an estimated \$90 trillion by 2030⁴⁷), which will “flow through new and untested financial markets and mechanisms,”⁴⁸ creating fertile ground for corruption. Many climate issues are complex, new and uncertain, yet require speedy solutions, which also increases the risk of corruption, for example by leaving “regulatory grey zones and loopholes.”⁴⁹

Patrick Alley points out that rife corruption in the forestry sector has already subverted efforts to use reforestation and forest management to slow climate change.⁵⁰ According to the World Bank, timber worth an estimated \$30-157 billion is illegally logged or produced from suspicious sources every year.⁵¹ This illegal harvesting of timber is facilitated by “deeply engrained corruption schemes”⁵² in the industry. The forestry sector is particularly prone to corruption because most tropical forests are on public land and therefore susceptible to control by a small group of politicians or public servants. Timber operations are also generally located in remote areas, far from scrutiny. A news release published by the International Criminal Police Organization notes that illegal timber is responsible for up to 90 percent of tropical deforestation in certain countries.⁵³ Despite recent legislative efforts at banning the importation of illegally sourced timber in the US,⁵⁴ the EU,⁵⁵ and China,⁵⁶ illegal timber remains easy to launder on the international market.

Bangladesh is one of the most vulnerable states for climate change-related effects. In his article “Governance Matters: Climate Change, Corruption and Livelihoods in Bangladesh,” Md. Ashiqur Rahman notes the deep roots corruption has in nearly all branches of

⁴⁷ “Financing Climate Action” (last visited 26 August 2021), online: *United Nations* <<https://www.un.org/en/climatechange/raising-ambition/climate-finance>>.

⁴⁸ Sweeney et al, *supra* note 46 at xxvi.

⁴⁹ *Ibid.*

⁵⁰ Patrick Alley, “Corruption: A Root Cause of Deforestation and Forest Degradation” in Sweeney et al, *supra* note 46, 299 at 299.

⁵¹ Juan Jose Miranda Montero, Elisson Wright & Muhammad Najeeb Khan, *Illegal Logging, Fishing, and Wildlife Trade: The Costs and How to Combat It*, (Global Wildlife Program/World Bank Group, 2019) at 15, online: <<https://openknowledge.worldbank.org/handle/10986/32806>>.

⁵² Sweeney et al, *supra* note 46 at xxxii.

⁵³ International Criminal Police Organization (INTERPOL), News Release, “Forestry Crime: Targeting the Most Lucrative of Environmental Crimes” (14 December 2020), online: <<https://www.interpol.int/en/News-and-Events/News/2020/Forestry-crime-targeting-the-most-lucrative-of-environmental-crimes>>.

⁵⁴ The *Lacey Act* banned the import of illegally harvested timber in 2008. For a brief overview of the law, see “Lacey Act” (last visited 8 August 2021), online: *US Fish and Wildlife Service* <<https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html>>.

⁵⁵ The EU Timber Regulation states that it “counters the trade in illegally harvested timber and timber products through three key obligations.” These obligations are a prohibition on illegal timber and timber products, and requirement of due diligence for traders to exercise due diligence and recordkeeping. For more information, see “Timber Regulation” (last visited 8 August 2021), online: *European Commission* <https://ec.europa.eu/environment/forests/timber_regulation.htm>.

⁵⁶ At the end of 2019, China revised its Forest Law to ban the trade of illegal timber. See Ashoka Mukpo, “China’s Revised Forest Law Could Boost Efforts to Fight Illegal Logging”, *Mongabay* (19 March 2020), online: <<https://news.mongabay.com/2020/03/chinas-revised-forest-law-could-boost-efforts-to-fight-illegal-logging/>>.

government and society. Using the Sundarbans forest as a case study, Rahman describes how bribery is simply a reality of “doing business” for individuals like woodcutters and honey collectors, who rely on the forest for their livelihood.⁵⁷ Further, Rahman notes how the presence of bribery facilitates excessive resource extraction, as the bribe-payers will collect more than their permits allow.⁵⁸ Bribery also impacts the local population's capacity to respond to climate change-related disasters: rather than saving to increase their adaptive capacity in the face of global warming, 56% of individuals surveyed find themselves spending part of their income on bribes.⁵⁹ The cycle of bribery and extortion fuels further resource extraction and simultaneously impairs the population's adaptive capacity, thus putting the already vulnerable population at an even greater risk. Corruption also hinders the state's adaptive capacity: a recent working paper published by TI Bangladesh notes that an estimated 35% of funds meant for climate change mitigation projects are embezzled.⁶⁰

Corruption threatens climate change action in many other ways. For example, undue influence and policy capture are current and future risks to effective climate change policy, as demonstrated by powerful energy sector lobby groups in the US.⁶¹ According to TI, carbon markets are also vulnerable to undue influence, which might have contributed to over-allocation of carbon permits and huge windfall profits for European power producers in 2005-2007. Carbon markets suffer from a lack of measuring, reporting, and verification of emissions. Other problems include the current lack of transparency and accountability in climate policy both internationally and nationally. For example, Shahanaz Mueller points out that, in Austria, the lack of transparency in implementation of aspirational policies has led to disappointing performance and slow progress.⁶² Corruption in the construction sector also poses a huge risk to future adaptation projects; “[a]daptation without oversight presents a two-fold risk of diverted funds *and* substandard work ... which may put populations at even more risk of climate extremes.”⁶³ There has also been a detailed economic analysis done by Athanasios Lapatinas et al., which conclude that administrations undertake technologically advanced climate projects in states with widespread corruption to maximize rent-seeking, rather than the mitigation of environmental risks.⁶⁴ Lapatinas et al. further note that these types of projects reduce public funds as citizens aware of deficient environmental policies are more likely to evade taxes.⁶⁵

⁵⁷ Md Ashiqur Rahman, “Governance Matters: Climate Change, Corruption and Livelihoods in Bangladesh” (2018) 147 *Climatic Change* at 319.

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 322.

⁶⁰ Mushtaq Khan et al, “Climate Change Investments in Bangladesh: Leveraging Dual-Use Characteristics as an Anti-Corruption Tool” (2020) Anti-Corruption Evidence Working Paper No 033 at 12, online: <<https://ace.soas.ac.uk/publication/climate-change-investments-in-bangladesh/>>.

⁶¹ Chris McGreal, “How a Powerful US Lobby Group Helps Big Oil to Block Climate Action”, *The Guardian* (19 July 2021), online: <<https://www.theguardian.com/environment/2021/jul/19/big-oil-climate-crisis-lobby-group-api>>.

⁶² Shahanaz Mueller, “Climate Policies in Austria: Poor Accountability Breeds Slow Progress” in Sweeney et al, *supra* note 46, 71 at 71.

⁶³ Sweeney et al, *supra* note 46 at xxxi.

⁶⁴ Athanasios Lapatinas et al, “Environmental Projects in the Presence of Corruption” (2019) 26 *Intl Tax Pub Finance* 103 at 122.

⁶⁵ *Ibid.*

TI points out that the corruption spawned by climate change is not limited to familiar forms of corruption, such as misappropriation of funds and bribery, but rather “transcends the established typologies of corruption.”⁶⁶ TI argues that its definition of corruption, the abuse of entrusted power for private gain, must be expanded in the context of climate change to include “the power that future generations have vested in all of us, in our stewardship role for the planet,” and abuses of power such as “distortion of scientific facts, the breach of principles of fair representation and false claims about the green credentials of consumer products.”⁶⁷

1.4.3 Global Security

When former Secretary of State John Kerry was speaking in Nigeria, he commented on the relationship between state security and corruption, declaring that “[b]ribery, fraud, and other forms of venality endanger everything that you value. They feed organized crime. They gnaw away at nation-states. They take away the legitimacy of a nation-state. They contribute to human trafficking. They discourage honest and accountable investment and they undermine entire communities.”⁶⁸ In *Thieves of State*, Sarah Chayes argues that corruption fuels threats to international security. Chayes ties endemic corruption by elites to national and international revolution and violence in the Arab world, Nigeria, Ukraine, and various historical settings.⁶⁹ The author draws attention to Al-Qaeda’s assertions that the main rationale behind the 9/11 attacks was President George W. Bush’s cozy relationship with kleptocratic Arab heads of state. To demonstrate a pattern of association between corruption and destructive, terroristic acts, Chayes compares the example of contemporary jihadists to Dutch Protestants who ransacked property of the corrupt Catholic Church during the Reformation. Similar to these early Protestants, the jihadists “articulate their struggle, at least in part, as a reaction to the kleptocratic practices of local rulers.”⁷⁰ Chayes also cites other threats to global security fueled by corruption, such as uprisings leading to government collapse. Building off of Chayes’ analysis, this has also been illustrated in Afghanistan, South Africa and Brazil, as well as Syria and Lebanon and other countries involved in the Arab Spring.⁷¹ Additionally, Chayes discusses the ease of trafficking in

⁶⁶ Sweeney et al, *supra* note 46 at xxv.

⁶⁷ *Ibid* at xxv–xxvi.

⁶⁸ Kerry, *supra* note 11.

⁶⁹ Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (New York; London: WW Norton & Company, Inc, 2015).

⁷⁰ *Ibid* at 181.

⁷¹ Lebanon is one of the most recent examples of a country in which rampant and widespread corruption has resulted in the collapse of its monetary system, hyperinflation, and led to wholesale poverty and civil uprising. For more information see, Martin Chulov, “‘This is the End of Times’: Lebanon Struggles to Find Political Path Through its Crisis”, *The Guardian* (28 June 2021), online: <<https://www.theguardian.com/world/2021/jun/28/this-is-the-end-of-times-lebanon-struggles-to-find-political-path-through-its-crisis>>. For a discussion of how endemic corruption has hindered Afghanistan’s nation-building, see Richard L Cassin, “Loud Warnings Never Stopped about Afghanistan’s ‘Silent Cancer’ of Corruption” (17 August 2021), online (blog): *The FCPA Blog* <<https://fcpcbog.com/2021/08/17/loud-warnings-never-stopped-about-afghanistans-silent-cancer-of-corruption/>>.

conflict minerals and other illegal goods in corrupt countries like Zimbabwe, and unreliable military regimes.⁷²

Although Chayes' first-hand experience leads to the conclusion that terrorism is, in part, a reaction to corrupt regimes in certain countries, other empirical research undermines the idea that corruption is a motivating factor for terrorism in general. Research by Jessica C. Teets and Erica Chenoweth suggest that "[c]orruption does not motivate terrorism because of grievances against corrupt states, but rather it facilitates terrorism ... corruption lowers the barriers to terrorist attacks, probably because obtaining illicit materials to conduct attacks is more difficult in less corrupt or transparent countries."⁷³ In an article titled "Terrorism and Corruption: Alternatives for Goal Attainment Within Political Opportunity Structures," Matthew Simpson "cast[s] doubt on the notion that terrorist violence is the expression of grievances developed in response to perceived corruption within the political process."⁷⁴ Rather, Simpson's research indicates that organizations turn to terrorism when other extralegal avenues, like corruption, are blocked; "[i]n instances where the particular path of corruption could not be employed to gain political influence, these organizations used alternative strategies – terrorism being high on the list – to fill the gap."⁷⁵ However, Simpson recognizes that more research is required to determine when the relationship between corruption control and terrorism might vary due to other factors like inequality and development.

In *Corruption: Global Security and World Order*, Robert I. Rotberg and Kelly M. Greenhill further explore the connection between corruption, trafficking and global security:

The durable ties between corrupt regimes and transnational crime and transnational trafficking pose major global security problems because of the ability of criminal organizations to subvert stability and growth in poor countries, by their skill at sapping such impoverished places of revenue and legitimate modernization, by their undermining the fabric of weak and fragile societies, and by their negative reinforcement of the least favorable kinds of leadership in developing countries ... these unholy partnerships ... by facilitating the spread of small arms and light weapons make civil wars possible and lethal.⁷⁶

Adding to the issue of global security, Matthew Bunn describes the link between corruption and nuclear proliferation, pointing out that "[c]orruption has been a critical enabling element of the nuclear weapons programs in Pakistan, Iraq, Libya, and Iran."⁷⁷ Bunn

⁷² Chayes, *supra* note 69 at 181–186.

⁷³ Jessica C Teets & Erica Chenoweth, "To Bribe or to Bomb: Do Corruption and Terrorism Go Together?" in Robert I Rotberg, ed, *Corruption, Global Security, and World Order* (Brookings Institution Press, World Peace Foundation & American Academy of Arts and Sciences, 2009) 167 at 180.

⁷⁴ Matthew Simpson, "Terrorism and Corruption: Alternatives for Goal Attainment within Political Opportunity Structures" (Summer 2014) 44:2 100 *Intl J Sociology* 87 at 100.

⁷⁵ *Ibid* at 100.

⁷⁶ Robert I Rotberg, "How Corruption Compromises World Peace and Stability" in Rotberg, *supra* note 73, 1 at 9.

⁷⁷ Matthew Bunn, "Corruption and Nuclear Proliferation" in Rotberg, *supra* note 73, 124 at 156.

explains that countries aspiring to a nuclear program are limited in their choice of means to obtain materials, and if these means are insufficient, “illicit contributions from foreign sources motivated by cash will be central to a nuclear program’s success.”⁷⁸

For an exploration of the need for anti-corruption measures and good governance to promote sustainable peace in post-conflict nations, see Bertram I. Spector, *Negotiating Peace and Confronting Corruption: Challenges for Post-Conflict Societies*.⁷⁹ Spector argues that negotiated cease-fires and other short-term measures are not enough to establish long-lasting peace; rather, good governance is needed to end the corruption that fuels conflict in the first place.

1.4.4 Treating Corruption as a Human Rights Violation

Human rights are an increasingly broad and all-encompassing concept. Laws that concern human rights are found both nationally and internationally. With regard to global corruption in particular, the focus is on human rights at a global level. No one definition of human rights exists; however, the overarching goal of human rights law is to recognize and affirm the dignity of human life.

Human rights has taken on great international significance since the *Universal Declaration of Human Rights* was proclaimed in 1948.⁸⁰ In the ensuing period, a wide range of documents has emerged to provide greater protections for the global population as a whole, as well as specific marginalized groups.⁸¹ However, international human rights law has faced criticism. The leading critique focuses on the fact that Western capitalist economies were the driving force behind the creation of legal instruments making up the body of human rights law. Accordingly, these laws represent the views and values of the industrialized countries, which are then imposed on the developing world. For a similar discussion of Western ideological imposition in international law, see Section 2.2.

⁷⁸ *Ibid* at 124.

⁷⁹ Bertram I Spector, *Negotiating Peace and Confronting Corruption: Challenges for Post-Conflict Societies*, (Washington, DC: US Institute of Peace Press, 2011).

⁸⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

⁸¹ See for example, the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, A/RES/2200 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966); *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106 (XX), UNGAOR, 20th Sess, Supp No 14, UN Doc A/6014 (1965); *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res 34/180, UNGAOR, 34th Sess, Supp No 46, UN Doc A/34/46 (1980); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 39/46, UNGAOR, 39th Sess, Supp No 51, UN Doc A/39/51 (1984); *Convention on the Rights of the Child*, GA Res 44/25, UNGAOR, 44th Sess, Supp No 49, UN Doc A/44/49 (1989); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res 45/158, UNGAOR, 45th Sess, Supp No 49, UN Doc A/45/49 (1990); *International Convention for the Protection of All Persons from Enforced Disappearance*, GA Res 61/177, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/251 (2006); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Session, Supp No 49, UN Doc A/61/661.

Human rights are often categorized into civil and political rights and economic, social, and cultural rights. These human rights include, amongst others, gender equality, the right to life and liberty and the right to a healthy environment. Without describing all the ways corruption can impact human rights, corruption violates the right to life, liberty, and security of the person. Corruption perpetuates the cycle of poverty and poverty prevents people from exercising their human rights.

In *Corruption: Economic Analysis and International Law*, Marco Arnone and Leonardo S. Borlini elaborate on the impact of corruption on the rule of law and human rights:

Massive corrupt dynamics, indeed, weaken the basic foundations both of the representative mechanisms underlying the separation of powers and of human rights.... Since corruption generates discrimination and inequality, this relationship [between human rights and government corruption] ... bears on civil and political rights. For instance, it strengthens the misappropriation of property in violation of legal rights ... it likely leads to the rise of monopolies which either wipe out or gravely vitiate freedom to trade. Corruption strikes at economic and social rights as well: the commissioning by a public entity of useless or overpriced goods or services, and the choice of poorly performing undertakings through perverted public procurement mechanisms are mere examples of how corruption can endanger the second generation of human rights.

The relationship between fundamental HR and corruption could not be expressed more vividly than in the words of the UN High Commissioner for Human Rights, Navy Pillay: "Let us be clear. Corruption kills. The money stolen is enough to feed the world's hungry every night, many of them children; corruption denies them their right to food, and in some cases, their right to life" The departure point and organizational principle of the 2004 [UN Development Program's] analyst study is that "Corruption affects the poor disproportionately, due to their powerlessness to change the status quo and inability to pay bribes, creating inequalities that violate their human rights."⁸²

In their article "The International Legal Framework Against Corruption: Achievements and Challenges," Jan Wouters et al. note the increasing tendency to frame corruption as a human rights issue.⁸³ To help understand the link between corruption and human rights, the International Council on Human Rights Policy divides corruption-based human rights violations into direct, indirect, and remote violations. For example, bribing a judge directly violates the right to a fair trial, while embezzling public funds needed for social programs indirectly violates economic and social rights. Many commentators hope this focus on

⁸² Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Cheltenham; Northampton: Edward Elgar, 2014) at 170–171.

⁸³ Jan Wouters, Cedric Ryngaert & Ann Sophie Cloots, "The International Legal Framework Against Corruption: Achievements and Challenges" (June 2013) 14:1 Melbourne J Intl L 205 at 271–273.

human rights will create new human rights-based remedies and assist in anti-corruption efforts.

The coupling of corruption and human rights remains an increasingly popular trend. In April 2015, at the 13th United Nations Congress on Crime Prevention and International Justice in Doha, Dean and Executive Secretary of the International Anti-Corruption Academy Martin Kreutner, stated, “All the universal goals run the risk of being severely undermined by corruption.... Corruption is the antithesis vis-à-vis human rights, the venom vis-à-vis the rule of law, the poison for prosperity and development and the reverse of equity and equality.”⁸⁴ While recognizing the important connection between corruption and human rights, recently some authors have further analyzed the potential dangers and limitations of confining discussions of corruption to the language of human rights.⁸⁵

Recent publications have also taken a closer look at the connection between corruption and human rights in particular geographic areas.⁸⁶ Anne Peters in her paper “Corruption and Human Rights” and subsequent article “Corruption as a Violation of International Human Rights” examines the various ways corruption can be conceptualized as a human rights violation and the advantages and disadvantages of doing so. Peters also examines whether it is a good idea to conceptualize corruption as a human rights violation and concludes, with some limitations, that it is.⁸⁷ In regard to this latter point, Peters states that this approach will lend a political and moral slant to the anti-corruption agenda.⁸⁸ As individuals begin to understand how corruption impacts their rights, they become empowered to take action against corrupt actors. In turn, this strengthens the anti-corruption agenda.⁸⁹ The UN Human Rights Council asserts two additional advantages for this framing: first, the central focus is on the state rather than individual perpetrators, and second, it strengthens the position of victims.⁹⁰

⁸⁴ United Nations Office on Drugs and Crime (UNODC), Press Release, “Sustainable Development, Human Rights, Freedoms Hinge on Anti-Corruption Strategies, Speakers Say as Crime Congress Concludes High-Level Segment” (14 April 2015), online: <<http://www.unodc.org/unodc/en/press/releases/2015/April/sustainable-development--human-rights--freedoms-hinge-on-anti-corruption-strategies--speakers-say-as-crime-congress-concludes-high-level-segment.html>>.

⁸⁵ Cecily Rose, “The Limitations of a Human Rights Approach to Corruption” (2016) 65:2 ICLQ 450.

⁸⁶ See for example Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart, 2014); Midori Matsushima and Hiroyuki Yamada, “Impacts of Bribery in Healthcare in Vietnam” (2016) 52:10 J of Development Studies 1479; and C Raj Kumar, “Corruption in India: A Violation of Human Rights Promoting Transparency and the Right to Good Governance” (2015) 49:2 UC Davis L Rev 741. For more on the connection between human rights and corruption, and the implications for anti-corruption efforts and remedies, see Lucy Koechlin & Magdalena Sepulveda Carmona, “Corruption and Human Rights: Exploring the Connection” in Rotberg, *supra* note 73, 310 at 310–340 and International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection*, (Versoix, Switzerland: ICHRP, 2009).

⁸⁷ Anne Peters, “Corruption and Human Rights” (2015) Basel Institute on Governance Working Paper No 20, online (pdf): <https://www.baselgovernance.org/sites/collective.localhost/files/publications/corruption_and_human_rights.pdf>; and “Corruption as a Violation of International Human Rights” (2018) 29:4 Eur J Intl L 1251.

⁸⁸ *Ibid* at 1276.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

Peters discusses a leading criticism of the movement to consider corruption as a form of human rights violations—that this conceptualization promotes neoliberal biases that undermine values and customs held in the Global South. Critics assert that this framework perpetuates contemporary imperialism and has a biased focus on the Global South, where petty corruption is more prevalent.⁹¹ Nevertheless, Peters posits that the framework advances a “modern rule-of-law-based state”⁹² that responds to citizens’ needs. Additionally, Peters notes that elites vulnerable to claims of corruption and human rights violations take up these arguments as a defensive mechanism.⁹³

Peters concludes by asserting that there is a need for “human rights mainstreaming of anti-corruption efforts.”⁹⁴ The author argues that integrating a human rights-based approach to anti-corruption measures and vice versa furthers both efforts—promoting universal empowerment, as well as greater monitoring and remedies. The recently proposed International Anti-Corruption Court, discussed in Section 1.1 of this chapter, could serve as a next step in integrating and mainstreaming human rights on a global scale.⁹⁵

1.5 Relationship Between Corruption, Reduced Economic Growth, and Poverty: An Economic and Governance Perspective

In *Corruption and Poverty: A Review of Recent Literature*, Chetwynd et al. summarize the different theories and research connecting corruption with poverty.⁹⁶ While the authors’ summary is now dated (2003), I believe it still accurately reflects the basic relationship between corruption and poverty. Their research reveals an indirect relationship between poverty and corruption explained by two main theories. Persons who attach themselves to the “economic model” argue that corruption negatively impacts indicia of economic growth, which exacerbates poverty. Chetwynd et al. refer to the second theory as the “governance model.” Proponents of this theory argue that there is evidence that corruption negatively affects governance and poor governance negatively affects levels of poverty.

The following excerpt from Chetwynd et al.’s report, *Corruption and Poverty*, explains the relationship between corruption and poverty:⁹⁷

BEGINNING OF EXCERPT

Introduction

Popular belief suggests that corruption and poverty are closely related in developing countries. Corruption in the public sector is often viewed as exacerbating conditions of

⁹¹ *Ibid* at 1278-1280.

⁹² *Ibid* at 1281.

⁹³ *Ibid*.

⁹⁴ *Ibid* at 1283.

⁹⁵ AP News For Business Wire, *supra* note 7.

⁹⁶ E Chetwynd, F Chetwynd & B Spector, *Corruption and Poverty: A Review of Recent Literature*, (Management Systems International, 2003) at 2–3.

⁹⁷ *Ibid* at 5–16.

poverty in countries already struggling with the strains of economic growth and democratic transition. Alternatively, countries experiencing chronic poverty are seen as natural breeding grounds for systemic corruption due to social and income inequalities and perverse economic incentives. This report summarizes recent research on the relationship between poverty and corruption to clarify the ways in which these phenomena interact. This understanding can inform USAID planning and programming in democracy and governance, as well as in poverty reduction strategies.

The development literature is rich with theoretical insights on this relationship, many of them founded on practical experience and careful observation. The World Bank's *World Development Report for 2000/01: Attacking Poverty* summarized current thinking on the corruption-poverty linkage as follows:

The burden of petty corruption falls disproportionately on poor people ... For those without money and connections, petty corruption in public health or police services can have debilitating consequences. Corruption affects the lives of poor people through many other channels as well. It biases government spending away from socially valuable goods, such as education. It diverts public resources from infrastructure investments that could benefit poor people, such as health clinics, and tends to increase public spending on capital-intensive investments that offer more opportunities for kickbacks, such as defense contracts. It lowers the quality of infrastructure, since kickbacks are more lucrative on equipment purchases. Corruption also undermines public service delivery (World Bank, 2001: 201).

Many of these relationships have been examined using empirical research methods.⁹⁸ Much of this literature is recent -- from the mid-1990s -- when major international donor institutions began to focus attention on corruption issues and researchers initiated cross-country measurement of the corruption phenomenon. This report integrates this literature to present the major themes that are hypothesized and tested.

...

2 Examining the Relationship Between Corruption and Poverty

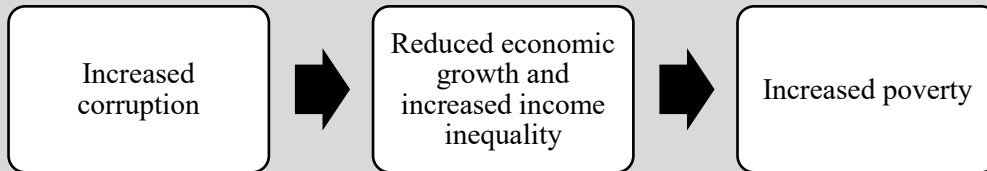
This review found that few studies examine or establish a direct relationship between corruption and poverty.⁹⁹ Corruption, by itself, does not produce poverty. Rather, corruption has direct consequences on economic and governance factors, intermediaries

⁹⁸ [1] Many studies address the issue indirectly; few address it directly. See Annex 1, Bibliographic Table.

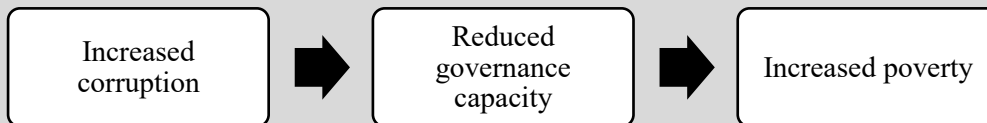
⁹⁹ [4] One group of researchers, Gupta et al (1998), found a statistically significant positive association directly between corruption and poverty. Tests for directionality showed that it appears to be corruption that increases poverty.

that in turn produce poverty. Thus, the relationship examined by researchers is an indirect one.

Two models emerge from the research literature. The “economic model” postulates that corruption affects poverty by first impacting economic growth factors, which, in turn, impact poverty levels. In other words, increased corruption reduces economic investment, distorts markets, hinders competition, creates inefficiencies by increasing the costs of doing business, and increases income inequalities. By undermining these key economic factors, poverty is exacerbated.



The “governance model” asserts that corruption affects poverty by first influencing governance factors, which, in turn, impact poverty levels. So, for example, corruption erodes the institutional capacity of government to deliver quality public services, diverts public investment away from major public needs into capital projects (where bribes can be sought), lowers compliance with safety and health regulations, and increases budgetary pressures on government. Through these serious challenges to governance practices and outcomes, poverty is affected.



...

Corruption Impedes Economic Growth

The relationship between corruption and economic growth is complex. Economic theory supports the notion that corruption hinders economic growth in the following ways:

- *Corruption discourages foreign and domestic investment:* rent taking increases costs and creates uncertainty, reducing incentives to both foreign and domestic investors.
- *Corruption taxes entrepreneurship:* entrepreneurs and innovators require licenses and permits and paying bribes for these goods cuts into profit margins.
- *Corruption lowers the quality of public infrastructure:* public resources are diverted to private uses, standards are waived; funds for operations and maintenance are diverted in favor of more rent seeking activity.

- *Corruption decreases tax revenue:* firms and activities are driven into the informal or gray sector by excessive rent taking and taxes are reduced in exchange for payoffs to tax officials.
- *Corruption diverts talent into rent seeking:* officials who otherwise would be engaged in productive activity become pre-occupied with rent taking, in which increasing returns encourage more rent taking.
- *Corruption distorts the composition of public expenditure:* rent seekers will pursue those projects for which rent seeking is easiest and best disguised, diverting funding from other sectors such as education and health.¹⁰⁰

These theoretical propositions are supported by a number of empirical studies. They demonstrate that high levels of corruption are associated with low levels of investment and low levels of aggregate economic growth. For example, the results of several World Bank corruption surveys illustrate this inverse relationship between corruption and economic growth.

- *Corruption discourages domestic investment.* In Bulgaria, about one in four businesses in the entrepreneur sample had planned to expand (mostly through acquiring new equipment) but failed to do so, and corruption was an important factor in their change of plans. The Latvia study surveyed enterprises that had dropped planned investments. It found that the high cost of complying with regulations and the uncertainty surrounding them, including uncertainty regarding unofficial payments, were important factors for 28% of businesses foregoing new investments.
- *Corruption hurts entrepreneurship especially among small businesses.* Several studies reported that small businesses tend to pay the most bribes as a percentage of total revenue (especially in Bosnia, Ghana, and Slovakia). In Poland, businesses have to deal with a large number of economic activities that are licensed, making them more prone to extortion.
- *Corruption decreases revenue from taxes and fees.* In Bangladesh, more than 30% of urban household respondents reduced electric and/or water bills by bribing the meter reader. In several studies, respondents were so frustrated that they indicated a willingness to pay more taxes if corruption could be controlled (Cambodia, Indonesia, Romania).¹⁰¹

...

¹⁰⁰ [5] For a summary discussion of these points, see Mauro 1999. For further discussion of the theoretical reasoning, see Heidenheimer and Johnston (2002), specifically Chapter 19, Corruption and Development: A Review of the Issues, pp. 329-338 (Pranab Bardhan); Chapter 20, The Effects of Corruption on Growth and Public Expenditure, pp. 339-352 (Paolo Mauro); Chapter 21, When is Corruption Harmful? pp. 353-371 (Susan Rose-Ackerman).

¹⁰¹ [6] For clarity, abbreviated references to the diagnostic studies are by country name rather than by name of author. References to the diagnostic studies are grouped at the end of the bibliography.

[Note: The empirical data cited by Chetwynd et al. is from the 1990s and early 2000s. Subsequent empirical research has cast doubt on the claim that high levels of corruption adversely affect economic growth in terms of GDP. In fact, corruption might increase economic growth in the short run under certain circumstances (for example, by allowing corporations to avoid meeting expensive environmental requirements). However, Toke S. Aidt argues that corruption still impedes sustainable economic growth in the long run in his article “Corruption and Sustainable Development,” discussed at page 33-35 of this chapter.]

Corruption Exacerbates Income Inequality

Several studies have demonstrated a relationship between corruption and income inequality. The theoretical foundations for this relationship are derived from rent theory and draw on the ideas of Rose-Ackerman (1978) and Krueger (1974), among others. Propositions include:

- Corruption may create permanent distortions from which some groups or individuals can benefit more than others.
- The distributional consequences of corruption are likely to be more severe the more persistent the corruption.
- The impact of corruption on income distribution is in part a function of government involvement in allocating and financing scarce goods and services (Gupta, Davoodi, and Alonso-Terme, 1998).

...

How does corruption exacerbate income inequality? Evidence from diagnostic surveys of corruption in several countries suggests that corruption aggravates income inequality because lower income households pay a higher proportion of their income in bribes.

In conclusion, the literature establishes clearly that corruption impedes economic growth and augments income inequalities. How does reduced economic growth, in turn, increase poverty?

Reduced Economic Growth Rates Increase Poverty

There is evidence that the absence of economic growth (or negative growth) increases poverty. Quibria's study (2002) suggests that the burden of rapid economic retrenchment, such as seen recently in Thailand and Indonesia, hurts the poor most heavily. Similarly, in the transition countries of the former Soviet Union (FSU), the changeover to a market system was associated with a sharp initial drop in output and significantly higher levels of poverty. The expansion of poverty was initiated by the collapse of GDP, which fell by 50 percent in the FSU countries and 15 percent in Central and Eastern Europe. Poverty was found to be highly correlated with administrative corruption and corruption was empirically associated with lower economic growth rates (World Bank, 2000a).

Using a poverty model, the Gupta et al. (1998) study conducted a cross-national analysis of up to 56 countries to examine the relationship between growth and poverty.... The authors found that higher growth is associated with poverty alleviation.

...

In his comprehensive study of the so-called Asian Tigers, Quibria (2002) gives a good example of rapid economic growth (during the 1980s and 1990s) leading to a substantial decrease in those living below a poverty line of \$1.25 per day.¹⁰² Further, in those countries with a more equitable distribution of income at the outset, the decrease in poverty tended to be more robust. However, even in this special case of multiple country rapid growth in a particular region, income distribution remained more or less constant over the period of growth. Similarly, Ravallion and Chen (in Easterly, 2001: 13-14) examined 65 developing countries between 1981 and 1999. They found that the number of people below the poverty line of \$1 per day was reduced in countries with positive economic growth. However, they concluded that “measures of inequality show no tendency to get either better or worse with economic growth.”¹⁰³

In conclusion, these studies show conclusively that income rises with economic growth and vice versa. It should be noted that economic growth does not necessarily lead to more equal income distribution; an increase in income may benefit the better-off rather than bringing the poor out of poverty. Income distribution seems to be an important moderating factor in the relationship between economic growth and poverty reduction.

2.1 Governance Model

The governance model postulates that increased corruption reduces governance capacity, which, in turn, increases poverty conditions. Kaufmann et al. (1999) define governance as,

“the traditions and institutions by which authority in a country is exercised. This includes (1) the process by which governments are selected, monitored and replaced, (2) the capacity of the government to effectively formulate and implement sound policies, and (3) the respect of citizens and the state for the institutions that govern economic and social interactions among them.”

Corruption disrupts governance practices, destabilizes governance institutions, reduces the provision of services by government, reduces respect for the rule of law, and reduces public trust in government and its institutions. Impaired governance, in turn, reduces

¹⁰² [13] Quibria (2002). Quibria suggests that a factor in this growth was the containment of corruption to the centralized type which he considers less costly to growth than more generalized or chaotic corruption.

¹⁰³ [14] Easterly (2001) at 13-14. In severe economic retraction, the poor suffer appreciably greater loss in income than the population's average. Easterly quotes from Martin Ravallion and Shaohua Chen, *Distribution and Poverty in Developing and Transition Economies* (World Bank Economic Review No.11 May 1997).

social capital and public trust in governance institutions; this reduces the public funds available to support effective economic growth programs and reduces the capability of government to help its citizens and the poor, in particular.

Corruption Degrades Governance

Johnston (2000) suggests that serious corruption threatens democracy and governance by weakening political institutions and mass participation, and by delaying and distorting the economic development needed to sustain democracy. In a study of 83 countries, Johnston compares Transparency International's CPI with an index of political competitiveness and finds that well-institutionalized and decisive political competition is correlated with lower levels of corruption. These results were confirmed, even when controlling for GDP and examining the relationship over time.

Diagnostic surveys of corruption in Bosnia-Herzegovina, Ghana, Honduras, Indonesia and Latvia report that government institutions with the highest levels of corruption tend to provide lower quality services. The converse is also true: in Romania, the survey shows that state sector entities with better systems of public administration tend to have lower levels of corruption.

The literature shows that corruption impacts the quality of government services and infrastructure and that through these channels it has an impact on the poor. This is particularly the case in the health and education sectors. Enhanced education and healthcare services and population longevity are usually associated with higher economic growth. But under conditions of extensive corruption, when public services, such as health and basic education expenditures that especially benefit the poor, are given lower priority in favor of capital intensive programs that offer more opportunities for high-level rent taking, lower income groups lose services on which they depend. As government revenues decline through leakage brought on by corruption, public funds for poverty programs and programs to stimulate growth also become more scarce.

...

Impaired Governance Increases Poverty

Pioneering research on the relationship among corruption, governance and poverty has been conducted at the World Bank by the team of Kaufmann, Kraay and Zoido-Lobaton. Their studies suggest an association between good governance (with control of corruption as an important component) and poverty alleviation.

Kaufmann et al. (1999) studied the effect of governance on per capita income in 173 countries, treating "control of corruption" as one of the components of good governance.... Analysis showed a strong positive causal relationship running from improved governance to better development outcomes as measured by per capita

income.¹⁰⁴ A one standard deviation improvement in governance raised per capita incomes 2.5 to 4 times. Analysis of updated indicators for 2000-2001 did not change these conclusions.¹⁰⁵

Kaufmann and Kraay (2002) used updated governance indicators to gain a more nuanced understanding of the role of good governance in the relationship between corruption and growth in per capita incomes.¹⁰⁶ Using governance data for 2000/01, the authors establish empirically that for Latin American and Caribbean countries (i) better governance tends to yield higher per capita incomes, but (ii) higher per capita incomes tend to produce reduced governance capacity. The authors attribute this second finding to state capture. In short, the authors suggest that corruption (in the form of state capture) may interfere with the expected relationship between economic growth (higher per capita incomes) and better governance. The authors note that an empirical in-depth examination of the phenomenon of state capture in the Latin American and The Caribbean (LAC) region is part of the upcoming research agenda.¹⁰⁷

The effect of governance on corruption and poverty is illuminated by another World Bank study (2000a). The deterioration in governance discussed in this study was accompanied by an increase in both corruption and poverty. Thus, as seen earlier, increases in

¹⁰⁴ [16] Kaufmann, Kraay and Zoido-Lobaton (1999) at 15. Although the relationship held for most of the aggregate indicators, the test of the relationship between the aggregate indicator for corruption and increase in per capita income did not hold up. Specification tests reported the p-value associated with the null hypothesis that the instruments affect income only through their effects on governance. For five out of the six aggregate indicators, the null hypothesis was not rejected, which was evidence in favor of the identifying assumptions. Corruption was the aggregate indicator for which the null hypothesis was rejected. This suggested that the aggregate indicator was not an adequate independent measure of corruption. "This is not to say that graft is unimportant for economic outcomes. Rather, in this set of countries, we have found it difficult to find exogenous variations in the causes of graft which make it possible to identify the effects of graft on per capita incomes." P.16 n. 15.

¹⁰⁵ [17] Kaufmann, Kraay and Zoido-Lobaton (2002). In an April, 2002, presentation at the US Department of State, Dr. Kaufmann summarized this work on governance and the demonstrated link to better development outcomes such as higher per capita income, lower infant mortality and higher literacy. He expects that donors will pay much more attention to governance, and that the link between good governance and poverty alleviation is now a mainstream concept. Kaufmann (2002), slide 44. New data will be released shortly and will be available at <<http://info.worldbank.org/beeps.kkz/>>.

¹⁰⁶ [18] Kaufmann and Kraay (2002). In a forthcoming study that draws on a survey of public officials in Bolivia, Kaufmann, Mehrez and Gurgur conclude (using a theoretical model for econometric analysis) that external voice and transparency have a larger effect on corruption (and quality of service) than conventional public sector management variables (such as civil servant wages, internal enforcement of rules, etc.).

¹⁰⁷ [19] This study would be similar to the Business Environment and Enterprise Performance Survey (BEEPS), developed jointly by the World Bank and the EBRD, which generated comparative measurements on corruption and state capture in the transition economies of the CIS and CEE. See <<http://info.worldbank.org/governance/beeps/>>.

corruption tend to deteriorate governance practices, but the reverse holds true as well – reduction in governance capacity increases the opportunities for corruption.

Reduced Public Trust in Government Increases Vulnerability of the Poor

Corruption that reduces governance capacity also may inflict critical collateral damage: reduced public trust in government institutions. As trust—an important element of social capital—declines, research has shown that vulnerability of the poor increases as their economic productivity is affected. The concept of social capital refers to social structures that enable people to work collectively for the good of the group.¹⁰⁸ One of the most important and widely discussed elements of social capital is trust, both interpersonal trust and trust in institutions of government.¹⁰⁹

...

One of the effects of widespread corruption in government services is that it appears to contribute to disaffection and distrust, and this appears to impact particularly heavily on the poor.¹¹⁰ This is not surprising, because low income people are the ones who are most likely to be dependent on government services for assistance with basic needs, such as education and healthcare, and least likely to be able to pay bribes to cut through complex and unresponsive bureaucracies. Lack of trust has economic consequences: when people perceive that the social system is untrustworthy and inequitable, this can affect incentives to engage in productive activities.¹¹¹

...

3 Conclusion

Overall, the literature reviewed in this paper demonstrates that corruption does exacerbate and promote poverty, but this pattern is complex and moderated by economic and governance factors. Table 1 summarizes the major findings of this report.

Table 1. Major Propositions Linking Corruption and Poverty

- Economic growth is associated with poverty reduction
- The burden of rapid retrenchment falls most heavily on the poor.
- Corruption is associated with low economic growth
- Corruption reduces domestic investment and foreign direct investment

¹⁰⁸ [20] For a discussion of various definitions of social capital and their evolution, see Feldman and Assaf (1999).

¹⁰⁹ [21] See Rose-Ackerman (2001). Rose-Ackerman discusses the complex nature of the relationship between trust, the functioning of the state and the functioning of the market. The study stresses the mutual interaction between trust and democracy and the impact of corruption.

¹¹⁰ [22] Rose-Ackerman (2001) at 26, noting that this is especially the case in the FSU.

¹¹¹ [23] Buscaglia (2000), discussing corruption and its long term impact on efficiency and equity, especially corruption in the judiciary.

- Corruption reduces public sector productivity
- Corruption distorts the composition of government expenditure, away from services directly beneficial to the poor and the growth process, e.g., education, health, and operation and maintenance
- Better health and education indicators are positively associated with lower corruption
- Corruption reduces government revenues
- Corruption lowers the quality of public infrastructure
- Corruption lowers spending on social sectors
- Corruption increases income inequality
- Corruption increases inequality of factor ownership
- Inequality slows growth
- Corruption decreases progressivity of the tax system
- Corruption acts as a regressive tax
- Low income households pay more in bribes as percent of income
- Better governance, including lower graft level, effects economic growth dramatically
- Better governance is associated with lower corruption and lower poverty levels.
- High state capture makes it difficult to reduce inequality
- Extensive, organized, well institutionalized and decisive political competition is associated with lower corruption
- Trust is a component of social capital. Higher social capital is associated with lower poverty. Corruption undermines trust (in government and other institutions) and thereby undermines social capital.

END OF EXCERPT

The 2015 OECD report, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development*, explores the correlation between corruption and economic growth by focusing on four sectors that are key in promoting economic growth and development but also vulnerable to corruption: extractive industries, utilities and infrastructure, health, and education.¹¹² The report investigates how corruption “distorts sector performance”¹¹³ and the consequences for economic growth and development. For example, in extractive industries, the report finds that corruption can siphon funds away from populations and render dependence on natural resources counterproductive for the economy. The analysis concludes that corruption in these four sectors directly affects the cost of public and private sector projects, while indirectly damaging public institutions, eroding public trust in government and increasing inequality.

In “Corruption and Sustainable Development,” Toke S. Aidt takes a new approach to analyzing the relationship between growth and corruption.¹¹⁴ Aidt points out that “[m]ost of the empirical research on the consequences of corruption at the economy-wide level uses

¹¹² OECD, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development*, (Paris: OECD Publishing, 2015), online:

<<http://www.oecd.org/publications/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development-9789264230781-en.htm>>.

¹¹³ *Ibid* at 9.

¹¹⁴ Toke S Aidt, “Corruption and Sustainable Development” in Susan Rose-Ackerman & Tina Soreide, eds, *International Handbook on the Economics of Corruption*, vol 2 (Cheltenham; Northampton: Edward Elgar, 2011), 3 at 3–50.

real GDP per capita,”¹¹⁵ which has led to ambiguous and contradictory results regarding causal directions. The author argues that research focused on GDP is “barking up the wrong tree.”¹¹⁶ Since “development is concerned with sustainable improvements in human welfare,”¹¹⁷ Aidt’s research focuses instead on the relationship between corruption and *sustainable* development, and indicates that “corruption is a major obstacle to sustainable development.”¹¹⁸ Aidt defines sustainable development as “present economic paths that do not compromise the well-being of future generations.”¹¹⁹ The following excerpt summarizes Aidt’s findings on the relationship between corruption and sustainable development:

Corruption has the potential to undermine sustainable development in many ways ... sustainable development requires suitable investment in the economy’s capital assets. A vast empirical literature strongly suggests that corruption is one reason why many societies do not make sufficient investments in their productive base. Take, for example, education, that is, investment in the stock of human capital. Since education is associated with positive externalities, the social value of these investments exceeds the private return, and public funding is justified from a social point of view, in particular for primary education. But do the funds committed always reach the schools? Expenditure tracking surveys undertaken by the World Bank in Africa suggest that the answer is no: corrupt officials manage to divert the flow of funds to other purposes, most likely to private consumption or political patronage ... the macroeconomic evidence presented by Mauro (1998), Tanzi (1998) and many others shows how corruption distorts the portfolio of public spending by shifting resources away from education and towards public [sic] consumption. In short, there are good reasons to believe that corruption undermines the accumulation of human capital and may thus be a cause of unsustainable development.

Another example is investment in manufactured capital. A large theoretical literature highlights different reasons why corruption reduces the incentive to invest. The basic point is that corruption, through the sale of investment licenses or simply through creation of red tape and rent-seeking, serves as a tax on investment. The macroeconomic evidence strongly confirms that investment does not thrive in a corrupt environment.... Tanzi and Davoodi (1998), for example, show that corruption tends to increase public investment, but that it is associated with low operation and maintenance expenditures and with poor quality of infrastructure, that is, with investments of lower quality. Moreover, Wei (2000) demonstrates that corruption acts like a tax on international investments.... Along similar lines, Rose-Ackerman (1999, ch. 3), argues that corrupt politicians favor investment projects with inefficiently high capital intensity (‘white elephants’) because the stream of bribe income generated by such projects

¹¹⁵ *Ibid* at 6.

¹¹⁶ *Ibid* at 3.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid* at 37.

¹¹⁹ *Ibid* at 6.

is front-loaded. As a consequence of this bias, too little investment is subsequently made in maintaining the capital.

...

The final example relates to the management of natural capital. Leite and Weidmann (2002) and many others provide macroeconomic evidence on the close association between extraction of natural resources, resource rents, and corruption. Anecdotal evidence linking the exploitation of natural resources to corruption is also abundant, ranging from kickbacks associated with logging concessions in Malaysia and Indonesia to oil concessions in Nigeria.... The consequence of these distortions is environmental degradation. This is directly related to a vast literature on the so-called 'resource curse'. Economic logic suggests that abundance of natural resources should be beneficial for economic development.... Yet, as first demonstrated by Sachs and Warner (1997), despite this apparent advantage, resource-rich countries tend to grow at a slower rate than other countries. One often-cited reason for this curse is that resource abundance fosters a 'rentier' economy with rampant corruption and poorly developed institutions.... Such an environment not only encourages overuse of the natural resource base; it also crowds out investment in manufactured and human capital (Gylfason, 2001; Papyrakis and Gerlagh, 2006), misallocates talent away from innovative activities to rent-seeking (Acemoglu and Verdier, 1998) and encourages growth-harming increases in government consumption (Atkinson and Hamilton, 2003) ... the general message from this literature is that resource rents induce corruption where institutions are weak, and that corruption and weak institutions encourage overuse of natural capital. The implied net result is a significant fall in genuine investment.

These examples show that corruption can be a threat to sustainable development through the effect it has on investment in an economy's productive base. However, they also demonstrate another basic point. The effect of corruption on economic growth, defined in terms of GDP per capita, is likely to be smaller than the corresponding effect of corruption on genuine investment and sustainability, at least over the medium term. [footnotes omitted]¹²⁰

For a detailed analysis of the effects of corruption on markets, national economies, the public sector, institutions and other aspects of economies and governance, see Arnone and Borlini, *Corruption: Economic Analysis and International Law*.¹²¹

¹²⁰ *Ibid* at 9–11.

¹²¹ Arnone & Borlini, *supra* note 82.

1.6 Poverty and Corruption: A Morally, Economically, and Politically Indefensible Problem

Figure 1.1 *Scenes from the Kibera in Nairobi*



Note. Photo by Karl Mueller. CC BY 2.0 Generic license.

The following excerpts are from Roy Cullen’s readable and informative book *The Poverty of Corrupt Nations*.¹²² Mr. Cullen, a former member of the Parliament of Canada, is also a founding member of the Global Organization of Parliamentarians Against Corruption.¹²³ In his book, he finds a strong correlation between low GDP per capita and corruption (or more accurately “perceptions of corruption,” based on TI’s Corruption Perceptions Index). The following excerpts illustrate some connections between corruption and poverty:¹²⁴

BEGINNING OF EXCERPT

Nations where corruption is rampant also tend to have a large proportion of the population living in poverty – such as the people in this shanty town – while the countries’ leaders may be diverting millions from national wealth to Swiss bank accounts for their personal benefit.

¹²² Roy Cullen, *The Poverty of Corrupt Nations* (Toronto: Blue Butterfly Books, 2008).

¹²³ See “GOPAC” (last visited 3 September 2021), online: *Global Organization of Parliamentarians Against Corruption* <<http://gopacnetwork.org/>>.

¹²⁴ Cullen, *supra* note 122 at 1–6, 27–29, 59–61, 71–72.

[Note: The photograph of the shanty town in Cullen's book is not reproduced because permission could not be obtained. An alternative picture has been substituted. See Figure 1.1.]

...

What I will attempt to demonstrate in this book is that while bribery and corruption may have cultural connotations and roots, they are morally and economically indefensible. This book places its focus on the relationship between corruption and poverty. It has two major themes.

First, there is the need for world leaders to address the growing disparities between the rich and poor nations. How big is this gap and what are the trends? As David Landes highlights in *The Wealth and Poverty of Nations*, "The difference in income per head between the richest industrial nation, say Switzerland, and the poorest non-industrial country, Mozambique, is about 400 to 1. Two hundred and fifty years ago, this gap between richest and poorest was perhaps 5 to 1.... It is estimated that in today's world, 20,000 people perish every day from extreme poverty (some argue that the figure is 50,000 daily deaths from poverty-related causes).

[Note: The enormous gulf globally between the rich and the poor continues to grow. For a more nuanced analysis of income inequality and the dangers it creates, see: *World Social Report 2020*, UNDESA, 2020, ST/ESA/372 and Facundo et al, "The Elephant Curve of Global Inequality and Growth" (2018) 108 AEA Papers and Proceedings at 103.]

Second, there is a need to deal with bribery and corruption, a growing activity that is getting completely out of hand, and one of the key factors that is slowing growth and reducing economic opportunities in the developing world.

I then argue that conventional approaches to battling poverty and corruption have not worked and need to be examined. We need to begin thinking and acting creatively to develop a new paradigm. Executing corrupt officials (25 officials have met this fate in China in the past four years) is not the answer for progressive nations with a respect for human rights and the rule of law.

The two themes mentioned above are closely interconnected. The poverty of the world's poor nations is significantly exacerbated through bribery and corruption. Later on, I will describe the high degree of correlation between poverty and corruption. Not only do the problems of income distribution amongst the political elites, the working poor, and the poverty-stricken become more exaggerated, but it saps hope. Corruption also leads to political instability, donor fatigue, and the disappearance of much needed investment capital in the affected countries.

...

We know that disparities between the rich and poor nations are not a function of poverty alone. In fact, corruption is not an unknown phenomenon in the so-called developed

world.... There are many underlying reasons for the wealth and income disparities. Some of these factors are not controllable, whereas corruption, with political will, can be controlled.

...

Quite clearly, corruption is a disease that affects every functioning aspect of governments. To better understand the correlation between corruption and good governance, researcher Tony Hahn created an Index of Public Governance (IPG). Hahn uses three levels of measurement to compute the index, drawing on data from the Freedom House's 2004 indices of political rights and civil liberties, Transparency International's 2004 Corruptions Perceptions Index, and the Economic Freedom of the World's 2004 annual report [these indices are further discussed in Section 4]. Each set of data represents a democratic and capitalist perspective of government based on the fundamentals that good governance ensures the ability of citizens to vote, encourages free enterprise, improves quality of life, and allows citizens to exercise their civil liberties.

Hahn's Index ranks 114 countries, revealing New Zealand at the top of the list with the highest model of good governance with a ranking of 9.45 out of 10. Following closely behind are Finland, Switzerland, Iceland, and Denmark. Also included in the top 10 are the United Kingdom, with a ranking of 9.2, and Australia and Canada, each of which have a perfect score in the areas of political rights and civil liberties. Surprisingly the United States missed the top 10 by one, ranking eleventh with a score of only 8.2 on economic freedom.

Most importantly, however, are the results for Africa. The first of the African countries to make the list is Botswana, which ranks 29th with a score of 7.52, with Mauritius and South Africa following closely behind. What is interesting about this, as Hahn points out, is that unemployment in Botswana is over 20 per cent and a third of the population is living with HIV/AIDS. Comparing the Index rankings with indicators of development such as life expectancy and literacy, Botswana is gravely behind South Africa and Mauritius, with a life expectancy at 33.38 years—less than half the expected age of Mauritians. Another African nation worth noting is war-torn Sierra Leone, which ranks 74th on the Index of Public Governance, ahead of both Russia (91st place) and China (99th place). Yet in comparison to indicators of development, China and Russia also greatly surpass Sierra Leone.

Hahn points to history and culture to explain why a country can have a positive ranking in the Index of Public Governance and a low incidence of development. He argues that if countries that have the foundations of good governance continue with their efforts, development will follow. This means if countries like Sierra Leone stick to the path of comparatively good governance, while countries like Russia do not, then the indicator of development should rise for Sierra Leone in comparison with Russia.

In fact, Hahn's hypothesis on the relationship between corruption and poverty appears to be supported in a correlation analysis between Hahn's IPG and GDP per capita.

...

However, good governance is not the only indicator of corruption—poverty plays a role as well. *Governance, Corruption, and Economic Performance* recently published by the IMF, includes studies on the impact of corruption on economic performance. Amongst the findings are the following:

- social indicators (e.g. child mortality rate, school drop-out rates) are worse where corruption is high;
- countries with higher corruption tend to have lower per capita income, a higher incidence of poverty and greater income inequality;
- tax revenue is lower in more corrupt countries;
- transition economies that have made more progress on structural reform tend to be less corrupt; and
- decentralization of taxation and spending improves governance.

...

Corruption and Society

In a December 2005 document, “Controlling Corruption: A Handbook for Arab Politicians,” a number of negative impacts of corruption on society were identified ...

- Substitutes personal gain for public good;
- Prevents or makes it more difficult for governments to implement laws and policies;
- Changes the image of politicians and encourages people to go into politics for the wrong reasons;
- Undermines public trust in politicians and in political institutions and processes;
- Erodes international confidence in the government;
- Encourages cynicism and discourages political participation;
- Can contribute to political instability, provoke coups d’état, and lead to civil wars;
- Perverts the conduct and results of elections, where they exist;
- Keeps the poor politically marginalized;
- Consolidates political power and reduces political competition;
- Delays and distorts political development and sustains political activity based on patronage, clienteles and money;
- Limits political access to the advantage of the rich;
- Reduces the transparency of political decision-making.

...

For politicians in Mexico, when it comes to dealing with the drug lords, the choices are very clear—take the money and run and turn a blind eye; or have you and your family face the consequences of violence turned against you. It becomes even more difficult for a politician attempting to fight the drug lords when the police themselves are corrupt, and when judges are also bribed. It takes a brave politician to buck this trend.

Corruption is not only related to regular crime, however; the downing of a Russian passenger airliner in August 2004 by terrorists highlights how corruption and terrorism can be linked. It is alleged that the terrorist who blew up one of the planes was initially denied boarding the aircraft because of some irregularities with her documentation. However, a bribe approximating US \$50 was paid—allowing her to board the aircraft and eventually blow it up, causing the death of 46 people.

In conclusion, corruption has enormous implications for developing countries. It undermines democratic processes, carries with it a huge economic cost, and corruption can lead to political unrest. But corruption also impacts countries with more developed economies and it is [to this] aspect that we now turn our attention.

...

Developed countries are not immune from corruption—it is more a question of order of magnitude, and the level of damage that corruption can cause in the respective jurisdictions. Many or all the negative consequences associated with corruption for developing countries apply to the more developed economies. There are, however, some additional and unique considerations for the industrialized world. There is an economic cost of bribery that is reflected in a higher cost of doing business in corrupt countries. This limits levels of foreign direct investment by developed countries in developing and emerging economies. Corruption in developing countries has undoubtedly changed world migration patterns as people flee their home countries out of disgust and/or the desire to improve the quality of their lives. They may flee their country of birth if they are being persecuted for exposing corrupt practices, or when bribery has caused greater health, safety, and environmental risks. [footnotes omitted]

END OF EXCERPT

2. THE MANY FACES OF CORRUPTION

2.1 No Universal Definition

Corruption is not a singular concept;¹²⁵ it comes in many forms and occurs in both hidden and open places. It is truly a global phenomenon; no country is corruption free. Although global in its nature, there is no global consensus on a universal definition of corruption. The definition and public perception of what behaviour constitutes corruption will vary to some extent depending on both the past and present social, political, economic, and cultural structure of each society.¹²⁶ For example, the line between lawful gift-giving and unlawful bribery is nearly impossible to pinpoint. Some countries have more prevalent social, political, and economic customs of gift-giving. In many Asian countries, for example, gift-giving is, or until recently has been, part of a complex socio-economic custom. In China, that custom is called *guanxi*.¹²⁷ The line between gifts and bribes can also change over time within a country. Indeed, over the past 50-75 years, this has taken place rapidly in many countries with the unrelenting march of the market economy into so-called “developing countries.”¹²⁸ Adam Graycar and David Jancsics in “Gift Giving and Corruption” provide a very useful four-part typology to distinguish between gifts and bribes in the public administration context.¹²⁹

¹²⁵ For an introduction to the illusive nature of corruption as a concept, see Jonathan Rose, “The Meaning of Corruption: Testing the Coherence and Adequacy of Corruption Definitions” (2018) 20:3 Public Integrity 220; Joseph Pozsgai-Alvarez, “The Abuse of Entrusted Power for Private Gain: Meaning, Nature and Theoretical Evolution” (2020) 74 Crime L & Soc Change 433.

¹²⁶ Perhaps the leading text on the history throughout the ages is JT Noonan, *Bribes: The Intellectual History of Moral Ideas* (New York: MacMillan, 1984).

¹²⁷ A Smart, “Gifts, Bribes and Guanxi: A Reconsideration of Bourdieu’s Social Capital” (1993) 8:3 Cultural Anthropology 388.

¹²⁸ For example, P Verhezen, in “Gifts and Alliances in Java” (2002) 9:1 J Eur Ethics Network 56, argues that the traditional Javanese norms of harmony and respect have been replaced by economic values encouraging individualistic consumption and accumulation rather than sharing of communal wealth. He states that “the [traditional Javanese] logic of the gift and its inherent three-fold structure of obligation [harmony, hierarchy, respect and reciprocity] are [now] used for personal gain, not maintaining a social order.... The rhetoric and ceremonial forms of a traditional culture are used to camouflage what are in fact business or commercial, and in extreme cases even extortionary relationships.” This example is cited by Douglas W Thompson, *A Merry Chase Around the Gift/Bribe Boundary* (LLM Thesis, University of Victoria, Faculty of Law, 2008) at 54-56. Thompson (in Chapter 2 of their thesis) also describes a somewhat similar shift in ancient Athens, whereby some traditionally proper gifting became unethical and illegal as Athens society changed.

¹²⁹ Adam Graycar & David Jancsics, “Gift Giving and Corruption” (2017) 40 Intl J Pub Admin 1013-1023. Their four-part typology is divided into social gift, social bribe, bureaucratic gift and bureaucratic bribe. They apply (at page 1020) a series of questions to help distinguish the four different types of exchanges:

The variables that we would consider for each of these are: what is the primary function of the exchange; what is it that is being transacted; what is expected in return; does the organizational affiliation of the participants matter; are they exchanging their own resources, or somebody else’s (the organization’s); is there

Although cultural differences may affect the nature, extent, and kinds of “corruption” in different states, this absence of universal agreement on the exact meaning of corruption does not mean there is no consensus at all on its meaning. The United Nations Convention Against Corruption (UNCAC) does not define the word corruption. Instead, it adopts the pragmatic approach of describing a number of specific behaviours that parties to the Convention must criminalize as corrupt, and other specific behaviours that State Parties should at least *consider* criminalizing. Thus, all countries that are parties to UNCAC agree that at least the conduct of the mandatory offences in UNCAC fall within the meaning of corruption. Therefore, in a legal sense, corruption is the type of behaviour that a state has defined as corrupt. Other behaviour a vast majority of people may consider morally corrupt, but is not specified in law as corrupt, is legally permissible behaviour regardless of its moral offensiveness. This form of behaviour is sometimes disparagingly referred to as “legal corruption.” Chapter 2 is devoted to an examination of the forms of conduct that have been defined as crimes of bribery or corruption.

“Corruption” is best seen as a broad, generic concept. TI’s definition of corruption best captures this generic flavour: “corruption is the abuse of entrusted power for private gain.”¹³⁰ The essence of corruption in the TI definition is the combination of three elements: abuse, entrusted power, and private gain. The abuse of entrusted power must be more than accidental or negligent; it must be intentional or knowing. TI’s definition includes abuse of power by public officials (sometimes called public corruption) as well as abuse of entrusted power by private citizens in business (also called private corruption).¹³¹ Private corruption is often dealt with through offences like theft, embezzlement or the offering and accepting of secret commissions. When describing corruption, adjectives are often used to indicate the context or form of the corruption in question, such as:

- grand corruption and petty corruption;
- public or private corruption;
- domestic or local corruption versus foreign corruption;
- systemic versus occasional corruption;
- supply-side corruption (i.e. offering or giving bribes) versus demand-side corruption (i.e. requesting or receiving bribes), which are also sometimes called active corruption (for the briber) and passive corruption (for the bribed official);

transparency in the transaction; who are the winners and who are the losers; what is the primary means of regulation of the transaction.

¹³⁰ For a more detailed discussion on this specific definition, see Joseph Pozsgai-Alvarez, “The Abuse of Entrusted Power for Private Gain: Meaning, Nature and Theoretical Evolution” (2020) 74 Crime L & Soc Change, 433; Jonathan Rose, “The Meaning of Corruption: Testing the Coherence and Adequacy of Corruption Definitions” (2018) 20:3 Pub Integrity, 220.

¹³¹ In “The Law and Economics of Bribery and Extortion” (2010) 6:1 Ann Rev L & Soc Sci 217, Susan Rose-Ackerman notes that many jurisdictions do not criminalize private-to-private bribery unless accompanied by some other offence like extortion. In spite of this lack of criminalization, Rose Ackerman is clear that private-to-private bribery has the potential for broader negative impacts, such as the development of monopolies harmful to consumers and suppliers, diluted product quality and limited entry for new businesses.

- administrative corruption versus state capture;¹³²
- political corruption as a species of public corruption, including some forms of financial contributions to political parties and election campaigns, patronage, cronyism and various forms of vote buying;
- books and records offences which are accounting offences designed to hide the giving or accepting of bribes.

Adam Graycar and Tim Prenzler, in their very readable primer on corruption, *Understanding and Preventing Corruption*, further suggest that corruption should be examined in the context of four components: types, activities, sectors, and places (TASP).¹³³ They describe the nature and meaning of each of these components. For example, types of corruption include bribery, abuse of discretion, and trading in influence and patronage.

Another analytic tool for describing corruption is the 4 W's—who, what, where and why. The “who” describes the various actors (e.g., political leaders, government employees, corporate agents, and executives) involved in corruption events, and the “what” describes the size (petty or grand), the frequency (rare or common) and the type of corruption offences being committed (e.g., bribery of a government official to obtain a government procurement contract or influence peddling in appointments to administrative boards and tribunals). The “where” describes both the place (national or international) and the sector (public works, law enforcement, etc.). Finally, the “why” deals with the purposes or motives for engaging in corruption (including financial need, the need for acceptance and friendship, competition, and the desire to succeed, promotion of perceived efficiency, greed, etc.).

In a more global sense, the 2014 OECD *Foreign Bribery Report* provides a glimpse into the prevalence and characteristics of the corruption of foreign public officials.¹³⁴ The Report examines enforcement actions (207 bribery schemes) against 263 individuals and 164 entities for the offence of bribery of foreign public officials in international business transactions. The vast majority of the enforcement actions took place in the US (62%) and Germany (12.5%), with a sprinkling of enforcement actions in Korea (5%), the UK (2.8%), Canada (1.9%) and other countries. The sanctioned offences occurred all over the world. According to the report, the majority of bribes (or at least the majority of bribes targeted by law

¹³² Arnone & Borlini, *supra* note 82 at 2, explain that administrative corruption “concerns all public employees’ or public officials’ actions for private gain that distort the application and enforcement of existing laws or rules; generally, these actions grant exemptions or tax allowances to specific agents. Alternatively, they are aimed at giving priority access to public services to an elite of agents.” State capture, according to Arnone and Borlini, encompasses “all illegal actions aimed at influencing the decision-making process of policy making in the different spheres of the life of a country.” Instead of being held accountable through public scrutiny and opinion, authorities in a situation of state capture exploit “illegal and secret channels that aim at favoring the interests of specific groups at the expense of everybody else. These channels are clearly accessible only to a limited group of ‘insiders’ at the expense of those who are ‘outsiders’ and do not participate in bribery.” State capture is also briefly discussed in Chapter 12, Section 1.1.

¹³³ Adam Graycar & Tim Prenzler, *Understanding and Preventing Corruption* (Basingstoke: Palgrave Macmillan, 2013), c 1.

¹³⁴ OECD, *Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, (OECD, 2014), online: <<http://dx.doi.org/10.1787/9789264226616-en>>.

enforcement officials) came from large companies with more than 250 employees. Senior management were involved in over 50% of cases. 80% of bribes were directed towards officials of state-owned enterprises, followed by heads of state (6.97%), ministers (4%) and defence officials (3%). The values of the bribes were only available in 224 cases, but totaled \$3.1 billion in those cases. At least 71% of bribes involved an intermediary such as an agent, corporate vehicle, lawyer or family member. Interestingly, almost half of the cases involved the bribery of officials in countries with high or very high human development scores, casting doubt on the idea that most bribery of public officials occurs in developing countries. In terms of sectors, 57% of cases involved bribes to secure public procurement contracts.

This description reveals some of the many faces of corruption. Recognition of corruption's many forms and an accurate description of those various forms is essential to finding appropriate responses and mechanisms in fighting corruption. The most effective anti-corruption mechanisms are varied and multi-faceted. They vary with the type of corruption being targeted and the social, political and economic context in which that corruption occurs. There are no "one size fits all" solutions to corruption. Remedies must be tailor-made and evaluated on an ongoing basis.

2.2 Imposing Western Definitions Globally

Some commentators claim that the developed Western countries have imposed their conception of corruption on the rest of the world via international anti-corruption instruments.¹³⁵ These instruments are heavily focused on the Western economic priorities of fostering international trade and leveling the playing field for competing businesses. As a result, the international conventions focus on economic corruption of foreign officials rather than subtler yet venomous forms of political corruption, such as corrupt party and campaign financing, cronyism or vote-buying (see Chapter 13).

The history of UNCAC and the OECD Convention (outlined in more detail in Section 6) explains why those conventions focus primarily on the grand corruption of political leaders in foreign states when securing lucrative contracts as opposed to political corruption. The concern over grand corruption in foreign countries is relatively recent. The history of that concern is recounted in Section 6. In short, the Watergate investigation led to the revelation of large, illegal presidential campaign contributions by prominent corporations through offshore subsidiaries. Further, the investigation revealed a systemic practice of corporate bribery of foreign public officials. Public outrage led to the enactment of the 1977 US *Foreign Corrupt Practices Act (FCPA)*, which made it an offence for US corporations to bribe foreign officials in order to obtain contracts abroad. Surprisingly, bribery of foreign officials was not an offence in any other country. Bribes paid in a foreign country to a foreign official were viewed as a matter for that foreign country. Indeed, bribes to foreign officials were tax

¹³⁵ See, for example, T Polzer, "Corruption: Deconstructing the World Bank Discourse" (2001) Development Studies Institute, London School of Economics and Political Science Working Paper I. Polzer notes that the word "corruption" has no equivalent in many languages. See also A Gupta, "Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State" (1990) 22:2 *Am Ethnologist* 375; and E Harrison, "Unpacking the Anti-Corruption Agenda: Dilemmas for Anthropologists" (2006) 34:1 *Oxford Dev Stud* 16.

deductible as an expense of doing business. Not surprisingly, American companies complained loudly that the *FCPA* put them at a serious competitive disadvantage in obtaining foreign government contracts, since other industrial countries were continuing to bribe foreign officials. Rather than reverse course and decriminalize bribery of foreign public officials, the American government undertook an intense international campaign to bring the major economic countries of the world into line with the American position. The US succeeded with the coming into force of the OECD Convention in 1999, followed by the broader UNCAC in 2005.

As this history demonstrates, the international conventions on corruption were born from American concerns about loss of international business and the absence of fair competition. As discussed further in Section 6.3.6, during UNCAC's negotiation, Austria, France, and the Netherlands advocated for regulations to increase the transparency of elections and campaign financing, but the US opposed this inclusion. Instead, Article 6 of the Convention merely requires State Parties to *consider* implementing measures to increase transparency in elections and campaign financing.

Related to this claim is the argument that anti-corruption discourse is predominantly focused on the developing world. Gabriel O. Apata's recent article "Corruption and the Postcolonial [sic] State: How the West Invented African Corruption" counters the narrative of Africa as an inherently corrupt continent.¹³⁶ In doing so, Apata asserts that corruption is a product of colonization.¹³⁷ Further, Apata posits that the discourse surrounding African corruption reflects a Western invention of a markedly corrupt region that emerged in full force during the period of decolonization to contest new independent governments.¹³⁸ Rather than focusing on the morally charged concerns of the rampant corruption in Africa, Apata argues that the more pressing issues lie in the aftermath of colonialism.¹³⁹

Few commentators argue that grand corruption of foreign public officials should not be criminalized. However, there is merit to the observation that the international conventions focus too exclusively on Western concerns regarding economic trade. One could argue that Western countries display a double standard by roundly denouncing foreign economic bribery while failing to promote global standards regarding political corruption.

2.3 The Ubiquitousness of Corruption

Corruption is ubiquitous—it can occur at anytime and anywhere. It can take place through a wide variety of activities: the making of public appointments, the procurement of public goods, the delivery of public services, as well as the regulation and auditing of administrative tasks and obligations. Corruption can occur in any sector of society, including construction, extractive industries, municipal governance, immigration, education, health care, sports (especially at the international level), and law enforcement. And finally,

¹³⁶ Gabriel O Apata, "Corruption and the Postcolonial [sic] State: How the West Invented African Corruption" (2019) 37:1 J Contemp Afr Stud 43.

¹³⁷ *Ibid* at 50.

¹³⁸ *Ibid* at 51.

¹³⁹ *Ibid* at 54.

corruption can take place internationally, nationally, regionally, and locally; in workplaces, governments, and corporate offices. The discussion in Section 4 relates to the difficulty in measuring the perceptions and actual prevalence of corruption nationally and globally. However, one does not need sophisticated measuring devices to know that corruption is rampant worldwide. One need only peruse the news over the past few years to see the variety of people, places, and activities involved in corruption. This section briefly sets out some of these corruption scandals.

Most corruption, especially in poorer countries, can be referred to as “petty corruption.” It is petty in the amount of the bribe, its frequency, and the reluctant acceptance by the public in general of the attitude, “there’s nothing we can do about it.” However, it is definitely not petty to its victims. Examples of petty corruption include a police officer who demands (or is offered) a small bribe in exchange for not issuing a traffic ticket to a motorist. Or when an electric, gas or telephone employee demands a small bribe before agreeing to hook up the required service. It takes place when a parent is required to pay a small bribe before their child is enrolled in school or when they are required to buy a school uniform at five times its normal cost. Access to “free” medical or hospital services may not be provided unless a bribe is paid. This list could go on and on.

Other forms of large-scale corruption and bribery arise in all societies, whether rich or poor. For example, nine US Navy officers were charged with accepting cash, hotel expenses, and the services of prostitutes in exchange for providing classified US Navy information to a defence contractor in Singapore.¹⁴⁰ In May 2015, BHP Billiton, a mining giant, agreed to pay \$25 million to settle charges laid by the US Securities Exchange Commission after BHP paid for government officials from various countries to attend the 2008 Olympics in Beijing. The officials were connected to pending contract negotiations or regulatory issues involving BHP.¹⁴¹ Malawi’s “cashgate” has been unfolding since 2013, when investigations into the siphoning of millions of dollars by civil servants began. In another instance, two top Malawian army officers were arrested for their involvement in the siphoning of \$40 million under the guise of ordering new military uniforms that never materialized.¹⁴² In June 2015, a New Jersey cardiologists’ practice agreed to pay \$3.6 million to settle allegations that it had falsely billed federal healthcare programs for medically unnecessary tests.¹⁴³ In another example, Haitian Senator Rony Célestin and Canada’s anti-money laundering legislation came under fire in 2021. Célestin, who owns a \$3.4 million mansion in Quebec, faces an investigation by a Haitian anti-corruption inquiry after being accused of using fraud and

¹⁴⁰ Richard L Cassin, “Navy Officer Is Ninth Defendant to Plead Guilty in ‘Fat Leonard’ Bribe Scandal” (16 April 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/4/16/navy-officer-is-ninth-defendant-to-plead-guilty-in-fat-leona.html>>.

¹⁴¹ Richard L Cassin, “BHP Billiton Pays \$25 Million to Settle Olympics FCPA Offences” (20 May 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/5/20/bhp-billiton-pays-25-million-to-settle-olympics-fcpa-offense.html>>.

¹⁴² “Two Top Army Officers Arrested in Malawi’s Corruption Probe”, *The New York Times* (13 May 2015).

¹⁴³ Richard L Cassin, “New Jersey Cardiologists Pay \$3.6 for False Claims Settlement, Whistleblower Awarded \$650,000” (4 June 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/6/4/new-jersey-cardiologists-pay-36-for-false-claims-settlement.html>>.

corruption to gain his fortune.¹⁴⁴ The *New York Times* reports that as per Canadian anti-money-laundering legislation, the February 2021 purchase of the mansion should have triggered mandatory due diligence on behalf of Canadian financial institutions involved in the real estate transaction.¹⁴⁵ The RCMP has not revealed whether there is an ongoing investigation.¹⁴⁶

In addition to the somewhat large-scale examples of bribery and corruption, there are other shocking examples of grand corruption and kleptocracy committed by autocrats, oligarchies, democratic leaders, and some of the largest and “most respected” corporations, banks and financial organizations.¹⁴⁷ Grand corruption occurs at the highest levels of our political and corporate structures. It has the most massive adverse impact, trickling down to all sectors of society. The rationale for these devastating crimes is greed—plain and simple!

Many of the world’s most well-known corporations and organizations have found themselves in hot water due to corruption-related scandals. The most infamous is likely the Enron scandal, but plenty of others are ongoing. For example, the multinational oil corporation Royal Dutch Shell and its Italian partner Eni have been embroiled in a decade-long investigation concerning a Nigerian oil block licence granted in 2011. Global Witness reported that the two oil companies paid \$1.1 billion—roughly equating to 80% of the projected Nigerian health budget for 2015—to Malabu Oil and Gas, a company beneficially owned by Dan Etete, the former Nigerian energy minister.¹⁴⁸ A leaked email sent to Shell’s former CEO Peter Voser declared that “Etete can smell the money. If, at nearly 70 years old, he does turn his nose up at nearly \$1.2 [billion] he is completely certifiable. But I think he knows it’s his for the taking.”¹⁴⁹ The “sweetheart deal” orchestrated by Shell and Eni would have cost Nigeria \$5.86 billion in potential revenues.¹⁵⁰ Nigerian President Buhari, however, refused requests to develop the oil block until the end of the legal proceedings and the licence expired in May of 2021.¹⁵¹ In March 2021, Shell and Eni were acquitted of all

¹⁴⁴ The *New York Times* investigated three businesses from which the senator proclaims to have amassed his wealth from, but was unable to verify the existence of two. The third seems to contravene constitutional provisions barring Haitian politicians from benefitting from state-sponsored contracts. For more information, see Dan Bilefsky & Catherine Porter, “Who Paid for That Mansion? A Senator or the Haitian People?”, *The New York Times* (10 July 2021), online: <<https://www.nytimes.com/2021/07/10/world/canada/Haiti-Canada-Celestin-corruption.html?referringSource=articleShare>>.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ For additional examples of grand corruption, see “25 Corruption Scandals That Shook the World” (5 July 2019), online: *TI* <<https://www.transparency.org/en/news/25-corruption-scandals>>.

¹⁴⁸ Elena Gaita, “Shell Scandal Shows Transparency for Oil, Gas & Mining is Vital” (11 April 2017), online: *TI EU* <<https://transparency.eu/shell-knew/>>.

¹⁴⁹ Jaclyn Jaeger, “The Inside Story of Royal Dutch Shell and the Cost of Integrity”, *Compliance Week* (18 April 2017), online: <<https://www.complianceweek.com/the-inside-story-of-royal-dutch-shell-and-the-cost-of-integrity/2703.article>>.

¹⁵⁰ “Take the Future: Shell’s Scandalous Deal for Nigeria’s Oil”, *Global Witness* (26 November 2018), online: <<https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/take-the-future/>>.

¹⁵¹ “Shell and Eni Lose Rights to Scandal Plagued Nigerian Oil Licence as Corruption Trials Continue”, *Global Witness* (26 May 2021), online: <<https://www.globalwitness.org/en/press-releases/shell-and-eni-lose-rights-scandal-plagued-nigerian-oil-licence-corruption-trials-continue/>>.

corruption charges by an Italian court.¹⁵² Chatham House fellow Matthew Page commented on the ruling, stating that it was “a huge blow for natural resource governance and transparency in Nigeria ... [and] will continue to sting.”¹⁵³ Shell continues to face legal action with outstanding prosecutions in Nigeria and the Netherlands.¹⁵⁴

And nearly the whole world knows about the corruption charges laid against senior FIFA officials by the US.¹⁵⁵ FIFA officials were indicted based on allegations that they took part in accepting bribes and kickbacks over the course of 24 years. The officials allegedly accepted bribes in relation to past bidding processes for hosting rights and the awarding of broadcasting and marketing rights for various tournaments. Former FIFA President Sepp Blatter resigned just four days after his re-election in June 2015 and has since been suspended from football until 2028, fined 1 million Swiss francs for violating the organization’s code of ethics, and is now facing a “criminal mismanagement” complaint related to the FIFA museum project in Zurich.¹⁵⁶ Gianni Infantino, former General Secretary of UEFA, took over from Blatter as President of FIFA following his election in February 2016.¹⁵⁷

In March 2016, FIFA filed a victim statement and request for restitution. In the restitution claim, FIFA argued that its organization as a whole was not corrupt, but rather only its leaders were. As such, it claimed that some of the \$290 million seized or frozen by US prosecutors should be used to compensate the victims of the corruption: FIFA and its member associations.¹⁵⁸ A US court awarded FIFA a mere \$108,268 of its original \$28 million restitution request.¹⁵⁹ At least 17 people and two entities plead guilty to charges in connection with the American FIFA investigation.¹⁶⁰

¹⁵² “Eni and Shell: Italian Court Acquits Oil Giants in Nigeria Corruption Case”, *BBC News* (17 March 2021), online: <<https://www.bbc.com/news/world-europe-56434890>>.

¹⁵³ *Ibid.*

¹⁵⁴ Jaclyn Jaeger, “Italian Court Acquits Eni, Shell of Corruption Charges”, *Compliance Week* (18 March 2021), online: <<https://www.complianceweek.com/regulatory-enforcement/italian-court-acquits-eni-shell-of-corruption-charges/30175.article>>.

¹⁵⁵ For a more detailed account and analysis of the FIFA corruption scandal, see Bruce W Bean, “An Interim Essay on FIFA’s World Cup of Corruption: The Desperate Need for International Corporate Governance Standard at FIFA” (2016) 22:2 *ILSA J Intl & Comp L* 367.

¹⁵⁶ PA Media, “Sepp Blatter Gets New Six-Year Ban From Football After Fifa Investigation”, *The Guardian* (24 March 2021), online: <<https://www.theguardian.com/football/2021/mar/24/sepp-blatter-gets-new-six-year-ban-from-football-after-fifa-investigation>>; PA Media “Fifa Lodges ‘Criminal Mismanagement’ Complaint Against Sepp Blatter”, *The Guardian* (22 December 2020), online: <<https://www.theguardian.com/football/2020/dec/22/fifa-lodges-criminal-mismanagement-complaint-against-sepp-blatter>>.

¹⁵⁷ Bean, *supra* note 155 at 392.

¹⁵⁸ Alex Johnson, “FIFA Demands Millions in Restitution from US – For its Own Misdeeds”, *NBC News* (16 March 2016), online: <<http://www.nbcnews.com/storyline/fifa-corruption-scandal/fifa-demands-millions-restitution-u-s-its-own-misdeeds-n540456>>.

¹⁵⁹ Jonathan Stempel, “World Soccer Bodies Awarded Just \$2.63 Million [sic] in US Bribery Case”, *Reuters* (21 November 2018), online: <<https://www.reuters.com/article/us-soccer-fifa-corruption-idUSKCN1NQ258>>.

¹⁶⁰ Nate Raymond, “Ex-Costa Rican Soccer Chief Li Pleads Guilty in US Bribery Case”, *Reuters* (7 October 2016), online: <<http://www.reuters.com/article/soccer-fifa-court-idUSL2N1CD1O3>>.

In June 2015, Switzerland announced they were investigating 53 “suspicious activity reports” concerning the possible laundering of bribes in connection to the hosting of the Russia and Qatar World Cups. By September 2015, former Swiss Attorney General Michael Lauber stated that Swiss authorities were investigating 121 suspicious banking transactions. Since then, a spokesman for the Attorney General’s office stated that the number of incidents under investigation had surpassed 200. As of 2021, criminal proceedings are still ongoing.

The world’s biggest banks often are no better: in November 2016, JPMorgan Chase agreed to pay \$246 million in fines in a settlement with US officials for hiring unqualified children of China’s ruling elite in exchange for gaining lucrative business.¹⁶¹ Moreover, in May 2015, four of the world’s largest banks (JPMorgan Chase, Citigroup, Barclays, and the Royal Bank of Scotland) pled guilty to systematic rigging of the currency markets for profit between 2007 and 2013. While paying a total of more than \$11 billion in fines,¹⁶² the impact and size of that fine can be put in perspective by noting that JPMorgan Chase earned \$4.1 billion from its currency business in the first quarter of 2015.¹⁶³

There are many examples of rulers and elite officials involved in grand corruption scandals. In March 2016, the South African Supreme Court ruled that former President Jacob Zuma had breached the constitution by failing to pay back the \$23 million of taxpayers’ money he used to fund additions to his home in Nkandla. Since then, further allegations of corruption against Zuma have surfaced. In June 2021, Zuma received a 15-month prison sentence for contempt of court after failing to present himself before a corruption inquiry.¹⁶⁴ The inquiry is investigating 16 different charges of “fraud, graft and racketeering relating to the 1999 purchase of fighter jets, patrol boats and military gear from five European arms firms for 30 billion rand, then the equivalent of nearly US\$5 billion.”¹⁶⁵ A series of riots have broken out

¹⁶¹ Matt Egan, “JP Morgan Fined for Hiring Kids of China’s Elite to Win Business”, *CNN Money* (17 November 2016), online: <<http://money.cnn.com/2016/11/17/investing/jpmorgan-china-hiring-bribery-settlement/index.html>>.

¹⁶² Kirstin Ridley & Iain Withers, “Big Banks Brace as British Forex Class Action Seeks Go-Ahead”, *Reuters* (12 July 2020), online: <<https://www.reuters.com/business/finance/big-banks-brace-british-forex-class-action-seeks-go-ahead-2021-07-12/>>.

¹⁶³ Michael Corkery & Ben Protess, “Rigging of Foreign Exchange Market Makes Felons of Top Banks”, *The New York Times* (20 May 2015), online: <<http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>>.

¹⁶⁴ Harriet Sherwood, “Former South African President Jacob Zuma Sentenced to 15 Months in Prison”, *The Guardian* (29 June 2021), online: <<https://www.theguardian.com/world/2021/jun/29/former-south-african-president-jacob-zuma-sentenced-prison>>.

¹⁶⁵ *Ibid.* For a detailed account of Zuma’s corruption charges and the state capture at the hands of the Gupta brothers, see Karan Mahajan, “‘State Capture’: How the Gupta Brothers Hijacked South Africa Using Bribes Instead of Bullets”, *Vanity Fair* (3 March 2019), online: <<https://www.vanityfair.com/news/2019/03/how-the-gupta-brothers-hijacked-south-africa-corruption-bribes>>. Within weeks of his arrest, he was moved into a private hospital on the basis of alleged unspecified illness. Four weeks later, he was released on “medical parole” by the Commissioner of Capital Services, who was a long-time ally of Zuma, notwithstanding the recommendation by the Medical Parole Advisory board not to grant him medical parole: Geoffrey York, “Jacob Zuma’s Release from Prison is Latest Sign of His Continuing Influence in South Africa’s Ruling Party” *The Globe and Mail* (10 September 2021), online: <<https://www.theglobeandmail.com/world/article-jacob-zumas-release-from-prison-is-latest-sign-of-his-continuing/>>.

following Zuma's imprisonment, resulting in the death of over 70 individuals.¹⁶⁶

In Brazil, a major corruption scandal has been unfolding since 2014 involving Brazil's state-owned oil company, Petrobras, and billions in bribery and kickback schemes. Petrobras' former engineering director Renato Duque, was sentenced to more than 20 years in 2015 for taking over \$9 million in bribes in exchange for favouring companies' bids for Petrobras contracts.¹⁶⁷ The former CEO of Petrobras and five other executives resigned in February 2015, and millions of people protested across Brazil in response to the scandal. In May of 2016, President Dilma Rousseff was suspended from her position to face an impeachment trial. In August 2016, in a 61 to 20 vote of the Senate, Rousseff was convicted of manipulating the federal budget to conceal the country's financial problems—resulting in Rousseff's impeachment and removal from office.¹⁶⁸

After Rousseff's successor Michel Temer, and his conservative government came to power, another scandal came to light. Brazilian police launched an investigation into fraudulent investments made by large pension funds of state-run companies with board members appointed by politicians. The pension funds implicated in the investigation controlled 280 billion reais (approximately \$87 billion) in assets in 2015, and the fraud scheme was valued at approximately 8 billion reais (\$2.5 billion). Many of the politicians under investigation are those already under investigation in connection with the Petrobras scandal.¹⁶⁹ Forty senior financiers and executives were ordered to temporarily step down from their positions, abstain from capital market activity, and forfeit their passports.¹⁷⁰ The most noteworthy of such executives was the chief executive of JBS, the world's largest beef exporter.¹⁷¹ On March 21, 2019, Temer, who by then was no longer President, was arrested and indicted on charges concerning a separate corruption investigation: Temer, the former energy minister and six aides were allegedly involved in a 1.8 billion reais (\$346 million) bribery scheme related to the construction of a nuclear power plant.¹⁷²

¹⁶⁶ "Death Toll Rises in South Africa Riots Over Zuma Jailing", *CBC News* (13 July 2021), online: <<https://www.cbc.ca/news/world/south-africa-rioting-jacob-zuma-1.6100382>>.

¹⁶⁷ "Ex-Treasurer of Ruling Party Gets Lengthy Jail Term in Petrobras Corruption Scandal", *The Guardian* (21 September 2015), online: <<https://www.theguardian.com/world/2015/sep/21/ex-treasurer-workers-party-sentenced-prison-petrobras-corruption-scandal>>.

¹⁶⁸ Simon Romero, "Dilma Rousseff is Ousted as Brazil's President in Impeachment Vote", *The New York Times* (31 August 2016), online: <<http://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html>>.

¹⁶⁹ Anthony Boadle, "Brazil's New Government Buffeted by Pension Fund Scandal", *Reuters* (6 September 2016), online: <<http://www.reuters.com/article/us-brazil-corruption-idUSKCN11C2JK>>.

¹⁷⁰ Cesar Raizer, "JBS CEO Ordered to Step Aside in Brazil Pension Fund Probe", *Reuters* (7 September 2016), online: <<http://www.reuters.com/article/us-brazil-corruption-pensions-idUSKCN11B14G>>.

¹⁷¹ *Ibid.*

¹⁷² Rodrigo Viga Gaier, "Brazil Ex-President Temer Indicted on Charges Involving Nuclear Plant Bribes", *Reuters* (2 April 2019), online: <<https://www.reuters.com/article/uk-brazil-corruption-idUKKCN1RE2NH>>.

As of February 2021, the government of Brazil's "Operation Car Wash" anti-corruption task force secured 174 convictions and recovered \$5 billion.¹⁷³ In the fall of 2020, President Jair Bolsonaro began shutting down Operation Car Wash, proclaiming that there was "no more corruption in the government."¹⁷⁴

Significant controversy has also surrounded the 1MDB affair. 1MDB is a Malaysian state investment firm launched in 2009, the same year Najib Razak became Prime Minister of Malaysia. The fund was supposed to be used to increase economic development in the country. By 2014, the company was over \$11 billion in debt. In 2015, information surfaced about a suspicious \$700 million payment made in 2013 to Najib's bank accounts. This information led to investigations into 1MDB in at least six countries. Najib claimed that the transfer was a legal donation from a Saudi benefactor.¹⁷⁵

On July 20, 2016, the United States Department of Justice filed lawsuits alleging that between 2009 and 2015, over \$3.5 billion had been taken from the fund by 1MDB officials and associates.¹⁷⁶ The lawsuits outline three separate phases of the theft: the first \$1 billion was allegedly obtained fraudulently through a fictitious joint venture between 1MDB and PetroSaudi. The following two phases focus on \$2.7 billion in funds that Goldman Sachs raised and diverted into a Swiss offshore company and a Singapore bank account.¹⁷⁷ The proceedings commenced by the US Justice Department sought to seize over \$1 billion in assets including luxury properties, art by Van Gogh and Monet, and a jet. The money from 1MDB was also reportedly used to finance production of the film "The Wolf of Wall Street." Riza Aziz, the stepson of former Prime Minister Najib Razak, co-founded the company that produced the movie. Razak was among the several individuals mentioned in the lawsuit.¹⁷⁸ In 2018, Mahathir Mohamad defeated Razak in a general election—the first majority win by the opposition in six decades.¹⁷⁹ Razak is now serving a 12-year sentence following a guilty verdict in the first of several ongoing corruption trials.¹⁸⁰ Goldman Sachs has also faced repercussions for its involvement: the US proceedings resulted in the largest American

¹⁷³ "What did Lava Jato, Brazil's Anti-Corruption Investigation, Achieve?" *The Economist* (9 March 2021), online: <<https://www.economist.com/the-economist-explains/2021/03/09/what-did-lava-jato-brazils-anti-corruption-investigation-achieve>>.

¹⁷⁴ *Ibid.*

¹⁷⁵ "Thick and Fast: America Applies to Seize Assets Linked to a Malaysian State Investment Firm", *The Economist* (23 July 2016), online: <<http://www.economist.com/news/finance-and-economics/21702481-america-applies-seize-assets-linked-malaysian-state-investment-firm-thick>>.

¹⁷⁶ *Ibid.*

¹⁷⁷ Randeep Ramesh, "1MDB: The Inside Story of World's Biggest Financial Scandal", *The Guardian* (28 July 2016), online: <<https://www.theguardian.com/world/2016/jul/28/1mdb-inside-story-worlds-biggest-financial-scandal-malaysia>>.

¹⁷⁸ Karishma Vaswani, "Who is 'Malaysian Official 1'? Case Closed", *BBC News* (1 September 2016), online: <<https://www.bbc.com/news/business-37234717>>.

¹⁷⁹ Hannah Ellis-Petersen, "Malaysia Election: Mahathir Sworn in as Prime Minister After Hours of Uncertainty", *The Guardian* (10 May 2018), online: <<https://www.theguardian.com/world/2018/may/10/malaysia-election-confusion-as-rival-questions-mahathirs-right-to-be-sworn-in>>.

¹⁸⁰ "Najib Razak: Malaysian Ex-PM Gets 12-Year Jail Term in 1MDB Corruption Trial", *BBC News* (28 July 2020), online: <<https://www.bbc.com/news/world-asia-53563065>>.

corruption settlement, with Goldman Sachs paying over \$2.9 billion as a penalty.¹⁸¹ The bank also struck a \$3.9 billion settlement with Malaysian officials.¹⁸²

Authorities in Switzerland and Singapore undertook separate investigations into the 1MDB scandal. On July 21, 2016, Singapore authorities reported having frozen or seized approximately \$175 million in its investigations into transactions linked to 1MDB.¹⁸³ They also announced that two Swiss banks had been ordered to cease their operations in the country and that fines had been laid against DBS and UBS for their inadequate attempts to prevent money laundering.¹⁸⁴ In July 2018, Switzerland's Office of the Attorney General announced that it froze \$404 million and opened investigations concerning two banks, as well as former representatives of 1MDB, Abu Dhabi sovereign funds, and PetroSaudi International.¹⁸⁵

Elsewhere, the Panama Papers prompted widespread shock and concern about tax evasion, laundering of proceeds of corruption, and other secretive financial dealings facilitated by offshore accounts and shell companies. In 2014, Bastian Obermayer, a journalist with the German newspaper *Süddeutsche Zeitung*, received an anonymous telephone call. Shortly thereafter, Bastian Obermayer and his colleague Frederik Obermaier received the 11.5 million documents, now known as the Panama Papers.¹⁸⁶ The leaked documents came from the Panamanian law firm Mossack Fonseca, which specializes in secretive offshore banking for the wealthy.¹⁸⁷ The International Consortium of Investigative Journalists (ICIJ) managed a team of 370 journalists from roughly 100 media organizations across 70 countries, which finally published the first coverage of the Panama Papers in April of 2016.¹⁸⁸ Of course, not all offshore accounts are used for illegal activities, but because of their secrecy they are often used for money laundering, hiding the proceeds of bribery, and tax evasion.¹⁸⁹ Evidence in the Panama Papers of legal, but perhaps immoral, tax avoidance has prompted backlash against some of the world's most powerful and wealthy individuals and companies.

¹⁸¹ Kalyeena Makortoff, "Goldman Sachs Reaches \$2.9bn Deal to Settle US-Led 1MDB Inquiry", *The Guardian* (22 October 2020), online: <<https://www.theguardian.com/business/2020/oct/22/goldman-sachs-reaches-29bn-deal-to-settle-us-led-1mdb-inquiry>>.

¹⁸² Mark Sweney, "Goldman Sachs Pays \$3.9bn to Settle 1MDB Corruption Scandal", *The Guardian* (24 July 2020), online: <<https://www.theguardian.com/business/2020/jul/24/goldman-sachs-settle-1mdb-corruption-scandal-malaysia>>.

¹⁸³ *The Economist*, *supra* note 175.

¹⁸⁴ Anshuman Daga & Joshua Franklin, "Singapore Shuts Falcon Bank Unit, Fines DBS and UBS Over 1MDB", *Reuters* (10 October 2016), online: <<https://www.reuters.com/article/us-malaysia-scandal-falcon-idUSKCN12B03Y>>.

¹⁸⁵ "Switzerland Investigates Six People in 1MDB Money Laundering Probe", *Reuters* (10 July 2018), online: <<https://www.reuters.com/article/us-malaysia-politics-1mdb-swiss-idUSKBN1K00SO>>.

¹⁸⁶ Paul Farhi, "'Hello. This is John Doe': The mysterious message that launched the Panama Papers", *The Washington Post* (6 April 2016), online: <https://www.washingtonpost.com/lifestyle/style/hello-this-is-john-doe-the-mysterious-message-that-launched-the-panama-papers/2016/04/06/59305838-fc0c-11e5-886f-a037dba38301_story.html>.

¹⁸⁷ Kirk Semple, Azam Ahmed & Eric Lipton, "Leaks Casts Light on Law Firm Built on Secrecy", *The Globe and Mail* (8 April 2016).

¹⁸⁸ Farhi, *supra* note 186.

¹⁸⁹ Frank Jordans & Raf Casert, "EU Threatens to Sanction Tax Havens", *The Globe and Mail* (8 April 2016).

Internationally, revelations in the Panama Papers instigated proposals for tax reform and calls for sanctions against countries that operate as tax havens. In April 2021, the CBC reported that the CRA identified \$21 million in unpaid taxes; however, no criminal charges have been laid.¹⁹⁰ At the time of writing, the breaking Pandora Papers story appears to be the largest leak of offshore data. The Pandora Papers reveal that the outcry generated by the Panama Papers largely failed to inhibit the growth and success of offshore accounts and shell companies.

The Panama Papers contain information about a multitude of politicians, such as Ukrainian President Petro Poroshenko and King Salman of Saudi Arabia. Russian President Vladimir Putin's associates and family members of Chinese President Xi Jinping are also mentioned.¹⁹¹ On April 5, 2016, Sigmundur David Gunnlaugsson stepped down from his position as Prime Minister of Iceland in response to protests following the release of the Panama Papers. The documents showed that Gunnlaugsson's wife owned an offshore company that held millions of dollars in debt from collapsed Icelandic banks.¹⁹² Shortly after he took over as President of FIFA, Gianni Infantino became the subject of an investigation by the Swiss Federal Police because the Panama Papers included a contract signed by Infantino when he was at UEFA. The contract suggests that Infantino may have sold broadcast rights below market price only to have them sold later at a far higher price.¹⁹³ While serving as Prime Minister of the United Kingdom, David Cameron came under scrutiny because the Panama Papers revealed that his late father owned an offshore investment fund called Blairmore Holdings. While he initially denied having profited from the investments, on April 7, 2016, Cameron admitted that he had sold shares in the company for more than £30,000 shortly before becoming Prime Minister. Although there is no suggestion that the fund facilitated any illegal activity, Cameron's lack of transparency was criticized.¹⁹⁴ The Papers further revealed that three of Pakistani Prime Minister Nawaz Sharif's children owned offshore assets not included on his family's wealth statement.¹⁹⁵ In 2018, Sharif received a 10-year prison sentence and a \$10.6 million fine.¹⁹⁶ The Panama Papers also revealed that entrepreneurs and corrupt public officials in several African countries such as Nigeria, Algeria, and Sierra Leone, used shell companies to hide profits from the sale of natural

¹⁹⁰ Zach Dubinsky & Frédéric Zalac, "CRA Has Found 35 Cases of Tax Dodging in the Panama Papers Leak, 5 Years Later", *CBC News* (3 April 2021), online: <<https://www.cbc.ca/news/canada/cra-panama-papers-audits-5-years-1.5974690>>.

¹⁹¹ Farhi, *supra* note 186.

¹⁹² Ragnhildur Sigurdardottir, "Iceland Appoints New Prime Minister", *The Globe and Mail* (7 April 2016).

¹⁹³ Brian Homewood, "Infantino Subject of UEFA Office Raid", *The Globe and Mail* (7 April 2016).

¹⁹⁴ "David Cameron Had Stake in Father's Offshore Fund", *BBC News* (7 April 2016), online: <<http://www.bbc.com/news/uk-politics-35992167>>.

¹⁹⁵ "Panama Papers: Pakistan PM Nawaz Sharif to face investigators", *BBC News* (20 April 2017), online: <<http://www.bbc.com/news/world-asia-36092356>>.

¹⁹⁶ Scilla Alecci, "Former Pakistan PM Sharif Sentenced to 10 Years Over Panama Papers" (6 July 2018), online: *International Consortium of Investigative Journalists (ICIJ)* <<https://www.icij.org/investigations/panama-papers/former-pakistan-pm-sharif-sentenced-to-10-years-over-panama-papers/>>.

resources and bribes paid to gain access to the resources.¹⁹⁷ The sprawling nature of the Panama Papers illustrates how truly “global” this category of super grand corruption can be.

3. DRIVERS OF CORRUPTION

Attempting to determine the causes of corruption is a complicated task. In their book *Corruption: Economic Analysis and International Law*, Arnone and Borlini note that “[a]ny attempt to isolate and distinguish causes [of corruption] from effects suffers from the limitations imposed by the presence of multi-directional causal chains.”¹⁹⁸ For example, although bad governance has been shown to contribute to corruption, corruption can also contribute to bad governance.

Some factors that enable or drive corruption can, however, be articulated. A good starting point is Arnone and Borlini’s observation that decision-making that involves discretion and conflict of interest are the breeding grounds for corruption. Bad governance can strengthen the presence of these “preconditions.” If lack of accountability is added to the mix, particularly where officials have “monopoly power over discretionary decisions,”¹⁹⁹ opportunities for corruption will be rife. Complex and opaque systems of rules tend to foster this lack of accountability, along with insufficient stigma and enforcement surrounding corruption offences.

In a study for the World Bank entitled *Drivers of Corruption*, Tina Soreide enumerates other, more specific drivers of corruption.²⁰⁰ She begins by describing factors which increase opportunities for “grabbing” by public officials. When officials have the power to control the supply of scarce goods or services, opportunities to create shortages and demand high payments will increase. This is particularly problematic if citizens cannot choose between officials. Soreide maintains that facilitation of financial secrecy and secret ownership also drives corruption, along with information imbalances between principals and agents. For example, principals might not be informed regarding corruption in foreign markets, leaving openings for agents to exploit this ignorance by promoting bribery and pocketing a portion of the proceeds. Soreide also points out that revenues from natural resource exports and development aid are vulnerable to grabbing. In the context of aid development, both donor and recipient countries contribute to misuse of aid funds:

The more urgent the development needs, the more the aid-offering entity pays, and the weaker the recipient government’s incentives to perform better, because better performance will eventually cut the level of aid received. The desire to offer financial and other forms of support is

¹⁹⁷ Scott Shane, “Panama Papers Reveal Wide Use of Shell Companies by African Officials”, *The New York Times* (25 July 2016), online: <<http://www.nytimes.com/2016/07/25/world/americas/panama-papers-reveal-wide-use-of-shell-companies-by-african-officials.html>>.

¹⁹⁸ Arnone & Borlini, *supra* note 82 at 4.

¹⁹⁹ *Ibid* at 21.

²⁰⁰ Tina Soreide, *Drivers of Corruption: A Brief Review* (Washington, DC: World Bank, 2014) at 9–38.

particularly strong in emergency situations and in the most-fragile states.... Such sets of circumstances are vulnerable to theft and corruption because oversight systems are weak and funds pour in from many sources, continuing as long as the needs are dire.

...

Many authors have pointed at incentive problems of donor agencies, and there are a number of examples where representatives of donor agencies have been involved in illegal transactions or activities that violate their organization's rules and the recipient country's legislation. Although donor agencies are aware of the potentially troubling impact of such cases on the legitimacy of their operations, they, like other bureaucracies, have encountered difficulties eradicating the challenges completely and handling revealed cases of fraud and corruption effectively.... Jansen [2014] explains a donor-government's disincentive to react partly as a trade-off between the cost of exercising control and the ease of referring to recipient responsibilities. Among the factors is the low propensity among donor representatives to procure independent reviews and audits of aid-financed projects and programs. Sometimes these are driven by the need to seize opportunities for new projects ... this tendency is intensified by heavy workloads and "pipeline problems"; that is, when funds have to be allocated within the timeframe of a financial year regardless of the status of preparatory work or controls. [footnotes omitted]²⁰¹

Soreide moves on to consider the factors that encourage people to exploit opportunities for corruption. Included are lack of sanction for individuals or organizations, widespread tolerance, condonement by management, lack of protection for whistleblowers, and the failure of political systems and their accountability safeguards.

In his article "Eight Questions about Corruption" (discussed in Section 5), Jakob Svensson points out that the countries with the highest levels of corruption, according to corruption ranking results, are those with low income and developing, and closed and transition economies.²⁰²

In his book *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa*, John Hatchard discusses the root causes of widespread corruption in Africa:

Many writers have sought to explain the bad governance/corruption phenomenon in Africa. Blundo has argued that the colonial legacy was instrumental in creating a climate of corruption: here the new elite simply copied the example from their former colonial masters,²⁰³ although Atyithey argues against this thesis going as far as to accuse Africans of 'carping'

²⁰¹ *Ibid* at 19.

²⁰² Jakob Svensson, "Eight Questions About Corruption" (2005) 19 J Econ Perspectives 19, online (pdf): <<http://kie.vse.cz/wp-content/uploads/Svensson-2005.pdf>>.

²⁰³ [27] Giorgio Blundo and Jean-Pierre Olivier de Sardan *Everyday Corruption and the State: Citizens and Public Officials in Africa*, ZedPress, London, 2006.

about colonial exploitation.²⁰⁴ Others have linked bad governance with the development of opportunities for corruption. For example, Collier attributes this to four factors: overregulation of private activity; expanded public sector employment; expanded public procurement; and weakened scrutiny.²⁰⁵ To these may be added issues such as increased access to development aid, privatization programmes, and the ability to launder the proceeds of corruption through the international financial system quickly and efficiently.²⁰⁶

Allen has argued that the constitutional models adopted by the Anglophone and Francophone African states at independence concentrated undue political power in the hands of the Executive and that this resulted in weak accountability mechanisms.²⁰⁷ This power was then enhanced and further entrenched by the establishment of a one-party system in many states and often largely retained despite a return to multi-party democracy and the making of new constitutions.²⁰⁸ This argument is taken up by Raditlhokwa who blames the spread of corruption almost solely on a crisis of leadership, accusing African leaders of a lack of self-discipline²⁰⁹ and a resultant 'crisis in leadership'²¹⁰ leading to dysfunctional or failed institutions which facilitates the abuse of governmental power.^{211 212}

Hatchard also explains some motives behind the corrupt acts of public officials. First on the list is financial gain, followed by the belief that corruption will not be prosecuted. Next, Hatchard describes the "[p]ressure to carry out or condone the activity"²¹³ when lower-level officials are threatened or bribed into assisting the corrupt acts of higher-level officials. The presence of traditional gift-giving practices can also motivate corrupt practices, along with the standard business practice of "[b]ona fide payments to public officials, such as gifts or hospitality, provided by a company in order to promote its image."²¹⁴ In addition, the desire to circumvent inefficient bureaucracy, through facilitation payments, for example, motivates corruption.

²⁰⁴ [28] George Ayittey, *Africa Betrayed* 1994, Macmillan, London, p. 13.

²⁰⁵ [29] Paul Collier 'How to Reduce Corruption' (2000) 12(2) *African Development Review*, 191 at 194.

²⁰⁶ [30] See also an interesting analysis by Wonbin Cho 'What are the origins of corruption in Africa? Culture or Institution?' Paper presented at the 2009 International Studies Association convention.

²⁰⁷ [31] Chris Allen 'Understanding African Politics' (1995) 22 *Review of African Political Economy*, 301-20.

²⁰⁸ [32] See further the discussion in Chapter 5, p. 107.

²⁰⁹ [33] L Raditlhokwa 'Corruption in Africa: A function of the Crisis of Leadership', in K Frimpong and G Jacques (eds) *Corruption, Democracy and Good Governance in Africa* Gaborone, Lightbooks, 1999, 49-55.

²¹⁰ [34] Kempe R Hope and Bornwell C Chikulo (eds) *Corruption and Development in Africa: Lessons from Country Case-Studies* Basingstoke, Macmillan, 2000.

²¹¹ [35] See Migai Akech 'Abuse of Power and Corruption in Kenya' (2011) 18 (1) *Ind J Global Leg Stud*, 341 at 342.

²¹² John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham; Northampton: Edward Elgar, 2014) at 16-17.

²¹³ *Ibid* at 18.

²¹⁴ *Ibid* at 19.

Recent scholarship has found a relationship between corruption and populism. Pipa Norris explains the link between the two, describing how populism “focuses power in the individual leader versus the party. It destroys and erodes ... political trust.... It also weakens accountability of the electorate. When you don’t have accountability, that often leads [sic] it open to other forms of power being abused and misused.”²¹⁵ Jose Ugaz, chairman of TI’s board, has also commented on the role populism has played as a driver. In doing so, Ugaz noted the importance of strong institutions, stating that:

[In] countries with populist or autocratic leaders, we often see democracies in decline and a disturbing pattern of attempts to crack down on civil society, limit press freedom, and weaken the independence of the judiciary. Instead of tackling crony capitalism, those leaders usually install even worse forms of corrupt systems.... Only where there is freedom of expression, transparency in all political processes and strong democratic institutions, can civil society and the media hold those in power to account and corruption be fought successfully.²¹⁶

The above few pages have listed a significant number of factors that encourage, facilitate or drive corruption—no doubt there are more. The factors or drivers include:

- Decision-making by officials involving discretion
- Conflicts of interest
- Poor governance structures and the rise of populist leaders
- Poverty and a low-income economy
- Lack of accountability and oversight
- Unchecked monopoly powers
- Complex and opaque systems of rules for obtaining government goods and services
- Insufficient stigma and enforcement of corruption laws
- Weak sanctions for corruption violations
- Widespread tolerance of corruption by public or government
- Lack of independent and free press, and an independent judiciary and effective whistle-blower laws
- Financial secrecy laws
- Anonymous beneficial ownership

Based just on the drivers described above, consider the complexity of trying to establish an economic, political, and social strategy and framework to control or reduce corruption and

²¹⁵ Ryan Balisacan, “The Link Between Corruption and the Global Surge of Populism” (6 October 2017), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2017/10/06/the-link-between-corruption-and-the-global-surge-of-populism/#more-10383>>.

²¹⁶ “Corruption Perceptions Index 2016: Vicious Circle of Corruption and Inequality Must be Tackled” (25 January 2017), online: *TI* <<https://www.transparency.org/en/press/corruption-perceptions-index-2016-vicious-circle-of-corruption-and-inequali>>.

bribery. No wonder corruption levels do not appear to be falling when reform efforts are only directed at one or two drivers. This point is well illustrated in the following piece on the significance, complexity, and multifaceted nature of the relationship between freedom of the press and corruption.

Freedom of the Press and Corruption: Exploring its Multifaceted Relationship

by Rachael Carlson²¹⁷

A considerable amount of literature suggests that press freedom plays a significant role in fighting corruption.²¹⁸ Indeed, the OECD states that, “[m]edia reporting is an essential—albeit untapped—source of detection in corruption cases.”²¹⁹ UNCAC also recognizes the importance of press freedom in Article 13: *Participation of Society*. Article 13 requires states to take measures to promote active participation of individuals and groups outside the public sector in preventing and fighting corruption, including through “respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.”²²⁰

Generally, the press is seen as a strong accountability mechanism, or “watchdog,” that may monitor the actions of public officials and communicate their transgressions to the general public (or authorities). While the OECD reports that only 2% of foreign bribery cases are detected through media reports, this statistic should not undermine the critical role journalists have held in a number of significant corruption cases. Jennifer Kline provides a few key examples:

²¹⁷ J.D. 2021, University of Victoria. The author thanks Jeffrey Vandespyker for his research assistance in the preparation of this article.

²¹⁸ See for examples, the recommendations here: “Corruption Perceptions Index 2017” (21 February 2018), online: *TI*

<<https://www.transparency.org/en/news/corruption-perceptions-index-2017>>. See also Aymo Brunetti & Beatrice Weder, “A Free Press is Bad News for Corruption” (2003) 87:7-8 *J Pub Econ* 1801; Sebastian Freille, M Emranul Haque & Richard Kneller, “A Contribution to the Empirics of Press Freedom and Corruption” (2007) 23:4 *Eur J Pol Econ* 838; Shyamal K Chowdhury, “The Effect of Democracy and Press Freedom on Corruption: An Empirical Test” (2004) 85:1 *Econ Letters* 93; and Christopher Starke, Teresa K Naab & Helmut Scherer, “Free to Expose Corruption: The Impact of Media Freedom, Internet Access and Governmental Online Service Delivery on Corruption” (2016) 10 *Intl J Commun* 4702.

²¹⁹ Leah Ambler, Daisy Pelham & Simone Rivabella, *The Role of the Media and Investigative Journalism in Combating Corruption*, (OECD, 2018), online (pdf):

<<https://www.oecd.org/daf/anti-bribery/The-role-of-media-and-investigative-journalism-in-combating-corruption.pdf>>.

²²⁰ See Cecily Rose, Michael Kubiciel & Oliver Landwehr, eds, *The United Nations Convention Against Corruption: A Commentary* (New York: Oxford University Press, 2019) at 136-149 for information on the drafting and implementation of Article 13. Note also how the drafters have “softened” the edges of the commitment in Article 13, through the caveat that the provision is to be implemented within “fundamental principles of domestic law” and may be limited when necessary and provided by law to protect rights and reputation, public order, national security and public health or morals.

In 2011, the *Los Angeles Times* revealed that officials in a small California city improperly paid themselves exorbitant salaries, and the subsequent court cases ordered restitution awards nearing \$20 million. In 2012, the *New York Times* exposed Walmart's widespread bribery in Mexico, and the company ultimately agreed to pay \$282 million to settle the resulting seven-year investigation into whether Walmart had violated the Foreign Corrupt Practices Act (FCPA). In 2017, the International Consortium of Investigative Journalists (ICIJ) shocked the world when its affiliated journalists broke the Panama Papers scandal, exposing extensive fraud and tax evasion by world leaders, drug traffickers, and celebrities alike. As a result of the ICIJ's investigation, governments around the world have managed to claw back \$1.28 billion from perpetrators thus far. A Malaysian-born British journalist's investigations (prompted by a whistleblower who provided her with more than 200,000 documents) produced the first hard evidence of what became known as Malaysia's 1MDB scandal, the world's largest kleptocracy scheme to date, which has produced, among other things, a nearly \$2.9 billion settlement for FCPA violations.²²¹

Press Freedom and Corruption Perception

Section 4 in this chapter reviews the approaches used in "quantifying" corruption levels. Due to its clandestine nature, corruption levels within a state are notoriously difficult to measure. A common measure of corruption is *corruption perception*. Prevailing literature on corruption demonstrates that corruption perception is lower in areas where there is more press freedom. However, the extent to which free media *actually* lowers corruption is less definitive.

Firstly, freedom of the press is not an isolated factor; that is, it does not exist within a vacuum. Press freedom will interact with other drivers of corruption, which may inhibit or enhance its capacity to root out and remedy corruption. For example, Basyouni Hamada et al. acknowledge the theory that press freedom only lowers corruption levels when paired with a democratic state, stating "[w]ithout a democratic environment that encourages the rule of law (RL), press freedom will not do more than report corruption events and create awareness."²²² They conclude that, while democracy and press freedom have a "magnifying effect" on one another in combatting corruption, "the magnitude of influence of RL in fighting corruption is not sensitive to the level of press freedom."²²³ Their findings also suggest that "corruption level is sensitive to the level of press freedom,

²²¹ Jennifer Kline, "Breaking News without Breaking the Bank: Monetary Rewards for Media Organizations that Expose Corruption" (12 July 2021), online (blog): *The Global Anticorruption Blog*: <<https://globalanticorruptionblog.com/2021/07/12/breaking-news-without-breaking-the-bank-monetary-rewards-for-media-organizations-that-expose-corruption/>>.

²²² Basyouni Ibrahim Hamada, Abdel-Salam G Abdel-Salam & Elsayed Abdelwahed Elkilany, "Press Freedom and Corruption: An Examination of the Relationship" (2019) 15:3 *Glob Media & Commun* 303 at 304.

²²³ *Ibid* at 316-317.

so any effort that reduces political and commercial influences on the press may be an important step towards curbing corruption levels,” but that “policy reforms in countries that want to fight corruption have to focus more on establishing a well-functioning legal system than on democracy and press freedom,” given that the RL is such a “powerful mechanism”²²⁴ to limit abuse of power. Christine Kalenborn and Christian Lessman’s research suggests that “democratic elections only work in controlling corruption, if there is a certain degree of press freedom in a country, vice versa” and that “democratic reforms are more effective, if they are accompanied by institutional reforms strengthening the monitoring of politicians.”²²⁵ TI also recognizes the importance of pairing freedom of association with freedom of the media in fighting corruption:

[F]reedom of association, including the ability of people to form groups and influence public policy, is vital to anti-corruption. CSOs play a key role in denouncing violations of rights or speaking out against breaches of law. Similarly, a free and independent media serves an important function in investigating and reporting incidences of corruption. The voices of both civil society and journalists put a spotlight on bad actors and can help trigger action by law enforcement and the court system.²²⁶

These observations highlight the complexity of the “corruption ecosystem.”

Secondly, press freedom at the state-level may be impaired by operational realities within the state. Investigative journalism may be condoned by law, but severely impaired by physical and legal threats to journalists or media outlets. This is explored more fully below.

Thirdly, the relationship drawn between press freedom and the perception of lower rates of corruption may at times also be the result of a “reputational premium.” Michael Breen and Robert Gillanders explore the possibility that “corruption experts may use press freedom as a mental shortcut, or heuristic device, when compiling corruption perceptions indices. If experts do this routinely, then press freedom may improve corruption perceptions irrespective of actual corruption levels.”²²⁷ They sum up their study and findings as follows:

In this article, we explore whether cross-country corruption perception indices based on expert assessments reward states with a freer press more than one might expect given levels of experienced corruption. We find that press freedom improves a country’s reputation, creating a

²²⁴ *Ibid.*

²²⁵ Christine Kalenborn & Christian Lessmann, “The Impact of Democracy and Press Freedom on Corruption: Confidentiality Matters” (2013) 35:6 J Policy Model 857 at 857.

²²⁶ Coralie Pring, Jon Vrushi & Roberto Kukutschka, “Digging Deeper into Corruption, Violence Against Journalists and Active Civil Society” (21 February 2018), online: TI <<https://www.transparency.org/en/news/digging-deeper-into-corruption-violence-against-journalists>>.

²²⁷ Michael Breen & Robert Gillanders, “Press Freedom and Corruption Perceptions: Is There a Reputational Premium?” (2020) 8:2 Politics & Governance 103 at 103.

reputational premium. In other words, whilst a free press may reduce corrupt behavior directly, we find that it also reduces corruption perceptions, irrespective of actual corruption levels. In particular, we find that the developed world is the main beneficiary of this reputational premium, as it is strongest in countries with low to moderate levels of corruption by global standards.²²⁸

Breen and Gillanders note that the artificial inflation or deflation of corruption perception based on this “reputational premium” has important ramifications: perception of high corruption levels can “harm national wellbeing by repelling foreign direct investment and undermining important outcomes such as GDP growth and interpersonal and institutional trust” (in turn affecting “trust in the state and its agents and [undermining] support for democracy, even in the developed world”²²⁹).

Lucia Rizzica and Marco Tonello have similar concerns:

Corruption perceptions drive individuals’ choices in many critical contexts. They affect citizens’ voting choices, entrepreneurs’ investment decisions, and also workers’ occupational sorting. Moreover, they are used to build most international indicators of corruption on which cross-country comparisons and rankings are based. For these reasons, it is imperative to understand how accurate these perceptions are and what drives them.²³⁰

Their study, set in Italy, analyzes “the impact of news content on individuals’ perceptions about the extent of corruption in their country.” One of their conclusions may have a striking impact on the reliability of corruption perceptions indexes:

Our finding that corruption perceptions respond to media content in a very volatile [and often shortlived] way, moreover, suggests that in order to achieve a reliable measure of perceived corruption in a given year one should randomize the dates of the interviews so as to make sure that the indicator is not flawed by idiosyncratic shocks in media content.²³¹

Rizzica and Tonello’s findings add nuance to the perception conversation: perceptions of corruption are prone to significant and “volatile” fluctuation that ought to be accounted for in corruption measurements. This latter finding also demonstrates the complexity in the relationship between press freedom and corruption. While press freedom may help root out corruption through investigative journalism, it also has a pivotal role in *shaping*

²²⁸ *Ibid* at 112.

²²⁹ *Ibid* at 104.

²³⁰ Lucia Rizzica & Marco Tonello, “Persuadable Perceptions: the Effect of Media Content on Beliefs about Corruption” (2020) *Econ Policy* 678.

²³¹ *Ibid* at 686.

our understanding of corruption and the actions of public officials through the methods and tenor of its communication.

Impediments to Investigative Journalism in the Corruption Landscape

As suggested, physical and legal threats are an ongoing hurdle for the work of investigative journalists. TI reports that countries with higher rates of corruption tend to have the fewest protections for media and journalists, and in highly corrupt countries, one journalist is killed each week on average.²³² One in five journalists that die as a result of their occupation do so while covering a corruption-related story.²³³ The physical threat to journalists is increasing at a rapid pace, doubling from 2019-2020.²³⁴

Journalists may also be subject to civil or criminal proceedings (the latter which may result in fines or imprisonment) when attempting to expose corruption or cover certain politically-sensitive topics.²³⁵ For example, TI writes that “strategic lawsuits against public

²³² “The High Costs Journalists Pay when Reporting on Corruption” (4 May 2020), online: TI <<https://www.transparency.org/en/news/the-high-costs-journalists-pay-when-reporting-on-corruption>>.

²³³ *Ibid.*

²³⁴ Committee to Protect Journalists (CPJ), “Murders of Journalists More than Double Worldwide” (22 December 2020), online: <<https://cpj.org/reports/2020/12/murders-journalists-more-than-doubled-killed/>>. CPJ writes:

The global climate of impunity and dangerous anti-press rhetoric comes amid the US’s abdication of global leadership on the defense of press freedom under President Trump. Instead of defending journalists and press freedom in principle, the Trump administration’s approach is opportunistic: speaking out about Iran’s actions but glaringly failing to condemn the Saudi government and Crown Prince Mohammed bin Salman for their role in the 2018 murder of Washington Post columnist Jamal Khashoggi is the most egregious example. Last month, CPJ published a proposal to the incoming Biden administration on restoring U.S. leadership, including appointing a special presidential envoy for press freedom who would be empowered to speak out about violations around the world; rebuilding State Department institutions that have traditionally supported press freedom; and sending a directive to US embassies that press freedom is a foreign policy priority.

This theory also highlights the complexity of the impact of press freedom on corruption at an international level: various socio-political factors may enhance or impair the ability of the press to combat corruption.

²³⁵ See Rebecca Redelmeier, “‘Like an Open-Air Cage’: Police Restrict Reporters’ Access to Canadian Anti-Logging Protests” (28 June 2021), online: CPJ <<https://cpj.org/2021/06/police-restrict-reporters-access-canadian-anti-logging-protests/>>:

Journalists say the injunction [to cover the anti-logging protects] violates their right to report: the RCMP has denied journalists access to the demonstration sites; demanded that members of the press stay within areas that are often out of earshot and only provide a partial view of what’s going on; and threatened journalists with arrest, according to local news reports, journalist accounts on Twitter, and a statement from the Canadian Association of Journalists (CAJ).

participation” or “SLAPP suits” are filed often with the “sole intention of intimidating and censoring journalists or activists.” This may occur even in countries with relatively high levels of press freedom.²³⁶ States may also be inclined to use events like the COVID-19 pandemic as a rationale to “justifiably” limit the ambit of press freedom (subjecting investigative journalists to a greater likelihood of criminal or civil proceedings, and undermining their role as an accountability mechanism).²³⁷

Apart from physical and legal threats, there is a third significant deterrent for journalists pursuing corruption-related reporting: “investigative journalism is a risky investment for media outlets.”²³⁸ It often-times amounts to nothing, despite being significantly time and resource intensive. Media outlets may find it difficult to justify the legal and political risks alongside the economic costs of engaging in the investigation altogether. Kline writes, “even though media outlets can reap substantial rewards from successful investigations—in the form of clicks, subscriptions, and prestige—media outlets faced with declining revenues and an increasingly hostile environment may not invest nearly as much in investigations into corruption as would be socially optimal.”²³⁹

Jerome Turner, a reporter at Ricochet, covered the demonstrations freely before police began enforcing the injunction, but has since faced restrictions at the site, he told CPJ via phone. The scene, he said, is reminiscent of last year in Wet’suwet’en territory in northern British Columbia, where police set up an “exclusion zone” where press were not allowed to enter as Wet’suwet’en hereditary leadership and supporters opposed the construction of a natural gas pipeline on the land, according to news reports. Turner was detained for eight hours, as CPJ documented at the time.

See also “Covering Police Violence Protests in the US” (last visited 26 August 2021), online: CPJ <<https://cpj.org/reports/2020/06/covering-police-violence-protests-in-the-us/>>, which provides a number of links to issues surrounding freedom of the press and safety for journalists covering protests in the United States.

²³⁶ See for example, TI, *supra* note 232:

In the United Kingdom, after years of costly legal proceedings, the Organized Crime and Corruption Reporting Project (OCCRP) recently settled a SLAPP lawsuit filed against them by an Azerbaijani businessman and politician implicated in the Azerbaijani Laundromat corruption and money laundering investigation.

²³⁷ See Katherine Jacobsen, “Amid COVID-19, the Prognosis for Press Freedom is Dim. Here are 10 Symptoms to Track” (last visited 26 August 2021), online: CPJ <<https://cpj.org/reports/2020/06/covid-19-here-are-10-press-freedom-symptoms-to-track/>>.

²³⁸ Kline, *supra* note 221.

²³⁹ Kline, *ibid*, proposes a media rewards program, where media outlets who expose corruption are paid a percentage of the asset recovery:

[A media reward] program could go a long way toward providing subsidies to media outlets that provide the invaluable public service by exposing corruption, as well as giving news organizations a powerful incentive to allocate a larger share of their resources towards the kinds of investigative journalism that are likely to produce such stories.

Finally, the OECD also reports that lack of effective whistleblower and source protection laws are significant obstacles in uncovering corruption:

Whistleblower protection was considered the second most valuable support for journalists investigating corruption (63%), behind strong editorial board backing (77%). Journalists also noted that their sources can also work for law enforcement agencies, and considered that these sources should be protected as any other whistleblower. The media plays a potentially vital role in de-stigmatising whistleblower reporting. For example, referring to a “leak” when breaking a story based on information provided by a whistleblower (particularly an insider), can serve to reinforce perceptions that the whistleblower was acting unethically or illegally in providing such information.²⁴⁰

Social Media and Corruption

A discussion of investigative journalism’s impact on corruption would not be complete without acknowledging the burgeoning role of social media in the press landscape. Zhenya Tang et al. write, “understanding the relationship between [Information and Communication Technologies] use and corruption reduction presents a promising area of research at the intersection of information systems, social science and public policy.”²⁴¹ With 4.48 billion social media users in July 2021, who spend an average of 2.5 hours/day using social media,²⁴² it is undoubtable that social media has a role to play in the complex socio-political ecosystem that seeks to deter (or promulgate) corruption. Study of this area

Disha Verma endorses Kline’s proposition in their post, “Why Paying the Media to Uncover Corruption Would Work in India” (16 July 2021), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2021/07/16/why-paying-the-media-to-uncover-corruption-would-work-in-india/>>, explaining four reasons why such a scheme would be particularly well-suited to combatting corruption in India: (1) despite being endemic in India, corruption is under-reported, with media focusing on only the most “sensational” scams. A reward system would provide an incentive to cover “more prosaic” corruption incidents; (2) a rewards program would financially support media outlets who face lawsuits, lose commercial revenue and face regulatory scrutiny in uncovering corruption. Further, strict laws against false claims in India, combined with the risk and cost of uncovering corruption, mean that it is less likely that there will be “reckless allegations” of corruption in India [Note: This interaction of corruption drivers—a media rewards program for uncovering corruption may be more likely to maintain its integrity when coupled with a strong false claims deterrent]; (3) monetary rewards may provide journalists with the ability to buy better security or offer “a sense of justice to journalists and their families” when they are faced with significant risks (including “death threats, rape threats, physical attacks and false arrests”) in exposing corruption; and (4) rewards programs may incentivize greater longevity in reporting each corruption incident, placing more pressure on the government to seek prosecution.

²⁴⁰ Ambler, Pelham & Rivabella, *supra* note 219 at 9.

²⁴¹ Zhenya Tang et al, “The Effects of Social Media Use on Control of Corruption and Moderating Role of Cultural Tightness-Looseness” (2019) 36:4 Gov Info Q 1 at 1.

²⁴² “Global Social Media Stats” (last visited 25 August 2021), online: *DATAREPORTAL* <[64](https://datareportal.com/social-media-users#:~:text=Our%20latest%20data%20show%20that,of%20the%20total%20global%20population>.”</p>
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is in its relative infancy.²⁴³ However, the limited data suggests that social media may be significant for combatting corruption, particularly in regions with limited press freedom.²⁴⁴ Indeed, even anecdotal examples are illustrative of social media's potential for disseminating corruption-related news and prompting accountability mechanisms:

[T]here are some dramatic examples of social media playing a role in the fight against corruption [in the Philippines]. For instance, as details of a major scheme involving misappropriation of public money began to surface in 2013, social media platforms exploded with photos and videos pulled from the Instagram and Facebook account of Jeane Napoles, whose mother, Janet, had orchestrated the scheme. Filipinos were shocked and appalled by all that ill-gotten wealth could buy—private planes, expensive handbags, multimillion-dollar apartments, and even a new car detailed with a Hermes leather exterior (yes, exterior). Even after these accounts were taken down, photos of the Napoles' lavish lifestyle continued to circulate. These images made people far more aggressive in condemning the actions of those involved, and even inspired the Million People March, when protestors called for complete elimination of the fund used in the scheme. More recently, Facebook posts about sightings of the younger Napoles helped the media to discover that Jeane, who fled the country in 2013, had in fact returned. She has since been charged with tax evasion.²⁴⁵

Beatriz Paterno writes that those who are “optimistic” about the potential impact of social media on corruption argue that it serves two main functions:

First, it allows more members of the public to actively participate in monitoring and reporting. The oft-cited website I Paid A Bribe in India is an example of how social media can encourage broader reporting of bribery.... Second, social media may have the potential to mobilize groups, as Facebook and Twitter did during the Arab Spring in 2011, and as the same platforms did during the Philippines' Million People March in 2013. Thus, social media can play a pivotal role in areas where the

²⁴³ For some explorations on social media and corruption, see Ruben Enikolopov, Maria Petrova & Konstantin Sonin, "Social Media and Corruption" (2018) 10:1 Am Econ J 150; Hendi Yogi Prabowo, Rizki Hamdani & Zuraidah Mohd Sanusi, "The New Face of People Power: An Exploratory Study on the Potential of Social Media for Combating Corruption in Indonesia" (2018) 12:3 Australas Account Bus & Finance J 19; and Kamil Demirhan & Derya Çakır-Demirhan, eds, *Political Scandal, Corruption, and Legitimacy in the Age of Social Media* (IGI Global, 2017).

²⁴⁴ See Chandan Humar Jha & Sudipta Sarangi, "Does Social Media Reduce Corruption?" (2017) 39 Info Econ & Policy 60.

²⁴⁵ Beatriz Paterno, "Facebook Fever is Not Enough: The Role of Social Media in the Philippines" (10 July 2015), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2015/07/10/facebook-fever-is-not-enough-the-role-of-social-media-in-the-philippines/>>.

government exercises tight control over the press, and where apathy and isolation hinder mass mobilization.²⁴⁶

Paterno also writes that social media has the advantages of addressing day to day corruption (i.e. individuals broadcasting instances of petty or everyday bribery), allowing instant reporting, inspiring long-term activism, and utilizing mixed media to further deter corrupt acts (i.e. “reputations will be harder hit if photographs of politicians’ corrupt acts begin to circulate on social media”²⁴⁷). Despite these advantages, Paterno asserts:

While social media may amplify many of the benefits traditionally associated with a free press and free speech, it’s important to remember that those principles have so far failed to curb corruption over the long term. More often than not, the elites use their resources to take back power. Real, lasting change will require recalibrating the existing social, political, and economic disparities that have always allowed elites to escape punishment.²⁴⁸

Again, we are reminded that each “driver” of corruption is limited in its influence, and always exists in a relationship with other “drivers.”

Media Corruption

As mentioned, media cannot only function to root out corruption, but it also plays a pivotal role in our perception of the current socio-political climate. While there is not enough space to explore this topic fully, it is worth noting that this second role makes *media corruption* itself a significant concern. In his book, *Media Corruption in the Age of Information*, Edward H. Spence presents a systematic theoretical study on how and why media corruption manifests. He writes:

Whereas much has been written on other forms of corruption, including corporate, political, financial, sports corruption, and police corruption, media corruption has been largely overlooked. Although identified as unethical within the general corpus of media ethics, practices such as cash-for-comment and media release journalism, including video news

²⁴⁶ *Ibid.* See also Richard Messick, “The Use of Social Media to Combat Corruption: The ‘I Paid a Bribe’ Web Site in India” (13 May 2015), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2015/05/13/the-use-of-social-media-to-combat-corruption-the-i-paid-a-bribe-web-site-in-india/>>; and Rebecca Cress, “Social Media and Anticorruption Reform: When Does Crowdsourcing Work?” (7 April 2014), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2014/04/07/social-media-and-anticorruption-reform-when-does-crowdsourcing-work/>>.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

releases (VNRs), fake news, staged news, advertorials, and infomercials, among others, have not been commonly defined as corrupt practices.²⁴⁹

If the media and the press are to be useful in combatting corruption, its own integrity is vital.

4. PERCEPTIONS AND MEASUREMENTS

As pointed out by Graycar and Prenzler, measuring corruption can guide remedial measures and provide “an indicator of how well a society is performing in terms of a government’s contract with its citizens.”²⁵⁰ However, measuring corruption is challenging due to the lack of a uniform definition and the covert nature of corruption. A variety of methods deal with these problems in different ways. Measurements might address the level of risk of corruption or the extent of actual corruption using various indicators, or the cost of corruption. Measurement might require creative techniques. For example, to reveal the amount of aid funding that had been skimmed in road-building projects in Indonesia, Benjamin Olken dug up chunks of road and measured the difference between funding and amounts of materials actually used. Because of the inevitable uncertainty involved in any one measurement method, Graycar and Prenzler recommend that measurements “triangulate as many indicators as possible.”²⁵¹

4.1 Commonly-Cited Indexes

(i) Transparency International’s Indexes

TI is the world’s largest anti-corruption NGO. TI has been very influential in raising the profile of the problem of corruption, in part through its research and surveys regarding the prevalence of corruption-related activities worldwide. The three main indexes and surveys published by TI are the Corruption Perceptions Index (the “CPI”), the Global Corruption Barometer (the “GCB”) and the Bribe Payers Index (the “BPI”).

²⁴⁹ Edward H Spence, *Media Corruption in the Age of Information* (Cham, Switzerland: Springer International Publishing, 2021) at 63. See also Ren Li, “Media Corruption: A Chinese Characteristic” (2013) 116:2 J Bus Ethics 297 for a discussion of how corruption may manifest in the media. The author divides media corruption into three categories based on the “nature of their rent-seeking behaviour and the scale involved in their daily practice” (at 299): (1) paid for news (or “individual red-envelope taking”); (2) institutional profit-seeking; and (3) personal enterprises of media workers.

²⁵⁰ Graycar & Prenzler, *supra* note 133 at 34.

²⁵¹ *Ibid* at 44.

(a) The Corruption Perceptions Index²⁵²

The CPI is the most commonly cited corruption index worldwide. As its title indicates, the CPI measures perceptions rather than actual rates of corruption. The index is an aggregate of a variety of different data sources. It reports on levels of public sector corruption, as perceived by businesspersons and country experts who deal with the country in question. Despite some limitations, it is generally acknowledged as a reliable, though not precise, indicator of the perception of public sector corruption levels. The CPI is published annually and its release gets significant media attention. The 2020 edition includes information on 180 countries and territories. Denmark and New Zealand, closely followed by Finland, Singapore, Sweden, and Switzerland topped the list with the lowest levels of perceived corruption, while Somalia, South Sudan, Syria, Yemen and Venezuela had the highest perceived corruption levels.

Table 1.1 examines Canada, the US and the UK's CPI scores from 2015 to 2020. Table 1.2 gives a sample of the TI corruption perception scores from best to worst for a selection of countries.

Table 1.1 *TI Corruption Perception Ratings for Canada, UK, and US between 2015-2020²⁵³*

Country		2015	2016	2017	2018	2019	2020
Rank is out of approximately 180 countries; score is out 100							
Canada	Rank	10	9	8	9	12	11
	Score	83	82	82	81	77	77
United Kingdom	Rank	11	10	8	11	12	11
	Score	81	81	82	80	77	77
United States	Rank	16	18	16	22	23	25
	Score	76	74	75	71	69	67

Note. (1) The country ranking of Canada, UK, and US have not changed dramatically over the six-year period, although the US' drop from 16 to 25 should be of some concern. (2) The raw scores for all three countries have each dropped in the past three years.

²⁵² "Corruption Perceptions Index 2020" (last visited 10 August 2021), online: *TI* <<https://www.transparency.org/en/cpi/2020>>.

²⁵³ I have constructed Table 1.1 from the data in *ibid*.

Table 1.2 *Corruption Perception Ratings for Select Countries and Years*²⁵⁴

Country	Ranking out of Approx. 180 Countries				Score out of 100			
Year	2014	2016	2018	2020	2014	2016	2018	2020
EXCELLENT (90% or better)								
Denmark	1	1	1	1	92	90	88	88
New Zealand	2	1	2	1	91	90	87	88
VERY GOOD (80% - 89%)								
Singapore	7	7	3	3	84	85	85	85
Netherlands	8	8	8	8	83	83	82	82
Canada	10	9	9	11	81	82	81	77
Germany	12	10	11	9	79	81	80	80
UK	14	10	11	11	78	81	80	77
GOOD (70% - 79%)								
Australia	11	13	13	11	80	79	77	77
Hong Kong	17	15	14	11	74	77	76	77
USA	17	18	22	25	74	74	71	67
Japan	15	20	18	19	76	72	73	74
FAIR (60% - 69%)								
France	26	23	21	23	69	69	72	69
Portugal	31	29	30	33	63	62	64	61
POOR (50% - 59%)								
Spain	37	41	41	32	60	58	58	62
South Korea	43	52	45	33	55	53	57	61

²⁵⁴ I have constructed Table 1.2 from the data reported in *ibid.*

FAILING (49% and below)

South Africa	37	41	41	32	60	58	58	62
Brazil	69	79	105	94	43	40	35	38
India	85	79	78	86	38	40	41	40
China	100	79	87	78	36	40	39	42
Indonesia	107	90	89	102	34	37	38	37
Russia	136	131	138	129	27	29	28	30
Somalia	174	176	180	179	8	10	10	12

Note. (1) I have added my own grading system to the TI scores, ranging from “excellent” to “failing.” (2) Canada, while originally in the “very good” category, has had its ranking fall out of the top ten in 2020. The US follows a similar downward trend. (3) Conversely, Singapore, Germany, and the UK have all improved their rankings.

(b) The Global Corruption Barometer²⁵⁵

The GCB measures both lived experiences with corruption and perceptions on corruption amongst the general public. According to TI, it is the world’s largest public opinion survey on corruption. The 2020 edition included responses from citizens in 119 countries. It asked respondents questions regarding both their experiences with corruption in major public services and their perceptions on items such as the effectiveness of government efforts to control corruption and corruption trends and rates. The GCB is published every few years. The survey indicates that nearly one in four people worldwide (25%) report having paid a bribe to a major public institution. This increases to more than three out of every four people (75%) in Yemen. In comparison, one percent of people in countries, such as Denmark and Finland, and two percent in Japan, report having done so.

Over the course of 2019-2021, TI has released the 10th edition of the GCB, which is now released in five separate regional surveys²⁵⁶ covering Africa, the Middle East and North Africa, the European Union, Asia, and Latin America and the Caribbean.²⁵⁷ They show, in particular, that in Europe and

²⁵⁵ TI, *People and Corruption: Citizen’s Voices From Around the World: Global Corruption Barometer*, (Berlin: TI, 2017), online: <<https://www.transparency.org/en/publications/people-and-corruption-citizens-voices-from-around-the-world>>.

²⁵⁶ Previous editions of the GCB were compiled as one survey, not five regional surveys. “Global Corruption Barometer” (last visited 10 August 2021), online: TI <<https://www.transparency.org/en/gcb>>.

²⁵⁷ TI, *Global Corruption Barometer Africa 2019*, (Berlin: TI, 2019), online: <<https://www.transparency.org/en/publications/gcb-africa-2019>>; TI, *Global Corruption Barometer*

Central Asia bribery rates vary considerably between the countries of the region. For instance, while less than one percent of households in Denmark reported paying a bribe when accessing basic services, this figure was as high as 20 percent in Romania and 19 percent in Bulgaria.²⁵⁸

(c) The Bribe Payers Index²⁵⁹

The BPI is based on a TI survey of business executives in 28 of the countries around the world that are most heavily involved in receiving imports and foreign investment. The index is not published on a regular schedule. Unfortunately, the 2011 BPI is the latest edition at this time. The 2011 survey focuses on the supply side of bribery and measures perceptions on how often foreign companies from the largest economies engage in bribery while conducting business abroad versus at home. Of the countries surveyed, Chinese and Russian companies were perceived as the most likely to engage in bribery while doing business abroad, while firms from the Netherlands and Switzerland were perceived as least likely to do so. Sadly, China and Russia have yet to prosecute a domestic firm for foreign bribery. The BPI results are also categorized by sector. The public works construction sector was perceived as the industry sector most likely to involve bribes. Table 1.3 illustrates the data from the 2008 and 2011 BPI surveys.

Middle East and North Africa 2019, (Berlin: TI, 2019), online:

<<https://www.transparency.org/en/gcb/middle-east-and-north-africa/middle-east-and-north-africa-1>>; TI, *Global Corruption Barometer European Union 2021*, (Berlin: TI, 2021) [EU Barometer], online:

<<https://www.transparency.org/en/gcb/eu/european-union-2021>>; TI, *Global Corruption Asia 2020*,

(Berlin: TI, 2020), online: <<https://www.transparency.org/en/gcb/asia/asia-2020>>; TI, *Latin America and the Caribbean 2019*, (Berlin: TI 2019), online: <[https://www.transparency.org/en/gcb/latin-](https://www.transparency.org/en/gcb/latin-america/latin-america-and-the-caribbean-x-edition-2019)

<<https://www.transparency.org/en/gcb/latin-america/latin-america-and-the-caribbean-x-edition-2019>>.

²⁵⁸ EU Barometer, *ibid* at 18-19.

²⁵⁹ Deborah Hardoon & Finn Heinrichl, *Bribe Payers Index 2011*, (Berlin: TI, 2011) online:

<<https://www.transparency.org/en/publications/bribe-payers-index-2011>>.

Table 1.3 *TI Bribe Payers Index*²⁶⁰

Country	2011 Ranking of 28 Countries	2008 Ranking of 22 Countries	2011 Score out of 10	2008 Score out of 10
Netherlands	1	3	8.8	8.7
Germany	4	5	8.6	8.6
Japan	4	5	8.6	8.6
Australia	6	8	8.5	8.5
Canada	6	1	8.5	8.8
Singapore	8	9	8.3	8.1
United Kingdom	8	5	8.3	8.6
United States	10	9	8.1	8.1
Brazil	14	17	7.7	7.4
Hong Kong	15	13	7.6	7.5
South Africa	15	14	7.6	7.5
India	19	19	7.5	6.8
Indonesia	25	N/A	7.1	N/A
China	27	21	6.5	6.5
Russia	28	22	6.1	5.9

²⁶⁰ Table 1.3 has been created with the data reported in the 2011 and 2008 BPIs: see *ibid*; Junita Riaño & Robin Hodess, *Bribe Payers Index 2008*, (Berlin: TI, 2008), online: <<https://www.transparency.org/en/publications/bribe-payers-index-2008>>.

(ii) The World Bank's Worldwide Governance Indicators Project²⁶¹

The Worldwide Governance Indicators project (WGI) reports on six indicators of good governance, one of which is control of corruption. The WGI is an aggregate of data from a large number of surveys conducted between 1996 and 2019, and includes data on more than 200 countries and territories. The WGI may be used to compare data over time or between countries. The Control of Corruption Indicator measures perceptions of the extent to which public power is exercised for private gain. The Rule of Law Indicator measures perceptions on how people believe in and follow the rules of society. For a view of how a select number of countries perform on these two indicators and TI's CPI index, see Table 1.4.

In August 2013, the Hertie School of Governance released a report titled "Global Comparative Trend Analysis Report."²⁶² The report, using data from the World Bank's control of corruption indicator, compares control of corruption scores among eight world regions between 1996 and 2011. The regions of North America, Western Europe and Oceania were consistently ranked as the leading regions in controlling corruption. Few countries showed significant change in their control of corruption scores over the fifteen-year period.

²⁶¹ "Worldwide Governance Indicators Project" (last visited 10 August 2021), online: *World Bank* <<http://info.worldbank.org/governance/wgi/>>.

²⁶² Roberto Martinez Barranco Kukutschka & Bianca Vaz Mondo, "Global Comparative Trend Analysis Report", in Alina Mungiu-Pippidi, ed, *Anti-Corruption Policies Revisited* (Hertie School of Governance, 2013), online: <<http://anticorrrp.eu/publications/global-comparative-trend-analysis-report/>>.

Table 1.4 *A Comparison of TI, WG and WJP Scores with Respect to Corruption*²⁶³

Country	Transparency International [TI]		World Bank's Worldwide Governance Project [WGI]		World Justice Project [WJP]
	CPI Ranking out of 180 Countries	Foreign Corruption Ranking of 28 Countries with Large Economies	WGI Percentile Ranking for "Control of Corruption" Indicators	WGI Percentile Ranking for "Rule of Law" Indicators	WJP Rule of Law Index Ranking out of 128 Countries
Year	2020	2011	2020	2020	2020
Canada	11	6	93.3	94.7	9
UK	11	8	93.8	91.3	13
US	25	10	84.6	89.9	21
South Africa	69	15	59.6	51.0	45
China	78	27	43.3	45.2	88
Indonesia	102	25	38.0	42.3	59
Russia	129	28	21.6	25.0	94

Note. (1) Table 1.4 illustrates a general trend that countries with high CPI rankings also have high rule of law and control of corruption rankings, and vice versa.

²⁶³ I have constructed Table 1.4 from the data reported in the indices: see "Corruption Perceptions Index 2020", *supra* note 253; Worldwide Governance Indicators Project, *supra* note 261; and World Justice Project, *WJP Rule of Law Index 2020*, (Washington, DC: World Justice Project, 2020) [WJP Rule of Law Index (2020)], online (pdf): https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

(iii) Freedom House Publications

Freedom House is a US-based watchdog organization committed to promoting democracy and political and civil liberties globally. It publishes a number of research reports and publications relating to indicators of good democratic governance. Two major publications which deal specifically with corruption are *Nations in Transit* and *Countries at the Crossroads*.

(a) Nations in Transit

Nations in Transit is an annually published report that studies the reforms taking place within 29 of the former communist countries of Europe and Eurasia. The report covers seven categories relating to democratic change, one of which is corruption. Its corruption index reflects “public perceptions of corruption, the business interests of top policymakers, laws on financial disclosure and conflict of interest, and the efficacy of anti-corruption initiatives.”²⁶⁴

(b) Countries at the Crossroads

Countries at the Crossroads, published between 2004 and 2012, was an annual publication examining government performance in 70 countries at a crossroads in determining their political future. Its anti-corruption and transparency section included four measurements:

- (a) environment to protect against corruption (bureaucratic regulations and red tape, state activity in economy, revenue collection, separation of public and private interests, and financial disclosure);
- (b) anti-corruption framework and enforcement (anti-corruption framework and processes, anti-corruption bodies, prosecution);
- (c) citizen protections against corruption (media coverage; whistleblower protection; redress for victims, and corruption in education); and
- (d) governmental transparency (general transparency, legal right to information, budget-making process, expenditure accounting, government procurement, and distribution of foreign assistance).²⁶⁵

(iv) TRACE Matrix

TRACE International is a non-profit business association, founded in 2001 by in-house anti-bribery compliance experts, that provides its members with anti-bribery compliance

²⁶⁴ Freedom House, *Nations in Transit 2021: The Antidemocratic Turn*, (Washington, DC: Freedom House, 2021), online: <<https://freedomhouse.org/report/nations-transit/2021/antidemocratic-turn>>.

²⁶⁵ Freedom House, *Divergence and Decline: The Middle East and the World after the Arab Spring: Countries at the Crossroads 2012*, (Freedom House, 2012) at 23-24, online (pdf): <https://freedomhouse.org/sites/default/files/2020-02/Countries_at_the_Crossroads_2012_Booklet.pdf>.

support. TRACE Compliance, Inc. offers risk-based due diligence, anti-bribery training and advisory services to both members and non-members.²⁶⁶ In collaboration with the RAND Corporation, TRACE International developed the TRACE Matrix, a global business bribery risk index for compliance professionals, which scores 194 countries in four domains—business interactions with the government, anti-bribery deterrence and enforcement, government and civil service transparency, and capacity for civil society oversight.²⁶⁷ Published since 2014, a new edition is released every year.

(v) The World Justice Project Rule of Law Index²⁶⁸

The World Justice Project (WJP) is a US-based independent and multidisciplinary organization that seeks to advance the rule of law globally. Its overall Rule of Law Index assesses performance of governments on the basis of 44 indicators organized in eight categories, including absence of corruption in the executive branch, the judiciary, the military and police, and the legislature.²⁶⁹ The 2020 edition of the WJP Rule of Law Index, which covers 128 countries and territories, places Denmark, Norway, Singapore, Sweden, and Finland on top of the list in the “absence of corruption” category.²⁷⁰

4.2 Limitations Associated with Indexes Based on Perceptions

Although the indexes included above are useful in understanding the prevalence of corruption around the globe, most do not include objective measures of corruption. There is little empirical data measuring corruption. Any empirical research that exists is not well-developed and is generally small in scope. This is because quantifying actual rates of corruption on a large scale is difficult. Objective measures, such as the number of bribery prosecutions, are not reliable indicators; a large number of prosecutions may simply reflect a well-resourced and effective policing system and judiciary rather than a comparatively high prevalence of bribery. Because of the limitations of objective measurements, TI views perceptions of public sector corruption as the most reliable method of comparing levels of corruption across countries.

Despite the convenience and widespread use of perception measurements, indexes such as TI’s CPI have also received significant criticism. There is no guarantee that perceptions of corruption accurately reflect actual rates, and some commentators suggest that perceptions of corruption are not well-correlated with reality. The CPI in particular has been criticized for being western-centric, as it focuses on the perceptions of western business people rather than local lived experiences with corruption (although TI’s Global Corruption Barometer measures the latter).

²⁶⁶ “About TRACE” (last visited 26 August 2021), online: TRACE
<<https://www.traceinternational.org/about-trace>>.

²⁶⁷ “TRACE Matrix” (last visited 26 August 2021), online: TRACE
<<https://www.traceinternational.org/trace-matrix>>.

²⁶⁸ “Who We Are” (last visited 26 August 2021), online: World Justice Project
<<http://worldjusticeproject.org/who-we-are>>.

²⁶⁹ WJP Rule of Law (Index 2020), *supra* note 263.

²⁷⁰ *Ibid* at 23.

Comparing perceptions across countries can also be difficult, as people from different regions may have different understandings about what constitutes corruption. For example, some election financing and lobbying activities in Western countries are designed to influence public officials in subtle, implicit ways—and in that sense, are corrupt—yet these practices are not legally defined as corruption.²⁷¹

Perception measurements raise the issue of how corruption is defined. Definitions of corruption are not universally agreed upon and different definitions may produce differing results. Some definitions include many types of corruption while others focus primarily on bribery. The common focus on corruption in public institutions has also been criticized as being western-centric. Corruption is often portrayed as a trans-cultural disease. However, it is important to consider the different cultural contexts in which it exists.

The authors of the major indexes generally caution that results are not definitive indicators of actual corruption and should not be used to allocate development aid or develop country-specific corruption responses. However, with an understanding of their limitations, these index measurements can provide important information about corruption trends around the globe.

For criticism of CPI scores and rankings as “uni-dimensional” or “seen in monochrome,” see Michael Johnston and Scott Fritzen’s recent book entitled *The Conundrum of Corruption: Reform for Social Justice*.²⁷² For a detailed, multidisciplinary and cross-sectoral examination of corruption research and practice, see Graycar and Smith’s *Handbook of Global Research and Practice in Corruption*.²⁷³ Chapter 3 (Finn Heinrich and Robin Hodess, “Measuring Corruption”) provides an overview of recent developments and trends in measuring corruption. Chapter 4 (Francesca Recanatini, “Assessing Corruption at the Country Level”) analyzes an alternative approach to measuring corruption, promoted by practitioners at the World Bank, that assesses a country’s governance structures and institutions from various perspectives, which are briefly discussed in Section 4.1(ii). For further information, see also Staffan Andersson and Paul M. Heywood, “The Politics of Perception: Use and Abuse of TI’s Approach to Measuring Corruption” and United Nations Development Programme & Global Integrity, *User’s Guide to Measuring Corruption and Anti-Corruption*.²⁷⁴

²⁷¹ See Garry C Gray, “Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour” (2013) 53:4 Brit J Crim 533.

²⁷² Michael Johnston & Scott Fritzen, *The Conundrum of Corruption: Reform for Social Justice* (New York: Routledge, 2021) at 50-58.

²⁷³ Adam Graycar & Russell G Smith, *Handbook of Global Research and Practice in Corruption* (Cheltenham; Northampton: Edward Elgar Publishing, 2011).

²⁷⁴ Staffan Andersson & Paul M Heywood, “The Politics of Perception: Use and Abuse of TI’s Approach to Measuring Corruption” (2009) 57 Political Stud 746; United Nations Development Programme & Global Integrity, *User’s Guide to Measuring Corruption and Anti-Corruption* (New York: UNDP Global Anti-Corruption Initiative, 2015), online: <<https://www.undp.org/publications/users-guide-measuring-corruption-and-anticorruption>>. For a collection of data from the burgeoning field of anti-corruption, see TI’s Knowledge Hub: “Welcome to the Anti-Corruption Knowledge Hub” (last visited 1 September 2021), online: TI <<https://knowledgehub.transparency.org/>>.

4.3 Are Quantitative Estimates of Global Corruption Reliable?

Matthew Stephenson, creator of The Global Anticorruption Blog (GAB), in a May 6, 2021 blog post, states that it has become common place for articles, reports and speeches to open with frequently cited estimates of the amount of global corruption, “including, for example, the claim that \$1 trillion in bribes are paid each year, the claim that corruption costs the global economy \$2.6 trillion annually [based on an estimate that corruption costs amount to five percent of global GDP], and the claim that each year 10-25% of government procurement spending is lost to corruption.”²⁷⁵ Where do these estimates come from and are they reliable?

Stephenson and Cecilie Wathne, a former senior director of Measurement and Evaluation at U4 (a non-profit, multi-disciplinary research institute), prepared a paper entitled “Credibility of Corruption Statistics: A Critical Review of Ten Global Estimates.”²⁷⁶ The results of their review of ten widely-cited estimates of global corruption, including the three statistics already mentioned, are disturbing. The paper summarizes some of their main points as follows:

We analysed ten global corruption statistics, attempting to trace each back to its origin and to assess its credibility and reliability. These statistics concern the amount of bribes paid worldwide, the amount of public funds stolen/embezzled, the costs of corruption to the global economy, and the percentage of development aid lost to corruption, among other things.

Of the ten statistics we assessed, none could be classified as credible, and only two came close to credibility. Six of the ten statistics are problematic, and the other four appear to be entirely unfounded.

The widespread citation of unreliable statistics undermines efforts to understand the nature of the corruption problem. Organisations calling for evidence-based anti-corruption strategies should be more careful about the quality of the evidence that they present.

To improve the use of corruption statistics, organisations should trace them to their original source; read the original source carefully; distinguish between claims of individual authors and of their institutions; use qualifying language to avoid imputing undue certainty and precision to gross estimates; and focus on evidence of significant effects or associations rather than statistics that merely sound impressive.²⁷⁷

The ten commonly used estimates of global corruption and the authors’ conclusions on each are summarized in Table 1 of their paper. The most widely cited estimate is probably \$2.6

²⁷⁵ Matthew Stephenson, “How Reliable are Global Quantitative Corruption Statistics? A New U4 Report Suggests the Need for Caution” (6 May 2021), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2021/05/06/how-reliable-are-global-quantitative-corruption-statistics-a-new-u4-report-suggests-the-need-for-caution/>>.

²⁷⁶ Cecilie Wathne & Matthew Stephenson, “The Credibility of Corruption Statistics: A Critical Review of Ten Global Estimates” (2021) 4 U4, online (pdf): <<https://www.u4.no/publications/the-credibility-of-corruption-statistics.pdf>>.

²⁷⁷ *Ibid.*

trillion/5% of GDP. According to the authors, this estimate appears to have no basis whatsoever and may have been based on a misreading of a problematic analysis on a different matter. “No organization or advocate should cite this statistic under any circumstances.”²⁷⁸ The 5% figure is sometimes cited as a range between 2 to 5% of GDP. While still unreliable, the 2 to 5 % range at least makes the point that we do not really know, very precisely, how much corruption there actually is. The lack of knowledge results in the creation of a very wide range for the estimates. The highest estimate of corruption (5% of GDP) produces a figure of \$2.6 trillion, whereas if the lowest estimate of corruption is used (2% of GDP) it produces a figure of \$1 trillion. There is obviously a huge difference between corruption which amounts to \$1 trillion and corruption which amounts to \$2.6 trillion. The bottom line is that having “precise” estimates of the total amount of corruption may be very useful for advocates or policymakers to use to reinforce their point that “there is a lot of global corruption,” but these estimates should be recognized for what they really are—unproven and often widely exaggerated.

5. MEASURING AND UNDERSTANDING CORRUPTION

Svensson has reviewed literature and data on eight topics involved in understanding corruption.²⁷⁹ For non-economists and non-statisticians, the data and analysis in Svensson’s article are sometimes dense. What follows is a brief summary of parts of Svensson’s review. Although based on available data as of 2005, more recent data does not significantly alter the main observations in the article.

Svensson notes that the most common definition of public corruption is the misuse of public office for private gain. He also notes that no “definition of corruption is completely clear-cut.”²⁸⁰ The data in his article focuses on public corruption.

5.1 Common Characteristics of Countries with High Corruption

Based on the corruption ranking results, Svensson states:

All of the countries with the highest levels of corruption are developing or transition countries. Strikingly, many are governed, or have recently been governed, by socialist governments. With few exceptions, the most corrupt countries have low income levels. Of the countries assigned an openness score by Sachs and Warner (1995), all of the most corrupt economies are considered closed economies, except Indonesia. [footnotes omitted]²⁸¹

Svensson’s analysis also shows that richer countries generally have lower corruption. However, corruption levels vary widely across countries, even controlling for income. For example, he notes that Argentina, Russia, and Venezuela are ranked as relatively corrupt

²⁷⁸ *Ibid* at 30. For more on this conclusion, see *ibid* at 12-13.

²⁷⁹ Svensson, *supra* note 202.

²⁸⁰ *Ibid* at 21.

²⁸¹ *Ibid* at 24.

given their level of income. On the other hand, rankings of countries in sub-Saharan Africa often match the expected levels of corruption given their GDP. Svensson notes that levels of income are a stronger predictor of levels of corruption when combined with levels of schooling, forms of governance, and freedom of the press.

On the other hand, Susan Rose-Ackerman and Bonnie Palifka argue that states emerging from conflict are especially susceptible to corruption, making reconstruction challenging.²⁸² Rose-Ackerman and Palifka observe that these post conflict states have many of the factors that create incentive to engage in corruption: widespread destruction, weak controls, lack of trust in law enforcement, poverty, and a poorly functioning judiciary.²⁸³

5.2 Will Higher Wages for Bureaucrats Reduce Corruption?

Svensson then reviews empirical research on the impact of certain corruption control measures on actual corruption levels. First, Svensson looks at the relationship between higher wages for public servants and corruption and concludes that:

wage incentives can reduce bribery, but only under certain conditions. This strategy requires a well-functioning enforcement apparatus; the bribe being offered (or demanded) must not be a function of the official's wage; and the cost of paying higher wages must not be too high. In many poor developing countries where corruption is institutionalized, these requirements appear unlikely to hold.²⁸⁴

5.3 Can Competition Reduce Corruption?

Svensson also analyzes data related to the relationship between competition and corruption:

Another common approach to control corruption is to increase competition among firms. One argument is that as firms' profits are driven down by competitive pressure, there are no excess profits from which to pay bribes (Ades and Di Tella, 1999). In reality, however, the connections between competition, profits and corruption are complex and not always analytically clear.²⁸⁵

²⁸² Susan Rose-Ackerman & Bonnie J Palifka, *Corruption and Government: Cases, Consequences and Reform*, 2nd ed (Cambridge: Cambridge University Press, 2016) at 316.

²⁸³ *Ibid.* As part of this analysis, Rose-Ackerman and Palifka use four case studies: Guatemala, Angola, Mozambique and Burundi. For more, see Chapter 10 of *ibid.*

²⁸⁴ Svensson, *supra* note 202 at 33.

²⁸⁵ *Ibid.*

For further discussion of this point, see Alison Taylor's article "Does Competition Cause Corruption."²⁸⁶

According to Svensson, some evidence shows that deregulation does not reduce corruption by increasing competition, but rather by reducing the discretion and power of public officials. Svensson concludes:

A variety of evidence suggests that increased competition, due to deregulation and simplification of rules and laws, is negatively correlated with corruption. But it can be a difficult task to strike the right balance between enacting and designing beneficial rules and laws to constrain private misconduct while also limiting the possibilities that such laws open the door for public corruption (Djankov, Glaeser, La Porta, Lopez-de-Silanes and Shleifer, 2003).²⁸⁷

5.4 Attempts to Fight Corruption

Svensson notes that many anti-corruption programs provide resources to existing enforcement institutions. Often, these institutions are corrupt themselves. Svensson states that, "[t]o date, little evidence exists that devoting additional resources to the existing legal and financial government monitoring institutions will reduce corruption."²⁸⁸ Although Hong Kong and Singapore are considered exceptions, both countries also implemented other wide-ranging reforms in their anti-corruption efforts.

Svensson then lists some alternative approaches to combating corruption, such as turning to private or citizen enforcement, providing citizens with access to information and delegating work to private firms. The issue of designing more effective anti-corruption institutions and practices is further addressed in Section 9.

Michael Johnston and Scott Fritzen provide a detailed, thoughtful analysis to the question of "why have we made such little progress in the fight against corruption in spite of the significant resources poured into the fight over the past 30 years?"²⁸⁹ The authors first review the anti-corruption approaches and developments over the past 30-year period, indicating how most of these plans, strategies, and actions are based on questionable assumptions about the real facilitators of corruption. Consequently, the existing anti-corruption activities focus on the wrong end of the corruption problem. The authors go on to identify the all-encompassing power imbalances existing in the economic, political, and social systems in

²⁸⁶ Alison Taylor argues that a competitive corporate atmosphere encourages corrupt conduct. According to Taylor, the promotion of a "narrative of intense rivalry and urgency" is "an integral part of a corrupt [corporate] culture." Taylor explains that "employees need to be socialized into paying bribes and encouraged to believe that corruption is an inevitable and necessary response to the hard commercial realities." See Alison Taylor, "Does Competition Cause Corruption?" (22 June 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/6/22/alison-taylor-does-competition-cause-corruption.html>>.

²⁸⁷ Svensson, *supra* note 202 at 34.

²⁸⁸ *Ibid* at 35.

²⁸⁹ Johnston & Fritzen, *supra* note 272.

virtually all countries as the most significant enabler, driver, and sustainer of widespread corruption. Reforms that don't address this power imbalance are likely to have little or no effect on the continued occurrence of corruption. Finally, the authors spend the last three chapters of their book discussing the types of reforms needed to fight corruption.²⁹⁰

6. HISTORICAL DEVELOPMENT OF INTERNATIONAL LAWS

6.1 From Antiquity to the OECD Convention

Tim Martin's 1999 article, "The Development of International Bribery Law," (portions excerpted below) details the development of anti-bribery laws in the west up to the 1997 signing of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).²⁹¹ The OECD Convention was ratified by Canada in December 1998 and came into force in February 1999. The OECD Convention paved the way for further international actions to combat corruption, including the more expansive United Nations Convention Against Corruption (UNCAC), which entered into force in 2005.

BEGINNING OF EXCERPT

Corruption [as we know it] was not a problem at the beginning of history. Rather than use bribes, people made "offerings" to their gods and leaders in the hope of receiving favors. In a sense, such reciprocities provided a social glue that allowed cultures and civilizations to develop. But with civilization came religious and civil institutions that needed rules of fairness and good governance to ensure the loyalty and trust of the populace. Kings and pharaohs had to demonstrate that the rule of law was above the influence of greasy palms. Thus, began the distinction between gifts and bribes.

After presenting the Ten Commandments to Moses on Mount Sinai, God instructed the Israelites not to take *shohadh*, which is loosely translated from Hebrew as "offering."

You shall not take *shohadh*, which makes the clear-eyed blind and the words of the just crooked. (Exodus 23:1-3, 6-8)

Given that the Old Testament was breaking new ground, it was only natural that this distinction started a bit ambiguously. However, even after several millennia of lawyers trying to define bribery, a certain amount of haze shrouds the issue.

There are records of bribes and bribery laws from ancient times. Archaeologists have recently found an Assyrian archive which is 3400 years old that listed the names of

²⁹⁰ *Ibid.*

²⁹¹ A Timothy Martin, "The Development of International Bribery Law" (1999) 14:2 Nat Resources & Env't 95, online (pdf): <<http://timmartin.ca/wp-content/uploads/2016/02/Devpt-of-Int-Bribery-Law-Martin1999.pdf>>. Tim Martin is an international advisor and governance counsel from Calgary, Alberta, Canada.

“employees accepting bribes.” An Egyptian pharaoh, Horemheb (1342-1314 BC), issued the first recorded law of a secular penalty for bribetaking. The Edict of Horemheb proclaimed that any judge who took a reward from one litigant and failed to hear the adversary was guilty of a “crime against justice” and subject to capital punishment. His threat apparently did not stop the practice of bribing the judiciary from spreading beyond Egypt.

The Greek historian Pausanias relates that before beginning each Olympic Games, all the umpires, athletes, their relatives and trainers swore over boars’ flesh that they would uphold Olympic rules intended to prevent corrupt activity. Similar to present times, not everyone played by the rules. Pausanias recorded in his *Description of Greece* (5.21.5) that Calippus of Athens bought off fellow competitors with bribes, as did many other contestants. This practice continued unabated until the Roman Emperor Theodosius eventually abolished the Olympic Games in 394 AD because of rampant corruption and brutality.

...

People’s view of corruption has evolved and become more negative as the institutions of government have developed. Instead of being ambivalent about the giving of gifts to officials in a position of public trust, modern society has enacted and prosecuted laws that make such payments illegal. Over time, a bribe has come to mean “an inducement improperly influencing the performance of a public function meant to be gratuitously exercised.” (For an illuminating history of bribes, please refer to J. T. Noonan, *BRIBES* (1984).) [See also Douglas Thompson’s LLM thesis.²⁹²] Even though it is usually opposed on moral grounds, bribery has become a legal concept analyzed and prosecuted by lawyers. Thus in understanding how the world has grappled with corruption, one must consider the history of bribery laws.

For King and Country (And a little bit for me, too)

Francis Bacon was one of the most brilliant lawyers, judges, and philosophers in English history. He was also one of its most corrupt Lord Chancellors. Bacon was first Solicitor General, then Attorney General, and finally, in 1618, Lord Chancellor. Even though he was an extremely capable jurist who honestly and fairly dispensed justice, he was too detached and philosophical to take notice of the bribes flowing to his servants who used his good office to benefit themselves. Caught up in the byzantine politics of the court of King James I, Bacon was accused of accepting bribes to affect cases in the Court of Chancery. His enemies in Parliament impeached him with twenty-three charges of

²⁹² [Douglas Thompson’s University of Victoria LLM thesis, *A Merry Chase Around the Gift/Bribe Boundary* (2008), written under the co-supervision of Gerry Ferguson, explains how the English word “bribe,” which originally had the altruistic meaning of a morsel of bread given as alms to beggars, became associated with the distasteful practice of selling indulgences in medieval England. That practice, carried out by pardoners licensed by the Church, was soon seen as a type of theft or extortion inflicted on those who felt compelled to buy indulgences to reduce the time spent in Purgatory by their deceased loved ones. With the abolition of the selling of indulgences at the time of the Reformation (1538), the word bribe took on its modern meaning.]

bribery and corruption. Bacon first replied with a qualified admission of guilt. The House immediately rejected his submission, whereupon Bacon caved in: "I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defence."

Sir John Trevor was probably the most corrupt Speaker in the history of Parliament. The East India Company was rumored to have bribed him to exert influence over laws affecting it. He also apparently accepted a large payment from the City of London Corporation. Indeed, a House Committee investigation discovered a written record of the City's instructions and an endorsement of the payment to Trevor. The Members of Parliament drew up a resolution in 1694 which convicted the Speaker of a "high crime and misdemeanour." Ironically, it was the responsibility of Sir John, as the Commons Speaker, to put the motion to the House, which he did in a shameless way. The motion was overwhelmingly acclaimed and Sir John slunk out of the House of Parliament. He did not return but rather sent a sicknote to the House who responded by expelling the Speaker. (These and other stories can be found in Matthew Parris, *GREAT PARLIAMENTARY SCANDALS* (1995).)

The English common law first dealt with foreign bribery in the trial of Warren Hastings who went to India at eighteen as a clerk of the East India Company and quickly rose through the ranks until he was appointed the British Governor of Bengal in 1772. During his tenure as Governor, he amassed a great fortune that could not be accounted for by his salary alone. Edmund Burke, a member of the House of Commons, accused the Company of great abuses in India and gradually those accusations focused on Hastings, who allegedly received large bribes while Governor. As a result of his investigations, Burke and his fellow Parliamentarians drafted Articles of Impeachment against Hastings that asserted various abuses of authority constituting "high crimes and misdemeanours" including "Corruption, Peculation and Extortion." After winning the support of the House of Commons, the impeachment trial of Hastings commenced in the House of Lords in 1787. See Peter J. Marshall, *THE IMPEACHMENT OF WARREN HASTINGS* (1965).

The leading case of the time (1725) concerned Thomas Earl of Macclesfield, a Lord Chancellor who was accused of selling jobs in Chancery. In that case, the House of Lords held that the sale of an office which related "to the administrations of justice" was not an offense at common law. This was reflected in the definition of bribery provided by Blackstone in his *COMMENTARIES ON THE LAWS OF ENGLAND* of 1765. A bribe was a crime committed by "a judge or other person concerned in the administration of justice." The definition was thus restricted to acts involving a judicial decree or its execution. By 1769 the law had expanded to make the offering of money for a government office a crime. In this environment, Hastings launched his defence which consisted of showing that he had not offered any money himself as bribes and that any presents he had received were not for himself but for the Company. To be on the safe side, he also launched personal attacks on Burke throughout the trial. Hastings' strategy was successful and resulted in the Lords deciding on April 23, 1795, after seven years of deliberation that he was not guilty. It would take another 180 years before anyone would again try to prosecute an act of foreign bribery. However, the next attempt would be in America rather than England.

New Law in the New World

America has a long tradition of being concerned about corruption. Public offices have been bought, judges were monetarily influenced, and the nation's infrastructure was sometimes built on the back of bribes. But America is a country where government is expected to be for the benefit of the people. Public officials and their decisions were not to be bought and sold by a few wealthy individuals or corporations. Bribes were seen as immoral and against the founding principles of the United States of America. Something had to be done about corruption and lawmakers were more than willing to fill the breach. A multitude of approaches was thus pursued to address the problem.

The U.S. Founding Fathers clearly had corruption on their minds when they drafted the Constitution. Their first concern was Executive Branch corruption but they expanded the concept to include the Judiciary. The mechanism they built into the Constitution to remedy this problem was impeachment. The Constitutional Convention of 1787 first specified that the grounds for impeachment would be "Treason, Bribery, or Corruption." They later dropped "Corruption" as superfluous but added "other high crimes and misdemeanours" using the language from the Hastings trial in Parliament. This amendment supposedly provided Congress sufficient flexibility in the future to prosecute corrupt judges and Presidents. Unfortunately, the Constitution did not provide that Congressional members were subject to impeachment based upon the argument of James Madison that it was harder to corrupt a multitude than an individual. How wrong he proved to be! Bribing Congressmen became a national pastime. Eventually, Congress passed An Act to Prevent Frauds upon the Treasury of the United States in 1853 which made it illegal to bribe a member of Congress. It was not used much (possibly because of its misleading title). Indeed, during the first 150 years of the American Republic, no high ranking government leader was convicted for bribery. The Teapot Dome Scandal in the 1920s changed this complacency.

...

Throughout this period [1770s-1970s], all of the industrialized countries and most of the developing world had their own laws which made the bribery of public officials illegal. England had the Public Bodies Corrupt Act of 1889 and the Prevention of Corruption Acts of 1906 and 1916. Countries such as Canada, Denmark, France, Germany, Italy, the Netherlands, Spain, and Switzerland had prohibited the bribery of public officials under their respective Criminal Codes for many years. Some, such as France, as early as 1810. But similar to the United States, all these laws addressed the bribery of domestic officials, i.e., judges, politicians, and government officials within the country's boundaries. No one ever contemplated looking beyond their own borders. All that changed as a result of some unrelated but extraordinary events investigated by several committees of the U.S. Senate.

A Leap into Foreign Waters

In 1972 the Democratic National Committee headquarters located at the Watergate complex in Washington, D. C., was burglarized. The Senate formed a select committee the next year to investigate the burglary and found that many U.S. corporations had made

illegal contributions to Richard Nixon's Committee to Re-Elect the President. The result was that fifteen prominent corporations pleaded guilty to making illegal campaign contributions and were fined. One of the corporations, Gulf Oil, provided an amazing report to the Senate committee that detailed an elaborate overseas network to siphon political bribes back to the States and to other countries. Gulf had apparently distributed more than \$5 million to influential politicians from overseas bank accounts over the years. See *THE GREAT OIL SPILL* (1976).

[The Watergate Inquiry led to several other Senate Inquiries, which revealed widespread foreign corruption and that no law specifically prohibited American persons or corporations from paying a bribe overseas. One of the biggest foreign bribery schemes involved a Lockheed Aircraft Corporation CEO.]

...

As it turned out, Lockheed had been engaged in a massive program of overseas bribes to government officials who bought their planes.... The Senate Banking Committee ... found that Lockheed had paid hundreds of millions of dollars through consultants to government officials in Saudi Arabia, Japan, Italy, and the Netherlands. When asked if he had paid a one million dollar bribe to Prince Bernhard of the Netherlands, the president of Lockheed, A. Carl Kottchian, replied:

I think, sir, that as my understanding of a bribe is a quid pro quo for a specific item in return. I would characterize this more as a gift. But I don't want to quibble with you, sir.

It appeared that even a sophisticated jet-setting business executive was unable to distinguish a gift from a bribe.

...

To the great chagrin of the Committee, no specific law explicitly prohibited an American from paying a bribe overseas. Something had to be done to prevent the abuses perpetrated by Lockheed, Gulf Oil, and others so inclined. Senator Proxmire's Committee thus recommended that a new law be enacted to prevent overseas bribery based on their reasoning that (1) foreign governments friendly to the United States had come under "intense pressure from their own people," (2) the "image of American Democracy" had been "tarnished," (3) confidence in the financial integrity of American corporations had been impaired, and (4) the efficient functioning of capital markets had been hampered.

After very little debate in either the House or Senate, both Houses unanimously approved the Committee's bill on December 7, 1977, and President Carter subsequently signed it into law on December 19, 1977. The Foreign Corrupt Practices Act (FCPA) was thus born. This law was the first of its kind in the world. A new era of global bribery prevention had begun. The United States, like no other country before it, had decided to make the payment of bribes to foreign officials illegal and imposed rigorous record keeping requirements on U.S. companies and their overseas subsidiaries to ensure that bribes

could not be hidden. However, when the dust settled and the United States surveyed the global landscape, it found itself standing alone.

All For One and One For All

American companies immediately recognized that they were at a disadvantage to their foreign competitors. They would thereafter constantly claim that they lost overseas contracts because they could not pay the bribes that foreign companies allegedly did. (This view has been reinforced in some recent studies. *See* U.S. Department of Commerce, UNCLASSIFIED SUMMARY OF FOREIGN COMPETITIVE PRACTICES REPORT (Oct. 12, 1995); James R. Hines, Jr., FORBIDDEN PAYMENT: FOREIGN BRIBERY AND AMERICAN BUSINESS AFTER 1977 (Nat'l Bureau of Econ. Res. Working Paper No. 5266, 1995). The American government believed that its companies were competing on an unlevel playing field and therefore began seeking multilateral co-operation on global bribery.

...

Having failed at the United Nations, the U.S. moved to another forum, the Organization for Economic Cooperation and Development (OECD). The American government lobbied the OECD in 1981 to implement an illicit payments agreement. However, several countries expressed the view that differences among their legal systems would make such an agreement difficult to implement. Another attempt was made at the insistence of Congress when they amended the FCPA in 1988. Nothing resulted from either of these efforts. *See* U.S. Department of State, ILLICIT PAYMENTS: PAST AND PRESENT U.S. INITIATIVES.

The multilateral approach of the U.S. government was shelved at that point.... [But] ... the Clinton administration had decided in late 1993 to renew a multilateral effort. Since the Cold War had ended, the U.S. focused its attention on global economics and the problem of foreign bribes was given high priority in this new war. The American government carefully considered the supply and demand sides of the corruption equation in forging its strategy. It primarily focused on the supply side (or active part of bribery) and the multilateral organization that received most of its attention was the OECD.

The OECD Convention

In May 1994, a majority of the OECD countries agreed upon a suite of recommendations entitled OECD RECOMMENDATIONS ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS. However, it was not binding and was well below the objectives set by the United States. No specific measures were recommended; rather, it offered a broad list of "meaningful steps." Subsequently, after intensive lobbying by the United States and after overcoming the resistance of some European countries (especially France), the OECD Council on April 11, 1996, approved a recommendation to eliminate the tax deductibility of bribes among its member states. At the next OECD meeting in May 1997, the American government pushed for a resolution committing governments to outlaw foreign bribery in their domestic legislation by the end of 1998 and to establish a monitoring system to ensure that it was being enforced. In opposition, France and Germany, with the support

of Japan and Spain, maintained that “you need an international convention for criminalizing corruption, because the legal framework in each country is different. The U.S. and its supporters viewed this as a stalling tactic since such treaties take many years to negotiate and ratify.

After much negotiation [in 1997], a compromise was struck. The ministers endorsed the REVISED RECOMMENDATION ON COMBATTING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS. They recommended that member countries would submit criminalization proposals to their legislative bodies by April 1, 1998, and seek their enactment by the end of 1998. The ministers also decided to open negotiations promptly on a convention to be completed by the end of 1997, with a view to its entry into force as soon as possible within 1998, and urged the prompt implementation of the 1996 recommendation on the tax deductibility of such bribes.

After six months of intensive discussions, all twenty-nine member countries of the OECD and five non-member countries agreed to sign the CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (the OECD Convention) in Paris on December 17, 1997, *reprinted at* 37 I.L.M. 1 (1998). This Convention provided the framework under which all the signatory governments undertook to prohibit and act against the bribery of foreign public officials on an equivalent basis without requiring uniformity or changes in the fundamental principles of each government's legal system. The OECD Convention entered into force on the 60th day following the date upon which 5 of the 10 countries with the largest shares of OECD exports, representing at least 60% of the combined total exports of those 10 countries, deposited their instruments of acceptance, approval, or ratification. Such ratification had to occur by December 31, 1998, to be binding upon all signatory countries. Canada's deposit of its instrument on December 17, 1998, met the pass mark and resulted in the OECD Convention's entering into force on February 15, 1999.... [As of August 1, 2021 there are 44 signatories to the Convention, 38 of which are OECD members and six are non-members.]

The Convention has a clearly defined scope. It provides that each government “shall establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.” The Convention makes it an offence for nationals of signatory countries to give a bribe to a foreign public official. In other words, it is directed against offences committed by the bribe-giver and not the public official receiving the bribe.

...

[Between 1990 and 2006] the United States has mounted a massive global campaign in every conceivable multilateral organization in the world [e.g. World Bank, International Monetary Fund and Foreign Multilateral Government Associations].... A lot of this campaign is motivated by self-interest, but there is also a genuine desire to make the

world a better place to do business. The U.S. government has relentlessly pursued the simple goal of having other countries' multinationals play by the same rules applicable to U.S. companies. Its strategy is clearly laid out in the 1996 Annual Report to Congress of the Trade Promotion Coordinating Committee....

There is a dawning realization that bribes eliminate competition, create inefficiencies, and ultimately cost countries and their consumers money.

END OF EXCERPT

6.2 Meaning and Effect of International Conventions

In *Handbook of Global Research and Practice in Corruption*, Graycar and Smith note some reasons why corruption has increasingly been seen as a significant global concern:

International trade has been a feature of human behavior for millennia. But in recent centuries new transport mechanisms and new technologies have made for economic interdependence. Compounded by digital technologies which move money around the world at the speed of light, and global business moguls who seek advantage opportunistically and capriciously, corruption takes on a new dimension. Political instability has also taken on a cross-national dimension, and it is often fuelled by, and in turn fuels corruption.²⁹³

In international law, a convention (or treaty) is a statement of principles, rules and procedures on a specific topic which is adopted by international bodies such as the United Nations. The adoption of a convention by the UN does not automatically bind all UN members to comply with the convention. At the time a convention is adopted, a number of countries will sign (become signatories) to the convention. By becoming signatories, those countries indicate their general agreement with the principles and purposes of the convention. However, countries are only bound by a convention or treaty by ratifying it. Ratification signals that a country has laws and practices in place that are in compliance with the convention and that the country is ready to be bound by the treaty under international law. Once ratified, the particular state becomes a "Party" or "State Party" to the convention.

In countries such as England, Canada, and Australia, ratification is a power exercised by the Executive (i.e., the elected government and, more specifically, the cabinet). Parliamentary approval is not required, although all treaties and conventions are tabled in Parliament before ratification by Canada. In the US, ratification takes place through the combined actions of the Executive and a two-thirds vote of the Senate.

Some conventions have protocols. A protocol is an addition or a supplement to an existing convention. State Parties are not automatically required to adopt protocols and for that reason protocols are often referred to as "optional protocols." For example, in the case of the

²⁹³ Graycar & Smith, *supra* note 273 at 3.

OECD Convention (discussed in Section 6.3.2), there have been three subsequent instruments, called “Recommendations,” which are also optional.

If states disagree on the interpretation of a convention or treaty provision, the dispute can be referred to an international tribunal or arbiter for resolution. Conventions and treaties frequently have specific provisions allowing countries to withdraw from (or denounce) the convention (e.g., Article 70 of UNCAC and Article 17 of the OECD Convention).

On the topic of enforcement of conventions and treaties, *Canada’s Approach to Treaty Making*, a publication from Canada’s Library of Parliament, states:

Compliance with and the enforceability of international treaties is a broad topic that cannot be dealt with in any comprehensive manner in a few paragraphs. Ultimately, there are multiple forms of international treaties, multiple levels of enforceability, and multiple mechanisms for enforcement. Various bodies are available to assist with the enforcement of international treaties and conventions at the international and regional levels. For example, trade treaties may be subject to enforcement under the NAFTA or through the World Trade Organization, which have various levels of tribunals to ensure compliance with their standards. Other trade treaties are subject to enforcement by arbitral tribunals that can impose financial penalties on parties to the agreement. By contrast, human rights treaties are often subject to some form of oversight through the United Nations treaty bodies. The Concluding Observations issued with respect to country compliance under these UN treaty bodies are not legally binding, but they do carry significant moral suasion. Breaches of humanitarian law, such as war crimes and crimes against humanity, are dealt with by the International Criminal Court, which has the power to sentence individuals to imprisonment. The International Court of Justice is also charged with settling legal disputes submitted to it by states in accordance with international law generally, and with giving advisory opinions on legal questions referred to it by UN organs and specialized agencies. [footnotes omitted]²⁹⁴

On a practical level, enforcement of conventions such as UNCAC and the OECD Convention is dependent on the implementation monitoring process which the State Parties have agreed to in each Convention.²⁹⁵

²⁹⁴ Canada, Legal and Legislative Affairs Division, *Canada’s Approach to Treaty Making Process*, by Laura Barnett, Publication No 2008-45-E (Ottawa: Library of Parliament, 2012) at 5, online (pdf): <https://publications.gc.ca/collections/collection_2013/bdp-lop/bp/2008-45-eng.pdf>.

²⁹⁵ Monitoring and compliance are challenging tasks in relation to international conventions. Fletcher and Hermann describe the difficulty of enforcement, *supra* note 36 at 73: “[t]heoretically, when a treaty comes into existence, ratifying states are legally bound to comply with it.... As we have seen, however, in the contemporary international system there is no single political authority above the state. In practical terms, therefore, states cannot be forced to comply.” Fletcher and Hermann also point out that monitoring without infringing on state sovereignty is problematic, while compliance with UNCAC and the OECD Convention is further jeopardized by the challenges of pursuing

6.3 International Instruments

Philippa Webb, in “The United Nations Convention Against Corruption,” describes the major international anti-corruption instruments developed between 1997 and the enactment of UNCAC.²⁹⁶ The brief summaries below of the major international instruments developed between 1996 and 2005 are largely derived from Webb’s article.

6.3.1 The Organization of American States Inter-American Convention Against Corruption (1996)

The Organization of American States Inter-American Convention Against Corruption (OAS Convention) was signed by 22 countries in 1996, including the US. Canada signed the convention in 1999 and as of August 1, 2021, 34 countries have ratified and deposited the Convention. The OAS Convention was the first binding international instrument on corruption. Venezuela led the group of Latin-American countries that lobbied for its creation. The United States was also a strong supporter of the Convention. The OAS Convention has a broader scope than the OECD Convention. Besides criminalizing the bribery of foreign officials, the OAS Convention requires that signatory states also criminalize the acceptance or solicitation of bribes. It therefore addresses both active bribery (the giving of a bribe) as well as passive bribery (the receiving of a bribe). Since the OAS Convention prohibits any bribe paid in relation to “any act or omission in the performance of that official’s public function” (Article VIII, OAS Convention), it is broader than the equivalent OECD Convention provision, which only criminalizes bribery when it relates to a business transaction or contract. In addition, the OAS Convention encourages signatory states to criminalize other acts of corruption not strictly covered under anti-bribery laws, such as the misuse of confidential information by public officials.

As Philippa Webb notes, the OAS Convention’s greatest weakness is its lack of a strong enforcement mechanism. In 2001 the Conference of State Parties established a peer review system to monitor implementation of the Convention. Under this system a Committee of Experts selects a state for review and then prepares a preliminary report on that country’s implementation of the Convention. This report is then made available for review by the subject state. The final report is then submitted to the Conference of States Parties and published. The Committee of Experts can only make recommendations for improvements and cannot recommend sanctions for states who fail to meet their international obligations under the Convention.

complex and expensive corruption cases within states. Further, as seen in the BAE case (described in more detail at Section 10), compliance with UNCAC and the OECD Convention also depends on political will in each ratifying state. For Rose-Ackerman and Palifka’s analysis of feasible options available to international bodies in fighting corruption see Chapter 14 of Rose-Ackerman & Palifka, *supra* note 273.

²⁹⁶ Philippa Webb, “The United Nations Convention Against Corruption” (2005) 8:1 J Intl Econ L 191, online: <<http://jiel.oxfordjournals.org/content/8/1/191.short>>.

6.3.2 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

As discussed in the excerpt from Martin's article, "The Development of International Bribery Law," the OECD Convention was a key development in the international fight against corruption. The Convention has now been ratified by 38 OECD member states and six non-member countries (Argentina, Brazil, Bulgaria, Peru, Russia, and South Africa).²⁹⁷ While the OECD Convention initially seemed to come with a more rigorous review process than the OAS Convention, Webb writes that the monitoring mechanism had "mixed results."²⁹⁸ Implementation of the OECD Convention is monitored by the OECD Working Group on Bribery, which uses a multi-phase peer-review system to evaluate and report on State Parties' implementation of the Convention. The review system has worked slowly at times and has not always been well-funded. In many countries the introduction of new anti-corruption legislation has not had a significant impact domestically. Webb concludes that "[d]espite its focused scope, widespread ratification, and well developed monitory system, it [the OECD Convention] is yet to produce significant changes on the ground."²⁹⁹ Some other commentators have a more positive view of the impacts of the OECD Convention. In my view, the OECD Convention's review system has prompted more government attention (and funding) for anti-corruption activities and, at least for Canada and the UK, has prompted some legislative and practice improvements. For example, in Canada, new federal money was directed towards enforcement of the *Corruption of Foreign Public Officials Act* (CFPOA) and amendments were made to the *Act* due to criticisms and suggestions from the OECD review. Pressure for creation of the new UK *Bribery Act, 2010* arose from many sources including the OECD review.

In accordance with Article 12 of the OECD Convention, a detailed monitoring program of each State Party is done under a framework developed and conducted by its Working Group on Bribery (see the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials*, Recommendations XIV and XV). The Working Group's Evaluation and Monitoring Reports for each country can be viewed on their website.³⁰⁰ Once the enforcement recommendations set out in the Country Evaluation Report are made public that country is under political and moral pressure to comply with the recommendations. A detailed review of the activities of the OECD Working Group on Bribery can be found in

²⁹⁷ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, S Treaty Doc No 105-43 (entered into force 15 February 1999), online: <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

²⁹⁸ Webb, *supra* note 296 at 197.

²⁹⁹ *Ibid* at 198.

³⁰⁰ "Country Reports on the Implementation of the OECD Anti-Bribery Convention" (last visited 26 August 2021), online: OECD <<http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>>.

their Annual Reports. The latest Annual Report available is the 2014 edition, but the OECD's website includes the country monitoring reports.³⁰¹

6.3.3 Council of Europe's Criminal and Civil Law Conventions (1999)

(i) Council of Europe's Criminal Law Convention on Corruption

This multilateral instrument—COE Criminal Law Convention on Corruption (COE Criminal Law Convention)—was adopted by the Council of Europe (COE) in 1999. The COE is a political organization composed of 47 European nations, including many from Central and Eastern Europe. The COE Criminal Law Convention may also be adopted by non-European states. Indeed, both Mexico and the United States are signatories to the Convention. The Convention applies to private sector and public sector bribery. The Convention requires that member states prohibit active and passive bribery, but does not require that signatory states criminalize other forms of corruption. The COE Criminal Law Convention also provides support mechanisms for parties fighting corruption, such as the requirement that signatory countries protect informants. In addition, although the facilitation of the tracing and seizing of assets is addressed, the Convention does not deal with the return of stolen assets exported out of the country of origin.

(ii) Council of Europe's Civil Law Convention on Corruption

The COE Civil Law Convention on Corruption (COE Civil Law Convention) is the first international instrument to address civil law legal remedies for those affected by corruption. Like the COE Criminal Law Convention, the COE Civil Law Convention may also be adopted by non-COE member states. As of May 2013, 33 states had ratified the Convention. The COE Civil Law Convention focuses on the act of bribery and requires that signatory states provide domestic legal avenues for victims of corruption to recover damages against those who participated in acts of corruption, as well as those who failed to take reasonable care to prevent corruption. The COE Civil Law Convention addresses the protection of whistleblowers and allows courts to declare a contract invalid if its validity was "undermined by an act of corruption" (Article 8). Although civil law mechanisms may allow victims of corruption to participate in the enforcement of anti-corruption laws on their own initiative, Webb notes that there are several disadvantages with addressing corruption through civil law means. Civil enforcement of anti-corruption laws could lead to a reduced ability of government agencies to control the overall anti-corruption strategy. As well, many victims of corruption may not have the means to take a civil claim to court.

³⁰¹ "OECD Working Group on Bribery in International Business Transactions" (last visited 26 August 2021), online: *OECD* <<https://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm>>. For further background on the development of the OECD Convention and a review of its application in member countries' domestic legislation, see Cindy Davids & Grant Schubert, "The Global Architecture of Foreign Bribery Control: Applying the OECD Bribery Convention" in Graycar & Smith, *supra* note 273, 319.

(iii) Group of States against Corruption

The Group of States against Corruption (GRECO) is a monitoring organization that was established in 1999 by the Council of Europe. It monitors compliance with the Council of Europe's anti-corruption standards. All states that are party to either the Criminal or Civil Law Conventions on Corruption are subject to GRECO's compliance monitoring. As of August 2021, GRECO includes 48 European States, as well as the US and Kazakhstan.

A team of experts nominated by GRECO members evaluates State Parties' implementation of the Council of Europe's anti-corruption conventions. Each evaluation round assesses member states on a different corruption subtopic. First, member states are evaluated and recommendations are issued on how the state could improve its compliance. Next, a compliance report that evaluates how well the country complied with the recommendations of the earlier evaluation report is completed. All evaluation and compliance reports are made public and are available on GRECO's website.³⁰²

6.3.4 Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (1997)

The Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (EU Convention) builds on the 1995 Convention on the Protection of the European Communities Financial Interests and the 1996 and 1997 Protocols. The EU Convention is focused on addressing bribery of officials. It is limited to acts that are harmful to the EU's economic interests and only addresses corruption occurring within EU member nations. Following the EU Convention, the EU addressed private sector corruption in the 1998 EU Joint Action Act. The 2003 Communication on a Comprehensive EU Policy against Corruption encouraged member states to act on their multilateral anti-corruption obligations; however, it was drafted in non-binding language.

For a recent, detailed analysis of European countries which have progressed and those that have regressed in the past 15 years, see Alina Mungiu-Pippidi, *The Good, the Bad and the Ugly: Controlling Corruption in the European Union*.³⁰³

6.3.5 African Union Convention on Preventing and Combating Corruption (2003)

The African Union Convention on Preventing and Combating Corruption (AU Convention) is a broadly conceived, regional anti-corruption agreement. It was adopted in 2003, potentially covering 55 states. It required 15 states to ratify before coming into force and this

³⁰² "Welcome to the GRECO Website" (last visited 26 August 2021), online: *Council of Europe Group of States against Corruption* <http://www.coe.int/t/dghl/monitoring/greco/default_en.asp>.

³⁰³ For a recent, detailed analysis of European countries which have progressed and those that have regressed in the past 15 years, see Alina Mungiu-Pippidi, "The Good, the Bad and the Ugly: Controlling Corruption in the European Union" (2013) European Research Centre for Anti-Corruption and State-Building Working Paper No 35, online (pdf): <<https://www.againstcorruption.eu/wp-content/uploads/2013/04/WP-35-The-good-the-bad-and-the-ugly.pdf>>.

was achieved in 2006. As of June 18, 2020, 49 states were signatories and 44 states had ratified and deposited the Convention.³⁰⁴ While the AU Convention is very comprehensive and is generally phrased in mandatory language, its enforcement mechanism relies on self-reporting. State Parties are required to report on their implementation of the AU Convention to an Advisory Board elected by the Executive Council. However, there is no obligation on the part of the Advisory Board to check the veracity of the country reports. Webb states that the lack of follow-up mechanisms to monitor enforcement may allow State Parties to avoid fully implementing the Convention. However, Indira Carr takes a more optimistic view of the AU Convention. She states that the “AU Convention is progressing in the right direction and with more harmonisation on the way through international and inter-regional agreements on various strengthening measures, such as codes of conduct for public officials and protection of informants, the war [against corruption] should ease in intensity.”³⁰⁵

6.3.6 United Nations Convention Against Corruption (2003)

The United Nations Convention Against Corruption (UNCAC) was adopted by the General Assembly in December 2003 and came into force in 2005 (with 140 state signatories). As of August 11, 2021, 188 states are parties to UNCAC.³⁰⁶ For a comprehensive overview of the articles of UNCAC, see Cecily Rose, Michael Kubiciel & Oliver Landwehr, eds., *United Nations Convention Against Corruption: A Commentary*.³⁰⁷

Webb notes that the negotiating process leading to UNCAC grew out of negotiation of the United Nations Convention Against Transnational Organized Crime (UNTOC, 2000). As part of its strategy to curb organized crime, UNTOC also requires that signatory states criminalize active and passive bribery relating to public officials. For a good description of the negotiations behind, and the content of, UNTOC, see Dimitri Vlassis, “The United

³⁰⁴ African Union, *List of Countries which have Signed, Ratified/Acceded to the African Union Convention on Preventing and Combating Corruption*, (African Union, 2020), online (pdf): <<https://au.int/sites/default/files/treaties/36382-sl-AFRICAN%20UNION%20CONVENTION%20ON%20PREVENTING%20AND%20COMBATING%20CORRUPTION.pdf>>.

³⁰⁵ Indira Carr, “Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?” (2007) J Bus L 111 at 136. For an in-depth review of the AU Convention and a comparison between it and other international and domestic instruments, see Thomas R Snider and Won Kidane, “Combating Corruption Through International Law in Africa: A Comparative Analysis” (2007) 40:3 Corn ILJ 691. For further information on corruption and anti-corruption strategies in Africa see: John Hatchard, *Combatting Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham; Northampton: Edward Elgar, 2014) and his recent book, *Combatting Money Laundering in Africa: Dealing with the Problem of PEPs* (Cheltenham; Northampton: Edward Elgar, 2020); “The African Development Bank Group” (last visited 3 September 2012), online: *African Development Bank Group* <<http://www.afdb.org>>; “The African Parliamentarians Network Against Corruption (APNAC)” (last visited 3 September 2021), online: *APNAC* <www.apnacafrica.org>; and “The African Union Advisory Board on Corruption” (AUABC) (last visited 3 September 2021), online: *AUABC* <www.auanticorruption.org/auac/en>.

³⁰⁶ “Signature and Ratification Status” (last updated 11 August 2021), online: *UNODC* <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

³⁰⁷ Rose, Kubiciel & Landwehr, *supra* note 220.

Nations Convention against Transnational Organized Crime and its Protocols: A New Era in International Cooperation.”³⁰⁸

By December 2000, however, the United Nations General Assembly decided that a more comprehensive international agreement on anti-corruption was needed. Over seven sessions, in 2002 and 2003, the Ad Hoc Committee for the Negotiation of the Convention against Corruption negotiated the text of the Convention. The draft version of UNCAC was adopted by the General Assembly in October 2003 and was officially signed at Merida, Mexico in December 2003.

The UNCAC is broader in scope than the OECD Convention and many of the earlier, regional anti-bribery agreements. As Webb notes, the Convention addresses the following three main anti-corruption strategies:

- *Prevention*: The provisions of Chapter II of UNCAC contain preventative measures which target both the public and private sectors. These non-mandatory provisions propose the establishment of anti-corruption organizations and lay out measures for preventing corruption in the judiciary and public procurement. Member states are encouraged to involve nongovernmental organizations (NGOs) in uncovering and stopping corruption. (See UNCAC Articles 11, 9 and 6).
- *Criminalization*: Chapter III of UNCAC requires member states to criminalize a wide array of corruption activities, including bribery, embezzlement of public funds, trading in influence, concealing corruption and money laundering related to corruption. Though these measures are mandatory, the UNCAC adds qualifying clauses allowing member states some flexibility in adopting criminal legislation “in accordance with fundamental principles of domestic law” or “to the greatest extent possible within [the state’s] domestic legal system” (See UNCAC Articles 23 and 31). Resistant government officials could potentially use these clauses to justify inaction.
- *International Cooperation*: Chapter IV mandates that member states cooperate in preventing, investigating and prosecuting corruption. Signatories of UNCAC agree to give mutual legal assistance through gathering and transferring evidence for court trials and extraditing accused offenders. Furthermore, member states must also support each other in tracing, freezing, seizing, and confiscating proceeds of corruption.³⁰⁹

The negotiation process was not without controversy. According to Webb, the topics that generated the most disagreement among negotiating parties were the provisions addressing asset recovery, private sector corruption, political corruption, and implementation of the Convention.

³⁰⁸ Dimitri Vlassis, “The United Nations Convention against Transnational Organized Crime and its Protocols: A New Era in International Cooperation” in *The Changing Face of International Criminal Law: Select Papers* (International Centre for Criminal Law Reform and Criminal Justice Policy: Vancouver, 2002) 75.

³⁰⁹ Webb, *supra* note 296 at 205–206.

Asset Recovery: A key aspect of UNCAC is the fact that it addresses the recovery of state assets exported from state coffers by corrupt officials. In this regard Webb states:

Asset recovery therefore became a sort of ‘litmus test’ for the success of the negotiating process as a whole. Although there were intense debates on how to reconcile the needs of the countries seeking the return of the assets with the legal and procedural safeguards of the countries whose assistance is needed, the representatives always emphasized its importance throughout the negotiations. The high priority of the issue was bolstered by the Security Council resolution deciding that all UN member states should take steps to freeze funds removed from Iraq by the Saddam Hussein or his senior officials and immediately transfer them to the Development Fund for Iraq, and take steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property that had been illegally removed. The African representative, in particular, believed that the words and spirit of this resolution should be incorporated into the UNCAC.

In the end, provisions on asset recovery formed an entire chapter of the UNCAC. The provisions have been hailed as ‘ground-breaking’. But this overstates their true impact. [footnotes omitted]³¹⁰

Asset Recovery is dealt with in detail in Chapter 5.

Private Sector: Considering the economic strength of many multinational corporations, private sector corruption was also considered during the UNCAC negotiating process. The European Union was strongly in favour of including the criminalization of private sector bribery during the UNCAC negotiations. The United States was opposed as it viewed this initiative as an undesirable constraint on private sector business dealing. The final version of UNCAC only includes non-binding articles relating to the criminalization of private sector bribery and embezzlement. UNCAC does, however, require that State Parties take steps to prevent private sector corruption. As well, the Convention requires State Parties to ensure that individuals and other legal entities that suffered damages as a result of corruption have the right to bring civil cases against those who are responsible. Due in part to the American business community’s fears of a plethora of lawsuits being brought against American companies by overseas litigants, each state has the ability to determine under what circumstances these types of claims will be permitted.

In regard to private-to-public sphere corruption, UNCAC is more comprehensive than the OECD Convention in several respects. UNCAC criminalizes the bribery of domestic officials as well as foreign officials. Also UNCAC mandates that State Parties prohibit bribes from being tax deductible; in comparison, this step is only a recommendation in the OECD Convention.

Financing of Political Parties: At one point in the negotiating process Austria, France, and the Netherlands proposed an article (Article 10) that mandated signatory countries adopt regulations aimed at addressing corruption and increasing transparency in elections and

³¹⁰ *Ibid* at 208–209.

campaign financing. The United States voiced strong opposition to the mandatory language of the article. This was a reversal from the American stance on the same issue during the OECD Convention negotiations 20 years earlier. Eventually a compromise was struck and the mandatory directions in Article 10 were replaced with Article 6, which only asks that states “consider” taking steps to enhance transparency in elections and campaign financing. As Webb writes, “[t]he Ad Hoc Committee ultimately had to recognize that campaign contributions are a crucial part of the election systems in many countries and it had to tread carefully in order to avoid the Convention coming into conflict with a core aspect of democratic politics.”³¹¹ Despite strong public concern on this issue, the UNCAC negotiating committee failed to reach agreement on a binding article addressing corruption in campaign financing.

Campaign finance laws are discussed in detail in Chapter 14.

Implementation, Enforcement, and Monitoring: Despite stronger proposals by several delegations, the final version of UNCAC was criticized for not establishing stronger monitoring mechanisms to ensure that signatory states comply with the Convention. UNCAC established a “Conference of State Parties,” meant to enable the exchange of information and cooperation among signatory states, but no formal review mechanism was agreed upon.

Article 63 of UNCAC leaves the issue of monitoring State Parties compliance to the Conference of State Parties who are directed to agree upon activities, procedures, and methods of work to achieve the Convention’s objectives, including (in Article 63(4)(e)) periodic review of the “implementation of the Convention by its State Parties.” UNCAC adopted a review mechanism during the 3rd Conference of State Parties in Doha in 2009 (Resolution 3/1). Under the review mechanism, each State Party is reviewed by two peer states under the coordination of the UNODC Secretariat. The terms of reference, guidelines and blueprint for UNCAC reviews can be found in the 2011 UNODC publication *Mechanisms for the Review of Implementation of the United Nations Convention against Corruption: Basic Documents*. In short, peer reviews of all states are to begin over a four-year time frame beginning in 2010, with a country’s year of review being determined by lottery.³¹² The two peer review countries are made up of one review country from the same region as the country being reviewed and another review country from a different region. The first step of the review is the completion and submission of a detailed self-assessment report by the country under review, followed by electronic communication; then (normally) a site visit and the writing of the review report (the executive summary is made public, but not the report itself). For more information on the progress of the UNCAC review mechanism, see the March 31, 2021 *Performance of the Mechanism for the Review of Implementation of the United*

³¹¹ *Ibid* at 218.

³¹² In the lottery, the US was selected for review in year one, the UK in year two and Canada in year three.

Nations Convention against Corruption.³¹³ Each evaluation cycle of the review mechanism lasts four years. The Progress Report from the seventh session of the Implementation Review Group, which occurred in April 2016, provides information on the first review cycle. At this seventh session, country pairings for the second cycle of reviews were drawn.³¹⁴ As of March 2021, the progress of the second cycle of reviews has run into delays and has now been extended until June 2024.³¹⁵

UNCAC has influenced global cooperation in fighting corruption. In “The United Nations Convention Against Corruption,” Jousten highlights UNCAC’s impact in three areas:

- as a global convention it has considerably expanded the geographical scope of cooperation,
- it provides common definitions of certain key offences, and requires (or, in some cases, at least encourages) States Parties to criminalize these acts, and
- it has standardized, and contributed to, the development of procedural forms of co-operation.³¹⁶

The UNODC developed materials for a university-level course on UNCAC. The course materials have been available on the UNODC’s webportal TRACK. As of August 1, 2021, UNODC is migrating the TRACK webportal to a new platform which should become publicly accessible in the near future. One can anticipate that the Education section of TRACK, which contains a Menu of Resources identifying 20 anti-corruption topics and providing a list of relevant academic articles, books, reports, etc. on each topic will be

³¹³ UNODC, *Performance of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption*, Implementation Review Group, 12th Sess, UN Doc CAC/COSP/IRG/2021/1 (2021) [Performance of the Mechanism for the Review of Implementation of UNCAC], online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/14-18June2021/CAC-COSP-IRG-2021-2/V2102111e.pdf>. The Implementation Review Group’s Canadian Progress Report can be found online (pdf): <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>. The United Kingdom’s Progress Report can be found online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V1901637e.pdf>. The United States’ Progress Report can be found online (pdf): <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1251970e.pdf>.

³¹⁴ UNODC, *Country Pairings for the Second Cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption*, Implementation Review Group, 7th Sess, UN Doc CAC/COSP/IRG/2016/CRP5 (2016), online (pdf):

https://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/2016_11_17_Country_pairings_SecondCycle.pdf.

³¹⁵ Performance of the Mechanism for the Review of Implementation of UNCAC, *supra* note 313 at 2.

³¹⁶ Matti Jousten, “The United Nations Convention Against Corruption” in Graycar & Smith, eds, *supra* note 273, 303.

included in some fashion.³¹⁷ For a discussion of the compliance challenges and impacts of UNCAC, see Ophelie Brunelle-Quaraishi, “Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis” and Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, “The International Legal Framework Against Corruption: Achievements and Challenges.”

6.4 Development and Revision of National Laws

6.4.1 US and UK

Following the multilateral agreements reached in the international forum, many countries have enacted or revised domestic laws to comply with their international convention obligations. As already noted, the United States’ *Foreign Corrupt Practices Act* (1977) was an influential example of a rigorous anti-corruption law long before the international instruments were established. The United Kingdom’s *Bribery Act* (2010) is the latest illustration of a strong and broad domestic anti-corruption law. Both the US and UK laws have broad extra-territorial provisions, and therefore foreign companies and persons conducting global businesses with a link to either country must comply with these two “domestic” laws. Both US and UK corruption laws will be examined throughout this book as illustrations of how other countries could comply with UNCAC and other anti-corruption conventions.

Unfortunately, compliance by State Parties with international anti-corruption obligations remains inconsistent. The 2020 TI report *Exporting Corruption Progress Report 2020: Assessing Enforcement of the OECD Convention* indicates that of the 47 leading global exporters, 43 of which are signatories to the OECD Convention, only four (Israel, Switzerland, the UK, and the US) are actively enforcing the OECD Convention, while nine countries have moderate enforcement, 15 others (including Canada) have limited enforcement, and 19 have little or no enforcement.³¹⁸ TI views the “Active Enforcement” ranking as a necessary step to effectively deterring companies and individuals from bribing foreign public officials.

6.4.2 Canada

Canadian corruption and bribery laws will be examined in detail in subsequent chapters. In short, the 1998 *Corruption of Foreign Public Officials Act* (CFPOA) was enacted in order to fulfill Canada’s obligations under the OECD Convention. The CFPOA makes it a criminal offence in Canada for Canadian corporations or individuals to bribe or offer a bribe to a foreign official in order to win business or gain an improper advantage. In 2013, the federal government amended the CFPOA in several ways to increase its scope and effectiveness.

³¹⁷ In addition, this book has been available on UNODC’s TRACK webportal. The UNODC Anti-Corruption University Module Series remains available at “University Module Series” (last visited 3 September 2021), online: UNODC <<https://www.unodc.org/e4j/en/tertiary/anti-corruption.html>>.

³¹⁸ Gillian Dell et al, *Exporting Corruption Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention*, (Berlin: TI, 2020) at 3, online (pdf): <https://images.transparencycdn.org/images/2020_Report_ExportingCorruptionFull_English.pdf>.

Canada currently meets its anti-corruption international obligations under UNCAC by a combination of provisions in its *Criminal Code* and *CFPOA*.

Enforcement of the *CFPOA* was nearly non-existent prior to 2008-2009 since there were no police resources specifically allocated to *CFPOA* enforcement.³¹⁹ Canada was criticized by many commentators and eventually by the OECD Working Group on Bribery for its non-enforcement of *CFPOA* provisions. As a consequence of this criticism, the federal government, in 2008, funded the creation of two new seven-person RCMP foreign corruption units, one located in Ottawa and the other in Calgary. These two units were disbanded in 2012 and the officers were assigned to the newly created “Sensitive and International Investigation Section,” which now includes the investigation of foreign corruption offences. It appears that this new national section spends very little resources on the investigation of *CFPOA* offences. Since the enactment of the *CFPOA*, there have been only eight convictions for foreign bribery, three of which are under appeal. It is unclear how many other cases are under active investigation, although that number is rumoured to be very small. TI currently ranks Canada’s enforcement of the OECD Convention as “Limited Enforcement” two levels below “Active Enforcement”³²⁰ which is considered the appropriate level.

7. POLITICAL, ECONOMIC, AND SOCIOLOGICAL PERSPECTIVES

7.1 Libertarians, Cultural Ethnographers, and Liberal Democrats

In “Corruption: Greed, Culture and the State,” Rose-Ackerman reviews how both free-market libertarians and cultural ethnographers have drawn on a distrust of the modern state to legitimize, excuse, and explain corruption.³²¹ She further argues that these views are overly simplistic and are at times internally inconsistent. Instead, she advocates for an approach to anti-corruption theory that acknowledges the importance of the modern state and seeks to build transparency and accountability in government institutions.

Libertarians

Rose-Ackerman describes the libertarian view of corruption “as a symptom of an intrusive, meddling state that systematically reins in the free market and undermines entrepreneurial activity and competition ... [Libertarians] argue that market actors who pay bribes to avoid complying with the rules, to lower tax bills, or to get favours, limit the harm that the state can do, and consequently enhance the benevolent operation of the free market as a locus of individual freedom.”³²² As an example, Rose-Ackerman submits that a libertarian would not

³¹⁹ In fact, in 2005, the RCMP appointed one commissioned officer to provide oversight of all RCMP anti-corruption programs. This was not an enforcement position. See Chapter 6, Section 3.3.3, under the heading “Canada.”

³²⁰ Dell et al, *supra* note 304.

³²¹ Susan Rose-Ackerman, “Corruption: Greed, Culture and the State” (2010) 120 Yale LJ 125, online: <<http://www.yalelawjournal.org/forum/corruption-greed-culture-and-the-state>>.

³²² *Ibid* at 126.

be concerned about, but would instead approve the illegality of using a bribe to get around a costly regulation.

Furthermore, Rose-Ackerman describes the extreme libertarian views of Geoffrey Brennan and James Buchanan, who perceive state taxation and regulation as equivalent to theft.³²³ Rose-Ackerman argues that Brennan and Buchanan's view would allow government officials to act in self-interest and extract private benefits, initiating the government's devolution into a kleptocratic monster. Critiquing this libertarian view, Rose-Ackerman maintains that although democracies are not completely efficient or perfect, they remain the best available way to reflect the will of the people. Indeed, as long as the government follows the rules of the constitution and respects human rights, Rose-Ackerman argues that using government inefficiency or bad laws as a way to justify bribery "trivializes and undermines democratic institutions."³²⁴

Ethnography

Rose-Ackerman also asserts that cultural anthropologists and ethnographers excuse the corrupt giving of gifts and favours, but do so by employing different justifications than libertarians. Cultural anthropologists, Rose-Ackerman argues, privilege traditions that emphasize payments, gifts or favours to friends and family over formal rules and laws. Indeed, Rose-Ackerman states, "scholars in this tradition often refuse to label transactions as corrupt if they are based on affective ties, or they claim that, even if formally illegal, the practices are socially acceptable, economically beneficial, and compensate for the imperfections of government and of electoral institutions."³²⁵

The author suggests that cultural anthropologists blame corruption on the mismatch of traditional practices with the development of impartial bureaucratic and democratic systems. Thus, if a society is transitioning from personal transactions to a formal set of rules and laws, cultural feelings of duty may clash with professional obligations and lead to corrupt acts. Additionally, Rose-Ackerman asserts that in some cultures, many ethnographers find the dominant conception of corruption a part of everyday life in a citizen's social interactions with the state. In instances where paying a fee to avoid taxes or bribing a judge for the "loss" of a key legal document, the social norms justify the behaviour, even though they mix economic motives and social practices. As examples of these anthropologic assertions, Rose-Ackerman relies on the work of JP Olivier de Sardan,³²⁶ Jennifer Hasty,³²⁷ and Daniel Smith³²⁸ who developed these themes in the African context. Furthermore, Rose-Ackerman submits that in Africa, many people recognize and criticize

³²³ Geoffrey Brennan & James M Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Indianapolis: Liberty Fund, 1980).

³²⁴ Rose-Ackerman, *supra* note 307 at 128.

³²⁵ *Ibid.*

³²⁶ JP Olivier de Sardan, "A Moral Economy of Corruption in Africa?" (1999) 37:1 J Modern Afr Stud at 25.

³²⁷ Jennifer Hasty, "The Pleasures of Corruption: Desire and Discipline in Ghanaian Political Culture" (2005) 20:1 Cultural Anthropology 271 at 273.

³²⁸ Daniel Jordan Smith, "Kinship and Corruption in Contemporary Nigeria" (2001) 66:3 Ethnos 344 at 344.

corruption even though “they themselves participate in networks that socially reproduce corruption.”³²⁹ The author also acknowledges a similar cultural norm of ambiguity regarding bribes to friends and family in China, termed *guanxi*, or as it translates, “social connections.”

While sympathetic to the position of those who find their social obligations conflict with their professional ones, Rose-Ackerman reasons that “deeply embedded and self-reinforcing, ... norms must change ... if a society is ever to build a legitimate democracy.”³³⁰ Rose-Ackerman further argues that the current condemnation of corruption by citizens leaves openings for potential reform.

In summary, Rose-Ackerman believes libertarians and ethnographers share very similar normative positions: “both stress the way payoffs to public officials permit nonstate institutions to flourish in spite of a set of formal rules that constrain private behaviour. However, each gives a different set of institutions priority – the market for one and social ties for the other.”³³¹ In addition, Rose-Ackerman argues both groups perceive corruption as a response to a dysfunctional reality.

Grand Corruption

In instances of grand corruption, those at the top of the state hierarchy participate in corrupt acts in return for funds. The problem with this, Rose-Ackerman argues, is that grand corruption leads to distortions in the quality and quantity of government decisions, diverts funds to public officials’ private accounts, and creates unfair electoral advantages. Multinational firms sometimes initiate grand corruption and, as Rose-Ackerman contends, invoke cultural norms as their justification for giving bribes to public officials. For example, Rose-Ackerman cites the 2006 international arbitration dispute where a firm paid a two-million-dollar bribe to the President of Kenya and tried to argue the payment was to satisfy the local custom of *harambee*. The Kenyan government, under new leadership, argued that there was no valid contract because of the bribe; the arbitration tribunal agreed.³³²

Rose-Ackerman analyzes multiple justifications she believes others use to excuse grand corruption.³³³ First, multinational firms argue that presenting bribes is simply an attempt to be culturally sensitive. The author points out this excuse is invalid—the unfavourable terms of the contract, obtained through the bribe, negatively affect the nation’s citizens. Second, Rose-Ackerman critiques the argument used by high-ranking officials that a bribe is simply a tribute to their prestigious status, in line with cultural traditions. This argument conflicts with established tradition in many societies, where bribes go from higher-status to lower-status individuals. Rose-Ackerman claims that high-ranking officials following tradition would be insulted by these bribes and reject them. Third, Rose-Ackerman states culturalists

³²⁹ Rose-Ackerman, *supra* note 307 at 130.

³³⁰ *Ibid* at 130.

³³¹ *Ibid* at 131.

³³² *Ibid* at 132, citing *World Duty Free Co v Republic of Kenya* (2007), 46 ILM 339 at 190-191 (International Centre for Settlement of Investment Disputes).

³³³ For more on grand corruption and an economic analysis on how to reduce the incentives and increase its cost, see Chapters 3, 4 and 5 of Rose-Ackerman & Palifka, *supra* note 273.

argue that grand corruption is imported from wealthy, capitalist countries where businesses have profit-maximization as their goal. In Rose-Ackerman's assessment, this argument is too simple: both parties, including the political leaders, must agree to make a corrupt deal; some are willing to use the excuse of culture to justify self-gain. Thus, the author asserts that "one needs to be cautious in accepting at face value assertions that seemingly corrupt transactions reflect entrenched cultural practices acceptable to most people."³³⁴

Democratic Legitimacy and Control

Rose-Ackerman asserts that democratic states exercise coercive power in decision-making. This may have a greater cost on some individuals over others, but remains acceptable as long as the state publicly justifies its exercise of power. Broadly speaking, the author believes a properly functioning democracy is a legitimate way to organize society, but argues that when elected officials or bureaucrats engage in self-interested behaviour such as corruption, it undermines the state's claim to legitimacy. Rose-Ackerman acknowledges that it may be difficult to separate corrupt dealings from local practices in situations where public power is bound up with paternalistic obligations. Nevertheless, the author argues that if corruption is allowed in government, state agents will likely rewrite rules to increase their self-gain, creating a feedback loop that weakens the government's legitimacy. Furthermore, she notes that "tensions between the democratic welfare state and the private market and between that state and a country's traditional cultural practices are all but inevitable."³³⁵

Therefore, Rose-Ackerman suggests that anti-corruption policy can take three paths: first, accepting cultural norms and channelling them into less destructive paths; second, bypassing cultural norms by substituting institutions that require other skills and values; or third, transforming these cultural norms. The author cautions that aggressive anti-corruption approaches may destroy the goodwill and loyalty of citizens. Acknowledging that there is no easy solution to the critiques of anti-corruption efforts, Rose-Ackerman provides eight potential areas of reform.

1. Simple Transparency is Necessary
2. External Oversight of Government Activity is Essential
3. Transparent and Competitive Processes for Large-Scale Procurement Should Exist
4. The State Should Enforce Bribery Laws Against Major Offenders both Inside and Outside of Government
5. Creation of a Complaint Mechanism Process to Report Bribes
6. Reforms Should Be Made to Improve Government Function and Reduce Corruption
7. The Working Conditions of Civil Servants and the Judiciary Should be Improved
8. Electoral Law May Need Reform

³³⁴ Rose-Ackerman, *supra* note 307 at 134.

³³⁵ *Ibid* at 136.

In conclusion, Rose-Ackerman acknowledges that while international treaties and civil society initiatives aimed at curbing global corruption are a step in the right direction, their effects do not, however, have the same “bite as hard law” and only complement much-needed domestic reform. In addition, Rose-Ackerman urges anti-corruption advocates and others to move away from simplistic claims that corruption is inevitable because of dysfunctional government.³³⁶ Instead, realistic domestic reforms, such as increasing the effectiveness of public services and ensuring conflicts are resolved fairly can be implemented to reduce corruption.³³⁷

7.2 The Three Authority Systems: Traditional, Patrimonial, and Rational-Legal

In “Corruption in the Broad Sweep of History,” Marcus Felson uses Max Weber’s three categories of historical authority systems to conceptualize corruption and place it within its political and economic context. The post-colonial critique that anti-corruption and human rights efforts and literature focus overly on developing countries has been discussed earlier in this chapter. Felson’s article provides a counterpoint to this narrative: he argues that the modern rational-legal authority system provides the greatest opportunity for corruption to transpire. In doing so, he casts a spotlight, in the following excerpt, on the different forms of institutional corruption that fester in Western states.³³⁸

BEGINNING OF EXCERPT

Corruption is a product of the interplay between (a) primary human imperatives and (b) an economic and social system trying to control and channel those imperatives. Primary human imperatives include both looking after one’s personal interests and meeting social commitments to friends and relatives. A strong tension is inherent between these primary human imperatives and the larger economic and social system. That tension is strongest with the modern form of economic organization. Hence corruption, despite its ancient presence, becomes especially relevant in a modern world. Although corruption becomes especially an issue as developing nations move towards a modern world, we should not assume that the tension will go away once they are developed.

...

[Max] Weber synthesized information about the broad sweep of economic and social history with three authority systems: (a) traditional, (b) patrimonial, and (c) rational-legal. This chapter explains his general categories, then shows why they help us to understand and conceptualize corruption.

³³⁶ *Ibid* at 140.

³³⁷ For further exploration of the relationship between culture and corruption, see Chapter 7 of Rose-Ackerman & Palifka, *supra* note 273.

³³⁸ Marcus Felson, “Corruption in the Broad Sweep of History” in Graycar & Smith, *supra* note 273, 12.

Within a traditional system, individuals are constrained by the rules and mores of society, but those constraints do not stand between primary human imperatives and productivity. Thus a traditional hunting and gathering society follows the teachings of the past and the social ties of kinship, whether or not these lead to greater efficiency. Traditional systems often apply in agrarian societies with small village life, and are not oriented towards a modern society. However, traditional systems may persist into the modern era. A prime example of a traditional system is the interplay of the Hindu religion and the economy in India. Each economic role is largely defined by caste and hence by tradition, within minimal economic flexibility and little regard to efficiency. Within a traditional system, many economic behaviours that we might regard as corrupt from an outside viewpoint are actually part of the rules. Thus assigning jobs by caste and village is intrinsic to the way of life, and should not be viewed as corrupt behavior as a matter of personal deviance, except when those collective obligations are circumvented.

The patrimonial system is very distinct from the traditional system because of its reliance on personal rule. In this system the ruler does not distinguish between personal and public life, treating state resources and decisions as his personal affair. The agents of the ruler act in his name and on his behalf. It is still possible for those agents to be corrupt only in the sense that they cheat the ruler of his due. If the ruler's agents mistreat the citizens, they are acting within the rules of the system—so long as they send the proceeds back to the ruler and do not take more than their allotted share. This is quite evident in the history of tax farmers whose job was to demand tribute and payments from the provinces. They would be perceived as corrupt to us today, but they were not corrupt in terms of their system, unless they hid the proceeds from the ruler in their own selfish interest. Examples of patrimony range from Roman emperors to President Ferdinand Marcos in the Philippines and Colonel Khadaffi in Libya—reflecting extension of authority beyond a local area.

...

The rational-legal system of economic and social organization has an entirely different set of expectations from the traditional and patrimonial systems.... Under this system, all persons follow rules and fit into formal roles that are separate from the personal, family, and friendship interests of their incumbents. The rulers and role incumbents are substitutable, so that a formal organization persists over time, pursuing goals beyond the individual. This impersonality includes hiring based on competence and certification, and promotion based on ability and productivity. The role incumbents must follow rules, and must be oriented towards goal achievement beyond themselves. They are also supposed to treat each client equally, according to the rules, ignoring personal ties and predilections. Thus modern life conflicts fundamentally with primary human imperatives. Bureaucracy in Weber's terms is like a machine, since it separates personal interests (including family and friend commitments) from interests, facilitating the latter. Yet this form of economic and social organization only emerged in the past 200 years or less in Europe, and in most of the world did not begin to spread until after 1950. In many parts of the world, the rational-legal form is only beginning to emerge

...

Of course, Weber's concept of rational formal organization is an ideal type.... The corruption potential of a rational-legal system is dramatically greater mainly because that system conflicts with basic human tendencies. If human beings are both selfish and social, then the modern form conflicts with each. It conflicts with the selfish tendencies because each individual has something to gain from evading less pleasant role assignments or taking resources beyond entitlement. It conflicts with social tendencies because each individual feels commitment to friends, family and those with less social distance and wants to help them more than strangers. Hence treating everybody alike under the rules is unnatural for real people.

Given its conflict with human selfishness and human sociability, the rational-legal system should have died an early death. Yet it survives and spreads for a simple reason: this strange and hardly human form of social and economic organization is extremely productive in material terms. It makes more cars. It processes more customers and clients. It shortens lines and puts a chicken in every pot. And so the least human of social and economic systems is also the most productive. Thus our selfish and social interests are torn between the immediate gains from violating the rules and the more general gains from following them. The best individual solution is to break the rules yourself but get everybody else to follow them, yielding a productive society as a whole that you can then exploit. However, if too many people do that then the productivity of the whole system declines and the rational-legal system becomes a figment of the imagination.

Imaginary rational-legal systems are all too common. In a way the real lesson of the 2000 Presidential election and the case of *Gore vs Bush* in Florida is the corruption and mismanagement of state and local governments in the United States. In Weber's terms, each occupational role is assigned to a specialist, with overlapping roles minimized. Those familiar with corruption issues will immediately recognize this as a flaw, for the lack of overlap makes it easier for one person to corrupt the system and avoid discovery. In contrast, overlapping makes it possible for someone else to check, or more generally for the people to check one another.

...

The theory of checks and balances may be the essential general theory of corruption control. In both government and business, checks and balances are employed to protect responsible decisions and actions. Rival political parties, parliamentary question periods, a free press, regulatory agencies, free competition in the marketplace, overlapping roles, auditors and accountants—each of these is a special example of the general rule that checks and balances are needed to prevent personal and social interests from impairing efficiency and productivity.

...

In fighting corruption, we must always remember what we are asking of people: to set aside personal interest and personal ties and to follow rules for the greater *impersonal*

good. But we must also understand that we can never completely win the war against corruption, nor can we give it up. We can never win it because primary human imperatives always outweigh impersonal goals. We can never give up the struggle because our modern prosperity depends on containing these personal and social goals while on the job. But if we don't contain it, it grows and takes over. Like housekeeping, no vacuum sweeper works permanently but the failure to vacuum lets a home get dirtier and dirtier.

Yet corruption cannot be controlled by assuming that people can be trained in ethics alone, since it is impossible to talk people out of being people. But it is possible to train people to supervise one another and hence to provide a system of checks and balances. Such a system works best when criminalization and punishment work only at the extreme, when the system operates on a normal basis without getting to that point. Control depends on designing more secure systems, efficient supervision, and effective checks and balances. As technology takes new forms, it brings new opportunities for corruption and hence demands new checking and balancing. With the march of technology, more and more value is intangible—contained in electronic data that are not easily watched with the naked eye. But systems can be designed to keep track of electronic data, too, thus interfering with the opportunities for corruption. As society becomes more complex in technology, corrupt practices can more easily escape notice, at least for a while. But in time we learn to use technology to reduce the complexity of supervision and thence to create methods for managing, checking, and balancing so that formal organization keeps personal and social needs under a reasonable degree of containment. An organization must find simplicity and accountability to avoid corruption. That means overcoming organizational and technical complexity with new forms of simple checks and balances. When that is achieved, modern society can achieve simple monitoring while requiring complex conspiring, and corruption will diminish. Developing nations face the same principles but at an earlier stage, with formal organization replacing family and patrimonial systems in places not yet ready for that to happen. But, of course, no place is fully ready to give up its personal and social tendencies, and so the work of reducing corruption is never complete.

END OF EXCERPT

Empirical data reflects Felson's contention that the rational-legal system holds the greatest potential for corruption. In their article "Democracy and Corruption: a Complex Relationship," Shrabani Saha et al. use sophisticated econometric models to show the rise in corruption in countries that have transitioned from autocratic regimes to electoral democracies (the ultimate rational-legal system).³³⁹ The authors conclude that electoral democracy and political rights alone are insufficient to reduce corruption; in fact, electoral democracy on its own aggravates widespread corruption because there are fewer checks and balances against corruption in an electoral democracy than in an autocratic regime. Effective democratic institutions, such as an independent judiciary, a free press, an economic system promoting the rule of law and the distribution of social benefits, and respect for civil rights

³³⁹ Shrabani Saha et al, "Democracy and Corruption: A Complex Relationship" (2014) 61:3 Crime L & Soc Change 287.

are crucial to reducing corruption. These institutions deter corruption by increasing the probability that corrupt acts will be detected and punished.

For a counterpoint to “economistic” understandings of corruption, see Barry Hindess, “Good Government and Corruption.”³⁴⁰ Hindess argues that a narrow focus on economic corruption obscures other, more general forms of corruption in government. By ignoring other forms of corruption, we fail to see the damaging effects of party politics, police corruption, and other insidious problems of political life in western democracies.

For an analysis of the institutionalization of unethical, yet technically legal, *quid pro quos* in professional environments and how this affects the independence of politics and professions, see Garry Gray’s article on, “Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour.”³⁴¹

7.3 Institutional Corruption: A Sociological Perspective

The following brief commentary, prepared for this book, provides a sociological perspective on institutional corruption.

A Sociological Perspective on Institutional Corruption

by Garry Gray³⁴²

As conventional wisdom would have it, corruption and illegality go hand in hand. Tacitus’ famed words, *Corruptissima re publica plurimae leges*, often translated as ‘the more corrupt the state, the more numerous the laws,’ evokes multiple meanings, but one rendering elucidates on the expansiveness of corruption beyond the law.³⁴³ Bribery and other direct *quid pro quo* conflict of interest exchanges involving public officials and fiduciaries are well recognized as indictable offences in many countries, but corruption also operates on an invisible level, embedded within the social norms and institutional practices of professional environments. This form of corruption can be referred to as institutional corruption. Conceptually it requires that we go beyond the focus on illegal behaviour to also include unethical and professional activities that violate public trust. Institutional corruption therefore requires a shift in focus towards examining “influences that implicitly or purposively serve to distort the *independence* of a professional in a position of public trust.”³⁴⁴

³⁴⁰ Barry Hindess, “Good Government and Corruption” in Peter Larmour & Nick Wolanin, eds, *Corruption and Anti-Corruption* (Canberra: Asia Pacific Press, 2001) 1.

³⁴¹ Gray, *supra* note 271.

³⁴² Associate Professor of Sociology, University of Victoria.

³⁴³ George Long, *The Annals of Tacitus with a Commentary by the Rev Percival Frost*, MA (London: Whittaker & Co, 1872).

³⁴⁴ Gray, *supra* note 271.

In summarizing an account from a confidential interview that I conducted with a consultant for a multilateral development institution who was also a tenured professor, we can observe distinctions between traditional corruption and institutional corruption.³⁴⁵ Over more than a decade, Anthony had taken on consulting assignments that required him to evaluate projects being considered for grant funding from a multilateral donor.³⁴⁶ On more than one occasion while abroad on assignment, he had been offered bribes in return for writing favorable reports. He said these bribes could involve very large sums of money. In one case the bribe was perhaps five percent of the grant total, amounting to more than double the annual salary that he was earning as a tenured professor. Anthony acknowledged that these overtly illegal and at times threatening experiences fit the traditional conceptualization of corruption.

Following this discussion I asked Anthony if he had experienced other kinds of conflicts, namely situations that caused him to wrestle with what to do in his work for the multilateral donor. Anthony recounted a situation where his research findings and recommendations in a commissioned report did not fit with the ideological perspective held by his manager at the multilateral development institution. After some careful consideration he felt he could not compromise, because of the impact the alternative could potentially have for the country in question. Anthony recalled having a lengthy conversation over the phone with that manager and being asked to change the report. He refused, and acknowledged in that phone call that his contract was coming up for renewal and that he knew this disagreement could affect it. He saw this possible consequence as an expected, even logical outcome given the norms of consulting. There was nothing illegal about the situation, but the ‘corrupting’ effect of the earlier bribery examples and the threat of reduced hours is the same: both were influences intended to alter the outcomes of Anthony’s reports.

Looking back on that exchange, Anthony is convinced that he would have been offered more consulting hours in the subsequent year had he submitted a report that fit with his manager’s desired outcome. He also questioned what he would have done had he not held a tenured professorship, and if consulting had been his primary mode of employment. He was convinced that his professorship had structurally enabled him to stand behind his report. In this case, he was able to resist institutional corruption, but acknowledges that he still felt pressured to ‘go along, to get along.’

The concept of public trust is an important element of institutional corruption theory. If Anthony was not a university professor, but instead was a full-time consultant who depended on the availability of future consulting opportunities, should we be less trusting of Anthony’s ability to remain independent? Would the possibility of missing out on future consulting opportunities lead to subtle forms of dependency within Anthony’s social and professional networks? If so, then what other subtle improper influences may

³⁴⁵ This interview was conducted as part of a larger project on behavioural ethics among professionals in positions of public trust and funded by the Edmond J Safra Center for Ethics at Harvard University.

³⁴⁶ The name Anthony is a pseudonym.

exist in professional environments that could compromise the *independence* of professionals in positions of public trust?

From Bribery to Political Corruption

While the United States, since the enactment of the *FCPA* in 1977, has been a driving force behind global attempts to regulate quid-pro-quo corruption and in particular, bribery, (c.f., the OECD Anti-Bribery Convention in 1999 and the UNCAC in 2005), it has been reluctant to impose similar regulations on political corruption. During the UNCAC negotiations, the United States resisted proposals from Austria, France, and the Netherlands to impose mandatory regulations that would address issues of corruption in campaign finance. While campaign finance reform, and the issue of money in politics, is a contentious policy issue in the United States³⁴⁷ it also provides a good example of the value of an institutional corruption approach.³⁴⁸

Political Corruption: The Case of Jack Abramoff

Prior to being convicted of fraud and being sent to prison, Jack Abramoff was one of the most influential lobbyists in the United States.³⁴⁹ Upon release from prison, Abramoff now spends his time exposing the role that institutional corruption plays in political decision-making and campaign financing. During one public interview, Abramoff told the interviewer the following: “We know a bribe is when you show up with a stack of cash and say, ‘Here’s \$10,000 in cash, and can you do this for me?’ But if I show up with 10 \$1,000 campaign contributions and say the same thing, that’s not a bribe in Washington. Outside of Washington, everybody gets this... but inside Washington, that’s the way it’s done... We have institutionalized corruption in Washington. It’s perfectly accepted, and it’s acceptable to virtually everybody, and that’s where things need to change.”³⁵⁰

The role of money in politics, in particular through campaign finances, is attracting increased international attention. For instance, in response to major corruption scandals in Brazil, the Supreme Court of Brazil declared on September 17, 2015, that corporate donations to election campaigns are unconstitutional.³⁵¹ And, in the United States, several

³⁴⁷ Jennifer Heerwig & Katherine Shaw, “Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure” (2014) 102 Geo LJ 1443; Garry C Gray & Michael D Jones, “A Qualitative Narrative Policy Framework: Examining the Policy Narratives of US Campaign Finance Regulatory Reform” (Paper delivered at the American Sociological Association Meetings, Chicago, August 24, 2015) (2016) 31:3 Pub Policy & Admin 193.

³⁴⁸ Lawrence Lessig, *Republic Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Twelve, 2011).

³⁴⁹ “Jack Abramoff Makes Plea Deal” (3 January 2006), online (transcript): NPR <<https://www.npr.org/transcripts/5080995?ft=nprml&f=5080995>>.

³⁵⁰ PBS, “Jack Abramoff Interview” (4 April 2012), online: <<http://www.pbs.org/wnet/tavisismiley/interviews/former-lobbyist-jack-abramoff/>> [note: the interview does not to appear to be available online as of 3 September 2021].

³⁵¹ Paul Kiernan, “Brazil Supreme Court Bans Corporate Donations to Politicians and Parties”, *The Wall Street Journal* (18 September 2015), online: <<http://www.wsj.com/articles/brazil-supreme-court-bans-corporate-donations-to-politicians-and-parties-1442616836>>.

US politicians seeking the party nomination for leader of the Democratic Party, including Hillary Clinton, Bernie Sanders, and Lawrence Lessig, campaigned for the November 2016 election with campaign finance reform as a major component of their election platform. There is a growing narrative developing in the United States that politicians are becoming less dependent upon the people they represent and more dependent on those who support their campaign finance initiatives.

However, rather than leading to direct quid-pro-quo corruption, the growing dependency on funders of campaigns in the United States is contributing to more subtle forms of institutionalized corruption through relational forms of dependency corruption. By creating situations where politicians become dependent on funders, it is suggested that integrity and independence are compromised. In turn, this leads to situations where self-censoring behaviour (such as deciding which policies or amendments to pursue, or alternatively, vote against) can begin to feel normal and perhaps even justified among politicians in positions of public trust. As Lawrence Lessig notes, “knowing that there are members of Congress dependent on campaign cash, private interests exploit that dependency, by seeking special benefits from the governments (‘rents’) and returning the favor ever so indirectly with campaign contributions. And knowing that they are so dependent upon private support, members of Congress will work to keep their fingers in as much of private life as possible... [And] because this is ‘just the way things are done’, no one needs to feel guilty, or evil in this system.”³⁵²

Given that the corruption described here is institutional in nature and often rationalized as a normal part of politics, a sociological account of institutional corruption is timely. For instance, an analysis of the insider accounts of institutional corruption provided by Jack Abramoff after he was released from prison reveals the mechanics of how the independence of American politicians can be exploited by lobbyists. In particular, through various techniques such as campaign finance contributions, legal loopholes, and the manipulation of social networks that result in improper influences that while often legal, may lead to corrupting outcomes.

Take for instance, the revolving door metaphor, where professionals holding jobs in congressional offices move into lobbying jobs and vice versa. Abramoff shows how this can contribute to institutionalized forms of corruption given the subtle and often hidden financial incentives that exist for public representatives.³⁵³ According to Abramoff, industry lobbyists are well aware of the importance of social relationships and social networks in a revolving door system. While there are cooling-off regulations in some countries that attempt to limit government employees from immediately going through the revolving door to a lobbying job, there still remains various corrupt ways that these regulations can be skirted. According to Abramoff, lobbyists are still able to informally capture individual members of the United States Congress, as well as their staff, even

³⁵² Lessig, *supra* note 349 at 237-8.

³⁵³ Jordi Blanes, Mirko Draca & Christian Fons-Rosen, “Revolving Door Lobbyists” (2010) London School of Economics and Political Science Centre for Economic Performance Discussion Paper No 993.

without offering a formal contract of employment. Improper influences can be quite insidious Abramoff states:

As I started hiring staff, particularly chiefs of staff [to members of Congress], I would say 'hey look when do you want to leave the hill?' 'Well, I don't want to leave for two years.' 'Ok, in two years I'll hire you.' I hired them right then. The minute they knew they were coming to work for me their whole job changed. They are human beings. If you have a job and you know you are going somewhere else you are at least going to be thinking about the next job. You don't want that business to go away.... When I tell people this ... they don't understand that their staff becomes my staffer. For two years that staffer is not only my staffer ... but is better than my staffer. Because my staffer can't find the things that person is going to find and look out for our interests more than we could ... one of the real pernicious and corrupt parts of the system, and again completely legal, and unknown entirely.³⁵⁴

According to Abramoff, he cultivated these kinds of improper influences in close to 100 of the 435 United States congressional offices. He also noted that staffers were "perfect targets for revolving-door techniques."³⁵⁵ The impact of the revolving door is that it contributes to dependencies between lobbyists and government officials (dependence corruption) whereby "public officials might be more likely to insert legal content known as riders that are favourable to lobbying clients into bills that are to be voted on by members of Congress."³⁵⁶ As Abramoff notes:

a lobbyist trying to enact his client's wishes needs to get his amendment onto a bill likely to pass both the House and the Senate, to then be signed by the president. No bill is more likely to pass than a reform bill ... so smart lobbyists always keep an eye out for reform bills. It's ironic, if not horrific, that this is the case. The very bills designed to limit corruption and improve our system of government sometimes serve as vehicles for special interests.³⁵⁷

According to Abramoff, the technique of inserting corrupt riders into a reform bill is a common practice, one that is intertwined with problems of political corruption embedded in the revolving door between government and industry. While reform efforts attempt to prevent political corruption, in particular, gifts that represent an illegal and overt attempt to buy influence, they do not always capture or prevent the subtler forms of institutional corruption. Abramoff's insider accounts reveal that political contributions to campaigns "are a significant form of indirect gifting that can accomplish the same things [as quid-

³⁵⁴ Gray, *supra* note 271 at 543.

³⁵⁵ *Ibid* at 543.

³⁵⁶ *Ibid* at 544.

³⁵⁷ *Ibid* at 544.

pro-quo corruption] but without the legal ramifications.”³⁵⁸ As Abramoff commented in an interview:

You can’t take a congressman to lunch for \$25 and buy him a hamburger or a steak or something like that. But you can take him to a fundraising lunch and not only buy him that steak but give him \$25,000 extra and call it a fundraiser. And you have all the same access and all the same interaction with that congressman.³⁵⁹

The insider accounts of structured and systematic corruption provided by Jack Abramoff illustrate the value of an institutional corruption approach to traditional studies of political corruption.³⁶⁰

Conclusion

Corruption, especially corruption that is specialized and intricately woven beyond the public eye, is often legal despite its potential for harm. Far too often, the general public has no choice but to trust that professionals will both recognize and resist corrupting influences when they arise in their professional environments. However, rather than simply trust that each individual professional will “do the right thing” and maintain integrity in the face of improper and potentially corrupting influences, institutional corruption theory offers an alternative. Examine institutional practices, structures, and relationships that bear on the trustworthiness and independence of public officials and professionals, and corrupting systems can be exposed, understood, and eventually mitigated.

8. TWO SIGNIFICANT DEVELOPMENTS IN CORPORATE GOVERNANCE

Corporate social responsibility (CSR) and environmental, social, and governance (ESG) factors have become increasingly prominent in the discourse on corporate governance. The former consists of a theoretical movement originating in mid-twentieth-century America, concerning businesses’ moral responsibilities to society. The latter is a recent movement which uses ESG factors to inform investment strategies. In “Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility,” Dan Heiss discusses the integration of anti-corruption measures and CSR, stating “over the last decade, combating corruption has taken a place alongside human rights, labour rights, and

³⁵⁸ *Ibid* at 542.

³⁵⁹ *Ibid* at 542.

³⁶⁰ For a full account of both the Jack Abramoff case and other techniques of institutional corruption, see Gray, *supra* note 271.

environmental protection as one of the major issues in corporate social responsibility (CSR).³⁶¹ Heiss further argues:

[T]o be truly effective in reducing the level of bribery in international business, the FCPA must work to encourage corporations to be socially responsible. Thus, to reduce corruption, corporations should be encouraged to think about not just what they should *not* do, but also what they *can* do. That is, corporations need to consider what they can do to work with other businesses, home and host country governments, local communities, and civil society organizations to reduce the levels of corruption in any particular country. To assist in this process, ... the enforcement of the FCPA should be structured to support the various actors and major initiatives in the CSR field that combat corruption.³⁶²

8.1 Corporate Social Responsibility

8.1.1 What is Corporate Social Responsibility?

Corporate social responsibility (CSR) is a broad and evolving concept.³⁶³ Its content is shaped by shifting societal expectations which are dependent in part on the industrial context in which it operates and the people who are impacted by its behaviour. Industry Canada, a government department, defines CSR as “a company’s environmental, social and economic performance and the impacts of the company on its internal and external stakeholders.”³⁶⁴ The UK Government describes CSR as “the voluntary actions that businesses can take over and above legal requirements to manage and enhance economic, environmental and societal impacts.”³⁶⁵ Though definitions of CSR vary, international sources reflect consensus on the following characteristics:

- CSR involves obligations apart from the formal requirements of law, and is instead a reflection of normative standards;
- CSR involves companies demonstrating varying degrees of commitment to concepts such as corporate citizenship, sustainable development, and environmental sustainability; and,
- governments, citizens, and investors now generally expect companies to adopt some form of internal CSR business strategy.³⁶⁶

³⁶¹ Dan Heiss, “Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility” (2012) 73 Ohio St LJ 1121 at 1122.

³⁶² *Ibid.*

³⁶³ Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis Canada Inc, 2009) at 5.

³⁶⁴ Industry Canada, “Governance for Sustainability” (last updated 16 September 2011), online: *Government of Canada* <https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00577.html>.

³⁶⁵ United Kingdom, Department for Business Innovation & Skills, *Good for Business & Society: Government Response to Call for Views on Corporate Responsibility* (April 2014) at 3.

³⁶⁶ Kerr, Janda & Pitts, *supra* note 364 at 6–8.

While CSR is dynamic and still developing, it is clear that the global corporate community has adopted CSR as an important item on the business agenda.³⁶⁷

8.1.2 How Did CSR Develop?

Archie B. Carroll, in “Corporate Social Responsibility: Evolution of a Definitional Construct,” suggests that our contemporary notion of CSR is the product of an American school of thought dating to the mid-twentieth century, perhaps originating with Howard R. Bowen’s 1953 seminal book *Social Responsibilities of the Businessman*.³⁶⁸ Bowen asks the fundamental question, “What responsibilities to society may businessmen [businesspersons] reasonably be expected to assume?”³⁶⁹ Businesspersons have a responsibility, Carroll suggests, to act in accordance with society’s values and best interests. Carroll notes that the Committee for Economic Development (CED), which published *Social Responsibilities of Business Corporations* in 1971, asserted that society expected businesses to assume greater moral responsibility and “contribute to the quality of American life.”³⁷⁰ In 1979, Carroll outlined three dimensions of CSR: corporate responsibilities, social issues of business, and corporate actions.³⁷¹ Otherwise put, corporate responsibilities lead corporations to respond to certain social issues, as determined by societal and corporate values and priorities.³⁷² While Carroll’s concept of CSR has evolved in subsequent decades, it remains foundational for contemporary CSR theory.³⁷³ Today, CSR is one of many related concepts that influence the role of businesses in society.³⁷⁴ These include corporate social performance (CSP), corporate citizenship, inclusive business, social entrepreneurship, sustainable development, and ESG.

There are also critics and skeptics of the notion of corporate social responsibility: for example, in Dustin Gumpinger’s article “Corporate Social Responsibility, Social Justice, and the Politics of Difference: Towards a Participatory Model of the Corporation,” the author states:

The problem is that the notion of corporate social responsibility, under the current corporate law framework, is an oxymoron. The corporation’s legal mandate is to pursue its own best interests and thus to maximize the wealth of its shareholders. Hence, corporate social responsibility is illegal and impossible to the extent that it undermines a company’s bottom line. Acting

³⁶⁷ *Ibid* at 33–34.

³⁶⁸ Archie B Carroll, “Corporate Social Responsibility: Evolution of a Definitional Construct” (1999) 38 Bus & Soc 269.

³⁶⁹ *Ibid* at 270 citing Howard R Bowen, *Social Responsibilities of the Businessman* (Harper & Row, 1953).

³⁷⁰ *Ibid* at 274–75.

³⁷¹ Masato Abe & Wanida Ruangkhitkul, “Developments in the Concept of Corporate Social Responsibility” in Marc Proksch et al, eds, *From Corporate Social Responsibility to Corporate Sustainability: Moving the Agenda Forward in Asia and the Pacific*, Studies in Trade and Investment No 77 (Bangkok: UNESCAP, 2013) 9 at 11, online (pdf): <<https://www.unescap.org/publications/corporate-social-responsibility-corporate-sustainability-moving-agenda-forward-asia-and>>.

³⁷² *Ibid*.

³⁷³ *Ibid*.

³⁷⁴ For further reading on the evolution of CSR, see Archie B Carrol, “Corporate Social Responsibility: Evolution of a Definitional Construct” (1999) 38:3 Bus & Soc 268. See also Proksch, *supra* note 372.

out of social concern can only be justified insofar as it tends to bolster the corporation's interests. It is not surprising then that critics have characterized corporate social responsibility as an "ideological movement" designed to legitimize the power of transnational corporations.

In order to foster a world in which corporate decision-makers act genuinely in the interest of individuals and groups other than shareholders, the institutional nature of the corporate form must be reconceptualised. But if corporate social responsibility is an ineffective tool for evaluating corporate decisions, actions and outcomes, where should we turn? I shall argue that, as a dominant social institution, the corporation ought to be held to the same theoretical standards as other social institutions: namely, to the standard of social justice. [footnotes omitted]³⁷⁵

Gumpinger concludes with the following thoughts:

Historically, corporations were public purpose institutions; today, they remain legal institutions in that they rely on legislation to create and enable them. Under this legal framework, corporations have come to govern virtually every aspect of our daily lives, despite the fact that they lack the democratic accountability of governments. This fusion of power and unaccountability has given rise to claims that the corporate form is inherently unjust and should be changed.

...

The corporation's propensity to cause and reinforce dominations and oppression highlight the need to build democratic decision-making structures into the corporate form. To achieve this goal, corporate law theory needs to abandon its desire for political unity, which tends to exclude the perspectives of the oppressed and the disadvantaged. Rather, a theory of the firm ought to be based on a heterogeneous notion of the public which gives voice to those who are systematically excluded from corporate decision-making. Hence, corporate law ought to provide the means through which the distinct voices and perspectives of those who are oppressed and disadvantaged by the corporation may be recognized and represented. If the corporation proves unable to serve this goal in addition to its primary goal of accumulating and generating wealth then it may be time to conceptualize an institution that can.³⁷⁶

8.1.3 Some Current CSR Policies and Initiatives

In order to develop an understanding of current expectations for CSR policies, it is helpful to consult commonly referenced international instruments. Though CSR is reflected in a vast

³⁷⁵ Dustin Gumpinger, "Corporate Social Responsibility, Social Justice, and the Politics of Difference: Towards a Participatory Model of the Corporation" (2011) 16:1 Appeal 101 at 102.

³⁷⁶ *Ibid* at 120.

array of global policies and initiatives, the following standards are referred to across the globe to aid businesses forming internal CSR strategies:

- International Organization for Standardization (“ISO”) 26000: Provides guidance on how businesses and organizations can operate in a socially responsible way and helps to clarify the concept of social responsibility.³⁷⁷ Other ISO standards, such as ISO 9000 on corporate quality management, ISO 14001 on environmental management, and the recent ISO/TC 322 on sustainable finance are also relevant.
- Global Reporting Initiative G4 Guidelines (“GRI G4”): Promotes corporate transparency by providing guidance on how to disclose information and what types of information should be disclosed. Anti-corruption is addressed as an aspect of the “society” reporting category.³⁷⁸ TI’s Business Principles for Countering Bribery (TI Principles): Provides a framework for companies to develop comprehensive anti-bribery programs.³⁷⁹
- The World Economic Forum Partnering Against Corruption Principles for Countering Bribery (PACI Principles) is derived from the TI Principles.³⁸⁰ The TI and PACI Principles are discussed and critiqued in Adeyeye’s book *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption*.³⁸¹
- The UN Global Compact: Is the largest global corporate citizenship initiative. It proposes ten principles of responsible and sustainable corporate conduct.³⁸²

8.1.4 Global Compact’s 10 Principles: A Closer Look at One CSR Policy

By way of illustration, the UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption. These core values are expressed in the form of ten principles:

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

³⁷⁷ See “ISO 26000 Social Responsibility” (last visited 3 September 2021), online: ISO <<https://www.iso.org/iso-26000-social-responsibility.html>>.

³⁷⁸ See “GRI Standards English Language” (last visited 3 September 2021), online: GRI <<https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/>>.

³⁷⁹ See TI, *Business Principles for Countering Bribery*, (Berlin: TI, 2013), online: <http://www.transparency.org/whatwedo/pub/business_principles_for_countering_bribery>.

³⁸⁰ See World Economic Forum, *Partnering Against Corruption Initiative Global Principles for Countering Corruption*, (Geneva: World Economic Forum, 2016), online (pdf): <http://www3.weforum.org/docs/WEF_PACI_Global_Principles_for_Countering_Corruption.pdf>.

³⁸¹ Adefolake Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge: Cambridge University Press, 2012) at 49–54.

³⁸² See “The Ten Principles of the UN Global Compact” (last visited 3 September 2021), online: *United Nations Global Compact* <<https://www.unglobalcompact.org/what-is-gc/mission/principles>>.

Principle 2: make sure that they are not complicit in human rights abuses.

Labour

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.³⁸³

In regard to the 10th Principle, the UN Global Compact website, amongst other things, provides the following commentary:

BEGINNING OF EXCERPT

Why should companies care?

There are many reasons why the elimination of corruption has become a priority within the business community. Confidence and trust in business among investors, customers, employees and the public have been eroded by recent waves of business ethics scandals around the globe. Companies are learning the hard way that they can be held responsible for not paying enough attention to the actions of their employees, associated companies, business partners and agents.

The rapid development of rules of corporate governance around the world is also prompting companies to focus on anti-corruption measures as part of their mechanisms to express corporate sustainability and to protect their reputations and the interests of their stakeholders. Their anti-corruption systems are increasingly being extended to a range of ethics and integrity issues, and a growing number of investment managers are looking to these systems as evidence that the companies undertake good and well-managed business practice.

³⁸³ *Ibid.*

Businesses face high ethical and business risks and potential costs when they fail to effectively combat corruption in all its forms. All companies, large and small, are vulnerable to corruption, and the potential for damage is considerable. Business can face:

- **Legal risks:** not only are most forms of corruption illegal where they occur but it is also increasingly becoming illegal in a company's home country to engage in corrupt practices in another country;
- **Reputational risks:** companies whose policies and practices fail to meet high ethical standards, or that take a relaxed attitude toward compliance with laws, are exposed to serious reputational risks. Often it is enough to be accused of malpractice for a company's reputation to be damaged even if a court subsequently determines the contrary;
- **Financial costs:** there is clear evidence that many countries lose close to \$1 trillion due to fraud, corruption and shady business transactions and in certain cases, corruption can cost a country up to 17% of its GDP, according to the UN Development Programme in 2014. This undermines business performance and diverts public resources from legitimate sustainable development;
- **Erosion of internal trust and confidence** as unethical behaviour damages staff loyalty to the company as well as the overall ethical culture of the company.

What can companies do?

The UN Global Compact suggests that participants consider the following three elements when fighting corruption and implementing the 10th principle:

- **Internal:** As a first and basic step, introduce anti-corruption policies and programmes within their organizations and their business operations;
- **External:** Report on the work against corruption in the annual Communication on Progress; and share experiences and best practices through the submission of examples and case stories;
- **Collective Action:** Join forces with industry peers and with other stakeholders to scale up anti-corruption efforts, level the playing field and create fair competition for all. Companies can use the [Anti-Corruption Collective Action Hub](#) to create a company profile, propose projects, find partners and on-going projects as well as resources on anti-corruption collective action;
- **Sign the "Anti-corruption Call to Action"**, which is a call from Business to Governments to address corruption and foster effective governance for a sustainable and inclusive global economy.³⁸⁴

END OF EXCERPT

³⁸⁴ "Principle Ten: Anti-Corruption" (last visited 13 August 2021), online: *United Nations Global Compact* <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10>>.

8.2 Environment, Social and Governance Movement

The Environment, Social and Governance (ESG) movement is the latest ‘big idea’ and buzzword in the corporate world. The following short piece, written expressly for this book, describes various aspects of the movement.

The ESG Movement

by Daniela Chimisso dos Santos³⁸⁵

1. Emergence of ESG

Milton Friedman introduced the “shareholder value theory” in 1970, in writing “The Social Responsibility of Business is to Increase its Profits.”³⁸⁶ As the title suggests, this view espouses that a business has no social obligation other than to make profits for its shareholders—a view that has dominated in the US. Conversely, it has had limited success in Canada and Great Britain, and barely influenced Continental Europe. Nevertheless, it is within this model that the principles of CSR and other efforts to imbue business with social responsibility have arisen. The latest movement is one based on ESG principles. First coined by UN Secretary-General Kofi Annan in 2004,³⁸⁷ ESG has taken over the business responsibility discourse and is now one of the fastest-growing areas of corporate action. In fact, ESG has been heralded as the business case for stakeholder capitalism, countering Friedman’s views and making the needs of society at large at par with shareholders’ interests and rights.³⁸⁸

Though there are no set ESG factors, industry-specific ESG criteria have been created.³⁸⁹ Generally, environmental factors reflect how the business interacts with the natural world, specifically its conservation. Social factors focus on the business’ relationship with people, both internal and external to the company. Governance indicators relate to how the business is run; it is here that we find the connection with anti-corruption programs.

³⁸⁵ S.J.D., University of Toronto. Principal Consultant, Invenient Solutions Consulting Inc. 20 years of global law practice experience in the extractive industries.

³⁸⁶ Milton Friedman, “A Friedman Doctrine-- The Social Responsibility of Business is to Increase its Profits”, *The New York Times* (13 September 1970), online: <<https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>>.

³⁸⁷ Institute for Pension Fund Integrity, *Defining ESG: Clarifying the Myths and Facts*, (IPFI, August 2020), online (pdf): <<https://ipfiusa.org/wp-content/uploads/2020/08/IPFI-Issue-Brief-Defining-ESG.pdf>>.

³⁸⁸ Klaus Schwab & Peter Vanham, “What is Stakeholder Capitalism?” (22 January 2021), online: *World Economic Forum* <<https://www.weforum.org/agenda/2021/01/klaus-schwab-on-what-is-stakeholder-capitalism-history-relevance/>>.

³⁸⁹ See for example, the Sustainability Accounting Standards Board (SASB) Standards: “Understanding SASB Standards” (last visited 26 August 2021), online: *Value Reporting Foundation: SASB* <<https://www.sasb.org/>>.

Figure 1.2 provides a summary of ESG factors as described by the CFA Institute.³⁹⁰ As can be seen, anti-corruption measures fall squarely within the “G” category.

Figure 1.2 *Defining ESG*



Note. From CFA Institute³⁹¹

2. How Did ESG Develop and Why Has it Risen to Prominence?

ESG flows from three main spaces. The first is socially responsible investments (SRI)—investments driven by particular ethical and moral guidelines. The second is impact investments (IIs)—investment strategies based on their social or environmental impact, also known as social return.³⁹² Finally, ESG derives some of its content from CSR efforts. It is important to note that SRIs and IIs are often exclusionary (i.e., non-compatible investments are excluded from the pool of investment choices). In contrast, ESG-compliant integrated investments can be defined as being within a spectrum of ESG activity.

Figure 1.3 sets out the spectrum of responsible investment strategies and clarifies where ESG metrics and methodologies may be at play.

³⁹⁰ “ESG Investing and Analysis” (last visited 12 August 2021), online: *CFA Institute* <<https://www.cfainstitute.org/en/research/esg-investing>>.

³⁹¹ *Ibid.*

³⁹² Brian Trelstad, “Impact Investing: A Brief History” (2016) 11:2 *Capitalism & Society*; see also Lloyd Brown, “*Cowan v Scargill* and the Fiduciary Duty of Investment: Has the Nature of Investment Duty Changed and What is Currently Driving ‘Socially Responsible Investing’ in Pension Schemes?” (2020) 26:8/9 *Trust & Trustees* 756.

Figure 1.3 *Sustainable Investments Spectrum*

	Philanthropy		Social Impact Investing		Sustainable and Responsible Investing ⁸	Conventional financial investing
	Traditional Philanthropy	Venture Philanthropy	Social Investing	Impact investment	ESG investing	Fully commercial investment
Focus	Address societal challenges through the provision of grants	Address societal challenges with venture investment approaches	Investment with a focus on social and/or environmental outcome and some expected financial return	Investment with an intent to have a measurable environmental and/or social return	Enhance long-term value by using ESG factors to mitigate risks and identify growth opportunities.	Limited or no regard for environmental, social or governance practices
Return Expectation	Social return only	Social return focused	Social return and sub-market financial return	Social return and adequate financial market rate	Financial market return focused on long-term value	Financial market return only
	Social impact		Social and financial		Financial returns	

Note. From OECD³⁹³

ESG criteria and investing has taken over capital markets and financial services. The OECD has set out three main factors that have made it a perfect storm for ESG growth:

First, recent industry and academic studies suggest that ESG investing can, under certain conditions, help improve risk management and lead to returns that are not inferior to returns from traditional financial investments. Despite these studies there is a growing awareness of the complexity related to the measurement of ESG performances. Second, growing societal attention to the risks associated with climate change, the benefits of globally-accepted standards of responsible business conduct, and the need for diversity in the workplace and on boards, suggests that social values will increasingly influence investor and consumer choices and may increasingly impact corporate performance. Third, there is growing momentum for corporations and financial institutions to move away from short-term perspectives of risks and returns, so as to better reflect longer-term sustainability in investment performance. In this manner, some investors seek to enhance the sustainability of long-term returns, and others may wish to incorporate more formalised alignment with societal values. In either case, there is growing evidence that the sustainability of finance must incorporate broader external factors to maximise returns and profits over the long-term, while reducing the propensity for controversies that erode stakeholder trust.³⁹⁴

3. Who Are the Main Players and How Does it Work?

The question of what is ESG is still open to argument. ESG factors can be metrics, key performance indices, categories representing values or corporate priorities, aspirational

³⁹³ R Boffo & R Patalano, *ESG Investing: Practices, Progress and Challenges*, (Paris: OECD, 2020) at 15, online (pdf): <<https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf>>.

³⁹⁴ *Ibid* at 6.

goals linked to an organization's vision and mission, decision-making tools, disclosure parameters, compliance tools, and risk mitigation tools. In its most common iteration, ESG are factors or criteria that have a material financial impact which investors use to make investment decisions on capital availability and cost.

As noted, ESG-integrated investments are not exclusionary but instead lie on a spectrum of assimilation, which is relevant for comparative purposes. For example, the UN Principles for Responsible Investment (UN PRI),³⁹⁵ has its members accede to voluntary, aspirational principles and provides for a "menu of possible actions for incorporating ESG issues into investment practice."³⁹⁶ The UN PRI defines "ESG integration" as "the explicit and systematic inclusion of ESG issues in investment analysis and investment decisions."³⁹⁷

Furthermore, although an organization may be ESG-focused and compliant, it does not mean that it has a positive social impact or is necessarily good for society. For example, even though it remains the largest cigarette seller in the world, Philip Morris International was included for the first time in the Dow Jones Sustainability Index North America in 2020.^{398 399}

The complexity of integrating ESG factors into investment strategies has created the need to explain it as a "financial ecosystem" — a cohesive group of players that feed the system and consume its output. Figure 1.4 is a depiction of the ESG financial ecosystem as described by the OECD.

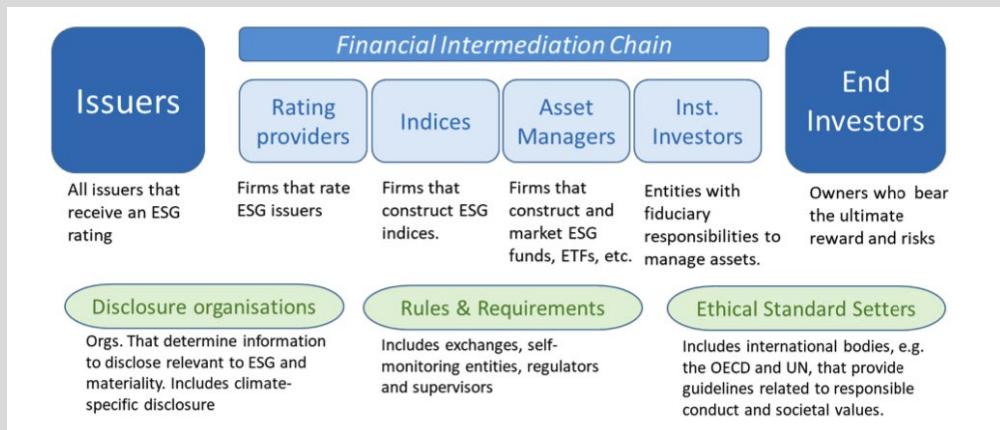
³⁹⁵ In March 2020, the UN PRI had 3038 signatories, representing \$86 trillion under management. For more information, see Shruti Khairnar, "PRI Signatories Now Exceed \$100 Trillion AUM", *ESG Investor* (9 November 2020), online: <<https://www.esginvestor.net/pri-signatories-now-exceed-us100-trillion-aum/>>.

³⁹⁶ "About the PRI" (last visited 12 August 2021), online: *Principles for Responsible Investment* <<https://www.unpri.org/pri/about-the-pri>>.

³⁹⁷ "What is ESG Integration?" (last visited 12 August 2021), online: *Principles for Responsible Investment* <<https://www.unpri.org/fixed-income/what-is-esg-integration/3052.article>>.

³⁹⁸ In 2016, Philip Morris International announced its new purpose: to deliver a smoke-free future by creating new products that could replace cigarettes, noting that it still sells cigarettes worldwide.

³⁹⁹ "Largest Tobacco and Cigarette Companies by Market Cap" (last visited 12 August 2021), online: *Companies Market Cap* <<https://companiesmarketcap.com/tobacco/largest-tobacco-companies-by-market-cap/>>.

Figure 1.4 *ESG Financial Ecosystem*

Note. From OECD⁴⁰⁰

It begins with the **financial issuer**. Financial issuers are organizations that supply equity or debt to the financial markets—either public or private—and demand capital from investors. ESG are one of the sets of criteria investors may use to make their decisions.

ESG rating providers are key to the system. Similar to credit rating companies, ESG rating providers are independent organizations that evaluate issuers based on their disclosure of ESG factors. Key ESG rating companies include MSCI, Sustainalytics, Bloomberg, Thomson Reuters, and RobecoSAM. Traditional rating companies also provide ESG ratings (e.g., Moody's and S&P).⁴⁰¹ Each rating provider has its own set of parameters and metrics that it uses to evaluate issuers. See, for example, Figure 1.5, which sets out the various ESG criteria measured by different ESG rating providers.

⁴⁰⁰ Boffo & Patalano, *supra* note 394 at 19.

⁴⁰¹ See Gabriella L, "Top ESG Rating Providers" (June 2021), online: *Broker Chooser* <<https://brokerchooser.com/how-to-invest/top-esg--rating-providers>>.

Figure 1.5 *ESG Metrics by ESG Rating Companies*

Pillar	Thomson Reuters	MSCI	Bloomberg
Environmental	Resource Use	Climate Change	Carbon Emissions
	Emissions	Natural resources	Climate change effects
	Innovation	Pollution & waste	Pollution
		Environmental opportunities	Waste disposal
			Renewable energy
			Resource depletion
Social	Workforce	Human capital	Supply chain
	Human Rights	Product liability	Discrimination
	Community	Stakeholder opposition	Political contributions
	Product Responsibility	Social opportunities	Diversity
			Human rights
			Community relations
Governance	Management	Corporate governance	Cumulative voting
	Shareholders	Corporate behaviour	Executive compensation
	CSR strategy		Shareholders' rights
			Takeover defence
			Staggered boards
			Independent directors
Key metrics and submetrics	186	34	>120

Note. From OECD⁴⁰²

The OECD defines ESG index providers and users as follows:

ESG index providers. A number of providers are also index providers, such as MSCI, FTSE Russell, Bloomberg, Thomson Reuters, Vigeo Eiris, etc. The use of such indices is growing rapidly as means to track relative performance of various ESG tilted market portfolios, from which institutional investors can benchmark performance. These index providers offer a range of stylised benchmarks that, in turn, allow for fund products to be developed for passive or active investment, and also for portfolio managers to utilise as a benchmark to compare their ability to generate excess risk-adjusted returns. Also, such indices are used by ESG funds and ETFs for passive and active investment management. By virtue of their growing use as benchmarks for ESG investing, the ways in which indices are created, including exclusion, extent of tilting portfolios toward issuers with higher ESG scores, and other forms such as thematic indices (e.g. high “S” issuers), is currently highly influential in guiding overall ESG portfolio management.

ESG users: asset managers, institutional investors,^[403] and public authorities. The users of ESG ratings and information include, at the very least, types of investors across private and public entities.

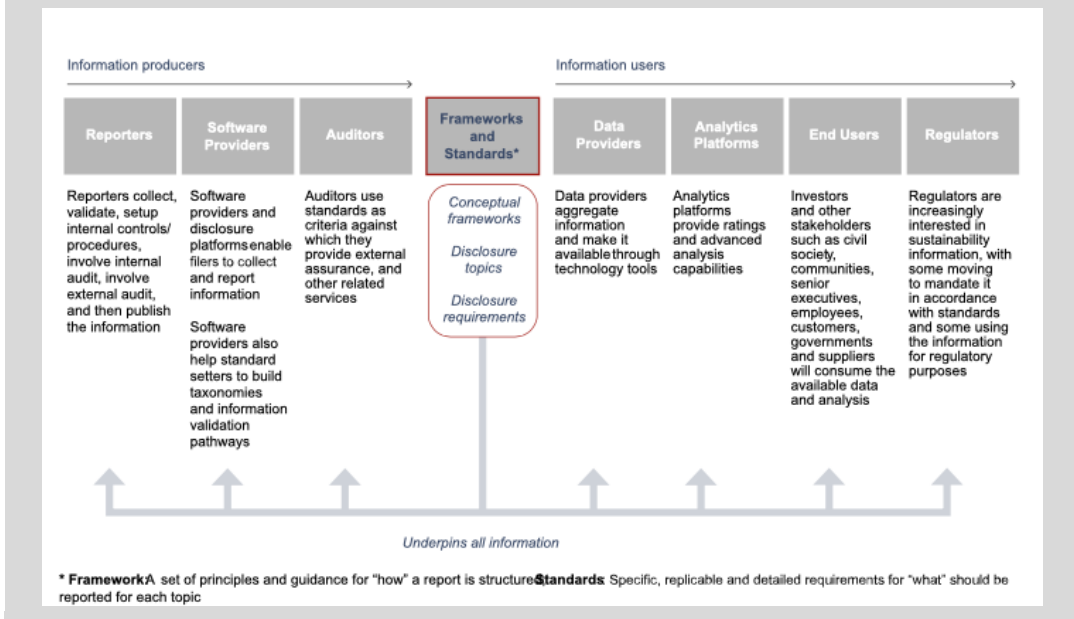
Disclosure organizations are also essential to the ESG ecosystem. They provide guidance and set standards and frameworks for ESG integration and disclosure. For example, the Sustainability Accounting Standards Board,⁴⁰⁴ the Global Reporting Initiative,⁴⁰⁵ and the Task Force on Climate-Related Financial Disclosure (TCFD)⁴⁰⁶ all provide frameworks

and/or standards that structure how an organization reports on the management of its ESG risks and results, and how they should disclose such efforts. Other framework developers include the United Nations Global Compact, the International Integrated Reporting Council (IIRC) and the Climate Disclosure Standards Board (CDSB).

As noted, a key standard-setter is the UN PRI. Other important players, such as institutional investors, have also played a significant role in advancing ESG. For example, BlackRock, an American multinational management corporation with a record \$9 trillion under management, has publicly endorsed ESG criteria and advocated for compliance with SASB and TCFD standards.⁴⁰⁷

The lens of transparency and disclosure is another way of understanding how ESG criteria is created and used. Ultimately, the purpose of ESG parameters is to inform investors how issuers are performing against environmental, social and governance metrics. SASB, arguably one of the key disclosure organizations, frames ESG as part of a “sustainability reporting ecosystem.” Figure 1.6 sets out how SASB describes the information flow—from creation to use—of a “sustainability reporting ecosystem.”

Figure 1.6 Sustainability Reporting Ecosystem



⁴⁰² Boffo & Patalano, *supra* note 394 at 22.

⁴⁰³ Asset managers and investment funds create segregated products (e.g. portfolios), such as investment funds and exchange traded funds (ETFs).

⁴⁰⁴ SASB, *supra* note 390.

⁴⁰⁵ “Welcome to GRI” (last visited 12 August 2021), online: *Global Reporting Initiative* <<https://www.globalreporting.org>>.

⁴⁰⁶ “Task Force on Climate Related Financial Disclosures” (last visited 12 August 2021), online: *Task Force on Climate Related Financial Disclosures* <<https://www.fsb-tcfd.org>>.

⁴⁰⁷ Michael Mackenzie, “BlackRock Assets Under Management Surge to Record \$9tn”, *The Financial Times* (15 April 2021), online: <<https://www.ft.com/content/e49180b1-2158-4adf-85d6-0eb4766f4d5f>>.

Note. From SASB⁴⁰⁸

In this model, a significant player is the assurers/auditors, which include KPMG, PwC, EY and Deloitte.⁴⁰⁹

One of the main criticisms of the ESG is that the parameters used to rate issuers are neither standardized nor regulated. For example, the International Organization of Securities Commission (IOSCO) states there is:

a lack of transparency about the methodologies underpinning ratings or data products and an often uneven coverage of products offered across industries and geographical areas. IOSCO has observed that this could lead to gaps and inconsistencies when applied to investment strategies and raise concerns around the management of potential conflicts of interest, such as fee structures and insufficient separation of business lines that provide advisory services to issuers to improve their ratings performance.⁴¹⁰

Furthermore, such a lack of standardization and regulation has resulted in an explosion of greenwashing—the false appearance of a sustainable and ESG-focused issuer through “green” promotion. As a successful marketing strategy, greenwashing is one of the biggest concerns that investors have with ESG-integrated investments.⁴¹¹

4. Key ESG Policy and Initiatives

As the ESG movement accelerates, a rally for standardizing ESG metrics is underway, with various initiatives taking place around the globe.⁴¹² It is expected that in the next few years there will be many changes and much action within this space. The following is a brief list of ESG policy and initiatives at the time of writing:

4.1 Key Policy Initiatives – Regulators

Canada

Canadian securities regulators have issued ESG-specific guidance with disclosure requirements set out in CSA Staff Notice 51-333 – Environmental Reporting Guidance and

⁴⁰⁸ “SASB Standards and Other ESG Frameworks” (last visited 12 August 2021) [SASB Standards], online: SASB <<https://www.sasb.org/about/sasb-and-other-esg-frameworks/>>.

⁴⁰⁹ See also “ESG Ecosystem Map” (August 2019), online: *World Economic Forum* <https://widgets.weforum.org/esgecosystemmap/index.html#>.

⁴¹⁰ International Organization of Securities Commissions, Media Release, IOSCO/MR/20/2021, “IOSCO Consults on ESG Ratings and Data Providers” (26 July 2021), online (pdf): <<https://www.iosco.org/news/pdf/IOSCONEWS613.pdf>>.

⁴¹¹ Robert J Richardson, CD, et al, “ESG Continues to Take Centre Stage in Securities Regulation in Canada and Abroad” (2021) 322 *Canada Corporate Brief* — Newsletter in *British Columbia Corporations Law Guide* 1 at 3 (QL).

⁴¹² See, for example, BlackRock.

CSA Staff Notice 51-358 – Reporting Climate Change-related Risks. Ontario’s Capital Markets Modernization Taskforce recommended mandatory ESG disclosure for all non-investment fund issuers that comply with the TCFD.

US

The United States Securities Exchange Commission (SEC) has formed a task force to review ESG-related disclosure—the “Climate and ESG Task Force.”⁴¹³ In June 2021, the US House of Representatives passed HR 1187 (the *Corporate Governance Improvement and Investor Protection Act*). If passed by the Senate, the *Act* may require the SEC to issue rules requiring public companies to disclose certain ESG metrics, including ones related to climate action, board diversity, and employee management and welfare practices.⁴¹⁴

Europe

Europe is leading the ESG movement and issued a comprehensive sustainable finance package, which includes the *EU Taxonomy Climate Delegated Act*, *The Corporate Sustainability Reporting Directive*, and amendments to six acts to strengthen fiduciary duties, investment and insurance product oversight, and governance practices.⁴¹⁵ The EU also adopted the *Sustainable Finance Disclosure Regulation*, which creates mandatory ESG disclosure obligations for manufacturers of financial products and financial advisors.⁴¹⁶

United Kingdom

The UK announced a “roadmap” that will require TCFD-compliant disclosure by 2025 across all issuers.⁴¹⁷

New Zealand

The *Financial Sector (Climate-related Disclosure and Other Matters) Amendment Bill* is presently in the review stage. If passed, it will require certain members of the financial sector to disclose the impact of climate change on their businesses.

⁴¹³ US Securities and Exchange Commission, Press Release, 2021-42, “SEC Announces Enforcement Task Force Focused on Climate and ESG Issues” (4 March 2021), online: <<https://www.sec.gov/news/press-release/2021-42>>.

⁴¹⁴ Vivian L Coates, Jane Jeffries Jones & Gracie Smith, “Dollars and Sense: How to Integrate ESG into Compensation Programs” (2 July 2021) XI:218 Nat’l L Rev 183.

⁴¹⁵ European Commission, Press Release, IP/21/1804, “Sustainable Finance and EU Taxonomy: Commission Takes Further Steps to Channel Money Towards Sustainable Activities” (21 April 2021), online: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1804>.

⁴¹⁶ Richardson, *supra* note 412 at 3.

⁴¹⁷ UK, HM Treasury, *A Roadmap Towards Mandatory Climate-Related Disclosure* (Policy Paper) (London: HM Treasury, November 2020), online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933783/FINAL_TCFD_ROADMAP.pdf>.

4.2 Key Policy Initiatives for Standardization of ESG reporting

Key standards are those set by TCFD, SASB, and GRI.⁴¹⁸ Nevertheless, the push to homogenise ESG standards is also strong. The following are a few of the significant initiatives presently at play:

- CDP Global, CDSB, GRI, IIRC, and SASB (the “group of five”) announced in 2020 that they are working to develop a “comprehensive corporate reporting system.”⁴¹⁹
- The International Federation of Accountants called for the creation of an International Sustainability Standards Board.⁴²⁰
- The World Economic Forum’s International Business Council created the IBC Disclosure Project in conjunction with the Big Four accountancy firms (Deloitte, KPMG, EY, and PWC). The project creates “stakeholder capitalism metrics”⁴²¹ to be used by companies aligning their sustainability reporting and tracking their contributions to the UN Sustainable Development Goals.

5. ESG and Anti-Corruption

The “G” in ESG promotes good governance. Therefore, codes of business conduct, including codes of conduct, corruption and bribery programs, systems and procedures, as well reporting on breaches, etc. are all included within this metric. Another factor that is usually involved in governance, for example, is supply chain management, which incorporates a supplier’s code of conduct.⁴²² However, as reported by Gartner, a leading research and advisory company, after reviewing S&P 500 companies’ ESG reporting, only eight percent of all reference metrics were governance-related.⁴²³ One of the issues includes how companies report on “G” metrics.

The UN PRI specifically links anti-corruption commitments made under SDG 16, which calls for “peace, justice and strong institutions,” indicator 16.5, which explicitly asks signatories to “substantially reduce corruption and bribery in all forms,”⁴²⁴ and the UN Global Compact’s 10th principle against corruption. The WEF IBC Disclosure Project has also included SDG 16 as part of its governance disclosure requirements. But, again, the “how” to report remains an issue.

In the spirit of filling the “guidance gap” in this area, Transparency International UK, published *Open Business—Principles and Guidance for Anti-Corruption Corporate Transparency* in 2020.⁴²⁵ *Open Business* is a guidance document on how to disclose corporate anti-corruption efforts across five key areas:

- Anti-corruption programme transparency (including third parties and procurement)
- Beneficial ownership transparency
- Organisational structure transparency
- Country-by-country reporting transparency

- Corporate political engagement transparency

6. For Compliance Practitioners

Compliance executives and anti-corruption practitioners should remain keenly aware of ESG developments as the expectation is that ESG-related issues, beyond anti-corruption efforts, are headed their way. For example, in its Report on ‘connecting the business and human rights and the anti-corruption agenda,’ the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises specifically calls for the end of silos within corporations and the merging of certain ESG responsibilities with the compliance function.⁴²⁶ Ultimately, the Working Group calls for the absorption of the role responsible for human rights by the anti-corruption and compliance function.⁴²⁷ Moreover, research by Kroll, a corporate investigations and risk consulting firm, has indicated that the expected trend is that ESG is and should be included in anti-bribery and corruption programs.⁴²⁸

⁴¹⁸ Investment Stewardship Group, “Sustainability Reporting: Convergence to Accelerate Progress”, Commentary (BlackRock, October 2020), online (pdf): <https://www.blackrock.com/corporate/literature/publication/blk-commentary-sustainability-reporting-convergence.pdf>.

⁴¹⁹ SASB Standards, *supra* note 409.

⁴²⁰ “Sustainability-Related Reporting” (last visited 12 August 2021), online: IFRS <https://www.ifrs.org/projects/work-plan/sustainability-reporting/>.

⁴²¹ Martha Carter et al, *Key Takeaways from the New WEF/IBC ESG Disclosure Framework* (Harvard Law School on Corporate Governance, 2020), online: <https://corpgov.law.harvard.edu/2020/10/17/key-takeaways-from-the-new-wef-ibc-esg-disclosure-framework/>.

⁴²² Kelly Tang, “Exploring the G in ESG: Governance in Greater Detail—Part I” (22 March 2019), online: *S&P Global* <https://www.spglobal.com/en/research-insights/articles/exploring-the-g-in-esg-governance-in-greater-detail-part-i>.

⁴²³ Gartner, Press Release, “Gartner Says Governance Metrics Lag in ESG Reporting Among S&P 500 Companies” (8 July 2021), online: <https://www.gartner.com/en/newsroom/press-releases/2021-07-08-gartner-says-governance-metrics-lag-in-esg-reporting-among-sp500-companies>.

⁴²⁴ “Why Engage? The Business Case” (14 June 2016), online: *Principles for Responsible Investing (PRI)* <https://www.unpri.org/sustainability-issues/environmental-social-and-governance-issues/governance-issues/corruption>.

⁴²⁵ TI UK, *Open Business: Principles and Guidance for Anti-Corruption Corporate Transparency*, (London: TI, 2020), online (pdf): https://www.transparency.org.uk/sites/default/files/pdf/publications/TIUK_OpenBusiness_WEB4.pdf.

⁴²⁶ UNGA, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Connecting the Business and Human Rights and the Anti-Corruption Agendas*, HRC, 44th Sess, UN Doc A/HRC/44/43 (2020), online (pdf): <https://undocs.org/A/HRC/44/43>.

⁴²⁷ *Ibid.*

⁴²⁸ “2021 Anti-Bribery and Corruption Benchmark” (last visited 25 August 2021), online: *Kroll* <https://www.kroll.com/en/insights/publications/compliance-risk/anti-bribery-and-corruption-benchmarking-report-2021>.

8.3 Need for Increased Trust in Business

Barbara Kimmel in a *FCPA Blog* post reports on the *Edelman 2017 Trust Barometer* as follows:

BEGINNING OF EXCERPT

Earlier today Edelman released the findings of its 17th annual Trust Barometer, a poll of 33,000 respondents in 28 countries. This year's results were strikingly different from their 2016 findings. In fact, trust to “do what is right” declined in all four major institutions: NGOs, Business, Media and Government.

I had the good fortune of an invitation to a pre-release webinar hosted by Edelman on January 13, enabling me to report early on the 2017 Trust Barometer findings.

As Trust Across America continues its mission to help build trust in business, the following are some of the key takeaways from the presentation:

- Only 37 percent of respondents trust the CEO as a credible spokesperson.
- CEO credibility dropped in all 28 markets, reflecting a global crisis of leadership.
- 82 percent of respondents believe “Big Pharma” needs greater regulation.
- 53 percent of respondents do not believe that financial institutions have been reined in “enough.”
- The main opportunities for businesses to prove they are “doing no harm” include focus on bribery, executive compensation, tax havens, overcharging for products, and reducing costs by decreasing product quality.
- The ways business can best show they are “doing more” is through their treatment of employees, producing high quality products, listening to customers, paying their fair share of taxes, and employing ethical business practices.
- CEOs must engage in talking “with” not “at” people. They should be more spontaneous, blunt, include personal experience in dialogue, and participate in their company's social media.
- And finally, Edelman's survey results reflect a fundamental shift from the old “For the people” to the new “With the people.”

What actions must big business take?

It is incumbent on Boards of Directors, CEOs and their C-Suites to:

- Acknowledge that they individually have a problem, and collectively are responsible for the growing crisis of trust in business.
- Recognize that trust is indeed a hard asset and a measurable currency, not an intangible to be taken for granted.

- Find the courage and take action to elevate trust across and among all stakeholder groups.

Through its *FACTS® Framework, Trust Across America's research focus picks up where Edelman's findings leave off. For the past eight years we have been measuring the trust "worthiness" or integrity of the largest 1,500 U.S. public companies.

We find that industry is not destiny and a handful of corporate leaders are already reaping the rewards of high trust. Edelman's 2017 findings do, however, support our call for a different "way" of doing business, and perhaps that "way" will find increasing support from big business in 2017.⁴²⁹

END OF EXCERPT

The recent 2021 Edelman Trust Barometer presents a slight counter to the 2017 narrative, with an overall sense of increased trust in business. The 2021 results show that respondents in 18 out of 27 countries surveyed trusted businesses more than government.⁴³⁰ Moreover, businesses were the only institution viewed as competent and ethical.⁴³¹ Nevertheless, CEO credibility, while slightly increasing from a low rating in 2017, remains weak. Lastly, trust in financial services has also decreased since 2017, and it remains the least trusted industry surveyed.⁴³²

From a Canadian perspective, the University of Victoria's Gustavson School of Business produces the Gustavson Brand Trust Index (GBTI) annually. The 2021 GBTI emphasizes consumers' growing expectations for businesses to align with social and environmental causes and, alternatively, the resulting loss in trust when a business fails to do so.⁴³³ Amazon, in particular, demonstrates this trend: in 2020, the company lost 17 points in overall brand trust due to the employment rights and sustainability-related controversies it has encountered.⁴³⁴

⁴²⁹ Barbara Brooks Kimmel, "Edelman 2017 Trust Barometer: Most Think CEOs Aren't Credible" (16 January 2017), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2017/1/16/edelman-2017-trust-barometer-most-think-ceos-arent-credible.html>>.

⁴³⁰ Edelman, *2021 Edelman Trust Barometer*, (January 2021), online (pdf): <<https://www.edelman.com/sites/g/files/aatuss191/files/2021-03/2021%20Edelman%20Trust%20Barometer.pdf>>.

⁴³¹ Government, for example, was viewed as less competent and unethical. NGOs were seen as ethical, but less competent. *Ibid* at 7.

⁴³² *Ibid*.

⁴³³ University of Victoria, Gustavson School of Business, *2021 Gustavson Brand Trust Index*, (May 2021), online (pdf): <<https://www.uvic.ca/gustavson/brandtrust/assets/docs/final--gbti-2021-main-report.pdf>>.

⁴³⁴ *Ibid* at 30.

8.4 A Critical View: Pretending CSR and ESG Will Alter ‘True’ Corporate Personality

Thus far, the content in Section 8 suggests that CSR and ESG movements provide hope that corporations will constrain both their illegal activities (such as bribery) and their activities which are legal, but cause significant harm to basic social values. Skepticism is both warranted and widely expressed in the public and academic literature on the suggestion that corporations are likely to constrain, to any significant degree, their ingrained profit-seeking goals for the sake of CSR and ESG values. While this issue is not addressed in this chapter, various sources strongly critique the suggestion that corporate social virtue, conscience or benevolence will ever prevail over profit-making.⁴³⁵

8.5 Legal Counsel and Guiding Corporate Policy

Chapter 8 considers the role of the corporate lawyer in anti-corruption initiatives. Legal counsel should be prepared to provide corporate clients with guidance on developing internal policies that will ensure fulfillment of legal and ethical obligations from both an anti-corruption and CSR perspective. Chapter 8 provides guidance to corporate lawyers who want to ensure that their clients’ anti-corruption policy and programs are conforming to national and international expectations for corporate behaviour.

9. SUCCESSES AND FAILURES IN INTERNATIONAL CONTROL

9.1 Ten Lessons in Designing Anti-Corruption Initiatives

In the 2011 report *Contextual Choices in Fighting Corruption: Lessons Learned*,⁴³⁶ prepared by the Hertie School of Governance for the Norwegian Agency for Development Cooperation (NORAD), Alina Mungiu-Pippidi et al. review the successes and failures of the international community’s anti-corruption initiatives and strategies in the previous fifteen years.⁴³⁷ From this review, the authors extract the lessons learned to help guide future anti-corruption

⁴³⁵ In the public domain, there have been two documentaries on this topic: “The Corporation” (Documentary) Zeitgeist Films (2004); “The New Corporation: The Unfortunately Necessary Sequel” (Documentary) Grant Street Productions (2020). See also Harry J Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002); and Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin Canada, 2004).

⁴³⁶ Alina Mungiu-Pippidi et al, “Contextual Choices in Fighting Corruption: Lessons Learned” (2011) European Research Centre for Anti-Corruption and State-Building Working Paper No 30, online (pdf): <http://www.againstcorruption.eu/wp-content/uploads/2012/09/WP-30-Contextual-Choices-new_merged2.pdf>.

⁴³⁷ Alina Mungiu-Pippidi expands on her analysis of guiding principles for government anti-corruption initiatives in her book, *The Quest for Good Governance: How Societies Develop Control of Corruption* (Cambridge: Cambridge University Press, 2015).

initiatives. It should be noted that the authors' conclusions are not necessarily agreed upon by all anti-corruption scholars and practitioners.

The following excerpts are from the Executive Summary and provide an overview of the report's findings:

BEGINNING OF EXCERPT

Why, despite unprecedented investment in anti-corruption in the last fifteen years and since the implementation of global monitoring instruments and global legislation, have so few countries managed to register progress? This new report commissioned by the Norwegian Agency for Development Cooperation (NORAD) to the Hertie School of Governance argues that conceptual flaws, imprecise measurement instruments and inadequate strategies are to blame. But it also argues that the quest for public integrity is a political one, between predatory elites in a society and its losers and fought primarily on domestic playgrounds. As such, the donor community can play only a limited part and it needs to play this part strategically in order to create results. Based on new statistical evidence, the report recommends cash-on-delivery/selectivity approaches for anti-corruption assistance [cash-on-delivery is a term used in the aid community to mean an aid scheme whereby funding is only delivered once progress on an agreed upon goal is achieved by the aid recipient]. Effective and sustainable policies for good governance need to diminish the political and material resources of corruption and build normative constraints in the form of domestic collective action. Most of the current anti-corruption strategies, on the contrary, focus on increasing legal constraints, which often fail because most interventions are localized in societies that lack the rule of law.

...

Most corruption academic literature conceptualizes anti-corruption at the individual level, as do most current theories about anti-corruption. This presumes that corruption is a deviation from an otherwise established norm of ethical universalism, where every citizen is treated equally by the state and all public resources are distributed impartially. In fact, outside the developed world, the norm is not ethical universalism, since the process of modernization leading to an impersonal state autonomous from private interest was never completed in most countries. Most anti-corruption instruments that donors favour are norm-infringing instruments from the developed context, when they should be norm-building instruments for developing contexts. There is a gross inadequacy of institutional imports from developed countries which enjoy rule of law to developing contexts, shown in section 6 (Table 13 on page 56) of the report, where statistical evidence found no impact by anti-corruption agencies, Ombudsmen-like institutions and the ratification of the United Nations Convention against Corruption (UNCAC). What is presented in most anti-corruption literature as a principal-agent problem is in fact a collective action problem, since societies reach a sub-optimal equilibrium of poor governance with an insufficient domestic agency pushing for change.

The report argues that the question "what causes corruption" is therefore absurd. Particularism exists by default, since most human societies have limited resources to

share, and people tend to share them in a particular way, most notably with their closest kin and not with everyone else. Modern states are based on universal citizenship, which entails fair treatment of every citizen by the government. But there are very few states that have thus far succeeded in moving from the natural state to this ideal of modernity. The question should change from “what causes corruption” to “what makes particularism evolve into universalism”. What determines a change in the equilibrium?

[The report concludes with a list of the ten lessons that can be learned from the fifteen years since the World Bank called for a global fight against corruption. Each lesson is described in more detail in the report; a brief overview of the lessons follows:]

1. Although globalization has turned corruption into a global phenomenon ... **the battlefield where this war is lost or won remains national....** [A] transformation has to be reflected in a new equilibrium of power at the society level for it to be both profound and sustainable.

2. **Transitions from corrupt regimes to regimes where ethical universalism is the norm are political and not technical-legal processes....** The main actors should be broad national coalitions, and the main role of the international community is to support them in becoming both broad and powerful.... Which windows of opportunities to use, what actors have more interest in changing the rules of the game and how to sequence the change depends on the diagnosis of each society and cannot be solved by a one-size-fits all solution.

3. **Lesson number three is that on this political front, the international community has often played an ambiguous and inconsistent role and has thus sabotaged its own efforts....** To minimize this in the future, good governance programs and **particularly UNCAC implementation should be tied to assistance on a cash-by-delivery mechanism only....** Diplomacy should also act in concert with aid, promoting representative anti-corruption actors in societies and avoiding the ‘professionalization’ of anti-corruption by limitation to a circle of ‘experts’.

4. **Lesson number four is that there are no silver bullets or maverick institutions in fighting corruption.**

...

5. **Lesson number five is about the lack of significant impact (in statistical tests) by the UNCAC after five years....** UNCAC is a collection of institutional tools, not all similarly effective or useful, of which some have the potential to become effective weapons. This is true, however, only if local actors take them up and fight the long fight with them. What the international community can do, in any event, is to push UNCAC implementation and review as a mechanism to stir collective action. UNCAC will have an impact only if the entire society contributes to a check on the government. Such a permanent check could play a far more important role than the international review of UNCAC.... Accountability to the entire society regarding the implementation of UNCAC is a minimal requirement in building the general accountability of

governments. In this context, the ownership principle in anti-corruption must simply be interpreted as ownership by the society, not by the government.

...

6. Lesson number six is about the importance of civil society, for which the report finds statistical and qualitative evidence. However, the kind of civil society needed to serve as a watchdog at the community as well as national level is frequently missing in many countries.... Any country ruled by particularism is bound to have many 'losers' who are shortcut by networks of privilege. Without their collective action, there is no sustainable change in the rules of the game, and their empowerment becomes therefore the chief priority.

...

7. Lesson seven is about developing indicators and measures to allow better monitoring of trends and impact of policies. The aggregate measures of corruption, particularly the WGI Control of Corruption, which allows measuring confidence error on top of perceptions of corruption, have played a great role by setting the stage for a global competition for integrity among countries. But once it comes to the process of change itself and the impact of certain policies, they become less helpful.

...

8. Lesson eight is about the fit of repressive policies to various development contexts. It is very risky to fight corruption by repressive means whenever particularism is the main allocation norm because some people will be above the law and the selection of those to be prosecuted cannot be anything but biased.

...

9. Lesson number nine is that policies of drying resources for corruption are essential, along with increasing normative constraints.

...

10. The final lesson is about formalization, which plays an important role in explaining corruption.... Societies hide from predatory rulers to defend themselves, and this is why it is important that government and society work together for more transparency. Successful policies of formalization are based on bargaining, not repression, except in the area of criminal economy (smuggling, drugs, traffic, money laundering). Formalization, understood as a process of persuasion and incentivizing of property and business registration, is an essential step in reducing informality. [footnotes omitted]

END OF EXCERPT

Richard Heeks and Harald Mathisen, in "Understanding Success and Failure of Anti-Corruption Initiatives," argue that anti-corruption initiatives often fail because of "design-

reality gaps,” which they describe as “a mismatch between the expectations built into their design as compared to on-the-ground realities in the context of their implementation. Successful initiatives find ways to minimize or close these gaps. Effective design and implementation processes enable gap closure and improve the likelihood of success.”⁴³⁸

10. CASE STUDY: BAE ENGAGES IN LARGE-SCALE CORRUPTION IN SAUDI ARABIA

In the video “Black Money,”⁴³⁹ Lowell Bergman investigates an \$80 billion arms deal between BAE Systems, a British corporation, and Saudi Arabia. Details of the contract were not released publicly. At the same time, members of the Saudi royal family and Saudi government officials received huge personal payments and gifts from BAE. When British prosecutors began investigations, Saudi Arabia threatened to pull support for Britain’s fight against terrorism. The British prosecutors backed off. The video introduces some of the major anti-corruption legal developments in international, as well as British and American law. It highlights the scale with which multinational corporations have been involved in the shadowy world of international bribery.

In 2010, BAE pled guilty in the US to charges of failing to keep accurate accounting records and conspiring to make false statements to the US government. Although the charges related to various cases of corruption, BAE did not, however, admit to actual bribery in the plea bargain. BAE was required to pay \$400 million to the US Treasury. The company avoided further sanctions, such as debarment from public procurement in the US, because it did not plead guilty to actual corruption offences. In the same plea deal, BAE was also required to pay the UK and Tanzania a combined total of £30 million. The UK’s Serious Fraud Office was investigating allegations of corruption by BAE in seven or eight other countries, but dropped the other cases after settling the Tanzania case.

In 2011, BAE was required to pay a further \$79 million as a civil penalty to the US Department of State for alleged violations of the *Arms Export Control Act* and the *International Traffic in Arms Regulations*. The Department of State imposed a statutory debarment from the US public procurement process but concurrently rescinded the debarment, implying that BAE is “too big to debar.”⁴⁴⁰

⁴³⁸ Richard Heeks & Harald Mathisen, “Understanding Success and Failure of Anti-Corruption Initiatives” (2012) 58:5 Crime L & Soc Change 533.

⁴³⁹ Lowell Bergman, “Frontline: Black Money” (4 September 2009), online (video): PBS <<http://video.pbs.org/video/1114436938/>>.

⁴⁴⁰ Nick Wagoner, “Was BAE Too Big to Debar?” (19 April 2011), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2011/4/19/was-bae-too-big-to-debar.html>>. The BAE case was also discussed in the 2018 edition of this book at Chapter 7, Section 4.6.

CHAPTER 2

BRIBERY AND OTHER OFFENCES

GERRY FERGUSON*

* The author thanks Heather Middlemass, Rachael Carlson, and Chloe Ducluzeau for their assistance in updating this chapter.

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- 5. ACCOUNTING (BOOKS AND RECORDS) OFFENCES**

APPENDIX 2.1

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION AND OVERVIEW

As noted in Chapter 1, corruption is a broad concept. In part, what counts as corruption is shaped by social, political and economic beliefs and norms in a given society. While there are legitimate disputes on whether certain forms of conduct are or should be classified as corruption, there is a core of conduct which is almost unanimously viewed as corruption. The fact that the periphery of corruption is grey does not provide any insurmountable barrier to defining and criminalizing the core of corruption.

If the concept of corruption is generally understood to be, in the words of Transparency International (TI), “the abuse of entrusted power for private gain,”¹ it is readily apparent that there are many types of behaviour that constitute corrupt abuse of public power for private gain. For the most part, states create a number of separate offences to deal with corruption, as opposed to creating a singular “corruption offence.” These separate offences can be defined narrowly to apply only to corrupt behaviour in the sense of the misuse of *public power* or they may be defined to apply more broadly to all persons, whether or not those persons are in positions of public power. For example:

- Theft (embezzlement) is (in general) the unlawful taking of another’s property. When that taking is by a public official in respect to public funds, that conduct is corrupt. States can treat this latter corrupt behaviour as simply one example of the general offence of theft, or can create a specific crime of corruption called theft by public officials in respect to their entrusted powers.
- Fraud is (in general) the unlawful taking or use of another’s property by dishonest means (i.e., lies, false pretences, omission of material information, etc.). When that fraud is committed by a public official in respect to their public functions that conduct is corrupt. States can treat this latter conduct as simply one example of the general offence of fraud, or they can create a specific crime of fraud by public officials carrying out their public duties. Bribes offered or received in the context of public procurement and bid rigging can be treated as offences of fraud or as specific corruption offences.
- Extortion is a third example. It is (in general) a crime of theft which is committed by threatening economic or physical harm to another, unless the threatened person gives the person making the threat the money or other benefit or advantage being demanded. Once again, extortion can be committed by or in respect to a public official in the context of their public functions in which case the conduct can be criminalized under a specific crime of extortion by, or of, public officials, or it can be treated as one example of the general offence of extortion.

On the other hand, there are offences that are specifically created to deal with the corrupt behaviour of public officials in respect to their public functions. For example:

¹ “What is corruption?” (last visited 28 July 2021), online: *Transparency International* (TI) <<https://www.transparency.org/en/what-is-corruption>>.

- Bribery is (in general) the asking or taking by a public official of a benefit or advantage for private gain in exchange for a misuse of the official's entrusted powers. Bribery is also a bilateral offence—it may criminalize the conduct of the public official and also the conduct of third-party bribers who have offered, given or agreed to give a bribe to a public official.
- Buying or selling a public office or exercising or promising to exercise improper influence on an appointment to a public office is an offence of corruption and is a specific offence in the penal codes of many nations.

There are other offences relevant to corruption and bribery. These offences include money laundering and books and records offences, which are seen as necessary to effectively fight against the commission of large-scale bribery, as well as other economic crimes.

Susan Rose-Ackerman notes that enforcement and monitoring alone will not adequately address corruption. She states:

Reform should not be limited to the creation of “integrity systems” or “anticorruption agencies.” Instead, fundamental changes in the way government operates ought to be at the heart of the reform agenda. The primary goal should be to reduce the underlying incentives to engage in corruption *ex ante*, not to tighten systems of *ex post* control. Enforcement and monitoring are needed, but they will have little long-term impact if reforms do not reduce the basic conditions that encourage payoffs. If these incentives and institutions remain, the elimination of one set of “bad apples” will soon lead to the creation of a new group of corrupt officials and private bribe payers.²

As noted in Chapter 1, the United Nations Convention Against Corruption (UNCAC) has been ratified by 187 countries across the globe.³ It is undoubtedly the most influential international anti-corruption instrument. UNCAC contains both mandatory and optional corruption offences and provisions. Signatories to UNCAC and members of the Organisation for Economic Co-operation and Development Convention on Combating Corruption of Foreign Public Officials in International Business Transactions (OECD Convention) are required to implement mandatory offences and to consider implementing optional offences. Both types of provisions are listed below.

Mandatory Offences:

- (1) Bribery of National Public Officials;
- (2) Bribery of Foreign Public Officials;
- (3) Public Embezzlement;

² Susan Rose-Ackerman & Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform*, 2nd ed (New York: Cambridge University Press, 2016) at 38.

³ This figure is current to 6 February 2020: “United Nations Convention against Corruption” (last visited 28 July 2021), online: *UNODC* <<https://www.unodc.org/unodc/en/corruption/uncac.html>>.

- (4) Money Laundering;
- (5) Obstruction [of Justice];
- (6) Liability of Legal Entities;
- (7) Accomplices and Attempts;
- (8) Conspiracy to Commit Money Laundering; and
- (9) Books and Records Offences.⁴

The OECD Convention is restricted to criminalizing bribery of foreign public officials in the course of international business transactions. The OECD Convention does not contain offence provisions on items (1), (3) and (5) listed above from UNCAC.

As you will see in the course of reading this chapter, domestic law in the US, UK, and Canada incorporates all the mandatory provisions set out in the list above, albeit with slightly different language and scope. Appendix 2.1 of this chapter references the exact provisions in each country that correspond to the UNCAC provisions.

Optional Offences:

- (1) Foreign Official Taking a Bribe;
- (2) Giving a Bribe for Influence Peddling;
- (3) Accepting a Bribe for Influence Peddling;
- (4) Abuse of Public Function to Obtain a Bribe;
- (5) Illicit Enrichment;
- (6) Private Sector Bribery;
- (7) Embezzlement in the Private Sector; and
- (8) Concealing Bribery Property.

Apart from the offence of illicit enrichment, these optional offences can also be found in US, UK and Canadian law.

While UNCAC and the OECD Convention include a number of corruption offences, this chapter explores the two most commonly charged offences: (1) bribery of national and foreign public officials and (2) books and records offences. The other Convention offences are listed in Appendix 2.1 at the end of this chapter. The offence of money laundering is explored in detail in Chapter 4. The remainder of this chapter involves a description of the elements of and relevant defences to bribery and books and records offences both domestically and in foreign countries under:

- (1) UNCAC;
- (2) OECD Convention;
- (3) US law, especially the *Foreign Corrupt Practices Act (FCPA)*;

⁴ UNCAC does not require State Parties to “criminalize” books and records offences per se but instead requires signatories to take necessary steps to prevent the creation and use of improper and fraudulent books and records.

- (4) UK law, especially the *Bribery Act 2010*; and
- (5) Canadian law, especially the *Corruption of Foreign Public Officials Act (CFPOA)*.

Chapter 3 then continues with an analysis of several general criminal law principles that are relevant to defining the scope of bribery and books and records offences, namely:

- (1) Extra-territorial jurisdiction for bribery offences;
- (2) Criminal liability of corporations and other legal entities;
- (3) Party or accomplice liability; and
- (4) Inchoate liability (attempts, conspiracy and solicitation).

An understanding of the foreign bribery laws of the US and UK is of particular importance for lawyers and their corporate clients in other jurisdictions because these two countries have broad extra-territorial jurisdiction provisions in their bribery statutes. Foreign persons and companies can often be prosecuted under US or UK law. For example, a Canadian company which offers a bribe to a public official in Bangladesh can be prosecuted not only in Canada, but also in the US under the *FCPA* if the Canadian company's shares are listed on the New York Stock Exchange (or any other US Stock Exchange).

2. DOMESTIC BRIBERY

2.1 UNCAC

2.1.1 Bribery of a National Public Official

Article 15 of UNCAC requires State Parties to create a criminal offence in respect to “the classic form of corruption”⁵: bribery of its public officials. Article 15 states:

Article 15. Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

⁵ Cecily Rose, Michael Kubiciel & Oliver Landwehr, *The United Nations Convention Against Corruption: A Commentary* (New York: Oxford University Press, 2019) at 165.

Cecily Rose et al. describe *why* this prohibition is universally recognized as a core measure to combatting corruption:

[B]ribery not only influences a concrete act or a single decision of a public official, but also undermines public institutions and — in the long run — the political architecture in general. Since a corrupt public official weakens both the functioning and the reputation of institutions, all states, whether they may be of a democratic or autocratic nature, have a rational interest in prohibiting bribery in the public sector. Therefore, all national criminal codes across the world include, in one form or another, the essential content of the provision.⁶

Further, Rose et al. comment on the purpose of Article 15, particularly given its “comprehensive scope”:

[O]ne must keep in mind that UNCAC applies to a broad variety of states with different political systems, cultures, and levels of development ... Article 15 hence cannot be solely conceptualised as an instrument to safeguard democracy and the rule of law. Rather, Article 15 must be based on a common ‘minimum’ valid for all states parties, irrespective of their social development and their political architecture.... In developing countries, criminalising the bribery of national public officials shall therefore help to establish well-functioning state institutions and good government practices. In states, however, with functioning democratic institutions and respect for the rule of law, the provision shall help to immunise the *status quo* against the plague of corruption.⁷

(i) Active and Passive Bribery

Article 15(a) is sometimes referred to as “active” bribery of a domestic public official, while Article 15(b) is sometimes called “passive” bribery. “Active” bribery refers to the giving or the offering of a bribe or other form of “undue advantage” to a national public official. “Passive” bribery, though somewhat a misnomer, refers to the actions of the corrupt public official who accepts, or in some cases, actively solicits, a bribe.

Marshet Tadesse Tessema and Raymond Koen note that “the *mens rea* for passive bribery and active bribery is the same, that is, intentional commission of the material elements comprising the *actus reus* ... [t]he material element which is unique to passive bribery is the solicitation or acceptance of the undue advantage.”⁸

⁶ *Ibid* at 165-166.

⁷ *Ibid* at 167.

⁸ Marshet Tadesse Tessema & Raymond Koen, “The Problem of Private-to-Private Corruption” (2017) 1:2 J Anti-Corrupt L 151–174. For a criticism of the use of the term “passive bribery”, see Matthew Stephenson, “An Almost Entirely Trivial Complaint About Terminology: Can We Please Retire the Term “Passive Bribery”?” (27 August 2019), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2019/08/27/an-almost-entirely-trivial-complaint-about-terminology-can-we-please-retire-the-term-passive-bribery/>>.

(ii) Public Official

Bribery is an offence involving public officials. “Public official” is defined in Article 2(a) of UNCAC as follows:

“Public official” shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function including for a public agency or public enterprise, or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party.

Michael Kubiciel notes that the UNCAC definition of “public official” is very broad.⁹ It includes persons who do not hold official positions but perform a public function or provide a public service (i.e. “public officials by status” such as “policemen, customs officers, members of the armed forces, judges, [an]d public prosecutors” and “public officials by function” such as those “working for a public agency or enterprise, or providing a public service irrespective of their formal status”¹⁰). This definition is more expansive than the definition prescribed by earlier multilateral conventions. The definition recognizes that even those who do not occupy official positions may still exercise influence and be subject to corruption.

(iii) Undue Advantage

Another key term in Article 15 is “undue advantage.” The United Nations Office on Drugs and Crime (UNODC)’s *Legislative Guide for the Implementation of the United Nations Convention against Corruption* states that an “undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.”¹¹ As Kubiciel notes, the word “undue” is an imprecise term, and Rose et al. note that UNCAC’s wording provides for both “the strict and

⁹ Michael Kubiciel, “Core Criminal Law Provisions in the United Nations Convention Against Corruption” (2009) 9 Intl Crim L Rev 139. Hannes Hechler, Mathias Huter & Ruggero Scaturro describe the definition as “functional”: *UNCAC in a nutshell 2019*, U4 Guide 2019:2 (U4 Anti-Corruption Resource Centre, Chr Michelsen Institute, 2019), online: <<https://www.u4.no/publications/uncac-in-a-nutshell-2019>>. Note also, that despite the apparent breadth of the definition, the idea of the “public official” may nevertheless spark normative debates and disputes in crafting the domestic law that is directed at criminalizing bribery in compliance with UNCAC. See for example: Max Lesch, “Multiplicity, hybridity, and normativity: disputes about the UN convention against corruption in Germany” (2020) *International Relations*, online: <<https://journals.sagepub.com/doi/10.1177/0047117820965662>>.

¹⁰ Rose, Kubiciel & Landwehr, *supra* note 5 at 168.

¹¹ United Nations Office on Drugs and Crime (UNODC), *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed (United Nations, 2012) [Legislative Guide (2012)], at 65, online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

more flexible interpretation”¹² to be implemented into national laws (as indeed, it is national law that will define what constitutes an “undue” advantage). According to a strict interpretation, “undue advantage” could mean all types of advantages, even small, culturally acceptable gifts. The word “undue” could also support a flexible interpretation and exclude gifts of low value that are generally socially acceptable (e.g., a cup of coffee). He warns, however, that the “line between an acceptable gift and corruption is thin.”¹³ A tradition of gift-giving should not necessarily be an automatic defence to a bribery charge. Kubiciel argues that states should be careful to evaluate which behaviours are actually cultural traditions, and moreover whether even those that can be characterized as cultural traditions are nonetheless harmful to public confidence in the state. Some countries deal with the issue by passing laws or regulations requiring all public officials to report (and sometimes surrender) to an appropriate authority a) the receipt of any gift/advantage, or b) the receipt of a gift/advantage over a specified monetary value.

Tessema and Koen state that undue advantage “may be corporeal or incorporeal, pecuniary or non-pecuniary” and “need not be for the benefit of the bribee but can be directed at any other person with whom the bribee has some affiliation.”¹⁴ However, the conduct associated with the undue advantage “must be aimed at inducing the bribee ‘to act or refrain from acting’, in breach of his or her duties, for the benefit of the briber.”¹⁵ Additionally, legal entities (broader than legal persons) can be the beneficiary of a bribe for the purposes of Article 15.¹⁶

Further, Rose et al. write that, because “the provision ... does not relate to an act of a public official that is illegal in itself[,] rather ... the crime of bribery derives its unlawfulness from the mere fact that an act of a public official is being linked with an undue advantage[,] ... Article 15 also covers a facilitation payment, that merely expedites the performance of duties of non-discretionary nature, ie, lawful acts, which public officials are already bound to perform.”¹⁷

(iv) Offering, Promising or Giving

Article 15(a) criminalizes the “offering, promising or giving” of an undue advantage. Therefore, the unilateral offer of a bribe, irrespective of whether the offer was accepted, must be criminalized by State Parties. Further, because the briber need only make a ‘promise,’ they need not have the resources to provide an undue advantage or actually intend to give the undue advantage to the public official.¹⁸

¹² Rose, Kubiciel & Landwehr, *supra* note 5 at 169-170.

¹³ Kubiciel, *supra* note 9.

¹⁴ Tessema & Koen, *supra* note 8 at 162.

¹⁵ *Ibid.*

¹⁶ Rose, Kubiciel & Landwehr, *supra* note 5 at 170.

¹⁷ *Ibid* at 166.

¹⁸ *Ibid* at 170.

(v) Soliciting or Accepting

Similarly, a request for a bribe, whether or not a bribe is agreed to or is actually given is to be criminalized (Article 15(b)). Rose et al. argue that the prohibition of an “acceptance” of an “undue advantage” (Article 15(b)) should be interpreted to mean that an offence is committed even if the public official acquiesces to the offer of a bribe, but subsequently returns the bribe or does not follow through on performance of the corrupt agreement.¹⁹ The latter circumstances would be, however, relevant to determining an appropriate sentence for the public official. It also raises the issue of whether voluntary withdrawal from the bribery scheme might be accepted as a defence as it is in the law of attempts in some countries.

(vi) Intention

Article 15 clearly states that the prohibited conduct in that article must be committed intentionally. Tessema and Koen posit that since UNCAC does not stipulate a required form of intention for corruption, it “implies that any form of intention will suffice.”²⁰

The phrase in subparagraphs (a) and (b) “in order to act or refrain from acting in matters relevant to official duties” requires that “some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties.”²¹ In instances where the accused offers a bribe that is not accepted, the accused must have intended to offer the advantage and must also have intended to influence the behaviour of the recipient in the future.²² Kubiciel notes that this phrase does not expressly prohibit instances where an undue advantage is offered or received by an official after the official has acted or refrained from acting in the exercise of his or her official duties. It could be argued that such conduct does constitute “indirectly” giving an undue advantage if the parties know or reasonably suspect that an undue advantage will be given after the fact. Alternatively, if courts do not adopt the interpretation of “indirectly,” State Parties could consider implementing legislation that criminalizes this type of behaviour. Rose et al. note that a number of national criminal codes do cover these *ex post facto* payments, and that these schemes “enhance prosecution in cases of repeated offences or when agreement has been reached that the bribe would be paid after the accomplishment or omission of an official act and the prosecutorial authorities have difficulties in proving the existence of such a previous agreement.”²³

2.1.2 Defences

There are no special defences for domestic bribery under UNCAC. Of course, the absence of any elements of the offences in Articles 15 to 25 will constitute a defence.

¹⁹ *Ibid* at 171.

²⁰ Tessema & Koen, *supra* note 8.

²¹ Legislative Guide (2012), *supra* note 11 at 62, 65.

²² Rose, Kubiciel & Landwehr, *supra* note 5 at 172.

²³ *Ibid*.

Article 28 of UNCAC deals with knowledge, intent and purpose as elements of an offence. The provision states that “[k]nowledge, intent or purpose [is] required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.” Absence of these objective factual circumstances is a defence if the knowledge, intent or purpose is not proven in another way. The *Legislative Guide* provides that “national drafters should see that their evidentiary provisions enable such inference with respect to the mental state of an offender, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.”²⁴ Despite its non-mandatory nature, most State Parties have adopted a similar evidentiary standard to Article 28.²⁵ The issue of whether facilitation payments are prohibited by UNCAC is discussed in Section 4.

2.1.3 Limitation Periods

Article 29 of UNCAC sets out its requirements in respect to limitation periods. Article 29 states:

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

The *Legislative Guide* notes “the concern underlying this provision is to strike a balance between the interests of swift justice, closure and fairness to victims and defendants and the recognition that corruption offences often take a long time to be discovered and established.”²⁶ This justifies the wording of Article 29, which requires states to “introduce long periods for all offences established in accordance with the Convention and longer periods for alleged offenders that have evaded the administration of justice.”²⁷

The provisions under UNCAC with regard to limitation periods parallel those under the OECD Convention, but with the additional option of suspending the limitation period when the offender is found to have been evading the administration of justice. The *Legislative Guide* suggests two ways that State Parties may implement Article 29. The first is to review the length of time provided for by existing statutes of limitations. The second is to review the way in which limitation periods are calculated. The *Legislative Guide* notes that “Article 29 does not require State Parties without statutes of limitation to introduce them.”²⁸

2.1.4 Sanctions

UNCAC has very little in the way of requirements or guidance for sanctions and sentencing in regard to corrupt conduct. It does not specify any maximum or minimum sentences for

²⁴ Legislative Guide (2012), *supra* note 11 at 73.

²⁵ Rose, Kubiciel & Landwehr, *supra* note 5 at 292.

²⁶ Legislative Guide (2012), *supra* note 11 at 108.

²⁷ *Ibid* at 109.

²⁸ *Ibid*. See also Rose, Kubiciel & Landwehr, *supra* note 5 at 294-300.

corruption offences. Instead, Article 12(1) of UNCAC 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. In addition, 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.” As an ancillary consequence, Article 30(7) indicates that State Parties should consider disqualification of persons convicted of corruption from holding public office for a period of time.

2.2 OECD Convention

As the name of the Convention implies, the *OECD Convention on Combating Corruption of Foreign Public Officials in International Business Transactions* only deals with bribery of foreign public officials, not domestic public officials.²⁹ Thus the OECD Convention is not relevant to this section on domestic bribery.

2.3 US

2.3.1 Bribery of a National Public Official

Domestic bribery is criminalized under both state and federal criminal law. Federal law (18 USC, c 11) sets out a number of offenses dealing with bribery, graft and conflict of interest. The principal federal section prohibiting both active and passive bribery is section 201 of 18 USC. Section 201(b)(1) criminalizes any person who “directly or indirectly, corruptly gives, offers or promises anything of value” to—or for the benefit of—any public official—or person nominated or selected to be a public official—with intent to influence any official act or the commission of any act of fraud by that official on the US, or to induce a public official to violate that official’s lawful duties. Section 201(b)(2) creates similar offenses for a public official to “corruptly demand, seek, receive, accept or agree to receive or accept anything of value” in return for improper influence or use of his or her public powers and duties. Section 201(a) defines the terms “public official,” “person selected as a public official,” and “official act.” These offenses are similar to bribery offenses in most countries. The conduct (*actus reus*) elements which need to be proven are: (1) the offering/giving or seeking/receiving of “anything of value” to or by (2) a current or selected public official for (3) improper influence of an official act or duty. The mental element (*mens rea*) is doing so “corruptly with intent to influence an official act or duty.” The expression “anything of value” is very wide and can include many things other than money. Additionally, there is no minimum economic value (or dollar figure) placed on a thing of value. For example, a prosecutor who offers an accomplice immunity or leniency is offering a thing of value, but that is not bribery because the offer is not for a corrupt purpose. “Public official” is also defined widely. The expression “an official act” is defined in § 201(a) as follows:

²⁹ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, S Treaty Doc No 105-43 (entered into force 15 February 1999), online: <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

In *McDonnell v United States*,³⁰ the US Supreme Court interpreted the meaning of “official act.” The Court held that the prosecutor must “identify a question, matter, cause, suit, proceeding or controversy involving the formal exercise of governmental power, that the pertinent question, matter, cause, suit, proceeding or controversy was required to be something specific and focused that was pending or could by law be brought before any public official”³¹ and then prove the public official made a decision or took action on that issue or agreed to do so. The action taken must involve formal exercise of governmental power similar in nature to a lawsuit, determination before an agency or hearing before a committee.³² In this regard, a typical meeting, call or event will not be an “official act.” The Court was critical of the prosecution’s expansive definition of “official act” noting that “White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government’s ‘breathtaking expansion of public corruption law would likely chill federal officials’ interactions with the people they serve and thus damage their ability effectively to perform their duties.”³³

The US Supreme Court’s decision has been widely criticized and has provoked calls for reform.³⁴ However, more recent commentators have suggested that *McDonnell* has had a limited impact on subsequent litigation.³⁵ In three subsequent cases, namely, *Cordaro v United States*, 2017 WL 6311696 (MD Pa); *United States v Lee* 919 F (3d) 340 (6th Cir 2019); and

³⁰ *McDonnell v US*, 2 136 S Ct 2355 (2016) [*McDonnell*]. For a brief summary of the case, see Richard L. Cassin, “Supreme Court Tosses McDonnell Conviction, Knock DOJ’s ‘Boundless Interpretation’ of Federal Bribery Law” (27 June 2016), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2016/6/27/supremes-toss-mcdonnell-conviction-knock-doj-boundless-inte.html>>. See also Bill Steinman, “Bill Steinman: What Does the Bob McDonnell Ruling Mean for the FCPA” (29 June 2016), online: *The FCPA Blog* <<http://www.fcpablog.com/blog/2016/6/29/bill-steinman-what-does-the-bob-mcdonnell-ruling-mean-for-th.html>>.

³¹ *McDonnell*, *supra* note 30 at 2357.

³² *Ibid* at 2358-2359.

³³ *Ibid* at 2372.

³⁴ See Carl Hulse, “Is the Supreme Court Clueless About Corruption? Ask Jack Abramoff”, *The New York Times* (5 July 2016), online: <http://www.nytimes.com/2016/07/06/us/politics/is-the-supreme-court-clueless-about-corruption-ask-jack-abramoff.html?_r=1>; Claudia Dumas, Shruti Shah & Jacqui de Gramont, “Gov. McDonnell and the Supremes: Corruption by Any Other Name Is Still Corruption” (17 June 2016), and subsequent reader comments, online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2016/6/17/gov-mcdonnell-and-the-supremes-corruption-by-any-other-name.html>>; PJ D’Annunzio, “McDonnell Case Casts Long Shadow in Public Corruption Prosecutions”, *The National Law Journal* (27 December 2016), online: <<http://www.nationallawjournal.com/home/id=1202775543648/McDonnell-Case-Casts-Long-Shadow-in-PublicCorruption-Prosecutions?mcode=1202617074964&curindex=4&slreturn=20170003135314>>.

³⁵ Terence A Parker, “Prosecuting Corruption After *McDonnell v. United States*” (2019) 94:2 Notre DL Rev at 960.

Tanoos v State, 137 NE (3d) 1008 (Ind Ct App 2019), the Courts declined to extend *McDonnell* beyond a very narrow interpretation. Jacques Singer-Emerly comments:

[The] initial indicators [i.e. that the decision triggered “a string of significant defeats for public integrity prosecutors] did not develop into a larger trend, and *McDonnell* has not turned out to be as much of an impediment to federal corruption prosecutions as some critics feared. Subsequent government prosecutions and court decisions have made this clear. Consider the following examples:

- Although, as noted above, a federal appellate court vacated the convictions of Sheldon Silver and Dean Skelos in light of *McDonnell*, federal prosecutors retried both defendants, and both were convicted by new juries that received instructions consistent with *McDonnell*.
- Similarly, another federal appeals court concluded that *McDonnell* required it to vacate a jury verdict against Congressman Chaka Fattah for five counts of corruption, but noted that several of the charges could “be reconsidered by a properly instructed jury.” This reasoning was also used by a different federal appeals court in a case called *United States v. Van Buren*.
- Furthermore, in *United States v. Conrad*, a separate appellate court held that merely “facilitating the award of government contracts” was still an “official act.” This approach was also accepted by another federal appellate court in *United States v. Repak*.
- Broadening this liability further, an appellate court in *United States v. Lee* held that a defendant was still culpable if he “use[d] his official position to exert pressure on another official to perform an ‘official act,’ or if an official ‘use[d] his position to provide advice to another official, knowing or intending that such advice[] form the basis for an ‘official act’ by the other official.”
- Notwithstanding the *De Blasio* case, where prosecutors appear to have decided not to press charges due in part to the difficulties of proof under *McDonnell*’s more demanding standard, it does not seem that *McDonnell* has had a broader chilling effect on anticorruption prosecutions, which have continued apace. For example, federal prosecutors have brought multiple corruption charges against Chicago Alderman Ed Burke, as part of an ongoing probe into a Chicago political corruption ring, and have also indicted and/or convicted public officials on corruption charges in places like Atlanta and Philadelphia.

This is only a partial list—the larger point is that the track record of federal corruption prosecutions after *McDonnell* is inconsistent with the strong predictions that the decision would make such prosecutions so difficult that bribery would be, as a practical matter, “legalized.” Of course, this does not

mean that *McDonnell* was rightly decided, or that the case had no impact. After all, other than the cases that were publicly dropped or reversed after *McDonnell*, it is almost impossible to know what investigations federal prosecutors did not pursue because of *McDonnell*, and it's entirely possible that the decision did dissuade federal prosecutors from pursuing more difficult cases. But on the whole, it appears that most federal courts have interpreted *McDonnell* narrowly rather than broadly, and, as a result, prosecutors are still able to pursue public corruption cases vigorously and often successfully.³⁶

David Kwok notes that “[i]t is likely that public officials widely benefit from the improved clarity of the *McDonnell* holding. They now know the bright-line rule. Thus, to the extent they consider accepting any payment or gift in exchange for a meeting, they can safely make the decision knowing that there is no threat of federal criminal liability.”³⁷

In regard to the mental element—a corrupt intent to influence, or be influenced in, the commission of an official act—the US Supreme Court has held that the prosecution must establish a *quid pro quo*, that is “specific intent to give or receive something of value in exchange for an official act.”³⁸ This excludes vague expectations or generalized hope of some future benefit and in this way excludes election campaign donations if they are not made in exchange for a specific official act.³⁹

Section 201(c) creates a separate offense sometimes referred to as giving or promising “illegal gratuities.” This provision is not punished as severely as violations of section 201(b).⁴⁰ Section 201(c) involves giving or accepting a gratuity for or because of the performance of an official act. There is no need to show the official act was conducted improperly or illegally, nor any need to show a *quid pro quo* for the gratuity. In effect, the section provides that it is an offense to give or accept a gratuity in respect to the official’s public duties. As the US Supreme Court said in *Sun-Diamond Growers* “[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the

³⁶ Jacques Singer-Emery, “Despite Predictions of Doom. *McDonnell v United States* Has Not Derailed US Anticorruption Prosecutions” (25 November 2019), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2019/11/25/despite-predictions-of-doom-mcdonnell-v-united-states-has-not-derailed-u-s-anticorruption-prosecutions/>>.

³⁷ David Kwok, “Is Vagueness Choking the White-Collar Statute” (2019) 53:2 Ga L Rev 495. For more discussion on *McDonnell* see also, Taylor Williams, “Criminal Law - A Formal Exercise of Governmental Corruption: Applying the Stream of Benefits Theory to the Federal Bribery Statute. *McDonnell v. United States*” (2017) 40:1 UALR L Rev 161.

³⁸ *United States v Sun-Diamond Growers*, 526 US 398 (1999) at 1402 [*Sun-Diamond Growers*].

³⁹ *United States v Jennings*, 160 F3d 1006 (4th Cir 1998) and *United States v Tomlin*, 46 F3d 1369 (5th Cir 1995).

⁴⁰ Joan Meyer, William Devaney & Peter Tomczak, “Anti-Corruption in the United States” (last visited 17 August 2021), online (blog): *Global Compliance News* <<https://www.globalcompliancenews.com/anti-corruption/anti-corruption-in-the-united-states/>>.

public official will take (and may already have determined to take), or for a past act that he has already taken.”⁴¹

2.3.2 Defenses

A person charged with a domestic bribery or illegal gratuities offense is entitled to plead any general defense that is applicable to any other crime. These defenses might include claims of entrapment or abuse of due process, but both of these defenses have requirements that will limit their availability in most bribery cases. If a person engages in bribery under physical duress, that duress will constitute a defense if the general requirements for the defense of duress exist. Likewise, necessity may be a defense, if there was no other reasonable option but to pay a bribe. For example, paying a bribe (which was more than a facilitation payment) to a customs officer who demands a bribe before allowing a shipload of perishable goods to be lawfully unloaded may well be excused on the basis of necessity (assuming there was no other reasonable option). Likewise, the general defenses of double jeopardy, *res judicata* and incapacity are available. Also, prosecution of the offense is barred if the prosecution violates an applicable state or federal statute of limitations.⁴²

2.3.3 Limitation Periods

No specific limitation periods are set out in US domestic bribery provisions. Accordingly, the general statute of limitations of five years for non-capital offenses applies to the bribery offences under the US Code.⁴³ This five-year limitation can be extended by three more years in certain circumstances (see Section 3.3.3).

2.3.4 Sanctions

According to § 202(b)(4), whoever commits the offense of bribery under § 202(b) “shall be fined under this title [a maximum of \$250,000 for individuals or \$500,000 for organizations] or not more than three times the monetary equivalent of the thing of value, whichever is the greater, or imprisoned for not more than fifteen years, or to both, and may be disqualified from holding any office of honor, trust, or profit under the United States.” Anyone committing the offense of illegal gratuities under § 201(c) is “fined under this title [a maximum of \$250,000 for individuals or \$500,000 for organizations] or imprisoned for not more than two years, or both.” The actual sentences imposed for both offenses are subject to the US Federal Sentencing Guidelines.⁴⁴ For a description of sentencing principles and practices applicable to corruption offenses, see Chapter 7, Section 4.

⁴¹ *Sun-Diamond Growers*, *supra* note 38 at 1406.

⁴² For a more detailed analysis of the offences and defences to domestic bribery and illegal gratuities, see 18 USC. Annotated 456-562 (West Group, 2000 and Cumulative Annual Pocket Part), and C Dixou, J Krisch and C Thedwall, “Public Corruption” (2009) 46 Am Crim L Rev 928.

⁴³ See 18 USC § 3282.

⁴⁴ See United States Sentencing Commission, *Guidelines Manual*, §3E11 (November 2018) online (pdf): <<https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated>> and the discussion of aggravating factors in C Dixou, J Krisch & C Thedwall, “Public Corruption” (2009) 46 Am Crim L Rev 928 at 942-949.

2.4 UK

2.4.1 *Bribery Act 2010*

The *Bribery Act 2010* (*Bribery Act*) came into force on July 1, 2011. It is the culmination of 10 to 12 years of study, consultation and debate.⁴⁵ The *Bribery Act* constitutes a codification of the law of bribery in England which prior to that time was a complex amalgamation of statute and common law.⁴⁶ The *Bribery Act* creates four bribery offences. There are two general offences: (1) offering or giving a bribe and (2) accepting a bribe. There is also a third offence of bribing a foreign public official and a new fourth offence of failure of a “commercial organization” to prevent bribery by one of its associates.

The *Bribery Act* is broad in several respects. Both domestic and foreign bribery are covered in this one statute. And as will be discussed in Chapter 3, the extra-territorial reach of the *Bribery Act* is quite extensive. Further, apart from the offence of bribing a foreign public official, the other three offences apply to giving or taking a bribe in both the public *and the private* sectors. This lack of distinction between public and private or commercial bribery has been criticized by Stuart Green. Green advocates treating commercial bribery as a crime, but also argues that its treatment should be distinguished from that of public bribery due to the distinct “moral and political character”⁴⁷ of public bribery. As explained by Peter Alldridge, commercial or private bribery “distort[s] the operation of a legitimate market,” while public bribery creates “a market in things that should never be sold.”⁴⁸

With the exception of bribery of a foreign public official, the other three bribery offences apply to both domestic and foreign activities over which the UK asserts fairly wide jurisdiction. This section covers the latter three offences which apply both domestically and to certain foreign activities. The offence of bribery of a foreign official will be dealt with in Section 3.4.⁴⁹

⁴⁵ GR Sullivan notes in “The *Bribery Act 2010*: An Overview” (2011) Crim L Rev 87 at 87, n9, that “the reform process was initiated by the publication of the Law Commission, *Legislating the Criminal Code: Corruption* 1997, Consultation Paper No. 145, followed by a final report, then another consultation paper, another final report, various interventions by the Home Office, the Ministry of Justice, several parliamentary select committees’ reports, and parliamentary debates along the way.” For an analysis of the *Bribery Act 2010*, see C Nicholls et al, *Corruption and Misuse of Public Office*, 3rd ed (Oxford: Oxford University Press, 2017).

⁴⁶ For a detailed description of the law before the *Bribery Act 2010*, see Nicholls et al, *supra* note 45 at 23-56.

⁴⁷ Stuart P Green, “Official and Commercial Bribery: Should They Be Distinguished?” in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2013) at 65.

⁴⁸ *Ibid.* See also Kelly Griffiths, “Criminalising Bribery in a Corporate World” (2016) 27:3 Current Issues Crim Just 251 for further discussion of distinguishing between official and commercial bribery.

⁴⁹ For a detailed analysis of the UK *Bribery Act* offences, see Nicholls et al, *supra* note 45.

2.4.2 Offences

(i) Offences of Bribing another Person: Section 1

Section 1 of the UK *Bribery Act* sets out two cases or scenarios in which a person will be guilty of the offence of “bribing another person” or “active bribery.” In both cases, section 1(5) specifies that it does not matter whether the bribe is made by a person directly or through a third party. Furthermore, it does not matter if the bribe is actually completed; the offer or promise is enough to make out the offence. The offence of bribing another person in Case 1 (section 1(2)) occurs where a person “offers, promises or gives a financial or other advantage to another person,” and intends that advantage to either “induce a person to perform improperly a relevant function or activity,” or “reward a person for the improper performance of such a function or activity.” This means the parties must intend acts beyond the offering or receiving of the bribe. Section 1(4) stipulates that it does not matter whether the person who has been bribed is the same person who is to perform (or has already performed) the activity in question. Section 1(3) describes Case 2 as a situation where a person “offers, promises or gives a financial or other advantage to another person,” and “knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.” The receiver need not behave improperly nor even intend to do so; in this case, the receipt of the advantage is itself improper. Note also that “person,” as defined by the UK *Interpretation Act* 1978, extends to “a body of persons corporate or unincorporate” and thus a body corporate can be liable if its “directing mind and will”⁵⁰ was implicated in the wrongdoing.

The expression “a relevant function or activity,” which is a component of the offence in all cases, is described in section 3 of the *Bribery Act* as:

- (a) any function of a public nature,
- (b) any activity connected with a business [which includes a trade or profession],
- (c) any activity performed in the course of a person's employment, and
- (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

The activity, if one of the above, must then meet one or more of the following conditions:

- Condition A is that a person performing the function or activity is expected to perform it in good faith.
- Condition B is that a person performing the function or activity is expected to perform it impartially.
- Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

⁵⁰ *Ibid* at para 3.28; *Interpretation Act* (UK), 1978 schedule 1, s 5.

A function or activity can be “relevant” even if it has no connection with the UK at all and is performed outside of the UK. This question of the jurisdictional reach of the UK *Bribery Act* is more fully examined in Chapter 3, Section 1.8.

Section 4 of the *Bribery Act* explains that a relevant function or activity is performed “improperly” if it is performed in breach of a relevant expectation or where there is a failure to perform the function in circumstances where that failure is itself a breach of a relevant expectation. Relevant expectations are described in Conditions A, B and C. Therefore, a person exercising a relevant function will be expected to act in good faith, to perform their function impartially or to avoid breaching trust. This means that the performance of the function in Case 1, or the mere acceptance of the financial advantage in Case 2, might be improper if it demonstrates bad faith, partiality or a breach of trust.⁵¹

Finally, section 5(1) states that “the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.” Section 5(2) adds that if the performance is not part of the law of the UK, then local customs and practices must be disregarded unless they are part of the written law (either legislative or judicially created) applicable to the country or territory in question. Ultimately this extends UK norms and standards to foreign sovereign nations, a position which raises “the need for active collaboration between jurisdictions” and furthermore “is likely to raise concerns for corporate legal advisers when advising their corporate clients on whether or not to self-report.”⁵² According to the Joint Committee on the Draft Bribery Bill, the UK Government's deliberate intention is to “encourage a change in culture in emerging markets” by eliminating local custom from a criminal court's considerations.

(ii) Offences Relating to Being Bribed: Section 2

Section 2 of the *Bribery Act* sets out four cases in which a person will be guilty of offences related to being bribed. The offence of “being bribed” is sometimes referred to as “passive bribery” despite the fact that section 2 also includes active conduct on the part of a government official or other person “requesting” a bribe. The offences are formulated in a rather complex way and often appear to overlap, but the drafter's intention is to ensure that the provisions will cover all the ways in which being bribed might occur.⁵³ In all cases, it does not matter if the person actually receives the bribe; the offence may be made out simply by requesting or agreeing to receive the bribe.

⁵¹ GR Sullivan points out that such a finding would be easy to prove in cases where an individual takes a bribe in advance of some decision he or she is due to make in their capacity as a judge, civil servant, agent, etc., where the briber has an interest that may be affected by the individual's decision. Evidence of taking this advantage may be proof in and of itself of improper performance even before a decision is made; Sullivan, *supra* note 45 at 90, n 15.

⁵² John Hatchard, “How Well Are We Doing: The United Kingdom and Its Implementation of the OECD Anti-Bribery Convention Legal Commentary” (2017) 29 Denning LJ 109 at 126. For more on section 5, see Nicholls et al, *supra* note 45 at paras 3.64-3.70.

⁵³ James Maton, “The UK *Bribery Act* 2010” (2010) 36:3 Employee Rel LJ 37 at 38; Maton states that the need for such detail was suggested by the Law Commission when publishing draft legislation.

There are four possible routes to liability:

Section 2(2): The first offence is described as “Case 3” (Cases 1 and 2 are dealt with in section 1). In this scenario, the person “requests, agrees to receive or accepts an advantage, whether or not he actually receives it; intending that, in consequence, a relevant function or activity should be performed improperly” (whether by [the person mentioned] or another person).⁵⁴ The key in this case is that the recipient of the bribe intends improper performance to follow as a consequence of the bribe. The improper performance may be done by the receiver or by another person.

Section 2(3): In Case 4, a person is guilty where he or she “requests, agrees to receive or accepts a financial or other advantage” and “the request, agreement or acceptance itself constitutes the improper performance by [the person] of a relevant function or activity.”⁵⁵ In this case, the taking of the bribe in and of itself amounts to improper performance of the relevant function. As described above with regard to Case 2, for this case to be made out the request, agreement or acceptance must itself prove bad faith, partiality, or a breach of trust. For example, the offence would be made out if a civil servant requested \$1000 in order to process a routine application.⁵⁶

Section 2(4): Case 5 deals with a person who requests, agrees to receive or accepts the bribe “as a reward for the improper performance ... of a relevant function or activity.”⁵⁷ The performance can be done by the person being bribed or another person.

Section 2(5): Finally, Case 6 deals with a situation where, “in anticipation of or in consequence of [a person] requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly” (either by that person or by another person at the culpable receiver's request or with the receiver's assent or acquiescence).⁵⁸ According to section 2(8), if a person performing the function or activity is someone other than the receiver, it “does not matter whether that performer knows or believes that the performance of the function or activity is improper.”⁵⁹

In all cases, it does not matter whether the bribe is accepted directly by the receiver or through a third party, and it does not matter if the bribe is for the benefit of the receiver or another person.

The descriptions in Section 2.4.2(i) pertaining to the definitions of “relevant function or activity,” “improper performance” and “expectation” apply equally to section 2 offences.

⁵⁴ Nicholls et al, *supra* note 45 at para 3.46.

⁵⁵ *Ibid* at para 3.47.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at para 3.48.

⁵⁸ *Ibid* at para 3.49.

⁵⁹ *Ibid*.

According to section 2(7), in Cases 4, 5, and 6, “it does not matter whether the person knows or believes that the performance of the function or activity is improper.” This section has resulted in a lack of clarity concerning the *mens rea* for the various cases in both sections 1 and 2. Section 2(7) seems to create a distinction between sections 1 and 2: in section 1, the “briber” must intend improper performance or improper receipt, whereas the “bribee” in section 2 can be guilty even if he or she did not know his or her performance was improper. G.R. Sullivan has considered the varying interpretations and suggests that section 2(7) was included for the sake of certainty, in order to confirm that normative awareness of wrongfulness is not necessary for those who accept advantages.⁶⁰ The goal, according to the Joint Committee on the Draft Bribery Bill, is to encourage people to “think twice” when seeking or taking an advantage.⁶¹ Sullivan further suggests that the same concept can be taken for granted in Cases 1-3, which would mean a briber is not required to know that the behaviour they intend to induce in the bribee is improper. Put another way, ignorance of the law is not a defence.

(iii) Commercial Organization Failing to Prevent Bribery: Section 7

Section 7 of the *Bribery Act* creates a new strict liability offence of failure of a commercial organization to prevent bribery. Section 7 defines the scope of this new offence in the following words:

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.⁶²

For more information on section 7, refer to Chapter 3, Section 2.4.1.

(iv) Consent or Connivance of Senior Officers: Section 14

If any of the bribery offences under sections 1, 2 or 6 are committed by a body corporate or a Scottish partnership, section 14 of the *Bribery Act* mandates that a “senior officer” or someone purporting to act in that capacity will be personally criminally liable (as will the body corporate) if the offence was committed with the officer's consent or connivance.

Senior officer is defined in section 14(14) as a “director, manager, secretary or other similar officer.” While the word “manager” is not defined and could be broadly interpreted, Nicholls et al. note that it was narrowly defined in a somewhat similar provision in *R v Boal* to include only “decision-makers within the company who have the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for

⁶⁰ Sullivan, *supra* note 45.

⁶¹ Cited in Nicholls et al, *supra* note 45 at para 3.45.

⁶² Interestingly, there is no corresponding offence of failure to prevent the taking of a bribe. For more on this offence, see Nicholls et al, *supra* note 45 at paras 3.88-3.117.

putting proper procedures in place.”⁶³ I question whether the narrow *Boal* definition is consistent with the purpose of putting a duty on “managers” in general to not consent or connive in the commission of bribery by those under their supervision.

The words “consent and connive” are also not defined in the *Bribery Act*. Nicholls et al. note that they will follow the model in the *Fraud Act 2006*, section 12,⁶⁴ and suggest that section 14 will be satisfied by knowledge or “willful blindness” to the conduct that constitutes bribery along with remaining silent or doing nothing to prevent that conduct from occurring or continuing.⁶⁵ See also Chapter 3, Section 3.4.

Finally, a “senior officer” will only be liable for a bribery offence committed by the corporation if that senior officer has a “close connection” to the UK as defined in section 12(4) of the *Bribery Act*.

2.4.3 Defences

Section 5(2) of the *Bribery Act* indicates that no bribery offence is committed if the payment of a financial or other advantage “is permitted or required by the written law applicable to the country or territory concerned.” In some countries, the law or government policies require the appointment of a commercial agent as a condition of doing business in that country. The agent is appointed by or associated with persons in high places and demands large agent fees for little or no work.⁶⁶ The agent's fees are shared with the high officials. This practice is a form of bribery, but it is not defined as corruption in such countries and is in fact legally required in those countries.

Section 13 of the *Bribery Act* provides a defence for persons whose conduct, which would otherwise constitute a bribery offence, is proven on a balance of probabilities to be necessary for the proper exercise of intelligence or armed services functions. Where the conduct that comprises the bribery offence is necessary for the proper exercise of any function pertaining to UK intelligence or armed services, the defence is made out. The head of the intelligence service or Defence Council must also ensure that arrangements are in place to ensure that any conduct constituting an offence will be necessary. Subsection (5) provides that where a bribe is paid by a member of the intelligence service or armed forces and they are able to rely on the section 13 defence, the receiver of that bribe is also covered by the defence.⁶⁷

Sullivan criticizes section 13 for its potential to provide space for “what may be highly questionable conduct.”⁶⁸ Although Sullivan recognizes the utility of such a defence, he worries “it might encourage payments made in circumstances far removed from matters of

⁶³*R v Boal* (1992), 95 Cr App R 272, cited in Nicholls et al, *supra* note 45 at para 3.189.

⁶⁴ *Ibid* at para 3.192.

⁶⁵ *Ibid* at para 3.189.

⁶⁶ Sullivan, *supra* note 45 at 100.

⁶⁷ For more on this defence, see Nicholls et al, *supra* note 45 at 99-101.

⁶⁸ Bob Sullivan, “Reformulating Bribery: A Legal Critique of the Bribery Act 2010” in Horder & Alldrige, *supra* note 47, 13 at 35.

vital national security,”⁶⁹ especially since the duties of the Intelligence Service include protecting the UK’s economic wellbeing.

No other bribery-related defences are specifically set out in the *Bribery Act*, such as committing bribery under duress or by necessity. While the requirements for these defences are rather stringent, there is no reason why they should not apply if the defence requirements are present. The Ministry of Justice Guidance states explicitly that duress may be available if a bribery offence was committed to prevent loss of life, limb or liberty.⁷⁰ Since duress, which includes duress by threat or by circumstances, only applies when the defendant is under threat of immediate or nearly immediate death or serious bodily harm, the defence would not cover less pressing health and safety concerns.⁷¹ As a result, Sullivan expresses concern regarding the potential of the *Bribery Act* to catch payments extracted through extortion, especially in light of the Act’s broad jurisdiction in areas where extortionate demands are common.⁷² The defence of necessity has the potential to assist defendants under the Act, but is still uncertain and relatively novel in the UK. Necessity acts as a justification for the defendant’s conduct in UK law, unlike duress, which is an excuse for wrongful acts committed under pressure. Necessity is based on the idea that sometimes the benefits of breaking the law outweigh the benefits of compliance. The defence is more likely to succeed for property offences, such as bribery, than offences involving the infliction of physical harm.⁷³

Other defences such as honest mistake of fact, incapacity and diplomatic immunity should also be available if the requirements for those defences are met. Immunity from the criminal law applies to foreign visiting sovereigns, foreign diplomats and members of the foreign armed forces. Entrapment is another defence available to a charge of bribery. The scope of the entrapment defence in England is set out by the House of Lords in *R v Loosely and Attorney General’s Reference (No 3 of 2000)*.⁷⁴ It is a non-exculpatory defence and therefore does not exonerate the accused. There is no verdict of not guilty, but rather a stay of proceedings on the basis that the investigative activities of the state were unfair and that prosecution of the offence would tarnish the integrity of the court and be an affront to the public conscience. The test for entrapment is whether the state activity goes beyond providing an opportunity to commit a crime and instead has actually instigated the offence. The details of this test are set out in *Loosely*. Random-virtue testing (offering a person an opportunity to commit a crime in circumstances in which there is no reasonable suspicion

⁶⁹ *Ibid.*

⁷⁰ United Kingdom, Minister of Justice, *The Bribery Act 2010: Guidance* [UK Bribery Act Guidance], online: <<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>. See Nicholls et al, *supra* note 45 at para 2.22, which states that the addition of duress to the Bribery Act 2010 to account for facilitation payments was considered in Parliamentary debate, but was ultimately left to prosecutorial discretion.

⁷¹ AP Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 7th ed (Oxford: Hart Publishing, 2019) at 801.

⁷² Sullivan, *supra* note 68 at 14–15.

⁷³ AP Simester et al, *supra* note 71 at 871–872.

⁷⁴ *R v Loosely*, [2002] Cr App R 29.

that the person intended to engage in the commission of a crime) is not permitted. Entrapment and integrity testing are also discussed in Chapter 6, Section 4.6.3.

(i) Section 7 – Adequate Procedures Defence

The “adequate procedures” defence applies to section 7 of the *Bribery Act*. Section 7(2) states that a full defence to the charge is available if the commercial organization can prove on a balance of probabilities that it had adequate procedures in place and followed those procedures at the time the bribery occurred in order to prevent associated persons from engaging in bribery. As is more fully argued by Stephen Gentle, this defence has proven to be contentious.⁷⁵

Section 9 requires the Secretary of State to publish guidance for commercial organizations regarding the “adequate procedures” that companies should implement to prevent persons associated with the company from bribing.

After much debate, lobbying and consultation, the Secretary of State for Justice (head of the Ministry of Justice) on March 30, 2011 issued the *Bribery Act 2010 Guidance* (*Guidance*, or *UK Guidance* where required for clarity).⁷⁶ On the same day, the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS) published their *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP* (*Joint Guidance*) to ensure consistency between police and prosecutors and to indicate that police and prosecutors will have careful regard for the *Guidance* issued by the Secretary of State.⁷⁷

The *Guidance* is organized around six principles for establishing adequate procedures to prevent corruption. After each principle is set out, the *Guidance* provides commentary on the meaning and scope of each principle. The six principles are as follows:

Principle 1: Proportionate procedures

A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.

Principle 2: Top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing

⁷⁵ Stephen Gentle, “The *Bribery Act* 2010: (2) The Corporate Offence” (2011) 2 Crim L Rev 101 at 106.

⁷⁶ UK *Bribery Act Guidance*, *supra* note 70.

⁷⁷ UK, Minister of Justice, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (2011) [Joint Prosecution Guidance (2010)], online (pdf): <<https://www.sfo.gov.uk/?wpdmdl=1456>>. Note also that the Joint Prosecution Guidance was revised in 2019 [Joint Prosecution Guidance (2019)], online: <<https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>>.

bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 3: Risk assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Principle 4: Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Principle 5: Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Principle 6: Monitoring and Review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Appendix A of the *Guidance* is composed of eleven case studies for further illustration and clarification of the six principles for “adequate procedures.” For example, case study 1 focuses on the problem of facilitation payments and discusses what a company can do when faced with demands for them.

TI UK has also provided guidance on the *Bribery Act* in a 100-page *Guidance on Adequate Procedures* and a 16-page *Adequate Procedures Checklist*, as well as publications such as *Managing Third Party Risk*,⁷⁸ *Anti-Bribery Due Diligence for Transactions*,⁷⁹ *Diagnosing Bribery Risk*,⁸⁰ and *Corruption in the UK Part Two: Assessment of Key Sectors*.⁸¹ These guidance

⁷⁸ TI UK, *Managing Third Party Risk: Only As Strong As Your Weakest Link*, (June 2016), online (pdf): <<https://www.transparency.org.uk/publications/managing-third-party-risk-only-as-strong-as-your-weakest-link>>.

⁷⁹ TI UK, *Anti-Bribery Due Diligence for Transactions*, (April 2014), online (pdf): <<https://www.transparency.org.uk/publications/anti-bribery-due-diligence-transactions>>.

⁸⁰ TI UK, *Diagnosing Bribery Risk*, (July 2013), online (pdf): <<https://www.transparency.org.uk/publications/diagnosing-bribery-risk>>.

⁸¹ TI UK, *Corruption in the UK Part Two: Assessment of Key Sectors*, (June 2011), online (pdf): <https://www.transparency.org/files/content/pressrelease/20110707_UK_Corruption_in_the_UK_Part_2_EN.pdf>.

documents are designed to assist companies in complying with the *Bribery Act* by providing clear, practical advice on good practice anti-bribery systems that in TI's opinion constitute "adequate procedures" for compliance with the *Bribery Act*.⁸² Other useful documents, policies and recommended anti-bribery strategies exist and are outlined by Nicholls et al.⁸³

Despite the guidance, emerging case law may suggest a limited ambit for the defence, particularly for smaller or medium sized enterprises. For example, after the Skansen Interiors case, Joanna Ludlum, Charles Thomson, and Henry Garfield commented as follows:

Skansen's defence sought to draw to the jury's attention the company's modest size (a workforce totalling approximately thirty) and limited geographical reach to argue that the company did not need sophisticated procedures to be in place for them to be "adequate". Skansen also argued that staff did not need a detailed policy to tell them not to pay bribes because such a prohibition was common sense and the company should be able to rely on the integrity and honesty of its employees to help avoid bribery. Skansen also sought to rely on broadly worded policies that enforced ethical conduct even though, at the relevant time, it had no specific anti-bribery policy. Existing financial controls, requiring transactions to be given the green light by numerous individuals and standard form clauses relating to bribery in contracts were also raised in support of the case for the defence.

However, this was not enough to convince the jury that the company's procedures were adequate and a guilty verdict was returned.

...

[T]he case provides an insight into what factors may and may not be taken into account by a jury when considering whether anti-bribery procedures are "adequate". The Ministry of Justice guidance accompanying the UKBA repeatedly makes clear that adequate bribery prevention procedures only need to be proportionate to the bribery risks that an organisation faces. More specifically, the guidance notes that if an organisation is small or medium sized "the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation" and that "[t]o a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor." Clearly in this case the jury did not consider that the steps Skansen had taken to prevent bribery were adequate, despite the small size of the company and its limited geographical reach. The case therefore serves as a reminder to small and medium sized companies to ensure that a rigorous risk assessment is conducted in relation to bribery risks and robust procedures

⁸² TI UK, *Adequate Procedures: Guidance to the UK Bribery Act 2010*, (March 2012), online (pdf): <<https://www.transparency.org.uk/publications/adequate-procedures-guidance-uk-bribery-act-2010>>.

⁸³ Nicholls et al, *supra* note 45 at 136-137.

are in place to deal with those risks that comply with the six guiding principles set out in the Ministry of Justice's Guidance.... The case also highlights the importance of documenting steps taken to implement "adequate procedures", irrespective of the size of the organisation, even if the conclusion is that there is no need for a policy (although that conclusion is likely to be rare for most companies). For all companies, large and small, the case suggests that, when it comes to considering adequate procedures, juries will give short shrift to ineffective policies and procedures that are not designed to target the considered bribery risks faced by the company and/or are not properly documented and communicated.⁸⁴

2.4.4 Limitation Periods

In accordance with general principles of UK criminal law, the offences in the UK *Bribery Act* are not subject to any limitation periods in respect to laying charges. Applicable human rights legislation mandates that once charges have been laid, defendants are entitled to receive a public hearing within a "reasonable time" – see for example the UK *Human Rights Act 1998* and the European Convention on Human Rights, Article 6(1).

2.4.5 Sanctions

Section 11 of the *Bribery Act* describes the penalties for all of the above offences. It states:

- (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 paragraph 24(2) of Schedule 22 to the Sentencing Act 2020, and

⁸⁴ Joanna Ludlam, Charles Thomson & Henry Garfield, "UK: "Adequate Procedures" and Self Reporting Under the Spotlight as Jury Rejects Section 7 Defence" (14 March 2018), online (blog): *Global Compliance News* <<https://www.globalcompliancenews.com/2018/03/14/adequate-procedures-rejects-defence-20180313/>>.

(b) in its application to Northern Ireland, as a reference to 6 months.

The statutory maximum fine is £5000 in England and Wales or £10,000 in Scotland, if the conviction is summary. If convicted on indictment, the amount of the fine is unlimited under the *Act*. Companies convicted of bribery are also liable to exclusion from obtaining future public contracts under the EC Regulations 2006 or the Public Contracts Regulations 2015 if the tender is made after February 26, 2015.⁸⁵

A section 7 offence can only be tried on indictment, and thus an organization convicted of a section 7 offence is subject to an unlimited fine, provided that fine is fair and proportionate in the circumstances of each case.

For a detailed description of sentencing principles and practices applicable to corruption offences, see Chapter 7, Section 5.

2.5 Canada

2.5.1 Offences

The Canadian *Criminal Code* contains eight specific offences relating to corruption and bribery committed in Canada:

- s. 119 Bribery of Judges or Members of Parliament or Provincial Legislative Assemblies
- s. 120 Bribery of Police Officers or other Law Enforcement Officers
- s. 121 Bribery/Corruption of Government Officials [Influence Peddling]
- s. 122 Fraud or Breach of Trust by a Public Official
- s. 123 Municipal Corruption
- s. 124 Selling or Purchasing a Public Office
- s. 125 Influencing or Negotiating Appointments to Public Offices
- s. 426 Giving or Receiving Secret Commissions

The offences are in part overlapping, so the same conduct can sometimes constitute an offence under more than one provision. The offences apply to both individuals and corporations. The offences concerning bribery of judges, politicians and police officers (sections 119-120) are considered to be the most serious offences and are punishable by a maximum of 14 years imprisonment. The other bribery and corruption offences (sections 121-125 and 426) are punishable by a maximum of 5 years imprisonment. In 2019, sections 121(3)(b), 122 (b), 123(1), 124, 125 and 426(3)(b) were amended to provide that those guilty of offences under sections 121-125, 426 may be found guilty of an offence punishable on summary conviction.⁸⁶ These offences are largely unchanged since their incorporation into

⁸⁵ Nicholls et al, *supra* note 45 at 95-96.

⁸⁶ Regarding sentencing these kinds of offences, the Court in *R v Serré*, 2013 ONSC 1732 (in the context of immigration fraud) provides helpful remarks at paras 28-35.

Canada's first *Criminal Code* in 1892. Several of these offences are loosely related to the common law offence of misconduct in public office. Canada abolished common law offences in 1955 and therefore the common law offence of misconduct in public office is of no force or effect in Canada.⁸⁷ However, this common law offence recently underwent a major resurgence in some common law jurisdictions⁸⁸ such as Hong Kong, Victoria and New South Wales in Australia, and the UK, even after the enactment of the UK's *Bribery Act 2010*.⁸⁹

Note. The discussion of Canada's domestic bribery offences that follows largely originates from Gerry Ferguson's "Legislative and Enforcement Framework for Corruption and Bribery Offences in Canada," a paper presented at the First ASEM Prosecutors General Conference (as part of the Canada-China Procuratorate Reform Cooperation Program) in Shenzhen, China, December 9-12, 2005.

BEGINNING OF EXCERPT

(i) Bribery of Judges, Members of Parliament or Provincial Legislative Assemblies

Section 119 of the *Criminal Code* creates offences which apply both to the person who accepts or obtains a bribe and to the person who offers the bribe.

Elements of the Offence: With regard to the person accepting or obtaining the bribe, the following elements constitute the full offence:

- The accused must be the holder of a judicial office, or be a member of Parliament or the legislature of a province;
- The accused must accept or obtain, agree to accept or attempt to obtain any money, valuable consideration, office, place of employment for himself or herself or another person;⁹⁰

⁸⁷ But see reference to it in *R v Boulanger*, [2006] 2 SCR 49 at paras 1, 52.

⁸⁸ D Lusty, "Revival of the Common Law Offence of Misconduct in Public Office" (2014) 38 Crim LJ 337.

⁸⁹ Nicholls et al, *supra* note 45 at c 5.

⁹⁰ The bribe must be proven in unequivocal terms: *R v Philliponi*, [1978] 4 WWR 173 (BCCA). Note also the following comment from Christopher J Ramsay:

The bribery provisions, set out in the Criminal Code, are often tempered by further federal and provincial legislation. For example, although the bribery provisions in the Criminal Code create a draconian landscape where "any valuable consideration" or "benefit" can be considered a bribe, federal, provincial and municipal governments are allowed to enact their own laws to determine which gifts are acceptable for officers. Nevertheless, gifts beyond a certain threshold, even if acceptable, must be disclosed. The threshold is determined by the level of government that has conduct over the public officer in question.

See Christopher J Ramsay, "Preface" in Mark F Mendelsohn, ed, *The Anti-Bribery and Anti-Corruption Review*, 6th ed (London: Law Business Research Ltd, 2017) 53 at 54-55, online (pdf):

<https://www.cwilson.com/app/uploads/2018/01/ABAAC_6Canada.pdf>.

- This must be done *corruptly*, and must relate to anything done or omitted or to be done or omitted by the accused in the accused's official capacity.

The offence for the person *offering* the bribe is essentially the mirror-image of that outlined above: the accused must corruptly give or offer any money, valuable consideration, office, place or employment to the holder of a judicial office or a member of Parliament or of the legislature of a province. The bribe must relate to anything done or omitted by that person in their official capacity, and may be for that person or any other person.

With respect to ministerial officers, the distinction between political and non-political officers has no significance, and includes ministers of the Crown.⁹¹

"Corruptly"

As noted, the only specifically required mental element is that the accused act corruptly. The Court in *R v Kozitsyn*,⁹² citing *Regina v Brown*, [1956] OJ No 573 stated that "[c]orruptly" does not mean wickedly or dishonestly, but to refer to an act done *mala fides* designed wholly or partially for the purpose of bringing about the effect forbidden by the section." The accused's conduct need not amount to a bribe to perform a specific act, or a reward for its accomplishment.⁹³ The Court in *R v Duffy* stated that, "[c]orrupt intent can be inferred from circumstances of the agreement and acceptance, including the manner in which the agreement was struck and manner in which the money was transacted."⁹⁴

"Official Capacity"

Provided the accused corruptly received money for influence "in his official capacity," the use to be made of the money is irrelevant.⁹⁵ It is not necessary that the corrupt act of a Member of Parliament relates to their legislative duties; rather, it may be connected to their participation in an administrative act of government.⁹⁶ Similarly, a cabinet minister, in absence of contrary evidence, acts in their official capacity as a member of the legislature when taking ministerial actions connected with the administration of the ministry.⁹⁷

In a highly publicized trial, Senator Michael Duffy was charged with 31 counts relating to allegations of breach of trust, fraudulent practices and accepting a bribe, and was ultimately acquitted on all charges. A charge under section 119(a) of the *Criminal Code*

⁹¹ *R v Sommers*, [1959] SCR 678.

⁹² 2009 ONCJ 540 (CanLII) at paras 3-4.

⁹³ *R v Gross* (1945), 86 CCC 68 (Ont CA), cited in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC).

⁹⁴ *R v Duffy*, 2016 ONCJ 220 at 1074 [*Duffy*]. See 1075-1077 for further discussion of the term.

⁹⁵ *R v Yanakis* (1981), 64 CCC (2d) 374 (QCA) (no defence that the money was used for non-reimbursable expenses incurred by the accused).

⁹⁶ *R v Bruneau*, [1964] 1 CCC 97 (Ont CA) (accused MP acting "in official capacity" when agreeing to accept money for the use of his influence to effect the purchase of the constituent's land by the government).

⁹⁷ *Arseneau v The Queen* (1979), 45 CCC (2d) 321 (SCC) (accused's capacity as a member cannot be severed from the functions he performed as a minister).

involved allegations that Senator Duffy improperly claimed residency expenses and repaid \$90,000 using corruptly received money (a bribe) received from Nigel Wright, Chief of Staff to then Prime Minister Harper ... Justice Vaillancourt found that Senator Duffy did not accept the funds voluntarily but was forced to accept them so the government could manage a political fiasco. Therefore, the acceptance of funds was not done corruptly. Thus, Senator Duffy was acquitted. Justice Vaillancourt also held that the charge would have otherwise been stayed as a result of an officially induced error.⁹⁸

(ii) Bribery of Police Officers or other Law Enforcement Officers

Section 120 of the *Criminal Code* creates offences similar to those outlined in section 119, but in relation to a different group of public officers: police officers, justices, and others involved in the administration of criminal law. There are few decisions which discuss the scope or meaning of the offence.⁹⁹

Elements of the Offence: As in section 119, the offence can be committed in two general ways. First, the accused must be a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or be employed in the administration of criminal law. The accused must corruptly accept or obtain, agree to accept, or attempt to obtain for himself or herself or any other person, any money, valuable consideration, office, place or employment.

The offence may also be committed where the accused corruptly gives or offers any money, valuable consideration, office, place or employment to a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or a person employed in the administration of justice. There must be an intention that the person bribed will interfere with the administration of justice, procure or facilitate the commission of an offence or protect from detection or punishment a person who has committed or who intends to commit the offence. Importantly, the individual bribing the officer must know or believe the person accepting the bribe is in fact an officer, or the requisite intent is not made out.¹⁰⁰

(iii) Frauds on the Government

Section 121 of the *Criminal Code* outlines seven different offences relating to fraud on the government. Section 121 does not include municipal corruption, since section 118 states that “government” means federal or provincial government, and therefore does not include municipal governments. However, the definitions of “office” and “official” have been interpreted widely to include municipal offices and officials. Further, section 123

⁹⁸ *Duffy*, *supra* note 94 at 1111, 1112, 1163.

⁹⁹ However, the Court in *Melhi v Canada* (Citizenship and Immigration), 2018 CanLII 107568 (CA IRB) provides an interesting comparison between the similar US and Canadian provision, and also comments (at paras 51-52) on the meaning and significance of the offence of bribery.

¹⁰⁰ *R v Smith* (1921), 38 CCC 21 (Ont CA).

expressly criminalizes municipal corruption.¹⁰¹ The seven offences under section 121 are described below.

(a) Giving or Accepting a Benefit

Section 121(1)(a) provides that it is an offence for a government official¹⁰² to demand, accept, or offer to accept from any person a loan, reward, advantage or benefit of any kind¹⁰³ as consideration in respect to the government official's duties.¹⁰⁴ It also creates a reciprocal offence where a person gives, offers or agrees to give or offer to an official or any member of the official's family, or to anyone for the benefit of the official, an item of the same description.

In either case, the action may be performed directly or indirectly, and must be done as consideration for cooperation, assistance, exercise of influence, or an act or omission.¹⁰⁵ This action must be in connection with the transaction of business with, or any other matter of business relating to, the government or a claim against Her Majesty or any other benefit that Her Majesty is entitled to bestow.¹⁰⁶ It is legally irrelevant whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to

¹⁰¹ Further, the Court in *R c Marcotte*, 2015 QCCQ 7961 (CanLII) comes to the conclusion that s 121 does not apply to municipal officials (at paras 155-156). Additionally, the removal of s 121 from the charges in *R c Bergevin*, 2017 QCCQ 21229 (CanLII) (which involved municipal corruption) may also suggest that municipalities are not included in the scope of "government" in the s 121 offences. In discussing s 118's definition of "government" as "the federal government, the government of a province, or Her Majesty in right of Canada or a province", Graham Steele notes that "this is a startling limitation", given the ubiquity of intricate infrastructure projects at the municipal level. For more, see Graham Steele, "The Criminal Code's Procurement Crimes: Underused Tools in Canada's Anti-Corruption Effort" (2017-2018) 65 Crim LQ 187 at 13 (in the Westlaw electronic version).

¹⁰² Section 118 of the *Criminal Code* defines an "official" as a person who holds an office (an office or appointment under the government, a civil or military commission or a position of employment in a public department) or is appointed to discharge a public duty.

¹⁰³ For discussion of the scope of a benefit "of any kind" in s 121, see *R v O'Brien*, 2009 CanLII 100209 (ONSC) at paras 13-19.

¹⁰⁴ "Commission" and "reward" connote compensation for services rendered. "Advantage" and "benefit" are not so limited in scope and include gifts not related to any service provided by the recipient. A government employee receives an "advantage" or "benefit" when the employee receives something of value that, in all the circumstances, the trier of fact is satisfied constitutes a profit to the employee (or family member), obtained at least in part because the employee is employed by the government, or because of the nature of the employee's work for the government: *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA); *R v Vandenbussche* (1979), 50 CCC (2d) 15 (Ont Prov Ct).

¹⁰⁵ "Influence" requires the actual affecting of a decision, such as the awarding of a contract. "Cooperation" and "assistance" are broader in scope and include the opening of doors or arranging of meetings (which would not constitute exercises of influence): *R v Giguere*, [1983] 2 SCR 448.

¹⁰⁶ The Court in *R v Carson*, 2018 SCC 12 (CanLII) provides very important comments on the meaning of two expressions: in ss 121(1)(a) and 121(1)(d), namely "in connection with ... any matter business relating to the government" and "any matter of business relating to the government."

do what is proposed, as the case may be. There is no requirement that the official be acting in their official capacity when contravening this section.¹⁰⁷

*R v Cogger*¹⁰⁸ clarified the *mens rea* element of this offence: the accused must intentionally commit the prohibited act with knowledge of the circumstances that are necessary elements of the offence. Where the accused is an official, they must be aware that they are an official; they must intentionally demand or accept a loan, reward, advantage or benefit of any kind for themselves or another person; and they must know that the reward is in consideration for their cooperation, assistance or exercise of influence in connection with the business transaction or in relation to the government.¹⁰⁹ However, it is irrelevant that the accused did not know their act constituted a crime or that they did not intend to accept a bribe by their definition of that term.¹¹⁰ Furthermore, willful blindness is a sufficient substitute for knowledge.¹¹¹

(b) Commissions or Rewards

Section 121(1)(b) of the *Criminal Code* provides that it is an offence for anyone having dealings of any kind with the government¹¹² to directly or indirectly pay a commission or reward to or confer an advantage or benefit of any kind¹¹³ with respect to those dealings on an employee or official of the government with which the accused deals, or any member of their family, or anyone whose involvement will benefit the employee or official. Like section 121(1)(c), section 121(1)(b) is a "conduct offence," which means that "they do not require, as part of the *actus reus*, proof that any result flowed from the doing of the prohibited act,"¹¹⁴ and they are broader than the other s.121 crimes.¹¹⁵ Although no mental element is specified, the jurisprudence suggests that the accused must intend to confer a benefit with respect to the dealings with the government.¹¹⁶ It is an offence if a

¹⁰⁷ *Martineau v R*, [1966] SCR 103.

¹⁰⁸ [1997] 2 SCR 842 [*Cogger*] (corruption is not a necessary element of *actus reus* or *mens rea*).

¹⁰⁹ In *R v Terra Nova Fishery Co* (1990), 84 Nfld & PEIR 13 (Nfld TD), the accused company was acquitted since reasonable doubt existed as to whether the government official upon whom the benefit was conferred was aware that it was in hope of his assistance in altering export certificates.

¹¹⁰ *Cogger*, *supra* note 108.

¹¹¹ *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA) [*Greenwood*].

¹¹² Formerly, under section 110 the term "person dealing with the government" referred to a person who, at the time of the commission of the alleged offence, had specific dealings or ongoing dealings in the course of their business with the government, where the gift could have an effect on those dealings: *R v Reid*, [1982] 3 WWR 77 (Man Prov Ct). The current, more expansive language, may encompass a wider range of dealings. "Government" is defined in s 118 of the *Criminal Code* as the Government of Canada, the government of a province, or Her Majesty in right of Canada or a province.

¹¹³ *Greenwood*, *supra* note 111.

¹¹⁴ *R v Ross and Dawson*, 2019 NSSC 275 (CanLII) at para 354.

¹¹⁵ *Ibid* at para 353.

¹¹⁶ *R v Cooper*, [1978] 1 SCR 860.

gift is given for an ulterior purpose, even if no return is ultimately given and even if there is no acceptance by the official.¹¹⁷

(c) Officials and Employees

Pursuant to section 121(1)(c) of the *Criminal Code*, it is an offence for an official or employee of the government¹¹⁸ to demand, accept or offer or agree to accept a commission, reward, advantage or benefit¹¹⁹ from a person who has dealings with the government.¹²⁰ This may be accomplished directly or indirectly by the accused, or through a member of the accused's family¹²¹, or through anyone for the benefit of the accused.

Although no mental element is specified, *R v Greenwood*¹²² held that the offence is committed where the employee makes a conscious decision to accept a gift, knowing at the time of receipt that the giver has dealings with the government. There is no requirement that the accused actually intended to exercise some undue influence in the giver's favour:

¹¹⁷ *R v Pilarinos* (2002), 167 CCC (3d) 97. See Cote J's dissent for a view on the relationship between 121(1)(b) and (c), particularly regarding why they do not require a *quid pro quo*:

[61] The *quid pro quo* required for all others. 121 offences is the corrupt practice that carries the potential to undermine government integrity. This requirement signals Parliament's concern with actual government integrity. Conversely, its absence from s. 121(1)(b) and (c) signals Parliament's unique concern, under those two provisions, with the appearance of impropriety in circumstances where no corrupt practice exists. This interpretation aligns with the analytical distinction between the two purposes, as described by this Court in *Hinchey*:

For a government, actual integrity is achieved when its employees remain free of any type of corruption. On the other hand, it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. [emphasis in original]

¹¹⁸ "Official ... of the government" is an officer of the executive who can be terminated by the executive without reference to the legislature: *Roncarelli v Duplessis*, [1959] SCR 121; *R v Despres* (1962), 40 CR 319 (SCQ).

¹¹⁹ These words are further described in *Sun-Diamond Growers*, *supra* note 38 at 404-405. The offence is committed even where the benefit derived only represents the true value of services rendered outside working hours: *Dore v Canada (A-G)* (1974), 17 CCC (2d) 359 (SCC).

¹²⁰ *R v Hinchey* (1996), 3 CR (5th) 187 (SCC) held that section 121(1)(c) only applies where a person with specific or ongoing commercial dealings with the government at the time of the offence confers material or tangible gain on a government employee.

¹²¹ *R v Mathur* (2007), 76 WCB (2d) 231, affirmed by the Ontario Court of Appeal, 2010 ONCA 311, 256 CCC (3d) 97, held that a client fee received *indirectly* by the wife of the accused was still a "benefit" to the accused and contravened section 121(1)(c).

¹²² *R v Greenwood*, *supra* note 111.

Section 121(1)(c) does not contain the phrase "as consideration for" or any equivalent language. The absence of such language clearly indicates to me that the fault requirement in s. 121(1)(c) differs from that found in those other sections: see *Dore v. Canada* (Attorney General), *supra*, at p. 780 S.C.R., p. 559 C.C.C. The difference rests in the absence of any requirement in s. 121(1)(c) that the recipient of a benefit intends to do something in return for the benefit. The corrupt state of mind inherent in the "something for something" nature of the offences created by s. 121(1)(a), (d), (e) and (f) is not present in s. 121(1)(c). The primary position taken by the respondent in this case and the judgment in *R. v. Reid*, 1982 CanLII 3924 (MB PC), [1982] 3 W.W.R. 77 (Man. Prov. Ct.), at pp. 87-89, require proof of a corrupt motive under s. 121(1)(c). That position is unsustainable in light of the clear distinction drawn in the language of s. 121.¹²³

(d) Influence Peddling/Pretending to Have Influence

Section 121(1)(d) of the *Criminal Code* relates to offers of influence in return for a benefit. In order to establish the elements of the offence, it must be shown that the accused had or pretended to have influence with the government or an official, and directly or indirectly demanded, accepted or offered or agreed to accept a reward, advantage or benefit of any kind for himself or herself or another person. This acceptance must be in consideration for cooperation, assistance, exercise of influence or an act or omission in connection with the transaction of business with, or any matter of business relating to, the government, a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, or the appointment of any person, including the accused, to office. No mental element is specified, but as a true crime, there is a presumption of *mens rea* which can be established by proof of intent, recklessness, or wilful blindness.

The Supreme Court of Canada in *R v Giguere*¹²⁴ emphasized that this subsection is limited to persons who have (or pretend to have) a significant nexus with government. "Influence" involves being able to actually affect a decision (or pretending to be able to do so), such as influencing the awarding of a contract.

The element that "the transaction of business with or any matter of business relating to the government" was considered in *R v Carson*.¹²⁵ The accused, Carson, worked as a Senior Advisor to former Prime Minister Stephen Harper in the years 2006-2009. In 2010-2011, Carson attempted to influence the department of Indian and Northern Affairs Canada [INAC] to purchase water treatment products from a company called H2O, in part to try to benefit a romantic partner. Carson admitted he had influence with the Government at the time of the alleged offence and used this influence to benefit his partner. Justice Warkentin found that INAC did not have power to purchase systems; that decision was left to individual First Nation communities. Therefore, the accused's conduct did not

¹²³ *Ibid.*

¹²⁴ *R v Giguere*, [1983] 2 SCR 448.

¹²⁵ *R v Carson*, 2015 ONCJ 7127.

involve a matter of business relating to the government and the accused was acquitted. In a comment on the case, Steve Coughlan suggests, properly in my mind, that a conviction for attempting to commit the offence should have been entered instead.¹²⁶

A majority of the Court of Appeal set aside the acquittal and entered a verdict of guilty. The majority stated:

Section 121 (1) provides that it matters not “whether or not, in fact, the official is able to cooperate, render assistance, exercise influence, or do or omit to do what is proposed.” Accepting a benefit in exchange for exercising influence on government officials in order “to push through their water treatment products to First Nation Bands” is a “matter of business related to the government.”¹²⁷

On further appeal, a majority of the Supreme Court of Canada dismissed Mr. Carson’s appeal, stating:

In my view, the offence under s. 121(1)(d) requires that the promised influence be in fact connected to a matter of business that relates to government. Furthermore, a matter of business relates to the government if it depends on or could be facilitated by the government, given its mandate. The phrase “any matter of business relating to the government” therefore includes publicly funded commercial transactions for which the government *could* impose or amend terms and conditions that would favour one vendor over others. Governments are not static entities – legislation, policies, and structures delimiting the scope of government activity evolve constantly. “Any matter of business relating to the government” must not be considered strictly with reference to existing government operational and funding structures.¹²⁸

¹²⁶ Steve Coughlan, Case Comment on *R v Carson* (2016), 25 CR (7th) 353. The Ontario Court of Appeal did not discuss the issue of an impossible attempt in this case. A majority of the Supreme Court (at paras 29 and 41) indicated a verdict of attempted influence peddling would have been appropriate if they had held that Carson’s conduct was not “related to government business.” Côté J, dissenting at the SCC (at para 83) declined to resolve that issue since “it was not raised in the lower courts and the Crown confirmed before this Court that the offence of attempt did not form part of its theory of the case.”

¹²⁷ *R v Carson*, 2017 ONCA 142 at para 50.

¹²⁸ *R v Carson*, *supra* note 106 at para 5. See also paras 29 and 41 which give more detail on the scope of “transaction of business with or any matter of business relating to the government.” Note also that there has been some critique of the majority’s decentralization of First Nations autonomy in the case: See Vivian Grinfeld, “Influence Peddling: From the *Criminal Code* to the Prime Minister’s Office” (5 November 2018), online (blog): *The Court* <<https://www.thecourt.ca/influence-peddling-from-the-criminal-code-to-the-prime-ministers-office/>>.

(e) Providing Reward

Section 121(1)(e) of the *Criminal Code* provides that it is an offence for anyone to give, offer or agree to give or offer a reward, advantage or benefit of any kind to a minister of the government or an official in consideration for cooperation, assistance, exercise of influence or an act or omission. This conduct must be in connection with the transaction of business with, or any matter of business relating to, the government, a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, or the appointment of any person, including the accused, to office. No mental element is specified, but the normal presumption that *mens rea* (intent, recklessness or wilful blindness) is required for a true crime should apply to this offence.

(f) Tender of Contract

Section 121(1)(f) of the *Criminal Code* relates to tenders to obtain contracts with the government. The offence may be committed in two ways. First, it is an offence for anyone, having made a tender to obtain a contract with the government, to give, offer or agree to give or offer a reward, advantage or benefit of any kind to another person. That person must be someone who has made a tender, or a member of their family, or another person where that person's involvement will benefit someone who has made a tender. This must be done as consideration for the withdrawal of the other person's tender.

The offence is also committed where the accused demands, accepts, or offers or agrees to accept a reward, advantage or benefit of any kind from another person as consideration for the withdrawal of the accused's tender.

No mental element is specified for either way of committing the offence, but once again *mens rea* will be presumed.

(g) Contractor with Government Contributing to an Election Campaign

Section 121(2) of the *Criminal Code* provides that it is an offence for anyone, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, to directly or indirectly subscribe or give, or agree to subscribe or give, to any person valuable consideration for one of the following purposes:

- (a) promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or
- (b) to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in Parliament or the legislature of the province.

Consequently, the required mental element of the offence is to act with the purpose of effecting one of the two objectives listed above. If the accused acts pursuant to a term of

a contract with the government, no further mental element is required. Otherwise, the accused must also act “in order to” obtain or retain a contract with the government.

Section 121(1)(f) and 121(2) are public procurement offences, but they do not appear to be used. Instead, public procurement offences are prosecuted as frauds under the *Criminal Code* or as bid-rigging under section 47 of the federal *Competition Act*. Graham Steele suggests that sections 121(1)(f) and 121(2) are underutilized and need to be given “more bite.”¹²⁹

Poonam Puri and Andrew Nichol also highlight the complementary role held by s 121(2) *vis-a-vis* Canada’s foreign domestic bribery legislation:

Note that unlike section 121(2) of the *Criminal Code*, which applies to payments made to a candidate for election or political party for the purposes of retaining a government contract, the *CFPOA* [reviewed later in this chapter] does not extend to payments made to candidates or political parties who do not subsequently enter public office.¹³⁰

(iv) Breach of Trust by Public Officer

Section 122 is specifically directed at fraud or breach of trust committed by public officials.¹³¹ The term “official” is defined in section 118 and was interpreted in *R v Sheets*¹³² to include:

a position of duty, trust or authority, esp. in the public service or in some corporation, society or the like' (cf. The New Century Dictionary) or 'a position to which certain duties are attached, esp. a place of trust, authority or service under constituted authority' (cf. The Shorter Oxford Dictionary).¹³³

The Supreme Court of Canada in *R v Boulanger*¹³⁴ reviewed the common law authorities relating to misfeasance in public office in order to clarify the elements of the section 122 offence. Chief Justice McLachlin for the court concluded at para 58 that the Crown must prove the following elements:

¹²⁹ This article, Graham Steele, “The Criminal Code’s Procurement Crimes: Underused Tools in Canada’s Anti-Corruption Effort” (2017-2018) 65 *Crim LQ* 187, is suggested reading in David Boulet, “Secondary Source Review” (December 2019) 10 *Crown’s Newsletter* at 51.

¹³⁰ Poonam Puri & Andrew Nichol, “The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices” (2015) 53:1 *Osgoode Hall LJ* 164 at n 80.

¹³¹ For a succinct overview of the purpose, *actus reus* and *mens rea* of section 122, see *R c Comparelli*, 2020 QCCQ 8885 at paras 540-554.

¹³² *R v Sheets*, [1971] SCR 614 [*Sheets*].

¹³³ *Ibid* at para 16. This expansive definition extends to positions of public authority in Indigenous nations: *R v Yellow Old Woman*, 2003 ABCA 342 [*Yellow Old Woman*].

¹³⁴ *R v Boulanger*, 2006 SCC 32 [*Boulanger*].

- (1) The accused was an official;¹³⁵
- (2) The accused was acting in connection with the duties of his or her office;
- (3) The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;¹³⁶
- (4) The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust;¹³⁷
- (5) The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.¹³⁸

The court's interpretation ultimately infuses section 122 with a subjective *mens rea*, adding that mere mistakes or errors of judgment do not suffice.¹³⁹

¹³⁵ It does not matter whether the official is elected, hired under contract or appointed: *R c Cyr* (1985), 44 CR (3d) 87 (CS Que). An accused who assists an officer with the breach of trust becomes a party to the offence and can be found guilty of the offence even if he is not himself a public officer: *R v Robillard* (1985), 18 CCC (3d) 266 (Que CA). A municipal official can be charged under this section: *Sheets*, *supra* note 132; see also *R v McCarthy*, 2015 NLTD(G) 24 (town clerk's falsification of property taxes she was in charge of receiving and depositing).

¹³⁶ In order to determine the appropriate standard of conduct against which to assess the accused's conduct, expert opinion may be tendered as evidence: *R v Serré*, 2011 ONSC 5778.

¹³⁷ The court in *Boulanger*, *supra* note 134 adds at paragraph 52 that "[t]he conduct at issue ... must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour." In para 54 they described the test as "analogous to the test for criminal negligence" but different in that it involves a subjective mental element. Section 122 is often used when police officers engage in dishonest or deceptive behaviour for personal gain, contrary to their duty to honestly uphold or follow the law: see, e.g. *R v Watson*, 2015 ONSC 710 (appeal dismissed in *R v Watson*, 2017 ONCA 346); *R v Whitney*, 2015 BCPC 27; *R v Mahoney-Bruer*, 2015 ONSC 1224; and *R v Kandola*, 2014 BCCA 443 (border services officer facilitating importation of cocaine) (decision affirmed in *R v Johal*, 2015 BCCA 101).

¹³⁸ "The fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea*"; conversely, "the offence may be made out where no personal benefit is involved": see *Boulanger*, *supra* note 134 at para 57.

¹³⁹ The Court in *R c Comparelli*, 2020 QCCQ 8885 (CanLII) provided the following on *mens rea* (note: the following excerpt is a translation from Google Translate):

[549] In the present matter, the *mens rea* of the offence, the fifth element in *Boulanger*, requires that I determine whether the accused used his «office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.» At a minimum, reckless indifference establishes the *mens rea* of improper purpose.

[550] In *R v Upjohn*, 2018 ONCA 1059, the Ontario Court of Appeal noted that the examples of an «improper purpose» to establish the *mens rea* of corruption are not limited to those mentioned in *Boulanger*:

[17] I should not be taken to suggest that the improper purposes that will satisfy the *mens rea* requirement are restricted to dishonesty, partiality, corruptness or oppression. There are certainly other improper uses of one's public office that would satisfy the *mens rea* requirement

[551] The fact that a public official uses his office for his own personal gain constitutes an improper purpose—or a purpose other than the public good—even if the work is done properly. For that matter, the fact that an official carried out his or her duties correctly in the interests of the public good does not preclude a finding that he or she also intended a non-public good purpose—that is, his or her own self-interest.

[552] With respect to the *mens rea*, the Saskatchewan Court of Appeal in *R v Probe*, 2020 SKCA 5 (CanLII), noted that when a public official deliberately uses his office, even in part, for a purpose other than the public good, the offence is made out (if the other elements are also proved):

[77] In my view, s. 122 should be understood to require the Crown to prove that the official acted deliberately while specifically intending a non-public good purpose, not that the official had only that one non-public good purpose in mind. This is not only consistent with Boulanger, but also with a purposive interpretation of s. 122. Chief Justice McLachlin introduced the judgment in Boulanger by emphasizing the central role that the offence has in maintaining confidence in government:

[1] The crime of breach of trust by a public officer, embodied in s. 122 of the *Criminal Code*, R.S.C. 1985, c. C-46, is both ancient and important. It gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance a clear idea of what conduct the crime encompasses. It is essential to retaining the confidence of the public in those who exercise state power. Yet surprisingly, the elements of this crime remain uncertain. This appeal requires us to clarify those elements so that citizens, police and the courts have

[78] An elected person who has a direct and substantial financial interest in a legislative matter will almost always be able to articulate public-good reasons for supporting or opposing the matter consistent with the advancement of the official's personal interests. The same reasoning would apply if the alleged breach of trust involved a non-elected official. Public confidence in those who exercise state power is undermined when a person is shown to have acted for a non-public good purpose, even if there is also a proper or good reason for their action.

[...]

[83] In summary, the inquiry under s. 122 is not whether the official had a positive or public good purpose in mind. Rather, the question is whether the Crown has proven, beyond a reasonable doubt, that the accused had a non-public good purpose for acting. Where the Crown proves beyond a reasonable doubt that an official has acted, even in part, with the intention to use his or her public office for a purpose other than the public good, and if the other elements of the offence are proven, a conviction should follow.

In *R v Vandebussche*, (1979) 50 CCC (2d) 15, the Ontario Court of Justice held that a municipal officer, although performing his official duties in an appropriate manner, was guilty of breach of trust because he still accepted benefits and rewards for his work. Using the language in *Boulanger*, this would constitute a breach of the standard of responsibility required of the officer. As the court succinctly put it, “Need I elaborate further on the erosion of public trust which would ensue if the proper duties of a municipal official were offered for sale on the block in the marketplace?” In *R v Ellis*, 2013 ONCA 739,¹⁴⁰ the Court upheld a conviction for breach of trust where an Immigration and Refugee Board adjudicator strongly implied that he would change his preliminary negative decision on the applicant’s refugee status to a positive decision if she entered into an intimate relationship with him.

In *R v Cosh*, 2015 NSCA 76, the Court examined the meaning of “official”, defined in section 118 within the context of section 122 of the *Criminal Code*. The accused worked as a paramedic for a private company that contracted its services with the government. After becoming addicted to narcotics, he stole morphine and falsified records to cover up his theft. He pled guilty to fraud, theft and unlawful possession of morphine but disputed the breach of trust charge. The Court held that as a paramedic employed by a private company, the accused was not an “official” within the meaning of sections 118 and 122 of the *Criminal Code* and upheld the accused’s acquittal on this count.

(v) Municipal Corruption

Section 123 of the *Criminal Code* creates two offences relating to municipal corruption. Case law on section 123 is relatively sparse, but *R c Marcotte* (translated below from Google Translate) provides the following explanation of the provision:

[40] In the *Leblanc* judgment, the Quebec Court of Appeal ruled that the mere fact for a municipal official to accept money in exchange for greater cooperation in favor of the payer constituted treatment. preferential and was sufficient to constitute the offense then provided for in s. 112 (1) (f) Cr. C. (corresponding to the current art. 123 (1) d) Cr. C.

[553] In *R. v. Mathur.*, the accused was an industrial technology adviser (“ITA”) with the National Research Council of Canada (“NRC”). The accused allegedly received (directly and indirectly through his wife and son) a portion of fees paid to consulting firms who helped clients with applications for technology funding; funding which, in his role as an ITA, he could recommend they receive. The accused was found guilty of breach of trust (s. 122 Cr.C.) and fraud on the government (s. 121 Cr.C.).

[554] With respect to breach of trust, significantly, the Court held that it did not matter that the applications «were in all respects appropriate»; a breach of trust had nevertheless been committed...

See also *R v Bissonnette*, 2018 QCCA 2165, [2018] JQ no 12102, which held that breach of trust does not need to be specified as general or specific intent; it must be clear, rather, that the accused had intent to do something that is not in the public interest.

¹⁴⁰ Notice for leave to appeal was refused on May 1, 2014: *R v Ellis*, 2014 SCC 5676.

...

[42] The Ontario Superior Court of Justice, reaffirming this principle, said that:

Section 123 does not require proof of an overtly corrupt action by a municipal official. Like s.122, the offense of municipal corruption only requires a municipal official to accept money in the course of his or her lawful duties as a public official. In *R v. Leblanc* ... the Supreme Court of Canada affirmed the Quebec Court of Appeal's finding that preferential treatment exercised by a municipal official is sufficient on its own to constitute an offense under this section.

...

[44] Although the terms of this article are quite clear, the authors Nightingale and Senneck specify that the evidence does not need to establish that the consideration was in fact given. Evidence that by giving a benefit to a municipal official a person intended to influence his own affairs, or that the municipal official who receives a benefit does so with the same intention as the donor, is sufficient to satisfy the requirement. 'counterparty' requirement provided for in this article. [footnotes omitted]¹⁴¹

(a) Loan/Reward/Advantage accepted by Municipal Officer

Section 123(1) provides that it is an offence for a municipal official¹⁴² to, directly or indirectly, demand, accept, or offer, or agree to accept, a loan, reward, advantage or benefit of any kind from any person. Conversely, it is an offence for anyone to give, offer, or agree to give or offer, a loan, reward, advantage or benefit to any kind of municipal official.¹⁴³

In either case, the act must be done as consideration for the official performing one of four acts:

- abstaining from voting at a meeting of the municipal council or a committee thereof;
- voting in favour of or against a measure, motion or resolution;
- aiding in procuring or preventing the adoption of a measure, motion or resolution; or
- performing or failing to perform an official act.¹⁴⁴

¹⁴¹ *R c Marcotte*, 2015 QCCQ 7961 (CanLII). For a discussion regarding the distinction between sections 122 and 123 (and the elements of section 123 more generally), see *R v Probe*, 2018 SKQB 176.

¹⁴² *R v Krupich* (1991), 116 AR 67 (Prov Ct) held that the supervisor of the Property Standards Section in the Buildings Regulation Division was a "municipal official," since he occupied a position under the authority of the municipal government involving duties of authority and service.

¹⁴³ *R v Leblanc* (1982), 44 NR 150 (SCC) held that preferential treatment of a town planner by a municipal treasurer, in exchange for money, constituted an "advantage or benefit".

¹⁴⁴ Acts performed by a "municipal official" in that capacity are "official acts": *Belzberg v R* (1961), 131 CCC 281 (SCC).

No mental element is specified, but *mens rea* will be presumed.¹⁴⁵

(b) Influence a Municipal Officer

Section 123(2) of the *Criminal Code* provides that it is an offence to influence or attempt to influence a municipal official to perform one of the four acts listed above by:

- suppression of the truth, in the case of a person who is under a duty to disclose the truth;
- threats or deceit; or
- by any unlawful means.

No mental element is specified; therefore, subjective *mens rea* will be presumed (which includes intent, recklessness or willful blindness).

(vi) Selling or Purchasing a Public Office

Section 124 targets conduct that goes beyond purchasing the influence of an officer or municipal official, and instead seeks to purchase the “office” itself.¹⁴⁶ The section criminalizes both the sale of an appointment or resignation from office or the receipt of a reward from such a sale, as well as the purchase or giving of a reward to secure such an appointment or resignation.

(vii) Influencing or Negotiating Appointments to Public Offices

Closely related to the above two offences is the offence of influencing or negotiating appointments to public offices. Section 125 involves the giving or receiving of bribes in order to cooperate, assist, exercise influence, solicit, recommend or negotiate with respect to the appointment or resignation of any person from office. It also prohibits keeping without lawful authority “a place for transacting or negotiating any business relating to (i) the filling of vacancies in offices, (ii) the sale or purchase of officers, or (iii) appointments to or resignations from offices.”

¹⁴⁵ The Court in *Bergevin v R*, 2020 QCCA 658 (CanLII) (leave to appeal at the SCC was dismissed) at para 48 held that, for s 123, “the intention of the offender to enrich himself or to benefit his own affairs does not have to be demonstrated.” The same case also states that acceptance of the bribe is not an element of the offence (see discussion at paras 40-51.) For examination of the sentencing principles applicable to a corporation convicted of section 123, see *R c BPR Triax inc*, 2017 QCCQ 4191 at paras 54-64. For sentencing involving an individual, see *R c Trudel*, 2017 QCCQ 4190 (CanLII), where the Court at para 61 notes, “the case law, although abundant in matters of fraud, is rather timid as regards the charge of attempting to influence municipal officials from which the accused did not derive any benefit. The Tribunal is therefore wary of drawing inspiration from inadequate case law.”

¹⁴⁶ *R v Hogg* (1914), 23 CCC 228 (Sask CA).

The acts of the accused should include something of a corrupt nature, as discussed above.¹⁴⁷

(viii) Section 425.1 – Threats and Retaliations Against Employees

Section 425.1, enacted in 2004, makes it an offence for an employer or a person acting on behalf of an employer to “take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of an employee” who has provided or is going to provide information with respect to any offence committed or going to be committed by the employer (or an officer, employee, or corporate director of the employer). The information has to be reported or will be reported to a person whose duties include the enforcement of federal or provincial law. The purpose of the section is essentially to encourage employees to assist the state in the suppression of unlawful conduct and to protect employees who do report information about offences from being disciplined for doing so.¹⁴⁸

(ix) Offering or Accepting Secret Commissions

Section 426 of the *Criminal Code*, Part X deals with “fraudulent transactions” making it an offence for an agent or employee¹⁴⁹ to corruptly (i.e. secretly) offer, give or accept a reward, advantage or benefit in respect to the affairs or business of their principal (the principal can be either a government or a private company or business). Thus this corruption offence can relate solely to the private sphere, with no government official involved. In that sense, it is sometimes referred to as private corruption as opposed to public corruption.

The elements of the offence are summarized in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC), at 406 as follows:

There are then three elements to the *actus reus* of the offence set out in s. 426(1)(a)(ii) as they apply to an accused agent/taker with regard to the acceptance of a commission:

- (1) the existence of an agency relationship;
- (2) the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal, and
- (3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit.

¹⁴⁷ *R v Melnyk*, [1938] 3 WWR 425. For more cases on and an overview of Canada's criminalization of municipal corruption, see Trevor Hunt, *Bibliography on Municipal Corruption*, (ICCLR, 2020) at 6-15, online (pdf): <<https://icclr.org/wp-content/uploads/2020/09/Bibliography-FINAL.pdf?x94276>>.

¹⁴⁸ *Merk v IABSOI Local 77*, 2005 SCC 70 at para 14.

¹⁴⁹ The provisions do not apply to independent contractors: *R v Vici* (1911), 18 CCC 51 (Que SP).

The requisite *mens rea* must be established for each element of the *actus reus*. Pursuant to s. 426(1)(a)(ii), an accused agent/ taker:

- (1) must be aware of the agency relationship;
- (2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal, and
- (3) must be aware of the extent of the disclosure to the principal or lack thereof.

If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate and timely.

The word “corruptly” in the context of secret commissions means “secretly” or “without the requisite disclosure”. There is no “corrupt bargain” requirement. Thus, it is possible to convict a taker of a reward or benefit despite the innocence of the giver of the reward or benefit. Non-disclosure will be established for the purposes of the section if the Crown demonstrates that adequate and timely disclosure of the source, amount and nature of the benefit has not been made by the agent to the principal.¹⁵⁰

The offence is made out by the acceptance of the benefit; that acceptance need not actually influence the agent in the manner he or she conducted affairs with the principal. The offence is established where the agent has, by accepting the benefit in secret, placed his or herself in a position of a conflict of interest, without informing the principal.¹⁵¹ Furthermore, the agent need not actually have a specific principal at the time the offer was made.¹⁵²

Section 426(2) elaborates that “every one commits an offence who is knowingly privy to the commission of an offence under subsection (1)”. As the British Columbia Court of Appeal pointed out in *R v Tran*, the word “privy” in section 426(2) criminalizes conduct by “persons who through their own acts, participate in the prohibited conduct.”¹⁵³

END OF EXCERPT

2.5.2 Defences

An accused charged with one of the above mentioned bribery or corruption offences is entitled to the same general defences as persons charged with other offences. This includes

¹⁵⁰ See also the discussion of section 426 in *Yellow Old Woman*, *supra* note 133, where the Court discusses whether the legal nexus required for the Kienapple principle (which “precludes multiple convictions arising from the same delict” and requires “a sufficient nexus between both the underlying facts and the offences must be demonstrated”: para 17) could be demonstrated for sections 122 and 426 at paras 22-25.

¹⁵¹ *R v Saunderson-Menard*, 2008 ONCA 493 at para 1.

¹⁵² *R v Wile* (1990), 58 CCC (3d) 85 (Ont CA).

¹⁵³ *R v Tran*, 2014 BCCA 343.

mistake of fact, officially induced error, incapacity due to mental disorder, duress, necessity, entrapment, diplomatic immunity and *res judicata*.¹⁵⁴ The scope and requirements of these defences can be found in a standard Canadian criminal law textbook.¹⁵⁵

2.5.3 Limitation Periods

Where an offence is punishable by indictment in Canada, there is no limitation period. This also applies where the offence is a hybrid offence and the Crown chooses to proceed indictably. Where the offence is punishable on summary conviction, or the Crown chooses to proceed summarily, the information must be laid within 12 months of the date of the offence (see section 786 of the *Criminal Code*). Once a charge is laid, the accused is entitled to a “trial within a reasonable time” under section 11(b) of the *Canadian Charter of Rights and Freedoms*. In *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada established a new framework for section 11(b) delay.¹⁵⁶

2.5.4 Sanctions

The *Criminal Code* classifies offences as indictable (i.e., major offence) or summary conviction (i.e., less serious offence). Indictable offences are further classified into varying degrees of seriousness based upon the maximum punishment available for each offence (life, 14, 10, 5- or 2-years imprisonment). The maximum punishment is set at a very high level and is designed to deal with the “worst imaginable case” for that type of offence. The *Criminal Code* does not include any minimum punishment for corruption offences, nor does it indicate an average or common punishment for the particular offence involved. Thus, individual judges have a lot of discretion in determining an appropriate penalty for each case within the bounds of the maximum penalty specified for each offence.

For a description of sentencing principles and practices applicable to corruption offences, see Chapter 7, Section 6.

¹⁵⁴ See for example *R v Rouleau* (1984), 14 CCC (3d) 14 (Qc CA), in which the accused deputy minister was acquitted of breach of trust on the *res judicata* doctrine after being convicted of benefitting from firms having dealings with the government.

¹⁵⁵ Don Stuart, *Canadian Criminal Law*, 8th ed (Carswell, 2020) at 323-684; M Manning & P Sankoff, *Criminal Law*, 5th ed (Lexis Nexis, 2015) chs 8-13; and E Colvin & S Anand, *Principles of Criminal Law*, 3rd ed (Carswell, 2007) at 553-584

¹⁵⁶ *R v Jordan*, 2016 SCC 27 [Jordan]. *Jordan* establishes a presumptive ceiling for cases, 15 months in summary matters and 30 months in indictable matters, after which delay is presumptively unreasonable. The Crown must then rebut the presumption on the basis of exceptional circumstances (at paras 46-47). Discussing exceptional circumstances, the Court notes where there is “voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time” exceptional circumstances may be found (at para 77). As these types of circumstances often occur in corruption cases, a trial may need to exceed the presumptive ceiling by some measure before it could be subject to a stay of proceedings. The new framework will encourage the Crown to consider carefully whether to bring multiple charges for the same conduct and try multiple co-accused together (see generally para 79). *Jordan* has most recently been followed in: *R v Virk*, 2021 BCCA 58; *R v Earle*, 2021 ONCA 34; and *R v Phan*, 2020 ABCA 370, and has since been affirmed by the Supreme Court of Canada in both *R v Cody*, 2017 SCC 31 and *R v KJM*, 2019 SCC 55.

3. FOREIGN PUBLIC OFFICIALS

3.1 UNCAC

3.1.1 Offences

Article 16 of UNCAC requires each State Party to create a criminal offence in respect to bribery of foreign public officials. Article 16 states:

Article 16. Bribery of foreign public officials and officials of public international organizations

- 1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
- 2) Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Rose et al. write that while Article 16 is based on the content of Article 15, “the requirements of Article 16 are much less self-evident than the requirements of Article 15.”¹⁵⁷ Part of the challenge can be attributed to its unusual “altruistic” use of criminal law: “While Article 15 obliges states parties to protect their own institutions and thereby serves their rational interests, Article 16 requires states parties to protect the institutions of other states and international organizations.”¹⁵⁸

(i) Foreign Public Official

Like the definition provided for “public official,” the meaning of “foreign public official” is broad and focuses on function and influence rather than official status. “Foreign public official” is defined in Article 2(b) as meaning: “any person holding a legislative, executive,

¹⁵⁷ Rose, Kubiciel & Landwehr, *supra* note 5 at 175.

¹⁵⁸ *Ibid.* See 176 as well, where Rose, Kubiciel & Landwehr describe the justifications for the provision, and at 177, which compares the scope of the provision to the OECD Convention and the Europe Criminal Law Convention on Corruption.

administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.”¹⁵⁹

(ii) Officials of IPOs

In addition to prohibiting bribery of foreign public officials, the bribery of officials of international public organizations is also prohibited. An “official of a public international organization” refers to international civil servants or other persons authorized to act on behalf of public international organizations (Article 2(c)). This would include organizations such as the World Bank or International Monetary Fund, but not FIFA or the International Olympic Committee (which are private legal entities that are organized and financed by private persons).¹⁶⁰ Article 16(1) also applies to corruption in the context of international aid.¹⁶¹

(iii) Active and Passive Bribery

While Article 16(1) requires criminalization of active bribery of foreign public officials, Article 16(2) only requires a State to consider criminalization of passive bribery (i.e., solicitation or acceptance of a bribe by foreign public officials). In other words, Article 16(2) does not require States to criminalize the corrupt behaviour of foreign public officials. Such conduct by foreign public officials is, or should be, a criminal offence of bribery under that public official’s own state law, as required by Article 15(b) of UNCAC. However, a State’s failure to enact legislation reflecting Article 16(2) would result in that State being unable to prosecute a foreign public official for passive bribery. For example, because Canada has not enacted provisions reflecting Article 16(2), Canada is unable to prosecute foreign public officials for soliciting or accepting bribes and can only prosecute Canadian legal entities for bribing foreign public officials. Prosecution of foreign public officials must be left, if at all, to the foreign public officials’ State.

(iv) For Business or other Undue Advantage

Kubiciel notes another significant difference between Articles 15 and 16: namely, Article 16(1) only prohibits acts of bribery intended to “obtain or retain business or other undue advantage in relation to the conduct of international business.”¹⁶² Article 15(a) and (b) has

¹⁵⁹ For further commentary, see *ibid* at 178. The implementation of Article 16 has proven difficult due to the definition of “foreign public official” (*ibid* at 181):

[T]he foreign bribery offence is strictly linked to the status of the foreign public official in his or her own jurisdiction. Problems also arose where states did not implement a stand-alone provision but simply clarified that their bribery offences also apply to public officials in a foreign state or within an international organization.

¹⁶⁰ *Ibid* at 178.

¹⁶¹ Legislative Guide (2012), *supra* note 11 at 67.

¹⁶² Kubiciel, *supra* note 9 at 151. Rose, Kubiciel & Landwehr, *supra* note 5 at 179-180 write that business should be interpreted broadly, including all commercial activity, and that the article does not require that the advantage be linked to immediate profit.

no similar clause. Similarly, Article 1 of the OECD Convention only requires State Parties to criminalize the offering or giving of bribes “in order to obtain or retain business or other improper advantage in the conduct of international business.” For example, a Canadian citizen who bribes a police officer in Mexico to avoid being charged with drunk driving in Mexico is not subject to prosecution for bribing a foreign public official under Canada’s *CFPOA*.

(v) Undue Advantage

Kubiciel also highlights the vagueness of the term “undue advantage” which appears in both Articles 15 and 16 of UNCAC (as well as Article 1 of the OECD Convention). Kubiciel states:

The interpretation of the term “undue advantage” is even more complicated when national courts and law enforcement agencies have to evaluate whether an advantage offered or granted abroad is undue or not. Generally speaking, courts can apply the standards of their own legal order, so that they are not bound to the perceptions abroad. Thus, local traditions or the tolerance by foreign authorities are no excuse per se for offering or giving advantages to foreign public officials or officials of international organizations. However, advantages whose acceptance is permitted or even required by the foreign law are not criminalized by Article 16. [footnotes omitted]¹⁶³

3.1.2 Defences

The defences available for bribery of a foreign public official are the same as those for bribery of a domestic public official, discussed at Section 2.1.2.

3.1.3 Limitation Periods

The limitation periods for bribery of a foreign public official are the same for bribery of a domestic public official, discussed at Section 2.1.3.

3.1.4 Sanctions

The sanction provisions in UNCAC for foreign bribery are the same as the sanctions for domestic bribery, discussed at Section 2.1.4.

¹⁶³ Kubiciel, *supra* note 9 at 153. See also Rose, Kubiciel & Landwehr, *supra* note 5 at 179, which provides a similar comment.

3.2 OECD Convention

3.2.1 Offences

Article 1(1) of the OECD Convention requires that State Parties make it a criminal offence under domestic law for:

any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

(i) Active but Not Passive Bribery

Like UNCAC, the OECD Convention *requires* State Parties to criminalize active bribery, but not passive bribery. Similarly, the OECD Convention also *requires* that the bribe be in relation to “the conduct of international business.” However, the OECD Convention does not require states to consider the criminalization of passive bribery like Article 16(2) of UNCAC.¹⁶⁴

(ii) Liability for Accomplices, Attempts and Conspiracy

Article 1(2) mandates that “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.” The Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Commentary), clarify that a foreign company that pays a bribe while bidding for a foreign contract is still committing the offence of bribery even if that company obtained the contract because they presented the best proposal rather than because of the bribe. In addition, Article 1 requires State Parties to ensure that “[a]ttempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official.” Inchoate offences and party liability are further explored in Chapter 3, Sections 3 and 4.

(iii) Definitions of Foreign Public Official and Official Duties

Article 1 also sets out the following definitions (paragraph 4):

- a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

¹⁶⁴ Note that the Europe Criminal Law Convention on Corruption requires the criminalization of passive bribery: Rose, Kubiciel & Landwehr, *supra* note 5 at 177.

- b) “foreign country” includes all levels and subdivisions of government, from national to local;
- c) “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorized competence.¹⁶⁵

(iv) State Flexibility in Enacting OECD Convention Provisions

Pacini, Swingen and Rogers discuss the impact of the OECD Convention in their article “The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials.”¹⁶⁶ They note that, unlike some earlier criminal law conventions, the OECD Convention is not “self-executing.” This means that the prohibitions contained within the provision are not automatically part of domestic law. It is up to signatory nations to incorporate the elements of the prohibition of the bribery of foreign public officials into domestic law—the goal is “functional equivalency.”¹⁶⁷ In effect, Pacini et al. state that the Convention allows State Parties “to pass legislation at different ends of a rather broad spectrum.”¹⁶⁸

3.2.2 Defences

As already noted, Article 1 of the OECD Convention requires State Parties to the Convention to make it “a criminal offence for any person intentionally to offer, promise or give an undue pecuniary or other advantage ... to a foreign public official ... in order to obtain or retain ... advantage in the conduct of international business.” The Convention deals with “bribes” and leaves punishment of the foreign public official who requests or receives a bribe to the general corruption laws of the foreign state. Under Article 1, the briber must: (1) act “intentionally” (2) the person being bribed must meet the broad definition under paragraph 4 of “foreign public official” (3) the “bribe” must constitute “an undue pecuniary or other advantage” and (4) the advantage must be offered “in the conduct of international business.” Clearly, failure to prove any element of Article 1 constitutes a defence.

(i) Conduct of International Business

On its face, bribery by an NGO or a private company for charitable rather than business purposes may not be covered by Article 1. However, a snapshot of 20 years of implementation and enforcement of the OECD Convention by the Working Group on Bribery, notes that “bribery committed through an intermediary, such as a subsidiary or

¹⁶⁵ “Public function” and “public enterprise” are also defined terms. For brief commentary on these definitions, see Robert W Tarun & Peter P Tomczak, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 5th ed (American Bar Association, 2018) at 69.

¹⁶⁶ Carl Pacini, Judyth A Swingen & Hudson Rogers, “The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials” (2002) 37 J Bus Ethics 385.

¹⁶⁷ OECD, Working Group on Bribery in International Business Transactions, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (adopted by the Negotiating Conference on 21 November 1997) [OECD Commentary] at para 2, online (pdf): <https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.

¹⁶⁸ Pacini, Swingen & Rogers, *supra* note 166 at 390.

other agent – and bribes for the benefit of family members, political parties or another third party (e.g., a charity or company in which the official has an interest) – must also be made illegal.”¹⁶⁹ Any uncertainty around the scope of Article 1 does not of course prevent countries from prohibiting bribes to more effectively pursue charitable purposes. Several countries, such as Canada, the US and the UK have done so in their domestic law. Canada updated its *CFPOA* in 2013 to include the “charitable sector” (see Section 3.5.1). Previously, the word “business” was limited by section 2 of the *CFPOA* to for-profit endeavours. The post-2013 definition of “business” is not limited in this way and applies to bribery by NGOs and other non-profit organizations.

In the US, the provisions of the *FCPA* are broader than those set out in Article 1 of the OECD Convention. According to the *FCPA* guidance released by the US Department of Justice and Securities Exchange Commission, “[i]n general, the *FCPA* prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.”¹⁷⁰ The *Resource Guide* goes on to note that “[t]he *FCPA* does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.”¹⁷¹

In the UK, the *Bribery Act* also provides a slightly more encompassing definition than that provided in Article 1 of the OECD Convention. Section 6 of the *Bribery Act* deals with bribery of foreign public officials. The person doing the bribing must intend to obtain or retain “business” or “an advantage in the conduct of business.” This is quite similar to the wording used in Article 1 of the OECD Convention. However, under UK law the term “business” includes “what is done in the course of a trade or profession.”¹⁷² This broad definition of business suggests that it may include the activities of a charitable organization or an NGO.

Further, in its *Guidance* document, the UK Ministry of Justice addresses the meaning of “carrying on a business” (in the context of section 7, which deals with the failure of commercial organizations to prevent bribery) as follows:

As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be

¹⁶⁹ OECD, *Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery*, online (pdf): <<https://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf>>.

¹⁷⁰ Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed (2020), [DJSEC Resource Guide (2020)], at 9 online (pdf): <<https://www.justice.gov/criminal-fraud/fcpa-resource-guide>>.

¹⁷¹ *Ibid* at 16.

¹⁷² Nicholls et al, *supra* note 45 at para 8.83. Note also that Nicholls et al write that whether NGOs and charities are “relevant commercial organizations” within the meaning of section 7(5) of the UK *Bribery Act* will “ultimately be decided by the courts on a case-by-case basis”: at para 3.103.

answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.¹⁷³

This excerpt suggests that charities and other NGO non-profit organizations are considered to be engaging in “business.” If a charity is considered a “business” for the purpose of section 7 of the *Act*, it follows that the charity’s activities are considered to be “business” for the purpose of section 6 of the *Act*, given the presumption of consistent usage of terms in legislation.

(ii) Undue Advantage

Article 1 also refers to “undue ... advantage.” Does the word “undue” permit facilitation payments? Facilitation payments are relatively small bribes paid to induce a foreign official to do something (such as issue a licence) that the official is already mandated to do. In order for a payment to be properly classified as a facilitation payment, “[t]he condition must be that these transfers really are of a *minor nature not exceeding the social norm* pertaining to them in the society in question.”¹⁷⁴

The OECD Convention does not clearly permit or forbid facilitation payments, however Commentary 9 provides the following:

Small “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” within the meaning of paragraph 1 and accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.¹⁷⁵

¹⁷³ UK *Bribery Act* Guidance, *supra* note 70 at 15.

¹⁷⁴ Ingeborg Zerbès, “Article 1 – The Offence of Bribery of Foreign Public Officials” in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention on Bribery: A Commentary*, 2nd ed (Cambridge; New York: Cambridge University Press, 2013) 59 at 171.

¹⁷⁵ OECD Commentary, *supra* note 167 at para 9. Additionally, Tarun & Tomczak, *supra* note 165 at 68, state:

As with the FCPA, small facilitation payments made with the intention of expediting or securing the performance of a routine governmental action are excluded from the definition of improper payments under the OECD Convention. By referring to “other improper advantage” the convention intends to address situations where a payment is made to obtain something to which the company is clearly not entitled (e.g. an operating permit for a factory that failed to meet local health and safety standards).

The *FCPA* does not prohibit facilitation payments, but the UK *Bribery Act* does prohibit them. The 2013 amendments of the Canadian *CFPOA*, proclaimed into force on October 31, 2017, also prohibit facilitation payments. The issue of facilitation payments is more fully analyzed in Section 4.

(iii) Specific Defences

There are no special or specific defences under the OECD Convention for bribery of foreign public officials, but Commentary 7 and 8 provide:

7. It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.¹⁷⁶

Otherwise, the general assumption is that this offence will be subject to the same defences that apply to other such crimes in the State Party's criminal law.

3.2.3 Limitation Periods

Article 6 of the OECD Convention addresses statutes of limitations. It states:

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

The meaning of an "adequate" period of time is not clear. The OECD has not provided any further guidance to signatories regarding Article 6 in the Convention itself or in the Commentaries. There is some discussion of its meaning elsewhere.¹⁷⁷

The UK and Canada have no statutory limitation periods for their bribery and corruption offences. For a discussion of US statutory limitation periods, see Section 3.3.3.

¹⁷⁶ OECD Commentary, *supra* note 167 at paras 7-8. Note that the OECD in *A Glossary of International Criminal Standards*, (Paris: OECD, 2007) [Glossary of International Criminal Standards] at 47, online (pdf): <<https://www.oecd.org/corruption/anti-bribery/39532693.pdf>> characterizes Commentaries 8 and 9 as a defence.

¹⁷⁷ See Christopher K Carlberg, "A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards" (2003) 26:1 BC Intl & Comp L Rev 95, online (pdf): <<http://lawdigitalcommons.bc.edu/iclr/vol26/iss1/5/>> and Glossary of International Criminal Standards, *supra* note 176 at 53-54.

3.2.4 Sanctions

The OECD Convention has very few provisions on sentences and sanctions for corruption of foreign public officials.¹⁷⁸ Article 3 of the OECD Convention is entitled “Sanctions.” Paragraph 1 requires bribery of foreign officials to “be punishable by effective, proportionate and dissuasive criminal penalties comparable to the penalties for corruption of domestic officials.”

Paragraph 2 requires State Parties which do not recognize “corporate criminal liability” to ensure that legal persons are “subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions for bribery of foreign public officials.”

Paragraph 3 and 4 of Article 3 also provide as follows:

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
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.

3.3 US

The United States *Foreign Corrupt Practices Act (FCPA)* represents the first attempt by a state to criminalize the bribery of foreign public officials. First enacted in 1977, it is significant in scope and application and has led to numerous high profile prosecutions.¹⁷⁹ The very broad jurisdictional reach of the *FCPA* will be analyzed in Chapter 3, Section 1.7. For now, suffice it to say, it applies not only to American citizens and corporations, but to all foreign corporations doing business (widely defined) in the US or traded on a US stock exchange.¹⁸⁰ The *FCPA* has often served as a model for other countries wishing to implement similar legislation. It was amended in 1998 in order to conform to the requirements of the OECD Convention.

For an in-depth guide to the *FCPA*, see Tarun & Tomczak, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White*

¹⁷⁸ See Glossary of International Criminal Standards, *supra* note 176 at 39-47 for some guidance on sanctions by the OECD generally, and at 62-64 for guidance on sanctions for legal persons.

¹⁷⁹ Tarun & Tomczak, *supra* note 165 at 73, write that “the DOJ and SEC have since 2000 ... brought more *FCPA* cases than all other nations combined.”

¹⁸⁰ See *ibid* at 74-75 for the entities and persons covered by the *FCPA*’s anti-bribery provisions.

*Collar Criminal Practitioners*¹⁸¹ (*Handbook*); see also: *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Resource Guide)* and Koehler, *The Foreign Corrupt Practices Act in a New Era*.¹⁸²

3.3.1 Bribing a Foreign Official

The following brief comments on § 78dd-1 are based on Tarun and Tomczak's *Handbook* and the *Resource Guide* (cited at 165 and 170).

(i) Provision

Section 78dd-1 of the *FCPA* prohibits the bribing of foreign officials or political parties. As highlighted in Tarun & Tomczak's *Handbook*, the *FCPA*'s bribery offense contains five elements:

1. A payment, offer, authorization, or promise to pay money or anything of value, directly or through a third party;
2. To (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any official of a public international organization, or (e) any other person while "knowing" that the payment or promise to pay will be passed on to one of the above;
3. Using an instrumentality of interstate commerce (such as telephone, telex, email, or the mail) by any person (whether US or foreign) or an act outside the United States by a domestic concern or US person, or an act in the United States by a foreign person in furtherance of the offer, payment, or promise to pay;
4. For the corrupt purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit doing any act in violation of his or her lawful duty, (c) securing an improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; and
5. In order to assist the company in obtaining or retaining business for or with any person or directing business to any person.¹⁸³

It is important to note that the *FCPA* criminalizes active bribery (the person offering the bribe), but does not address passive bribery (the person receiving the bribe), and the scope of the offense is restricted to bribes made for the purpose of "obtaining or retaining business," which parallels the provisions of UNCAC and the OECD Convention. The *FCPA* also does not criminalize commercial bribery, although accounting offenses may catch

¹⁸¹ *Ibid.*

¹⁸² DJSEC Resource Guide (2020), *supra* note 170. See also Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham; Northampton: Edward Elgar, 2014).

¹⁸³ Tarun & Tomczak, *supra* note 165 at 5-6.

commercial bribery. Deferred prosecution agreements also might require companies to refrain from commercial bribery.¹⁸⁴

(ii) Authorization

Authorization can be explicit or implicit.¹⁸⁵ In some circumstances, acquiescence might be sufficient to indicate authorization.¹⁸⁶

(iii) Anything of Value

The phrase “anything of value” is not defined in the *FCPA*. However, it has been interpreted broadly by the SEC and DOJ, and includes both tangible and intangible benefits.¹⁸⁷ The thing of value will often be less direct than cash. There is no minimum threshold amount, but “DOJ’s and SEC’s anti- bribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business.”¹⁸⁸ Wei Zhang notes that the phrase “anything of value” has been interpreted expansively and is in “accordance with the definition of bribery contained in the domestic anti-bribery statute.”¹⁸⁹

(iv) Foreign Official

Under the *FCPA*, “foreign official” is defined as an officer or employee of “a foreign government or any department, agency or instrumentality thereof, or of a public international organization,” or any person working for or on behalf of any of those entities. Foreign governments are not included in the provisions. As a result, when the Iraqi government received kickbacks during the UN Oil-for-Food program, the DOJ was obliged to turn to the accounting offenses to charge the companies involved.¹⁹⁰

According to Koehler in his book, *The Foreign Corrupt Practices Act in a New Era*, the definition of “foreign official” is in dispute, but enforcement agencies tend to interpret the phrase broadly.¹⁹¹ This means that “FCPA scrutiny can arise from business interactions with a

¹⁸⁴ *Ibid* at 24.

¹⁸⁵ *Ibid* at 21.

¹⁸⁶ Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (New York: Oxford University Press, 2014) at 201.

¹⁸⁷ Tarun & Tomczak note that, while no *FCPA* decisions had addressed “anything of value” at the time, federal courts that addressed similar domestic bribery legislation had interpreted the term broadly to include such intangible property including “information,” witness testimony, and promises of future employment: *supra* note 165 at 6.

¹⁸⁸ DJSEC Resource Guide, *supra* note 170 at 14.

¹⁸⁹ Wei Zhang. “Foreign Corruption Practices ActFT” (2020) 57:3 Am Crim L Rev 837 at 852-853.

¹⁹⁰ Tarun & Tomczak, *supra* note 165 at 15. Note that the DOJ may also turn to the *Travel Act* in cases where the bribe receiver is not a public official. The *Act* prohibits travel in interstate or international commerce that carries out unlawful activity, which includes activity in violation of state commercial bribery laws. See Tim Martin, *International Bribery Law and Compliance Standards*, (Independent Petroleum Association of America, 2013) at 7, online (pdf): <<http://timmartin.ca/wp-content/uploads/2016/02/Int-Bribery-Law-Compliance-Standards-Martin2013.pdf>>.

¹⁹¹ Koehler, *supra* note 182.

variety of individuals, not just bona fide foreign government officials.”¹⁹² According to Deming, “[a] critical factor in determining whether someone is a foreign public official is whether the individual occupies a position of public trust with official responsibilities.”¹⁹³

Whether a state-owned enterprise is an “instrumentality” is particularly open to dispute.¹⁹⁴ According to the *Resource Guide*, to determine whether an entity is an “instrumentality,” an entity’s ownership, control, status and function should be considered.¹⁹⁵ Generally, an entity will not be included in the definition of “instrumentality” if foreign government ownership is less than 50%, unless the government has special shareholder status.¹⁹⁶

In *United States v Esquenazi*,¹⁹⁷ the Eleventh Circuit concluded that the definition of “instrumentality,” under the *FCPA*, was “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”¹⁹⁸ The Eleventh Circuit determined “that this test is a fact-bound inquiry” and provided a non-exhaustive list of factors to determine whether the government “controls” an entity:

- the foreign government’s formal designation of that entity;
- whether the government has a majority interest in the entity;
- the government’s ability to hire and fire the entity’s principals;
- the extent to which the entity’s profits, if any, go directly into the governmental fiscal accounts, and, by the same token, the extent to which the government funds the entity if it fails to break even; and
- the length of time these indicia have existed.¹⁹⁹

Furthermore, “to determine whether the entity performs a function that the government treats as its own,” the Eleventh Circuit listed the following non-exhaustive factors:

- whether the entity has a monopoly over the function it exists to carry out;
- whether the government subsidizes the costs associated with the entity providing services;
- whether the entity provides services to the public at large in the foreign country; and

¹⁹² Tarun & Tomczak, *supra* note 165 at 89–90.

¹⁹³ Deming, *supra* note 186 at 211.

¹⁹⁴ See Tarun & Tomczak, *supra* note 165 at 9–14 for an overview of the term and case law, and for summaries of *United States v Aguilar*, 783 F Supp 2d 1108 (CD Cal 2011) and *United States v Carson*, 2011 US Dist LEXIS 88853 (CD Cal May 18, 2011), which decided whether state-controlled or owned enterprises are instrumentalities.

¹⁹⁵ DJSEC Resource Guide (2020), *supra* note 170 at 20.

¹⁹⁶ *Ibid* at 21.

¹⁹⁷ *United States v Esquenazi*, 752 F3d 912, 925 (11th Cir 2014).

¹⁹⁸ *Ibid* at 925.

¹⁹⁹ *Ibid*.

- whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.²⁰⁰

Additionally, it should be noted that “a number of courts in other circuits have approved final jury instructions providing a similar non-exclusive list of factors to be considered.”²⁰¹

Public international organizations include the World Bank, International Monetary Fund, World Trade Organization, OECD, Red Cross and African Union.²⁰²

(v) Knowledge

Payments or offers cannot be made through third parties if the defendant knows the payment or offer will be passed on as a bribe. Actual knowledge is not required. Although carelessness or foolishness is not sufficient, knowledge includes wilful blindness towards or awareness of a high probability that the payment will be used to bribe a foreign official.²⁰³ This means companies must be alert to “red flags,” such as close relations between a third party and a foreign public official or a request by the third party to make payments to offshore bank accounts.²⁰⁴

(vi) Application

The anti-bribery provisions of the *FCPA* apply to three categories of legal entities and all officers, directors, employees, agents and shareholders thereof:

- 1) “issuers”: any company listed on a US stock exchange
- 2) “domestic concerns”: any citizen, national, or resident of the US or any company that is organized under the laws of the US
- 3) “persons or entities acting within the territory of the US”: any foreign national or non-issuer who engages in any act in furtherance of corruption while in the territory of the US.

As already noted, the jurisdictional reach of the *FCPA* will be dealt with in greater depth in Chapter 3, Section 1.7.

(vii) Business Purpose Test

For a bribe to constitute an offence under the *FCPA*, the prosecution must show that the defendant bribed a foreign official intending the official to act in a manner which would assist the defendant in “obtaining or retaining business.” Though this wording appears restrictive on its face, US courts have given a broad interpretation to “obtaining and retaining.” For example, in *US v Kay* (2004), the Fifth Circuit Court of Appeals held that bribes paid to obtain favorable tax treatment—which reduced a company’s customs duties

²⁰⁰ *Ibid.*

²⁰¹ DJSEC Resource Guide (2020), *supra* note 170 at 19.

²⁰² Tarun & Tomczak, *supra* note 165 at 16.

²⁰³ *Ibid* at 20.

²⁰⁴ Martin, *supra* note 190 at 7.

and sales taxes on imports—could (but do not necessarily) constitute “obtaining and retaining business” within the meaning of the *FCPA*.²⁰⁵ The court ruled that avoidance of taxes can provide a company with an improper advantage over its competitors, which necessarily allows the company a greater probability of obtaining and retaining business.

Bribes in the conduct of business or to gain a business advantage also satisfy the business purpose test. Other examples of prohibited actions include bribe payments to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, to influence the adjudication of lawsuits or enforcement actions, or to circumvent a licensing or permit requirement. As the *Resource Guide* puts it:

In short, although the *FCPA* does not cover every type of bribe paid around the world for every purpose, it does apply broadly to bribes paid to help obtain or retain business, which can include payments made to secure a wide variety of unfair business advantages.²⁰⁶

It should also be noted that UNCAC has expanded the definition of “international business” to include the provision of international aid. This means that nonprofit organizations “should be presumed to be fully subject to the anti-bribery provisions.”²⁰⁷

(viii) Corrupt and Willful Intent

To violate the *FCPA*, a bribe must be made “corruptly,” which focuses on the intention of the defendant; there must be an “evil motive” or intent to wrongfully influence the recipient.²⁰⁸ Under the *FCPA*, it is not necessary that a bribe succeed in its purpose (i.e., actually influence a foreign official to act corruptly). If the prosecution can prove that the defendant intended to induce the foreign official to misuse their position of power, then the burden of proof is met, regardless of the foreign official’s actual conduct or the effect on the defendant’s business. For example, in *United States v Joo Hyun Bahn, et al.*,²⁰⁹ a New York commercial real estate broker paid a “middleman” to a government official at the sovereign wealth fund of a Middle Eastern country, a \$500,000 payment, with the promise of a \$2.5 million dollar bribe, to “induce the sovereign wealth fund to buy an \$800 million dollar office building complex owned by the broker’s client.”²¹⁰ In reality the “middleman” did not have any relationship with the government foreign official, however, “[e]ven though there was

²⁰⁵ *US v Kay*, 359 F 3d 738 (5th Cir 2004). See also Tarun & Tomczak, *supra* note 165 at 17-18.

²⁰⁶ DJSEC Resource Guide (2020), *supra* note 170 at 13. Note also that where prior the DJSEC guidance “cursorily noted that payments must meet the ‘business purpose test’ to fall under the scope of the *FCPA*, [t]he newest version of the Guide expands its description of the ‘business purpose test’.... While not a change in substantive law, regulators’ emphasis on non-traditional forms of bribery highlights broader *FCPA* enforcement efforts”: Mayling C Blanco et al, “New US DOJ/SEC Guidance on *FCPA* Offers Insight into Regulators’ Expanded Enforcement Efforts” (9 July 2020), online (blog): Norton Rose Fulbright <<https://www.nortonrosefulbright.com/en-us/knowledge/publications/bc0fed15/new-us-doj-sec-guidance-on-fcpa-offers>>.

²⁰⁷ Deming, *supra* note 186 at 219–220.

²⁰⁸ Tarun & Tomczak, *supra* note 165 at 7. Also note that “the [legislative] history [of the *FCPA*] indicates that the motive or purpose is the same as that required under [domestic bribery]”: at 7.

²⁰⁹ No 16-cr-831 (SDNY 2016), ECF No 1.

²¹⁰ DJSEC Resource Guide (2020), *supra* note 170 at 13.

no foreign official actually receiving the bribe, the defendant was convicted of violating the *FCPA*.²¹¹ Practically speaking, even though there is no legal requirement that the defendant benefit from the corrupt bribe, the DOJ is still less likely to take enforcement action where the defendant has not personally benefitted.

The prosecution must also prove that the defendant acted “willfully.” This is generally construed by courts to mean an act committed “deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law.”²¹² It is not necessary that the defendant knew the specific law that he or she was breaking (i.e., that their conduct violated the *FCPA*), but merely that the defendant knew that his or her actions were unlawful.²¹³ It should be noted, however, that proof of willfulness is not required to establish corporate or civil liability.²¹⁴

Intent is often a difficult element for the prosecution to prove beyond a reasonable doubt in relation to bribery offences. Tarun and Tomczak point out that the search for intent:

[W]ill frequently turn on the transparency of a payment or relationship, direct or indirect, with a foreign official. While some transactions or relationships will be fully concealed and thus likely corroborative of a corrupt plan or scheme, others will reveal a confounding mixture of visibility and secrecy that can defeat a conclusion of evil motive beyond a reasonable doubt.²¹⁵

Tarun also notes that related accounting offenses are often “telltale” indications of corrupt intent.²¹⁶

(ix) Gifts, Entertainment and Charitable Contributions

Gifts are often used to foster cordial business relationships and promote products,²¹⁷ especially in countries where gift-giving is culturally mandated, such as China. If a gift is given with no corrupt intent, the *FCPA* will not apply. However, gifts and charitable donations often disguise bribes and the line between proper and improper gifts is fuzzy, creating a compliance minefield for companies. Further, there is no *de minimis* exemption in the *FCPA* (meaning that when “read literally, the *FCPA* prohibits in theory almost any kind of gift or form of entertainment, even nominal ones, assuming that all other elements are met”²¹⁸). The *Resource Guide* states that larger, more extravagant gifts are more likely to

²¹¹ *Ibid.*

²¹² *United States v Bourke*, 582 F Supp 2d 535 (SDNY 2008) [*Bourke*].

²¹³ DJSEC Resource Guide (2020), *supra* note 170 at 13.

²¹⁴ *Ibid.* See also Tarun & Tomczak, *supra* note 165 at 8.

²¹⁵ Tarun & Tomczak, *supra* note 165 at 35.

²¹⁶ *Ibid.*

²¹⁷ See Foley, *FCPA Best Practices: Gifts, Meals, and Entertainment*, (Foley), online (pdf): <https://www.foley.com/en/files/uploads/GRS/GRS_FCPA_Best_Practices_Gifts_Meals_and_Entertainment.pdf>, for an example of best practices guidance regarding gift giving in the anti-corruption environment.

²¹⁸ Tarun & Tomczak, *supra* note 165 at 6.

indicate corrupt motives, although small gifts might be part of a larger pattern of bribery.²¹⁹ For example, in *SEC v Veraz Networks, Inc* (2010), the SEC settled with Veraz for violations relating to improper gifts. According to Tarun, “[t]he Veraz gift allegations – down to the detail of giving flowers for an executive’s wife – represent an extreme SEC charging example and would not by themselves have likely resulted in an enforcement action. Still, the case demonstrates that the SEC will charge even minor gift abuses if they are part of a scheme.”²²⁰ More recently, in *United States v SBM Offshore*,²²¹ “a publicly traded energy company in the Netherlands resolved with DOJ over bribes it paid that included extravagant gifts such as paying for foreign officials to travel to sporting events and providing them with ‘spending money,’ paying for school tuition for the children of foreign officials, and shipping luxury vehicles to foreign officials.”²²²

Not everyone agrees with the SEC and DOJ’s line-drawing; for example, the decision to fine BHP Billiton \$25 million for hosting foreign officials at the 2008 Olympics, despite the absence of evidence of any specific *quid pro quo*, has been criticized for going too far.²²³ The *Resource Guide* notes that “DOJ and SEC enforcement cases thus have involved single instances of large, extravagant gift-giving (such as sports cars, fur coats, and other luxury items) as well as widespread gifts of smaller items as part of a pattern of bribes.”²²⁴

According to the *Resource Guide*, the “hallmarks of appropriate gift-giving” are transparency, proper recording in the giver’s books and records, a purpose of showing esteem or gratitude and permissibility under local law.²²⁵ The DOJ has approved charitable donations, but will consider whether companies carry out proper due diligence and implement control measures to ensure that donations are unrelated to business purposes and used properly.²²⁶

3.3.2 Defenses

In 1988, Congress added two affirmative defenses to the *FCPA*. In order to defend against a charge of foreign bribery, the defendant must prove either that:

- (a) the payment was lawful under the written laws of the foreign country, or
- (b) the payment was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by a foreign official and was directly related either to
 - (i) the promotion, demonstration or explanation of products or services, or (ii) the execution or performance of a contract (for example, this could include travel and

²¹⁹ DJSEC Resource Guide (2020), *supra* note 170 at 15.

²²⁰ Tarun & Tomczak, *supra* note 165 at 232.

²²¹ NV, No 17-cr-686 (SD Tex 2017), ECF No 1.

²²² DJSEC Resource Guide (2020), *supra* note 170 at 15.

²²³ “The World’s Lawyer: Why America, and Not Another Country, Is Going after FIFA”, *The Economist* (6 June 2015), online: <<https://www.economist.com/international/2015/06/04/the-worlds-lawyer>>.

²²⁴ DJSEC Resource Guide (2020), *supra* note 170 at 15.

²²⁵ *Ibid* at 14.

²²⁶ Martin, *supra* note 190.

expenses incurred for training or meetings, or to visit company facilities or operations).²²⁷

The fact that an act would not be prosecuted in a foreign country is not enough to invoke the local law defense. The payment itself must be lawful under foreign law.²²⁸ Because no foreign countries permit bribery in their written laws, the local law defense is “largely meaningless,”²²⁹ according to Koehler. However, Tarun points out that the defense could be useful in the context of political campaign contributions.²³⁰

The reasonable and bona fide expenditure defense can absolve a company of liability for providing gifts, travel, hospitality and entertainment for foreign officials. However, if carried too far, these expenditures can become improper and lead to *FCPA* scrutiny. For example, the defense will not cover side trips to tourist destinations with the sole purpose of personal entertainment.²³¹ The *Resource Guide* provides some guidance as to what constitutes appropriate expenses.²³²

In addition, situations of extortion or duress afford a defense by negating “corrupt intent.” That being said, “economic coercion” does not amount to extortion.²³³ In other words, the argument that the bribe was required in order to gain entry into the market or to obtain a contract will fail—see *United States v Kozeny*.²³⁴ In addition, if extortion payments are not recorded properly, the SEC may pursue accounting offenses.²³⁵ See Tarun and Tomczak for a list of potential defenses to bribery and accounting offenses under the *FCPA*.²³⁶ See also the discussion of other criminal law defenses in Section 2.3.2.

The case of James Giffen provides an example of a unique defense, nick-named the “spy defense.” Giffen was charged with violating the *FCPA* after he allegedly used \$84 million from US oil companies to bribe Kazakhstan’s president and various officials. However, the prosecution failed. Giffen claimed he was an informant for the CIA and argued that the US government was supporting his actions all along. The court agreed, and New York judge William Pauley called Giffen a “hero” for advancing US strategic interests in Central Asia.²³⁷

²²⁷ See Tarun & Tomczak, *supra* note 165 at 22.

²²⁸ Bourke, *supra* note 213.

²²⁹ Koehler, *supra* note 182.

²³⁰ Tarun & Tomczak, *supra* note 165 at 22.

²³¹ *Ibid* at 23.

²³² *Ibid* at 23-24.

²³³ DJSEC Resource Guide (2020), *supra* note 170 at 27-28.

²³⁴ *United States v Kozeny*, 582 F Supp 2d (SDNY 2008).

²³⁵ See complaint, *SEC v NATCO Group*, No 4:10-cv-00098 (SD Tex, 2010).

²³⁶ Tarun & Tomczak, *supra* note 165 at 349-351.

²³⁷ Aaron Bornstein, “The BOTA Foundation Explained (Part Three): The Giffen Case” (8 April 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/4/8/the-bota-foundation-explained-part-three-the-giffen-case.html>>.

3.3.3 Limitation Periods for Bribery of a Foreign Official

According to the *Resource Guide*, the FCPA does not specify a statute of limitations and accordingly the general statute of limitation periods apply:

[f]or substantive violations of the FCPA anti-bribery provisions, the five-year limitations period set forth in 18 U.S.C. § 3282 applies.... For violations of the FCPA accounting provisions, which are defined as “securities fraud offense[s]” under 18 U.S.C. § 3301, there is a limitations period of six years.²³⁸

However, as the *Resource Guide* points out, there are several ways to extend the limitation period. For example, if the case is one of conspiracy, the prosecution need only prove that one act in furtherance of the conspiracy occurred during the limitations period. Thus, the prosecution may be able to “reach” bribery or accounting offenses occurring prior to the five year limitation if the offenses contributed to the conspiracy.²³⁹

The limitation period can also be extended if the company or individual is cooperative and enters into a tolling agreement that voluntarily extends the limitation (i.e., waives the right to claim the litigation should be dismissed due to expiration of the limitation period). Koehler points out that, in practice, enforcement actions against corporations usually involve conduct outside the scope of the limitations period, since corporations are given the choice of extending the limitation or being charged by the DOJ. Koehler criticizes this tactic, pointing out that enforcement agencies face no time pressure, which means “the gray cloud of FCPA scrutiny often hangs over a company far too long.”²⁴⁰

Finally, if the government is seeking evidence from foreign countries, the prosecutor may apply for a court order suspending the statute of limitations for up to three years.

3.3.4 Sanctions

For violation of the anti-bribery provisions, corporations and other business entities are liable to a fine of up to \$2 million, while individuals (including officers, directors, stockholders and agents of companies) are subject to a fine of up to \$250,000 and imprisonment for a maximum of 5 years. Fines imposed on individuals may not be paid by their principal or employer.²⁴¹

However, the *Alternative Fines Act* 18 USC § 3571(d) provides for the imposition of higher fines at the court's discretion. The increased fine can be up to twice the benefit that the defendant obtained in making the bribe, “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

²³⁸ DJSEC Resource Guide (2020), *supra* note 170 at 36.

²³⁹ *Ibid* at 37.

²⁴⁰ Koehler, *supra* note 182 at 129.

²⁴¹ 15 USC §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A)), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A).

admitted in a guilty plea proceeding.”²⁴² The same *Act* specifies that the maximum fine for an individual charged under the *FCPA* is \$250,000 (see § 3571(e)). Actual penalties are determined by reference to the US Sentencing Guidelines.²⁴³ Chapter 7, Section 4 contains a detailed discussion of US sentencing practices.

3.3.5 Facilitation Payments

The *FCPA* contains a narrow exemption in § 78dd-1(b) for “facilitating or expediting payment[s] ... made in furtherance of a ‘routine governmental action’ that involves non-discretionary acts.” According to the *Resource Guide*, such governmental actions could include processing visas, providing police protection and mail service and the supply of utilities.²⁴⁴ It would not include such actions as the decision to award or continue business with a party, or any act within the official's discretion that would constitute the misuse of the official's office. The general focus is on the purpose of the payment rather than its value.²⁴⁵ The *Resource Guide* notes the OECD's Working Group on Bribery recommends “that all countries encourage companies to prohibit or discourage facilitating payments.”²⁴⁶ The *Resource Guide* recommends companies discourage facilitating payments despite their legality under the *FCPA*, since they may still violate local laws in the country where the company is operating, and other countries' foreign bribery laws may not contain a similar exception (such as the UK).²⁴⁷ As a result, American individuals and companies may find they still face sanctions in other countries despite the *FCPA*'s facilitation payment exception.

Finally, facilitation payments must be properly recorded in the issuer's books and records.²⁴⁸ A discussion of the *FCPA*'s facilitation payments exemption and its pros and cons is provided in Section 4.

3.4 UK

For a detailed analysis of the UK *Bribery Act* offences see: Nicholls et al, *Corruption and Misuse of Public Office*.²⁴⁹ For a comparison of the *FCPA* and the UK *Bribery Act*, see: Nicholas Cropp, “The Bribery Act 2010: (4) A Comparison with the *FCPA*: *Nuance v Nous*” [2011] *Crim L Rev* 122.

3.4.1 Offences

As noted in Section 2.4.2, the UK *Bribery Act* addresses both foreign and domestic bribery and applies to individuals and other legal entities. In addition to its general anti-bribery prohibitions, the *Bribery Act* also contains a discrete offence in section 6 that applies to

²⁴² DJSEC Resource Guide (2020), *supra* note 170 at 69.

²⁴³ *Ibid* at 69-70. See <<https://www.ussc.gov/guidelines>>. for the guidelines in full.

²⁴⁴ *Ibid* at 25.

²⁴⁵ *Ibid* at 26.

²⁴⁶ *Ibid*.

²⁴⁷ *Ibid*.

²⁴⁸ *Ibid*.

²⁴⁹ Nicholls et al, *supra* note 45.

bribery of foreign public officials. The reach of sections 1, 2 and 7 is very broad, subject only to jurisdictional constraints. As a result, it is difficult to envisage conduct falling within the foreign bribery offence that would not already be covered by the other offences. Sullivan posits that the primary role for the offence of bribing foreign public officials is to “flag clearly that the United Kingdom is compliant with its treaty obligations to combat the bribery of public officials.”²⁵⁰

Section 6 criminalizes the giving or promising of an advantage to a foreign public official in order to gain or retain business or a business advantage. Importantly, the offence only covers “active bribery” and not the acceptance of bribes. The briber must know the receiver is a public official and must intend to influence the official in the performance of his or her functions as a public official. Unlike section 1, the briber need not intend to influence the recipient to act improperly.²⁵¹ This is very different from the *FCPA*, which requires corrupt intent. Under section 6, the intention to influence the foreign official in and of itself makes out the offence, regardless of whether the briber knows their conduct is improper or unlawful. This means that a reasonable belief in a legal obligation to confer an advantage does not provide a defence.²⁵² Cropp criticizes this minimal *mens rea* requirement and illustrates its absurdity by describing trivial, *de minimis*, scenarios that meet all the requirements of a section 6 offence.²⁵³ Although the Director of Public Prosecutions and the SFO are unlikely to allow prosecution of such *de minimis* allegations, Cropp argues that prosecutorial discretion should not be the only check on “overbreadth of application.”²⁵⁴ According to Cropp, businesses should not have to depend on the whims of the prosecutor to avoid liability, but rather should be able to determine what conduct will result in prosecution from the *Bribery Act* itself. He further notes that this “unusual reliance on official discretion ... raises serious concerns about the extent to which the Act will be applied consistently and transparently.”²⁵⁵

A bribe can be made directly or through a third party, and can be received by the foreign public official or by another person at the official's request or with their assent. Because the official must have assented or acquiesced to the bribe, section 6 captures less peripheral and preliminary conduct than the *FCPA*.²⁵⁶ Instead, the UK regime relies on inchoate offences to capture such conduct.

“Foreign public officials” are defined in subsection (5) as individuals who hold legislative, administrative, or judicial positions, as well as individuals who are not part of government, but still exercise a public function on behalf of a country, public enterprise or international organization. The definition does not include political parties or political candidates.

²⁵⁰ Sullivan, *supra* note 45 at 94.

²⁵¹ Nicholls et al, *supra* note 45 at para 3.73.

²⁵² Nicholls et al, *supra* note 45 at 75-76.

²⁵³ Nicholas Cropp, “The Bribery Act 2010: Part 4:(4) A Comparison with the FCPA: Nuance v Nous” (2011) Crim L Rev 122 at 132.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid* at 134.

²⁵⁶ *Ibid* at 135.

Corporate hospitality presents a challenge for companies trying to comply with the foreign bribery provisions, especially in light of the absence of a corrupt intent requirement in section 6.²⁵⁷ Corporate hospitality is a legitimate part of doing business, but can easily cross the line to bribery. The Ministry of Justice *Guidance* states that the *Bribery Act* does not intend to criminalize “[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organization, better to present products and services or to establish cordial relations.”²⁵⁸ The *Guidance* also states that “some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match”²⁵⁹ are unlikely to trigger section 6. According to the *Guidance*, the more lavish the expenditure, the stronger the inference that the expenditure is intended to influence the official.

3.4.2 Defences

If the foreign public official is permitted or required by the written law applicable to that official to be influenced by an offer, promise, or gift, then the offence is not made out (see section 6(3)(b)). The official must be specifically entitled to accept the payment or offer; the silence of local law on the matter is not sufficient to ground the defence. Section 6(7) addresses this defence in more detail. It clarifies that where the public official’s relevant function would be subject to the law of the UK, the law of the UK is applicable. If the performance of the official’s actions would not be subjected to UK law, the written law is either the rules of the organization or the law of the country or territory for which the foreign public official is acting (including constitutional or legislative laws as well as published judicial decisions).

The UK *Bribery Act 2010* contains no other specific defences to section 6. For a discussion of general criminal law defences, see Section 2.4.3.

3.4.3 Limitation Periods

As described in Section 2.4.4, the UK *Bribery Act* is not subject to any limitation periods.

3.4.4 Sanctions

The applicable penalties have already been discussed at Section 2.4.5 under domestic bribery.

3.4.5 Facilitation Payments

The UK *Bribery Act*, unlike the American *FCPA*, does not provide an exemption for facilitation payments. However the *Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* state that whether it is in the public interest to prosecute for bribery in the case of facilitation payments will depend on a number of

²⁵⁷ For commentary on the *Bribery Act* and corporate hospitality, see Nicholls et al, *supra* note 45 at 89-90.

²⁵⁸ UK *Bribery Act* Guidance, *supra* note 70 at 12.

²⁵⁹ *Ibid* at 14.

factors set out in the *Joint Prosecution Guidance*,²⁶⁰ the Full Code Test in the Code for Crown Prosecutors,²⁶¹ and where relevant, the *Joint Guidance on Corporate Prosecutions*.²⁶²

3.5 Canada

3.5.1 Offences

The *Corruption of Foreign Public Officials Act (CFPOA)* came into force in 1999 in order to meet Canada's obligations under the OECD Convention. Section 3(1) of the *CFPOA* states:

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

- (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
- (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

As pointed out by Deming, the inclusion of the words "in order to obtain or retain an advantage" indicates a *quid pro quo* element.²⁶³ Since no particular *mens rea* is specified for this crime, Canadian law presumes that the necessary mental element is subjective. There is nothing in the context of this offence to displace that presumption. Proof of negligence will not be enough; to be held liable the accused person must have committed the offence with the intention of doing so or with recklessness or willful blindness to the facts. The definition of "person" in the *Criminal Code* also applies to the bribery offences in section 3 of the *CFPOA*, by reason of section 34(2) of the *Interpretation Act*.²⁶⁴ The definition of "person" in section 2 of the *Criminal Code* includes both individuals and other organizations, including corporations.

In *R v Niko Resources Ltd* (2011), the court demonstrated that gifts of significant value are liable to be considered a "reward, advantage or benefit"²⁶⁵ under the *CFPOA*. Niko, an oil and gas company, gave the Bangladeshi Minister for Energy and Mineral Resources an expensive SUV and a trip to Calgary and New York in order to influence ongoing business

²⁶⁰ Joint Prosecution Guidance (2019), *supra* note 77.

²⁶¹ UK, Crown Prosecution Services, "The Full Code Test" in The Code for Crown Prosecutors (CPS: 2018), online: <<https://www.cps.gov.uk/publication/code-crown-prosecutors#section4>>.

²⁶² Nicholls et al, *supra* note 45 at 88. UK, Serious Fraud Office, *Guidance on Corporate Prosecutions* (SFO), online (pdf): <<https://www.sfo.gov.uk/?wpdmdl=1457>>. See also "Facilitation Payments" in Joint Prosecution Guidance (2019), *supra* note 77, for a list of specific public interest considerations that prosecutors must consider in the context of facilitation payments.

²⁶³ Deming, *supra* note 186 at 53.

²⁶⁴ *Interpretation Act*, RSC 1985, c I-21.

²⁶⁵ *R v Niko Resources Ltd*, [2011] AJ 1586, 2011 CarswellAlta 2521 (ABQB).

dealings. The minister attended an oil and gas exposition in Calgary, but the trip to New York was purely to visit family. These benefits were provided after an explosion at one of Niko's gas wells in Bangladesh, which had caused bad press and legal problems for Niko. The court imposed a fine of almost \$9.5 million, in spite of the relatively small value of the gifts in comparison to the size of the fine and Niko's cooperation during the investigation.²⁶⁶

In *R v Karigar* (2017), the court clarified the proper interpretation of "agrees" within section 3(1) of the *CFPOA*.²⁶⁷ Acting as an employee of Cryptometrics Canada, Karigar agreed with other employees of the company to bribe Indian officials in order to secure a multi-million dollar contract with Air India. Karigar was convicted of agreeing to offer a bribe to a foreign public official, contrary to section 3(1)(b) of the *CFPOA*. On appeal, Karigar challenged the meaning of the word "agree" within section 3 of the *CFPOA*, submitting that "the Crown must prove an agreement between the accused and the foreign public official and that it is not sufficient to prove a conspiracy to offer a bribe to a foreign public official."²⁶⁸ Upholding the trial judge's interpretation, the ONCA held that "agrees" within section 3(1) of the *CFPOA* is interpreted to include "both a direct and an indirect agreement to give or to offer an advantage."²⁶⁹ Furthermore, the court held that "the offence of 'agreeing' to give or offer a benefit to a foreign public official in section 3 of the Act includes an agreement among two or more people to offer a bribe to a foreign public official, and does not require the Crown to prove an agreement with or payment to a particular foreign official. To do so would make the legislation difficult or impossible to enforce, possibly undermining international comity obligations."²⁷⁰ The court dismissed the appeal, agreeing with the trial judge that "to read in such a limitation would constrain the ability of the Crown to enforce the policy of the *Act* in accordance with Canada's obligations under the [OECD Convention]."²⁷¹

"Foreign public official" is defined in section 2 of the *CFPOA* as follows:

- (a) a person who holds a legislative, administrative or judicial position of a foreign state;
- (b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
- (c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

This definition does not include political party officials or political candidates.

²⁶⁶ Norm Keith, *Canadian Anti-Corruption Law and Compliance*, 2nd ed (Toronto: LexisNexis, 2017) at 189-195.

²⁶⁷ *R v Karigar*, [2017] OJ 3530, 2017 CarswellOnt 10393 (CA).

²⁶⁸ *Ibid* at para 2.

²⁶⁹ *Ibid* at para 43.

²⁷⁰ *Ibid* at 20.

²⁷¹ *Ibid* at para 44.

In response to criticism from a number of commentators as well as the OECD Working Group, Canada amended the *CFPOA*. Bill S-14, *An Act to Amend the Corruption of Foreign Public Officials Act* received royal assent and subsequently came into force in June, 2013. Previously, the word “business” was limited by section 2 of the *CFPOA* to for-profit endeavours. This has since been replaced by a definition of “business” that is not limited in this way. Thus it also applies to bribery by NGOs and other non-profit organizations, although according to Norm Keith, RCMP investigations remain focused on for-profit businesses.²⁷² In addition, the jurisdictional provisions under the former *CFPOA* were amended in 2013 and the *CFPOA* now applies to the acts of Canadian citizens, permanent residents and Canadian corporations while they are outside of Canadian territory. Previously, Canada’s ability to prosecute those engaged in bribery of foreign officials was limited by the concept of “territoriality”: in order for a person to be held liable under the *CFPOA* there had to be a real and substantial link between the acts which constituted the offence and Canada (discussed in detail in Chapter 3, Section 1.9). The 2013 amendments also establish accounting offences, which make it a crime to falsify accounting records for the purpose of facilitating or concealing the bribery of a foreign public official.

As noted by Deming, the secret commissions offence under section 426 of the *Criminal Code* may be used to supplement the *CFPOA* if Canada has territorial jurisdiction over the conduct at issue. The secret commissions offence covers any situation involving an agency relationship and is not limited to situations in which the recipient of a bribe is a public official. Section 426 could therefore be useful when dealing with recipients who do not meet the definition of a foreign public official or when commercial bribery is at issue.²⁷³

3.5.2 Defences

An accused charged with an offence under the *CFPOA* is entitled to the same general defences as persons charged with other offences. These include mistake of fact, incapacity due to mental disorder, duress, necessity, entrapment, diplomatic immunity and *res judicata*.

In addition, section 3(3) states that no person is guilty of an offence under section 3(1) where the loan, reward, advantage or benefit is “permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions.” Further, no person will be guilty where the benefit was “made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official” where those expenses “are directly related to the promotion, demonstration, or explanation of the person’s products and services” or to “the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.” According to Canada’s 2013 Written Follow-Up to the OECD *Phase 3 Report*, the defence of “reasonable expenses incurred in good faith”²⁷⁴ has not yet been considered by any Canadian courts.

²⁷² Keith, *supra* note 266 at 48.

²⁷³ Deming, *supra* note 186 at 48.

²⁷⁴ OECD, Working Group on Bribery, *Canada: Follow-Up to the Phase 3 Report & Recommendations*, (2013) at 16, online (pdf): <<https://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>>.

Keith pointed out the peculiarity of the wording of the defences in section 3(3). Both defences use the words “loan, reward, advantage or benefit,” but Keith argues these words “tend to imply a potential questionable or even inappropriate payment to a foreign public official.”²⁷⁵ Keith points out that providing “a loan to a foreign public official, with whom a Canadian business must work” will rarely appear “ethical, lawful or permitted by the laws of a foreign government,”²⁷⁶ and will rarely be appropriate as reimbursement for expenses incurred by the official. As a result, Keith argues that the wording of section 3(3) is difficult for businesses to interpret.

3.5.3 Limitation Periods

Because the offences in the *CFPOA* are punishable by indictment, there are no limitation periods in respect to laying a charge after an offence is alleged to have occurred. However, since there was no offence in Canada of bribing a foreign public official prior to the enactment of the *CFPOA*, there can be no prosecution of such conduct which occurred prior to 1999.

3.5.4 Sanctions

Bribing a foreign public official under section 3(1) is an indictable offence which was punishable by a maximum of 5 years imprisonment until amendments were enacted in 2013 raising the maximum penalty to 14 years imprisonment. The accounting offences under section 4 are also indictable and punishable by imprisonment for a maximum of 14 years.

Pursuant to *Criminal Code* amendments to section 742.1, the addition of subsection (c), conditional sentences served in the community are no longer available sentencing options for any indictable offence with a 14-year maximum penalty. Accused persons may also face forfeiture of the proceeds of *CFPOA* offences, and Public Works and Government Services Canada may not contract with businesses convicted under the *CFPOA*.²⁷⁷ These and other consequences of a *CFPOA* conviction are dealt with in Chapter 7, Sections 7 to 10.

3.5.5 Facilitation Payments

As part of the 2013 amendments discussed, facilitation payments, meaning those payments made to either ensure or expedite routine acts that form part of a foreign public official’s official duties or functions, will no longer be exempt from liability under the *CFPOA*. This provision was proclaimed in force as of October 31, 2017. The pros and cons of facilitation payments are discussed in greater detail in Section 4.

²⁷⁵ Keith, *supra* note 266 at 54.

²⁷⁶ *Ibid.*

²⁷⁷ Deming, *supra* note 186 at 63.

4. FACILITATION PAYMENTS AND THE OFFENCE OF BRIBERY

Facilitation or “grease” payments are relatively small bribes paid to induce a foreign public official to do something (such as issue a licence) that the official is already mandated to do.²⁷⁸ As Nicholls et al. point out, “those facing demands for such [payments] often feel there is no practical alternative to acceding to them.”²⁷⁹ In almost every case the payment will be illegal in the public official’s home state. Yet such payments are a routine way of life in most of the countries listed in the bottom half or quarter of the TI Corruption Perception Index. Some of the most developed nations do not prohibit their own nationals from making these payments to public officials elsewhere. Other nations prohibit facilitation payments, but make no effort to enforce that prohibition.²⁸⁰ UNCAC and the OECD Convention do not expressly accept or reject exempting facilitation payments from the definition of offences of bribery.

4.1 Facilitation Payments, Culture, and Economic Utility

While the debate surrounding the exemption of facilitation payments is beginning to abate (that is, the prevailing international view is that facilitation payments constitute foreign bribery²⁸¹), it is nevertheless important to recognize two of the most circulated arguments for not criminalizing facilitation payments: (1) that it is wrong for multinational corporations and foreign states to impose western-centric views on corruption and facilitation payments on countries where these payments are embedded within local customs (the culture argument)²⁸² and (2) that facilitation payments are economically efficient and allow firms to

²⁷⁸ Ingeborg Zerbès notes that in order for a payment to be properly classified as a facilitation payment, “[t]he condition must be that these transfers really are of a minor nature not exceeding the social norm pertaining to them in the society in question.”: Zerbès, *supra* note 174. However, some jurisdictions, like the US, may focus on the purpose of the payment rather than its value. Further, the payment must not be in exchange for a breach of duty or involve a discretionary decision; its purpose may only be for the inducement of a lawful act or decision on the part of the foreign public official that does not involve an exercise of discretion.

²⁷⁹ Nicholls et al, *supra* note 45 at para 3.120.

²⁸⁰ As pointed out by Tim Martin, in practice, facilitation payments are not necessarily treated differently in jurisdictions with prohibitions on facilitation payments as opposed to those without. For example, in the US, the exception for facilitation payments has been substantially narrowed, while in the UK, where facilitation payments are banned, prosecutorial policies make charges for small facilitation payments less likely. See Martin, *supra* note 190.

²⁸¹ For further commentary on the shift in attitude towards facilitation payments in the international community over time, see Tyler Girard, “When Bribery is Considered an Economic Necessity: Facilitation Payments, Norm Translation, and the Role of Cognitive Beliefs” (2021) 22:1 Intl Studies Perspectives 65 at 72-74. See “Compliance Glossary: Facilitation Payments” (last visited 18 August 2021), online: *Gan Integrity* <<https://www.ganintegrity.com/compliance-glossary/facilitation-payments/>>, for an overview of facilitation payments and which countries provide an exemption for foreign facilitation payments.

²⁸² See the following for more information on the “culture” argument”: Emily Strauss, “Easing Out the FCPA Facilitation Payment Exception” (2013) 93:1 BUL Rev 235; Robert Bailes, “Facilitation Payments: Culturally Acceptable or Unacceptably Corrupt?” (2006) 15:3 Bus Ethics: A European Rev 293; and Qingxiu Bu, “The Culture Variable Vis-à-Vis Anti-Bribery Law: A Grey Area in

navigate more quickly through the unnecessary and time-consuming red tape that exists in certain highly bureaucratic states (the economic efficiency argument).²⁸³

4.2 US

As noted, the *FCPA* does not prohibit firms operating under its jurisdiction from making facilitation payments to foreign public officials. The prosecution has the burden of negating this exception. However, companies may still be liable under the *FCPA*'s accounting provisions if they make facilitation payments but fail to properly record the payments as such. Firms are often unwilling to properly record facilitation payments as they are generally prohibited under the domestic legislation of the foreign public official's home state.²⁸⁴ The *FCPA* provides a more detailed description of what qualifies as a facilitation payment than the OECD Convention; however, interestingly, the *FCPA* does not specifically require that the payment be "small."²⁸⁵ Rather, the facilitation payments exception only applies to payments which are "made to further 'routine governmental action' that involves non-discretionary acts."²⁸⁶

Transnational Corporate Criminal Liability" (2018) 19 European Bus Organization L Rev 183, online (pdf): <<https://link.springer.com/article/10.1007/s40804-017-0089-8>>; and TI UK, Press Release, "Small Bribes, Big Problem: New Guidance for Companies (30 June 2014), online: <<https://www.transparency.org.uk/small-bribes-big-problem-new-guidance-companies>>.

²⁸³ For more information on the "economic efficiency" argument, see Hiren Sarkar & M Aynul Hasan, "Impact of Corruption on the Efficiency of Investment: Evidence from a Cross-Country Analysis" (2001) 8:2 Asia-Pacific Development J 111; Girard, *supra* note 281 (which canvases the arguments for and against allowing facilitation payments that were proposed during the amendment process of anti-corruption legislation in Canada and New Zealand. The article also examines how the manner in which these arguments were presented and what stakeholders were present at these discussions may have impacted the decision to criminalize or not criminalize these payments); Shang-Jin Wei & Daniel Kaufmann, "Does 'Grease Money' Speed Up the Wheels of Commerce" (2000) International Monetary Fund Working Paper No 00/64 (World Bank Institute, 1999), online (pdf): <<https://www.imf.org/external/pubs/cat/longres.aspx?sk&sk=3524.0>>; Anti-Corruption Helpdesk, *Evidence of the Impact of Facilitation Payments*, (OECD, 2013), online (pdf): <https://knowledgehub.transparency.org/assets/uploads/helpdesk/The_impact_of_facilitation_payments.pdf>; and Oliver Wagg, "Facilitation Payments – The Cost of Greasing the Wheel" (1 December 2009), online: *Reuters Events Sustainable Business* <<https://www.reutersevents.com/sustainability/stakeholder-engagement/facilitation-payments-cost-greasing-wheel>>.

²⁸⁴ The DJSEC Resource Guide also cautions corporations that labelling a payment as a facilitation payment does not make it one, and uses the Noble Corporation settlement as an example of this erroneous practice. See Richard L Cassin, "At Large: It's a Tempting Time to (Mis)use the 'Facilitating Payments' Exception" (30 September 2020), online (blog): *The FCPA Blog* <<https://fcpablog.com/2020/09/30/at-large-its-a-tempting-time-to-misuse-the-facilitating-payments-exception/>>. See also this response to *The FCPA Blog* post: Mike Koehler, "Shallow Commentary Regarding the Facilitation Payments Exception" (30 September 2020), online (blog): *FCPA Professor* <<https://fcpaprofessor.com/shallow-commentary-regarding-facilitation-payments-exception/>>.

²⁸⁵ OECD, Working Group on Bribery, *United States Phase 3 Report*, (2010) at para 74, online (pdf): <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf>>.

²⁸⁶ DJSEC Resource Guide (2020), *supra* note 170 at 25.

The facilitation payment exception under the *FCPA* has been called “illusory” by the SEC’s former Assistant Director of Enforcement due to enforcement patterns:

[T]he fact that the *FCPA*’s twin enforcement agencies have treated certain payments as prohibited despite their possible categorization as facilitating payments does not mean federal courts would agree. But because the vast majority of enforcement actions are resolved through DPAs [deferred prosecution agreements] and NPAs [non-prosecution agreements], and other settlement devices, these cases never make it to trial. As a result, the DOJ and the SEC’s narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts – or Congress – would agree.²⁸⁷

As other states intensify enforcement of domestic anti-bribery laws, it is becoming increasingly likely that American corporations will face criminal charges in foreign countries for offering or making facilitation payments. Some commentators find merit in the argument that, as the chief enforcer of anti-bribery laws, the US must maintain the facilitation payment exemption to “bridge the gap between the aspirational norm of total intolerance for bribery, and the operational code in the field that actually determines how business gets done.”²⁸⁸ Further, because the US is the predominant enforcer of anti-bribery legislation, perhaps “it is even more important that its laws actually align with the aspiration norm it wishes to achieve, or the gap between norm and practice will not narrow.”²⁸⁹ Despite such arguments, it does not appear that the US intends to change its stance on facilitation payments anytime soon.

4.3 UK

As already noted, the UK *Bribery Act* does not contain an exception for facilitation payments. Recognizing the practical difficulties potentially faced by UK businesses operating abroad, the Government reiterated the basic principles of UK prosecution policy, including the concept of proportionality (for example, it may not be in the public interest to prosecute

²⁸⁷ Richard Grime and Sara Zdeb, “The Illusory Facilitating Payments Exception: Risks Posed by Ongoing *FCPA* Enforcement Actions and the UK *Bribery Act*” (2011), quoted in Koehler, *supra* note 182 at 120.

²⁸⁸ Strauss, *supra* note 282 at 267. See also Mike Koehler, “A Reminder Why Congress Chose to Exempt Facilitating Payments From the Reach of the *FCPA*’s Anti-Bribery Provisions” (30 July 2021), online (blog): *FCPA Professor* <<https://fcpaprofessor.com/remind-congress-chose-exempt-facilitating-payments-reach-fcpas-anti-bribery-provisions-2/>>.

²⁸⁹ *Ibid.* See also Matthew McFillin & Amanda Rigby, “Compliance Leaders Are Being Forced to ‘Do More With Less.’ Here’s What it Means” (21 September 2020), online (blog): *The FCPA Blog* <<https://fcpablog.com/2020/09/21/compliance-leaders-are-being-forced-to-do-more-with-less-heres-what-it-means/>> and Cassin, *supra* note 284 which illustrate how difficult economic and political circumstances (i.e. due to COVID-19) may encourage the misuse of the facilitation payment exemption in the *FCPA*.

where the payments made were very small) and stated that the outcome in any particular case will depend on the full circumstances of that case.²⁹⁰

The *Joint Prosecution Guidance* from the SFO and Ministry of Justice also notes that “[f]acilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated,”²⁹¹ which favours prosecution. On the other hand, if the payer was in a “vulnerable position arising from the circumstances in which the payment was demanded,”²⁹² this militates against prosecution. Additionally, the common law defence of duress may apply where individuals are faced with no alternative but to make a payment to protect against loss of life, limb, or liberty.²⁹³ However, the defence has not been adapted or expanded to include non-physical pressure.²⁹⁴ On the other hand, the less well recognized defence of necessity in England has no similar restriction and might therefore be a viable defence.

4.4 Canada

- (5) Section 3(2) of Bill S-14 (2013), which came into force as of October 31, 2017, eliminates the exception for facilitation payments that previously existed in the *CFPOA* in sections 3(4) and 3(5).

Section 4 of the *CFPOA* also criminalizes the actions of anyone who, “for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,” misrepresents bribe payments in books and records or takes other steps to misrepresent or hide illicit bribery payments. Note that this is in contrast to the accounting provisions in the USA under their *FCPA*, which require accurate records be kept by issuers irrespective of what the payments are actually for.

5. ACCOUNTING (BOOKS AND RECORDS) OFFENCES

5.1 UNCAC

Creating criminal offences to punish false, deceptive or incomplete accounting of the payment or receipt and use of money or other assets is seen as an essential and necessary tool in fighting the hiding of corruption payments. Article 12 of UNCAC provides:

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide

²⁹⁰ Nicholls et al, *supra* note 45 at paras 3.126-3.127. See paras 3.103 for factors prosecutors are likely to consider when deciding whether to prosecute.

²⁹¹ Joint Prosecution Guidance (2010), *supra* note 77.

²⁹² *Ibid.*

²⁹³ Nicholls et al, *supra* note 45 at para 3.134.

²⁹⁴ *Ibid* at para 2.22.

effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

2. Measures to achieve these ends may include, inter alia:
 - (a) Promoting cooperation between law enforcement agencies and relevant private entities;
 - (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;
 - (c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;
 - (d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;
 - (e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;
 - (f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.
3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:
 - (a) The establishment of off-the-books accounts;
 - (b) The making of off-the-books or inadequately identified transactions;

- (c) The recording of non-existent expenditure;
 - (d) The entry of liabilities with incorrect identification of their objects;
 - (e) The use of false documents; and
 - (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.
4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

The UNCAC *Legislative Guide* highlights the following features of Article 12:

- (1) Paragraph 1 of article 12 requires that States parties take three types of measures in accordance with the fundamental principles of their law. The first is a general commitment to take measures aimed at preventing corruption involving the private sector. The second type of measure mandated by paragraph 1 aims at the enhancement of accounting and auditing standards. Such standards provide transparency, clarify the operations of private entities, support confidence in the annual and other statements of private entities, and help prevent as well as detect malpractices. The third type of measure States must take relates to the provision, where appropriate, of effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with the accounting and auditing standards mandated above.²⁹⁵
- (2) Article 12, paragraph 2, outlines in its subparagraphs a number of good practices, which have been shown to be effective in the prevention of corruption in the private sector and in the enhancement of transparency and accountability.²⁹⁶
- (3) Risks of corruption and vulnerability relative to many kinds of illicit abuses are higher when transactions and the organizational structure of private entities are not transparent. Where appropriate, it is important to enhance transparency with respect to the identities of persons who play important roles in the creation and management or operations of corporate entities.²⁹⁷

The UN Working Group on the Prevention of Corruption has divided state implementation of the provisions of Article 12 into three thematic categories: “([1] prevention and monitoring through accounting and auditing standards—paragraphs 1 and 2(f); [2] sanctions for non-

²⁹⁵ Legislative Guide (2012), *supra* note 11.

²⁹⁶ *Ibid* at para 120.

²⁹⁷ *Ibid* at para 124.

compliance—paragraphs 1, 2(a), 3 and 4; and [3] prevention of private sector corruption through codes of conduct and other measures—paragraphs 1, 2(b) and (e).”²⁹⁸

5.2 OECD Convention

Article 8 of the OECD Convention stipulates that:

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

The OECD Convention’s implementation has immediate consequences. Commentary 29 states that “one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery.”²⁹⁹

Pacini, Swingen and Rogers discuss the impact of the OECD Convention in their article “The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials.”³⁰⁰ In addition to commenting on the contents of Commentary 29, they note that Article 8 has implications for auditors, who “may be liable if they have not detected bribery of a foreign public official by properly examining a company’s books and records.”³⁰¹

Commentary 29 also points out that “the accounting offences referred to in Article 8 will generally occur in the company’s home country, when the bribery offence itself may have

²⁹⁸ Rose, Kubiciel & Landwehr, *supra* note 5 at 128; see also 126-135 for more on this provision.

²⁹⁹ OECD Convention, Commentary 29.

³⁰⁰ Pacini, Swingen & Rogers, *supra* note 166.

³⁰¹ *Ibid.* Nicholls et al, *supra* note 45 at para 17.93 also note the “key role played by auditors and accountants in identifying foreign bribery in international business operations,” which is evidenced in the 2014 OECD Foreign Bribery Report, and underscores the importance of Article 8.

been committed in another country, and this can fill gaps in the effective reach of the Convention.”

Unlike UNCAC, the OECD does not require State Parties to prohibit tax deductibility of bribe expenses.³⁰² However, the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials* does urge State Parties to disallow deducting bribes from taxes.³⁰³

5.3 US

5.3.1 Accounting Provisions

Accounting provisions in the *FCPA* are designed to prohibit off-the-books accounting. Traditionally, enforcement of the provisions has been via civil actions filed by the Securities Exchange Commission.³⁰⁴ The standard for imposing criminal liability is set out in § 78m(b)(5), which states that no person shall “knowingly” circumvent or fail to implement a system of controls or “knowingly” falsify their records. This full *mens rea* of “knowingly” removes liability for inadvertent errors, while willful blindness would still satisfy the requisite intent.³⁰⁵ When prosecuted as a crime by the DOJ, the burden of proof is on the prosecutor beyond a reasonable doubt. When dealt with as a civil offense by the SEC, the burden of proof is the lower standard of balance of probabilities.³⁰⁶ In practice, most of the books and records violations are dealt with as civil offenses by the SEC.³⁰⁷

FCPA provisions operate independently of the bribery provisions, and also amend the *Securities Exchange Act*, meaning the accounting provisions apply to far more situations than bribery, including accounting fraud and issuer disclosure cases. Furthermore, companies engaged in bribery may also be violating the anti-fraud and reporting provisions found in the *Securities Exchange Act*. The DOJ and SEC also may turn to accounting offenses when the elements of a bribery offense cannot be made out.³⁰⁸

While judicial decisions on the accounting provisions are rare, the provisions are common in enforcement actions that never make it to trial.³⁰⁹ As pointed out by Koehler, “the

³⁰² Rose, Kubiciel & Landwehr, *supra* note 5 at 132.

³⁰³ *Ibid.*

³⁰⁴ James Barta & Julia Chapman, “Foreign Corrupt Practices Act” (2012) 49:2 Am Crim L Rev 825.

³⁰⁵ *Ibid* at 832.

³⁰⁶ Tarun & Tomczak, *supra* note 165 at 25 state: “in the civil context, the accounting provisions impose essentially strict liability on issuers, and do not require the showing of knowledge by an issuer to sustain a civil violation of the *FCPA*’s accounting provisions. Persons who are not issuers must have ‘knowingly’ circumvented or failed to implement a system of accounting controls in order to violate the *FCPA*’s accounting provisions.”

³⁰⁷ *Ibid* at 25.

³⁰⁸ *Ibid* at 25.

³⁰⁹ For commentary on a recent charge under the accounting provisions against an issuer and its current executive offers in federal court, see Mike Koehler, “SEC Charges Live Ventures and its Current CEO and CFO with, Among Other Things, *FCPA* Books and Records and Internal Control Violations” (11 August 2021), online (blog): *FCPA Professor* <<https://fcpaprofessor.com/sec-charges->

[accounting] provisions, as currently enforced by enforcement agencies, are potent supplements to *FCPA*'s more glamorous anti-bribery provisions."³¹⁰ The enthusiastic use of accounting offenses in SEC settlements creates compliance challenges for companies.³¹¹

There are two general accounting provisions in the *FCPA*: the books and records provision and the internal controls provision. Unlike the *FCPA*'s anti-bribery provisions, the accounting provisions do not apply to private companies. Instead, they apply to publicly

live-ventures-current-ceo-cfo-among-things-fcpa-books-records-internal-controls-violations/>. See also Mike Koehler, "A Further Reminder that the FCPA has Always Been a Law Much Broader than its Name Suggests" (26 February 2021), online (blog): *FCPA Professor* <<https://fcpprofessor.com/reminder-fcpa-always-law-much-broader-name-suggests/>>, which comments:

[T]he fact remains that most FCPA enforcement actions (that is enforcement actions that charge or find violations of the FCPA's books and records and internal controls provisions) have nothing to do with foreign bribery and these provisions are among the most generic legal provisions one can possibly find.

...

Based on the above, the SEC found that Gulfport, among other things, violated the books and records provisions "by failing to record the true nature of the expenses as personal benefits and perquisites paid to Moore in the company's books, records, and accounts." In addition, the SEC found that Gulfport violated the internal controls provisions "by failing to implement sufficient internal accounting controls concerning perquisites and related person transactions."

The Gulfport enforcement action is not only a reminder that the FCPA has always been a law much broader than its name suggests, but also a reminder just how inconsistent the SEC's approach is to enforcing the books and records and internal controls provisions.

For instance, even though the Gulfport matter involved CEO conduct and resulted in material misstatements in its annual reports and definitive proxy statements, the enforcement action did not involve any monetary settlement amount.

Compare this to the BHP Billiton enforcement action ... in which the SEC assessed a \$25 million civil penalty for – better sit down for this one – the company's "failure to devise and maintain sufficient internal controls over a global hospitality program that the company hosted in connection with its sponsorship of the 2008 Beijing Summer Olympic Games." Or the SEC's enforcement action against Telefonica Brasil ... in which the SEC assessed a \$4.1 million civil penalty for – are you still sitting down – "a hospitality program that the company hosted in connection with the 2014 World Cup and 2013 Confederations Cup.

³¹⁰ Koehler, *supra* note 182 at 166. See also Michael Ronickher & Sarah "Poppy" Alexander, "The FCPA's Accounting Provisions Get a Fresh Look from the SEC" (13 August 2020), online (blog): *Constantine Cannon* <<https://constantinecannon.com/2020/08/13/fcpas-accounting-provisions-fresh-look-from-the-sec/>>.

³¹¹ A quick canvas of the SEC's enforcement actions demonstrates how often the accounting provisions are charged: "SEC Enforcement Actions: FCPA Cases" (last visited 18 August 2021), online: *US Securities and Exchange Commission* <<https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases>>.

held companies that are “issuers” under the *Securities Exchange Act*. An issuer is a company that has a class of securities registered pursuant to § 12 of the *Securities Exchange Act* or that is required to file annual or other periodic reports pursuant to § 15(d) of the *Securities Exchange Act* (244), regardless of whether the company has foreign operations.

The reach of the accounting provisions is quite broad. As the *Resource Guide* emphasizes:

Although the FCPA’s accounting requirements are directed at “issuers,” an issuer’s books and records include those of its consolidated subsidiaries and affiliates. An issuer’s responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions.³¹²

To be strictly responsible for a subsidiary for the purposes of the accounting provisions, the issuer must own more than 50% of the subsidiary stock. Where the issuer owns 50% or less of the subsidiary, they must only use “good faith efforts” to cause the subsidiary to meet the obligations under the FCPA (§ 78m(b)(6)).³¹³

For a detailed discussion of the nature, reach and implications of the accounting provisions, see: Stuart H. Deming, “The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act.”³¹⁴

(i) Books and Records

The books and records provision (§ 78m(b)(2)(A)) states that every issuer shall “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” Section 78m(b)(6) defines “reasonable detail” as a “level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.” The SEC Chairman’s 1981 advice provided that a company should not be “enjoined for falsification of which its management, broadly defined, was not aware and reasonably should not have known.”³¹⁵

The *Resource Guide* notes that “bribes are often concealed under the guise of legitimate payments.”³¹⁶ According to a Senate Report, “corporate bribery has been concealed by the falsification of corporate books and records,” and the accounting provisions are designed to “remove this avenue of coverup.”³¹⁷ The books and records provision can provide an avenue

³¹² DJSEC Resource Guide (2020), *supra* note 170 at 43.

³¹³ See also Tarun & Tomczak, *supra* note 165 at 27-28 for more on foreign subsidiaries and the accounting provisions.

³¹⁴ Stuart H Deming, “The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act” (2006) 96:2 J Crim L & Criminology 465.

³¹⁵ Koehler, *supra* note 182 at 149.

³¹⁶ DJSEC Resource Guide (2020), *supra* note 170 at 39.

³¹⁷ US, Senate Committee on Banking, Housing and Urban Affairs, *Domestic and Foreign Investment: Improved Disclosure Acts of 1977* (95-144) at 6, online (pdf):

<<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf>>.

for prosecution where improper payments are inaccurately recorded, even if an element of the related anti-bribery provision was not met.

(ii) Internal Controls

The “internal controls” provisions “codify existing auditing standards.”³¹⁸ § 78m(b)(2)(B) states that every issuer (as above) shall:

Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets
- (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Again, “reasonable assurances” is defined in § 78m(b)(7) as a “level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.” The provision allows companies the flexibility to implement a system of controls that suits their particular needs and circumstances. Reflective of the *Guidance* published pursuant to section 9 of the UK *Bribery Act*, the *Resource Guide* points out that “good internal accounting controls can prevent not only FCPA violations, but also other illegal or unethical conduct by the company, its subsidiaries, and its employees.”³¹⁹ Compliance with the provision will therefore depend on the overall reasonableness of the internal controls in the circumstances of the company, including the risks of corruption in the country and sector of operation.³²⁰ In *SEC v World-Wide Coin*,³²¹ the court indicated that the costs of devising a system of internal controls should not exceed the expected benefits. The court further noted that the occurrence of improper conduct does not necessarily mean internal controls were unsatisfactory.³²²

Koehler argues that enforcement patterns potentially conflict with the reasonableness qualifications built into the books and records and internal control provisions and promoted in the *Guidance* and in *SEC v World-Wide Coin*.³²³ For example, in a 2012 SEC enforcement action, Oracle Corporation was held liable for failing to conduct audits of its subsidiary in

³¹⁸ Tarun & Tomczak, *supra* note 165 at 28.

³¹⁹ DJSEC Resource Guide (2020), *supra* note 170 at 41.

³²⁰ Barta & Chapman, *supra* note 304. See also the discussion in Tarun & Tomczak, *supra* note 165 at 28-31.

³²¹ *SEC v World-Wide Coin*, 567 F Supp 724 (ND Ga 1983).

³²² Koehler, *supra* note 182 at 147.

³²³ *Ibid* at 164.

India, even though such audits would not have been “practical or cost-effective *absent* red flags suggesting improper conduct. The SEC did not allege any such red flag issues. In fact, the SEC alleged that Oracle’s Indian subsidiary ‘concealed’ ... the conduct from Oracle.”³²⁴ Koehler argues that such enforcement actions are edging towards strict liability, in spite of the inclusion of “reasonable detail” and “reasonable assurances” in the accounting provisions. Koehler goes on to state:

Based on the enforcement theories, it would seem that nearly all issuers doing business in the global marketplace could, upon a thorough investigation of their entire business operations, discover conduct implicating the books and records and internal controls provisions. For instance, the SEC alleged in an FCPA enforcement action against pharmaceutical company Eli Lilly that the company violated the books and records and internal controls provisions because sales representatives at the company’s China subsidiary submitted false expense reports for items such as wine, specialty foods, a jade bracelet, visits to bath houses, card games, karaoke bars, door prizes, spa treatments and cigarettes. If the SEC’s position is that an issuer violates the FCPA’s books and records and internal controls provisions because some employees, anywhere within its world-wide organization, submit false expense reports for such nominal and inconsequential items, then every issuer has violated and will continue to violate the FCPA. [footnotes omitted]³²⁵

5.3.2 Defenses/Exceptions

There are two exceptions to criminal liability under the accounting provisions. The first (§ 78m(b)(4)) states that criminal liability will not be imposed where the accounting error is merely technical or insignificant. The second (§ 78m(b)(6)) discharges an issuer of their responsibility for a subsidiary’s accounting violations when the issuer owns 50% or less of the subsidiary and the issuer “demonstrates good faith efforts” to encourage the subsidiary to comply with the *FCPA*. However, in practice, Koehler points out that enforcement agencies have eroded this good faith defense for parent companies and essentially created strict (no fault) liability.³²⁶ For example, the SEC charged Dow Chemical with accounting offenses committed by its fifth-tier subsidiary, even though Dow had no knowledge of the improper conduct, and even though the SEC did not allege a lack of good faith on Dow’s part.³²⁷

5.3.3 Limitation Periods for Books and Record Offenses

The limitation periods for *FCPA* books and records offenses are the same as for the offense of bribery, discussed at Section 3.3.3.

³²⁴ *Ibid* at 166.

³²⁵ *Ibid*.

³²⁶ *Ibid* at 161.

³²⁷ *Ibid* at 162.

5.3.4 Sanctions for Books and Records Offenses

§ 78ff(a) of the *FCPA* mandates that for violation of the accounting provisions, corporations and other business entities are liable for a fine of up to \$25 million while individuals (including officers, directors, stockholders and agents of companies) are subject to a fine of up to \$5 million and imprisonment for a maximum of 20 years. However, the *Alternative Fines Act* 18 USC. Section 3571(d) provides for the imposition of higher fines at the court's discretion. The increased fine can be up to twice the benefit obtained by the defendant in making the bribe.

Actual penalties are determined by reference to the US Sentencing Commission, *Guidelines Manual*, § 3E1.1 (Nov 2018).³²⁸

5.4 UK

There are no accounting offences in the UK *Bribery Act*. However, as pointed out by Martin, a compilation of existing UK corporate laws coupled with section 7 of the *Bribery Act* leads to similar requirements as those in *FCPA*.³²⁹ Firstly, the *Companies Act 2006* requires every company in the UK to keep records that can show and explain their transactions, to accurately disclose their financial positions and to implement adequate internal controls. Secondly, the defence to section 7 requires companies have “adequate procedures” in place, which means in part that the companies will need to keep proper records and implement adequate internal controls.³³⁰ Finally, accounting offences facilitating corruption or the hiding of the proceeds of corruption are covered in sections 17-20 of the *Theft Act, 1968*.³³¹

Section 17 of the *Theft Act* creates the offence of false accounting. Section 17(1)(a) criminalizes the conduct of a person who intentionally and dishonestly destroys, defaces, conceals or falsifies any account, record or document made or required for any accounting purpose. The falsification, etc., must be done with a view to gain or cause loss to another, but need not actually cause loss or gain. Authorities are inconsistent regarding the meaning of “accounting purpose,” but a set of financial accounts is *prima facie* made for an accounting purpose. The defendant is not required to know that the documents are for an accounting purpose, creating an element of strict liability. Section 17(1)(b) also criminalizes the dishonest use of false or deceptive documents with a view to gain or cause loss.³³²

Section 17 overlaps with both forgery and fraud offences. The fraud offence is broader than section 17, since it is not restricted to documents made for accounting purposes, and also has a higher maximum sentence. As a result, the *Fraud Act* is sometimes used instead of the false accounting provisions.

³²⁸ “2018 Guidelines Manual Annotated” (last visited 18 August 2021), online: *US Sentencing Commission* <<https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated>>.

³²⁹ Martin, *supra* note 190 at 11.

³³⁰ UK *Bribery Act* Guidance, *supra* note 70 at 15. See generally Nicholls et al, *supra* note 45 at 119-145.

³³¹ c 60. For a detailed analysis of these offences see David Ormerod, *Smith & Hogan's Criminal Law*, 5th ed (Oxford University Press, 2018) at c 18.

³³² *Ibid* at 826-870.

Section 18 imposes liability on directors, managers, secretaries or other similar officers of a body corporate for an offence committed by the body corporate with their consent or connivance. The purpose of this section is to impose a positive obligation on people in management positions to prevent irregularities, if aware of them. Section 19 is intended to protect investors by making it an offence for directors to publish false prospectuses to members. Section 20 makes it an offence to dishonestly destroy, deface or conceal any valuable security, any will or other testamentary document, or any original document that is belonging to, filed in or deposited in any court of justice or government department.

5.5 Canada

Before 2013, *CFPOA* had no accounting offences. False accounting allegations were dealt with under domestic criminal law or income tax laws in circumstances where Canada had jurisdiction over the commission of those offences.

Amendments to *CFPOA* in 2013 created new accounting offences. The accounting provisions must be proven beyond a reasonable doubt (unlike the similar provisions in the *FCPA*, which need only be proven on a balance of probabilities when used by the SEC). Section 4 of the *CFPOA* provides:

- 1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
 - (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
 - (b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;
 - (c) records non-existent expenditures in those books and records;
 - (d) enters liabilities with incorrect identification of their object in those books and records;
 - (e) knowingly uses false documents; or
 - (f) intentionally destroys accounting books and records earlier than permitted by law.
- (2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Section 4 was brought into force on June 19, 2013, and as far as I can tell (as of 2021), there have been no prosecutions. This section was added to the *CFPOA* to bring the *Act* into line with article 8 of the OECD Convention. Other existing *Criminal Code* offences support Canada's implementation of Article 8 of the OECD Convention. These include the offences of making a false pretence or statement (ss. 361 and 362), forgery and the use or possession

of forged documents (ss. 366 and 368), fraud affecting public markets (s. 380(2)), falsification of books and documents (s. 397) and issuing a false prospectus (s. 400). Section 155 of the *Canada Business Corporations Act*, which addresses financial disclosure, may also be relevant in cases involving false accounting.

APPENDIX 2.1

Table 2.1 presents an overview table of UNCAC and OECD corruption offences and the equivalent offences in US, UK, and Canadian law.

Table 2.1 *Corruption Offences (A. Mandatory and B. Optional UNCAC and OECD Offences and Equivalent US, UK and Canadian Offences)*

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
A. MANDATORY OFFENCES		
(1) Bribery of National Public Officials UNCAC Article 15 – includes two subsections: 15(1) – giving a bribe – promising, offering or giving a bribe to a public officer 15(2) – accepting a bribe – the solicitation or acceptance of a bribe by a public officer. OECD No provisions on bribery of national public officials.	US	§201(b)(1) and (2), 18 USC.
	UK	Ss. 1 and 2, <i>Bribery Act</i> 2010.
	Canada	Ss. 119-125, <i>Criminal Code</i> .
(2) Bribing a Foreign Public Official UNCAC Article 16(1) – promising, offering or giving a bribe to a foreign public official. OECD Article 1 – promising, offering or giving a bribe to a foreign public official (Both articles only include the briber; but see optional offence in Article 16(2) of UNCAC).	US	§§ 78dd-1, 78dd-2 and 78dd-3 of the <i>FCPA</i> , 15 USC.
	UK	S. 6, <i>Bribery Act</i> 2010.
	Canada	S. 3, <i>CFPOA</i> and s. 18, <i>Crimes Against Humanity and War Crimes Act</i> .
(3) Public Embezzlement UNCAC Article 17 – embezzlement, misappropriation or other diversion of property by a public official who has been entrusted with that property.	US	§§641, 645, 656 and 666, 18 USC.
	UK	No comparable provision in <i>Bribery Act</i> , but “fraud by abuse of position of trust”, s. 4 <i>Fraud Act</i> would apply to public embezzlement.

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
OECD No comparable provision.	Canada	ss. 122 and 322, <i>Criminal Code</i> .
(4) Money Laundering UNCAC Articles 14 and 23 – laundering of proceeds of crime (including proceeds of corruption). OECD Article 7 – money laundering.	US	§§1956 & 1957, <i>Money Laundering Control Act</i> , 18 USC.
	UK	Ss. 327-329 and 340(11), <i>Proceeds of Crime Act 2002</i> .
	Canada	S. 462.31, <i>Criminal Code</i> .
(5) Obstruction UNCAC Article 25 – obstruction of justice in respect to UNCAC offences or procedures. OECD No comparable provision.	US	§§1501, 1503, 1505, 1510, 1511, 1512 and 1519, 18 USC (dealing with obstruction in general).
	UK	A common law offence, unless superseded by a specific statutory obstruction offence, such as section 356A and section 453A of the <i>Proceeds of Crime Act 2002</i> .
	Canada	Ss. 139(2) & (3) and 423.1(1), <i>Criminal Code</i> .
(6) Liability of Legal Entities UNCAC Article 26 – establish liability of legal entities (such as corporations) for UNCAC offences in accordance with each state’s legal principles on criminal or civil liability of legal entities. OECD Article 2 – responsibility of legal persons, in accordance with each state’s legal principles on legal entities.	US	Criminal liability of corporations is based on common law principles involving acts or omissions of corporate agents or employees acting within the scope of their employment for the benefit of the corporation.
	UK	S. 7, <i>Bribery Act 2010</i> creates a special offence of bribery by commercial organizations; for other offences, corporate liability is based on common law principles.
	Canada	Definition of “organization” in s. 2 of the <i>Criminal Code</i> . Criminal liability of organizations, ss. 22.1 and 22.2, <i>Criminal Code</i> .

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
(7) Accomplices and Attempt UNCAC Article 27 – establish criminal liability for participation (accomplices) in a UNCAC offence and for attempting to commit an UNCAC offence. OECD Article 1(2) – establish criminal liability for complicity, and for attempts and conspiracy to the same extent that those concepts apply to domestic law.	US	§2, 18 USC (aiding, abetting, counselling and procuring); no general provision on attempts of all federal offenses, but the wording of the bribery offense (§201) includes many attempts at bribery, i.e. “offering, authorizing or promising to pay a bribe.”
	UK	S. 1, <i>Criminal Attempts Act 1981</i> – creates an offence to attempt to commit any indictable offence.
	Canada	Ss. 21 and 22 of the <i>Criminal Code</i> includes accomplices in participation of an offence (aiders, abettors, and counselors). S. 24 criminalizes attempting an offence.
(8) Conspiracy UNCAC Conspiracy is not a mandatory or optional offence except Article 23 (conspiracy to commit money laundering). OECD Article 2(1) – creates offence of conspiracy to bribe a foreign official, to the same extent that conspiracy is an offence in a state’s domestic penal law.	US	§371, 18 USC (conspiracy to commit an offense).
	UK	S. 1(1), <i>Criminal Law Act 1977</i> .
	Canada	S. 465(1)(c), <i>Criminal Code</i> .
(9) Books and Records Offences UNCAC Article 12(3) – does not require state parties to “criminalize” books and records offences, but requires states to take necessary measures to prevent the creation and use of improper and fraudulent books and records for the purpose of assisting in the commission of UNCAC offences. Improper books and records conduct includes making off-the-books accounts, inadequately identifying transactions, creating non-	US	§78(m)(2)(17) (books and records offenses) and §78(m)(b)(2)(B) (accounting/internal control offenses), 15 USC.
	UK	No comparable provision in UK <i>Bribery Act</i> , but ss. 17-20, <i>Theft Act, 1968</i> criminalizes false accounting.

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
existent transactions, creating or using false documents, or unlawful, intentional destruction of documents. OECD Article 8 – shall provide effective civil, administrative or criminal penalties for improper books and records offences.	Canada	S. 4, <i>CFPOA</i> and other possible offences such as s. 361 (false pretences), s. 380 (fraud) and s. 397 (falsification of books and documents) of the <i>Criminal Code</i>, or s. 155 (financial disclosure) of the <i>Canada Business Corporations Act</i>.

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
B. OPTIONAL OFFENCES		
(1) Foreign Official Taking a Bribe UNCAC Article 16(2) – the solicitation or acceptance of a bribe by a foreign public official. OECD No comparable provision.	US	The <i>FCPA</i> does not criminalize the offense of bribery committed by the foreign public official.
	UK	No comparable provision in <i>Bribery Act 2010</i> .
	Canada	No comparable provision in <i>CFPOA</i> .
(2) Giving a Bribe for Influence Peddling UNCAC Article 18(1) – promising, offering or giving a bribe to a public official to misuse his or her real or supposed influence for the benefit of the bribe offeror. OECD Article 1(1) & (4) – creates the offence of bribery of a foreign public official.	US	This offense would be prosecuted under §78dd-1, 15 USC.
	UK	S. 1, <i>Bribery Act 2010</i> .
	Canada	S. 121(1)(d) and (3), <i>Criminal Code</i> .
(3) Accepting a Bribe for Influence Peddling UNCAC	US	No comparable provision in the <i>FCPA</i> , but can be prosecuted under §201(b)(2) of 18 USC.

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
Article 18(2) – the solicitation or acceptance of a bribe by a public official in exchange for promising to misuse his or her real or supposed influence for the benefit of the bribe giver. OECD No comparable provision.	UK	S. 2, <i>Bribery Act 2010</i> .
	Canada	S. 121(1)(d) and (3), <i>Criminal Code</i> .
(4) Abuse of Public Function to Obtain a Bribe UNCAC Article 19 – abuse of public functions of the purpose of obtaining an undue advantage. OECD No comparable provision.	US	No comparable provision in <i>FCPA</i> , but can be prosecuted under §201(b)(2) of 18 USC.
	UK	S. 2, <i>Bribery Act 2010</i> .
	Canada	S. 122, <i>Criminal Code</i> .
(5) Illicit Enrichment UNCAC Article 20 – illicit enrichment, that is, a significant increase in the assets of a public official that cannot be reasonably explained in regard to the public official's lawful conduct. OECD No comparable provision.	US	No comparable provision.
	UK	No comparable provision.
	Canada	No comparable provision.
(6) Private Sector Bribery UNCAC Article 21 – bribery in the private sector for both the person making the bribe and the person receiving the bribe. OECD No comparable provision.	US	Could be prosecuted under the general offense of fraud.
	UK	Could be prosecuted under the general offence of fraud.
	Canada	S. 426 of the <i>Criminal Code</i> makes receiving or offering bribes as a company official an offence. Depending on the specific facts, fraud (s. 380) or extortion (s. 346) of the <i>Criminal Code</i> might also be applied.

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
(7) Embezzlement in the Private Sector UNCAC Article 22 – embezzlement of property in the private sector. OECD No comparable provision.	US	Could be prosecuted under the general offense of theft/embezzlement.
	UK	S. 1 and related provisions, <i>Theft Act, 1968</i> , as amended.
	Canada	Theft under s. 322 of the <i>Criminal Code</i> or fraud under s. 380 of the <i>Criminal Code</i> .
(8) Concealing Bribery Property UNCAC Article 24 – the concealment or continued retention of property knowing such property is the result of an UNCAC offence. OECD No comparable provision.	US	§1962, 18 USC.
	UK	Ss. 329 and 340, <i>Proceeds of Crime Act, 2002</i> .
	Canada	Ss. 341 (concealing) and 354 (possessing), <i>Criminal Code</i> .

CHAPTER 3

**JURISDICTION, CORPORATE LIABILITY, ACCOMPLICES,
AND INCHOATE OFFENCES**

GERRY FERGUSON AND RACHAEL CARLSON

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- 1. JURISDICTION: STATE PROSECUTION OF BRIBERY OFFENCES**
- 2. CORPORATE CRIMINAL LIABILITY AND OTHER COLLECTIVE ENTITIES**
- 3. PARTY OR ACCOMPLICE LIABILITY**
- 4. INCHOATE OFFENCES**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. JURISDICTION: STATE PROSECUTION OF BRIBERY OFFENCES

1.1 Overview

In today's globalized world, bribery and other forms of corruption are often transnational. Instances of bribery may involve a number of individuals or legal entities and encompass actions in multiple states. Large corporations are often multi-national, and carrying on business in numerous states. Acts of bribery by one corporation may disadvantage other foreign firms who lose business as a result. Since anti-corruption laws and their enforcement are not consistent across states, the way in which states determine jurisdiction—to whom their anti-corruption laws apply and who can be prosecuted by their courts or tribunals—has important implications for determining how effective anti-corruption laws will be in detecting, investigating, prosecuting, and punishing corruption.

There are three general forms of jurisdiction: prescriptive, enforcement, and adjudicative. These were briefly described by the Supreme Court of Canada in *R v Hape*:

Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation. Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld.... Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force. [footnotes omitted]¹

¹ *R v Hape*, [2007] 2 SCR 292 at para 58. The International Bar Association Task Force on Territorial Jurisdiction's *Report of the Task Force on Extraterritorial Jurisdiction*, (International Bar Association 2009), however, notes that most jurisdictions outside of the United States simply differentiate between prescriptive and enforcement jurisdiction. See 7-8 online: *IBA* <<https://www.ibanet.org/resources>>. For further description of prescriptive and enforcement jurisdiction, see Robert Currie, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 56-105.

Danielle Ireland Piper provides a strong example which illustrates the gravity afforded to enforcement jurisdiction:

[W]hen Adolf Eichmann was kidnapped in 1960 in Argentina and taken to Israel for trial, it was not the prescription or adjudication of the offences for which he was charged that troubled the international community. Rather, it was the method of enforcement that caused the United Nations Security Council to declare that Israel had violated Argentinean sovereignty. [footnotes omitted]

See Danielle Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law" (2012) 13:1 *Melb J Intl L* 122 at 125. In the article, Ireland-Piper proceeds by discussing assertions of jurisdiction through categories descriptive of their circumstance or motive (i.e., treaty-based assertions, politically motivated prosecutions, reactive assertions) instead of through these traditional three categories (see 126 onwards).

As the Supreme Court noted, these forms of jurisdiction overlap in certain cases. Even if there is prescriptive jurisdiction, there may be no enforcement jurisdiction (i.e., there may not exist the power to compel extradition by reason of an extradition treaty or agreement, or the power to conduct an investigation through mutual agreement of the relevant states). Additionally, attitudes towards prescriptive jurisdiction tend to be permissive, while they are considered restrictive for enforcement jurisdiction.² The “permissive” nature of prescriptive jurisdiction (that is, that a state *may* assert jurisdiction over a particular crime, but they are not *required* to do so unless the crime has obtained *jus cogens* status) is “subject only to the exceptional situations where a treaty-based obligation to pursue particular offenders has crystallised into a customary law principle”³ (i.e. those who commit grave breaches of the *Geneva Convention*), or where suppression treaties have been executed to fill the many gaps left by permissive prescriptive jurisdiction. Some of these treaties target organized crime and narcotics trafficking.⁴

The rules governing extra-territorial jurisdiction must be balanced with the concept of state sovereignty. The principles of state sovereignty, including equality, territorial integrity, and non-intervention are reaffirmed in Article 4 of UNCAC. A state is under an international obligation to not enforce its legislative powers within the territorial limits of another state without that state’s consent, reflecting the general consensus on the ambit of enforcement jurisdiction. However, under international law, the limits of a state’s prescriptive or legislative jurisdiction (in other words the limits of how a state may determine to whom its laws apply) are less clear. See the International Bar Association’s *Report of the Task Force on Extraterritorial Jurisdiction*.⁵

When engaged in international business transactions, it is essential for the company and its legal advisors to be aware which country’s laws apply to its activities; that is, jurisdiction is the most important issue in international business transactions. H. Lowell Brown describes

² See Currie, *supra* note 1 at 97. At 101, Currie notes the gravity of respecting enforcement jurisdiction in combatting transnational crime:

It is important not to understate the dangers presented by conflicts over enforcement jurisdiction, since, as [Chris D Ram] noted, “[s]tates and intergovernmental organizations act with caution, deliberation and consensus because the consequences of precipitous unilateral actions can be dire. The First World War started, in part, because one State insisted on the right to conduct a criminal investigation into the murder of one of its officials on the sovereign territory of another.” Less calamitously, breaches of the rule against extraterritorial enforcement jurisdiction can create legal and diplomatic complications between states; **create havens for criminals in situations where jurisdiction is interfered with;** and, perhaps most seriously, **compromise the level of trust that is required for states to cooperate in the suppression of transnational crime.** In the Canadian experience, such breaches have led to both extradition and mutual legal assistance requests being denied by courts, as well as to the corrosion of relationships between Canadian and US police forces. [emphasis added] [footnotes omitted]

³ *Ibid* at 102.

⁴ *Ibid* at 103. For an explanation regarding how jurisdiction operates in treaties (in contrast to customary international law), see *ibid* at 103-105.

⁵ International Bar Association, *supra* note 1 at 7-8.

six theories that states may rely upon to assert prescriptive jurisdiction (i.e., to determine to whom their law applies).⁶ The two most accepted of these are **territoriality**, whereby jurisdiction is determined on the basis of where the criminal acts occurred, and **nationality** (sometimes termed the “active personality principle”), whereby a state’s jurisdiction extends to the actions of its nationals no matter where the acts constituting the offence occur. Historically, common law countries have been much more reluctant to assert jurisdiction based on nationality, while civil law and socialist law countries were more likely to have embraced this theory.⁷ Nationality also may be “extended” from citizens to those with “nationality-type links to the state,”⁸ such as permanent residents, resident aliens, corporations, or foreign citizens employed by the government or armed forces.⁹ This kind of jurisdiction is called “extended nationality.” The third theory is **universality**, where a state may charge any person present in its territory under its own domestic laws no matter where the acts constituting the offence occurred. While this principle was traditionally reserved for piracy, it has been extended more recently to crimes universally regarded as heinous, such as war crimes. The fourth theory—the **protective** principle—determines jurisdiction based on harm caused by the offending act to the state’s national interests, while the fifth theory’s **passive personality** principle determines jurisdiction based on the nationality of the crime’s victim or victims. Finally, there is the “**flag**” principle, which is sometimes classified under the principle of territoriality and extends a state’s domestic laws to acts occurring at sea on a ship flying that state’s flag.

By its nature, foreign corruption involves actions commenced and completed across sovereign boundaries. As such, the theory which underpins the assertion of prescriptive jurisdiction over the criminal act has significant implications for effecting criminal liability. For example, bribery of a foreign public official, commonly involves the actual act of bribery taking place within the official’s home country while some preparation, or perhaps the authorization to offer a bribe, takes place in the briber’s home state. Therefore, in respect to statutes that operate based on the territoriality principle alone, a home state’s jurisdiction over a briber will depend on the connection required by the home state’s law between the briber’s conduct and the home state. A law that requires the *whole or majority* of the act of bribery take place within the home state will have significantly less jurisdictional reach than a law like the US FCPA, which applies (among other ways) when *any or virtually any* act or communication in furtherance of a corrupt payment occurs within the US.

⁶ H Lowell Brown, “The Extraterritorial Reach of the US Government’s Campaign against International Bribery” (1998-1999) 22 *Hastings Intl & Comp L Rev* 407 at 419, first identified in “Harvard Research in International Law, Jurisdiction with Respect to Crime” (1935) 29 *Am J Intl L* 435.

⁷ Currie states that civil law countries likely favoured the nationality principle due to a “(typically constitutional) inability to extradite their nationals to face criminal processes in foreign countries.” Without the nationality principle, these nationals would not face criminal liability for crimes committed abroad. Common law countries were reluctant to assert jurisdiction based on nationality due to England’s historical “strict adherence to the territoriality principle,” but more flexibility was required by these countries over time to close the gaps that of jurisdictions which facilitated criminal activity. See Currie, *supra* note 1 at 69-70.

⁸ *Ibid* at 71.

⁹ *Ibid*.

Territoriality may be asserted under the principles of either subjective territoriality or objective territoriality. Jennifer Zerk reviews the different ways in which states may assert jurisdiction based on territoriality:

The principle of subjective territoriality gives State X the right to take jurisdiction over a course of conduct that commenced in State X and was completed in another state. A terrorist plot that was hatched in State X and executed in State Y could fall into this category. The principle of objective territoriality gives State X the right to take jurisdiction over a course of conduct that began in another state and [was] completed in State X. A conspiracy in State Y to defraud investors in State X could give rise to jurisdiction based on this principle. A further refinement of the principle of objective territoriality appears to be gaining acceptance, in the antitrust field at least. This doctrine, known as the *effects doctrine*, argues that states have jurisdiction over foreign actors and conduct on the basis of “effects” (usually economic effects) produced within their own territorial boundaries, provided those effects are substantial, and a direct result of that foreign conduct. Jurisdiction taken on the basis of the effects doctrine is often classed as “extraterritorial jurisdiction” on the grounds that jurisdiction is asserted over foreign conduct. It is important, though, not to lose sight of the territorial connections that do exist (i.e. in terms of “effects”) over which the regulating state arguably does have territorial jurisdiction. Nevertheless, while this doctrine has become increasingly accepted in principle as more states adopt it, its scope remains controversial, especially in relation to purely economic (as opposed to physical) effects.¹⁰

1.2 UNCAC

Article 42(1) of the United Nations Convention Against Corruption (UNCAC) requires State Parties to assert jurisdiction when an offence is committed within their territory or on board a vessel flying their flag. In addition, Article 42(3) requires State Parties to exercise jurisdiction when the offender is present in their territory and extradition is refused on the basis that the offender is a national, and Article 42(4) includes an extradite or prosecute obligation. Unlike the OECD Convention, UNCAC does not appear to mandate that a state assert jurisdiction in instances where the act occurred only partially within its territory. It is also notable that UNCAC regulates the demand side of bribery, whereas the OECD Convention only addresses supply-side bribery.¹¹ The inclusion of demand side significantly

¹⁰ Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (2010) Harvard Corporate Social Responsibility Initiative Working Paper No 59 at 19, online (pdf):

<https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/workingpaper_59_zerk.pdf>. See also Currie, *supra* note 1 at 66-67.

¹¹ Currie writes that this inclusion is an “important breakthrough” of UNCAC: *supra* note 1 at 402. For an exploration of the ramifications of only addressing supply-side bribery, see OECD, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?*, (2018), online (pdf): <<https://www.oecd.org/corruption/Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf>>.

broadens the reach of UNCAC. For an explanation of demand and supply side bribery, see Chapters 1 and 2.

Article 42(2) *permits* states to establish jurisdiction in the following circumstances:

2. Subject to Article 4 of this Convention [State Sovereignty], a State Party may also establish its jurisdiction over any such offence when:
 - (a) The offence is committed against a national of that State Party; or
 - (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
 - (c) The offence is one of those established in accordance with article 23, paragraph 1(b) (ii) [conspiracy or other forms of participation in a plan to commit money laundering offences], of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i) [money laundering offences], of this Convention within its territory; or
 - (d) The offence is committed against the State Party.¹²

Article 42(2) is limited by Article 4 and meant to protect state sovereignty by discouraging the exercise of extraterritorial jurisdiction within the territory of another state if the laws of that state mandate exclusive territorial jurisdiction. Some commentators, such as Evan Lestelle, have questioned whether UNCAC permits jurisdiction to be established on the basis of other theories of jurisdiction, such as the protective principle, which is notably absent from Article 42(2).¹³ Lestelle states:

Despite the extensive list of extraterritorial circumstances contemplated by article 42, the limitation in article 4 denudes much of the potency from the grant. Furthermore, a final theory of extraterritorial jurisdiction, the “protective” principle, is notably absent from the list in article 42. The “protective” principle provides jurisdiction if the effect or possible effect of the offense is to occur in the forum state and for offenses that threaten the “specific national interests” of the forum state. As discussed in Part I, global efforts at combating foreign public bribery would be aided by an amendment to the UNCAC that removes the limitations of article 4 and

¹² *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, art 42 (entered into force 14 December 2005) [UNCAC], online (pdf):

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

Currie, *supra* note 1 at 404, writes that 42(2)(a) is based on passive personality, (b) reflects expanded nationality, and (d) is a protective principle-based jurisdiction. For more discussion of Article 42, see Cecily Rose, Michael Kubiciel & Oliver Landwehr, *United Nations Convention Against Corruption: A Commentary* (Oxford University Press, 2019) at 404-414.

¹³ Evan Lestelle, “The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction” (2008-2009) 83 Tul L Rev 527.

adds the “protective” principle as a basis for jurisdiction. [footnotes omitted]¹⁴

It could be argued, however, that the list of permitted bases of jurisdiction provided in Article 42(2) is non-exhaustive. Article 42(6) provides that:

Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

In addition, the *Legislative Guide* for UNCAC, produced by UNODC, states that UNCAC does not aim to alter general international rules regarding jurisdiction, and that the list of jurisdictional bases in 42(2) is not meant to be exhaustive. Rather, the purpose of Article 42 is to permit the exercise of jurisdiction in such a way that ensures that corruption offences do not go unpunished because of jurisdictional gaps.¹⁵ As noted, there are differing views concerning the degree of latitude afforded to states under international law when determining the basis of criminal jurisdiction.

1.2.1 Extraterritoriality

Lestelle argues that UNCAC should be amended to expressly allow for further extraterritorial application of domestic laws, potentially based on the protective or passive personality principles. In Lestelle’s view, corruption is a humanitarian concern of sufficient gravity to merit the application of laws with significant extraterritorial jurisdiction. Lestelle compares corruption to piracy, the earliest crime for which states commonly asserted jurisdiction based on the universality principle. According to Lestelle, both are “crimes against the global market,” and therefore far-reaching state-level laws are necessary in order to avoid the possibility that perpetrators will be able to evade prosecution; otherwise, Lestelle warns that some states motivated by self-interest will refrain from taking legal action against perpetrators, thus creating a “safe harbour” refuge where those engaged in bribery or corruption will not be prosecuted.¹⁶

However, other scholars argue that “even if extraterritoriality limits bribery in developing countries, it might dictate to these countries [moral] values they do not share,”¹⁷ providing some doubt on the utility or prudence of sweeping extraterritorial approaches. These conversations are becoming more salient in the post-colonial or “anti-imperialist” era: extraterritorial application of laws also necessitate the application of certain norms, conceptions of the rule of law and legitimacy, and may “stigmatise some economic policies

¹⁴ *Ibid* at 541. However, note again that Currie believes Article 42(2)(d) is based on the protective principle (*supra* note 1 at 404).

¹⁵ United Nations Office on Drugs and Crime (UNODC), *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed (United Nations, 2012) [Legislative Guide (2012)], at 134, online (pdf): https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf.

¹⁶ Lestelle, *supra* note 13 at 552.

¹⁷ Branislav Hock, “Transnational Bribery: When is Extraterritoriality Appropriate” (2017) 11:2 *Charleston L Rev* 305 at 311.

and legal regimes ... without analysing their distributional or social consequences in any specific detail.”¹⁸ Alina Veneziano argues that “the morality concerns are easy, as extraterritoriality involves the regulation of other states' nationals by a government who is not accountable to these people; it is plainly an unfair process.”¹⁹ Veneziano summarizes the downsides of extraterritorial application as follows:

(1) it is an unconsented form of global regulation and infringes state sovereignty; (2) it makes people uncomfortable with its legitimacy because it is coercive and diverts attention away from its victims; (3) it is a process by which the United States is not accountable to those that are affected by its regulatory reach; and (4) it undermines the self-determination of states as well as the democracy of the United States, such as the separation of powers.²⁰

Veneziano offers an alternative or complement to territorial sovereignty that may help form a basis for jurisdiction that is more reflective of the modern impact of extraterritorial approaches:

[B]ecause it is usually a foreign national - not the foreign state itself - that is aggrieved in [transnational activities], the state's rights under international law are not infringed. Instead, the resentment by the affected state against the dominant state exerting extraterritorial application “represents more a desire to prevent economic harm to its nationals or corporations than an assertion of the rights of the state.” For this reason, and because the traditional understanding of sovereignty has been rendered slightly outdated, a more appropriate notion to sovereignty may include the recognition of *economic* sovereignty, as opposed to the traditional territorial sovereignty. Alan Simon advanced this theory to “acknowledge the increased significance of economic forces,” “facilitate necessary economic transactions between and among states,” and “preserve economic activities closely linked to the existence of the state.” [emphasis in original] [footnotes omitted]²¹

¹⁸ *Ibid* at 312. See also Austin L Parrish, “*Kiobel*, Unilateralism and the Retreat from Extraterritoriality” (2013) 28 Md J Intl L 208 at 220, online: <<http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/11>>, who also expands on the factors which drove a trend of extraterritorial regulation at 220-221. See also “Extraterritoriality” (2011) 124:5 Harv L Rev 1226; and Kevin E Davis, *Between impunity and imperialism: The regulation of transnational bribery* (New York: Oxford University Press, 2019).

¹⁹ Alina Veneziano, “Extraterritoriality and the Regulatory Power of the United States: Featured Issues of Sovereignty, Legitimacy, Accountability, and Democracy” (2018) 6:2 U Balt J Intl L 189.

²⁰ *Ibid* at 213.

²¹ *Ibid* at 204. For further commentary on the moral and cultural issues with extraterritoriality in anti-bribery legislation, see Steven R Salbu, “Redeeming Extraterritorial Bribery and Corruption Laws” (2017) 54:4 Am Bus Law J 641; Cornelia Rink, “*Leges Sine Moribus Vanæ*? On the Relationship Between Social Morality and Law in the Field of Foreign Bribery” (2016) 17:1 German LJ 19; and Steven R Salbu, “Perspective, Transnational Bribery: The Big Questions” (2001) 21 Nw J Intl Bus L 435.

1.3 OECD Convention

Article 4 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) addresses jurisdiction. It requires that each State Party take steps to ensure it has jurisdiction over bribery offences that occur wholly or partially within its territory. This is a narrow conception of extra-territorial jurisdiction.²² The word “partial” is not defined. The Commentary accompanying the Convention text states that this provision should be interpreted broadly in a way that does not require “extensive physical connection to the *bribery act*.” In addition, a State Party with “jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles” (Article 4(2)). Article 4(4) also requires states to review whether their basis for jurisdiction is sufficient to effectively fight against the bribery of foreign public officials. The OECD Convention does not have an extradite or prosecute provision for enforcement jurisdiction.²³

Currie elaborates on the meaning of “jurisdiction” in the OECD Convention:

The Commentary to the OECD Convention ... makes clear that ‘jurisdiction’ (as well as a reference in the article to domestic ‘principles’) refers to the usual decision-making process of states regarding the bases on which they choose to exercise jurisdiction. Thus, a state such as Canada, which does not ordinarily exercise nationality jurisdiction, will still be in compliance with this article if it uses only territoriality; this is, indeed, what Canada did for the first decade or more after it signed the Convention, though it has now put nationality jurisdiction in place. [footnotes omitted]²⁴

At the time the OECD Convention was negotiated (during the 1990s), many common law countries were opposed to including a requirement that signatory states assert jurisdiction based on nationality. Article 4(4) therefore represented a compromise.²⁵ However, since that time most of the common law OECD states have incorporated the principle of jurisdiction based on nationality into their domestic anti-bribery legislation.

1.4 Other International Instruments

In addition to mandating that states assert jurisdiction based on the territorial principle, The Council of Europe Criminal Law Convention, the European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member

²² However, some argue that “committed” in Article 4(1) may be interpreted to include both subjective territoriality and objective territoriality, meaning the effects of the act are included as a basis for asserting jurisdiction. See Hock, *supra* note 17 at 319-321.

²³ Currie, *supra* note 1 at 403.

²⁴ *Ibid.* Canada incorporated the nationality principle in 2013.

²⁵ For further information on the negotiation and development of Article 4, see Mark Pieth, “Article 4 - Jurisdiction” in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention on Bribery: A Commentary*, 2nd ed (Cambridge University Press, 2014) 322.

States, and the African Union Convention on Preventing and Combating Corruption all require State Parties to exercise jurisdiction on the basis of nationality. Interestingly, the African Union Convention is the only multilateral anti-corruption convention to expressly provide for jurisdiction based on the protective principle (see Article 13(1)(d)).

1.5 Corporate Entities

A corporation or other collective legal entity can be subject to a state's corruption laws (1) based on territorial jurisdiction if the company commits the offence (in whole or in part) in that state or (2) based on nationality jurisdiction if the company is incorporated or otherwise legally created or registered in that state.²⁶ A company from one state can commit an offence in a foreign state either as the primary offender or as a secondary party offender (i.e., aid, abet or counsel another person to commit the offence).

In countries that base corporate criminal liability on the identification (i.e., “directing minds”) theory, the actions and state of mind of certain employees and officers becomes in law “the actions and state of mind” of the corporation. In those instances, the corporation is the principal offender. Alternatively, a company can be liable for a corruption offence committed in a foreign state by means of secondary party liability. If the parent company aids, abets or counsels a subsidiary company or a third-party agent to commit a corruption offence, the parent company is guilty of that offence as a secondary party to that offence. For example, if SNC-Lavalin Group, the Canadian parent company, had been prosecuted for corruption in the Padma Bridge case, its criminal liability would have been based on the claim that it aided, abetted or encouraged its subsidiary company and its third-party agent (not an employee of SNC-Lavalin) to commit the offence as principal offenders.

The requisite mental element for the parent company as an aider, abettor or counsellor can vary depending on the particular offence and the state's laws for establishing corporate criminal liability. Generally speaking, the parent company's required level of fault will be (1) subjective fault (intentionally aided), (2) strict liability (aided by failing to take reasonable steps to prevent the offence), or (3) absolute liability (no mental fault element to aid, abet or counsel the offence is required).

The ability of state parties to exercise jurisdiction over foreign corporate entities, as addressed in the UNCAC and the OECD Convention, is summarized by Zerk as follows:

While all of the treaties either authorise or require the use of nationality jurisdiction in relation to the extraterritorial activities of their corporate nationals, they do not impose specific requirements vis-à-vis the regulation of the foreign activities of foreign companies and no treaties require the regulation of such activities directly. This will be because of the

²⁶ There is no single test for establishing the nationality of a company: see Hock, *supra* note 17 at 321. The emphasis on domestic law in this part is partly due to the fact that “all international instruments in international criminal law and transnational criminal law so far only apply to natural persons, although there are some modest inroads being made to also extend liability to corporate entities”: Currie *supra* note 1 at 705.

acknowledged legal limitations in relation to the regulation of foreign nationals in foreign territory. However, a number of treaty provisions are potentially relevant to the situation where a foreign subsidiary or agent is primarily responsible for a bribe. For instance, the UN Convention contains provisions relating to “accessory” or “secondary liability”, under which a parent company could be held responsible for a foreign bribe on the basis that it was the “instigator” of that bribe. The OECD Convention mandates liability for complicity in the bribery of a foreign public official, including “incitement, aiding and abetting, or authorization” of such an act. The “Good Practice Guideline” annexed to a recent OECD Recommendation on implementation of the OECD Convention asks state parties to ensure that “a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.”

There is little guidance in the treaty provisions themselves as to the extent to which accounting controls must cover the transactions of foreign subsidiaries. However, to the extent that the treaty covers foreign bribery, it would appear to be the intention that consolidated reporting (covering the transactions of foreign subsidiaries as well as the parent company) is indeed required. [footnotes omitted]²⁷

1.6 Jurisdictional Liability of Legal Persons for Foreign Bribery

The 2016 OECD *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* provides a summary of the types of jurisdiction for each OECD country. A few of the more interesting highlights are:²⁸

BEGINNING OF EXCERPT

Some of the key findings in relation to jurisdiction are:

- All the Parties to the Convention (except Argentina) establish some form of territorial jurisdiction over legal persons for the offence of foreign bribery. In some Parties, this jurisdiction is a collateral effect of having jurisdiction over the acts of a natural person who commits foreign bribery in its territory.
- At least 23 Parties (56%) are able, in at least some circumstances, to assert jurisdiction over foreign companies that commit foreign bribery in their territory.

...

²⁷ Zerk, *supra* note 10 at 55-56.

²⁸ OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, (OECD, 2016) [OECD Stocktaking (2016)] at 112-13, online (pdf): <<https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>>.

Finally, although the Convention does not create obligations for Parties to assert jurisdiction over acts of foreign legal persons for offences that take place entirely outside its territory, the WGB has identified some interesting arrangements among the Parties for asserting such jurisdiction. These include:

- *Universal jurisdiction* [e.g. Iceland and Norway].
- *Foreign legal person conducts business in, or owns property, in the territory* [e.g. Czech Republic].
- *Foreign legal person committed offence for the benefit of a domestic legal person* [e.g. Czech Republic].
- *Foreign legal person is closely connected to a domestic legal person or natural person* [e.g. Greece and Israel].

END OF EXCERPT

In regard to the nationality requirements for legal persons, the 2016 report states the following:

Of the 41 Convention Parties, at least 16 countries (39%) will consider any legal person incorporated or formed in accordance with their laws to have their nationality. At least eight countries (20%) will look to the legal person's headquarters or seat of operations to determine its nationality, and at least another three countries (7%) will look at either the place of incorporation or the seat. Only 1 country, Brazil, restricts the application of its nationality jurisdiction to legal persons that are both incorporated in and headquartered in the country's territory.

Finally, at least 11 countries (27%) will assert nationality jurisdiction over legal entities based on "other" factors, primarily whether the company is "registered" under the country's laws or has a "registered office" on its territory. Depending on the country, these other factors may be exclusive or operate alongside the place of incorporation or the seat of the company. [footnotes omitted]²⁹

1.7 US

1.7.1 Expansive Extraterritorial Reach of the US FCPA

The US *FCPA* has significant extraterritorial reach. Not only does it apply in instances where any act in furtherance of the offence occurs within the territory of the US, but it also exercises

²⁹ *Ibid* at 124. For a variety of perspectives on the imposition of liability on legal persons, see OECD, *Public Consultation on liability of legal persons: Compilation of responses*, (OECD, 2016), online (pdf): <<https://www.oecd.org/daf/anti-bribery/Online-consultation-compilation-contributions.pdf>>; and OECD, *Public consultation on liability of legal persons: Secretariat summary of responses*, (OECD, 2016), online (pdf): <<https://www.oecd.org/corruption/anti-bribery/Summary-Responses-Public-Consultation-Liability-Legal-Persons.pdf>>.

jurisdiction based on nationality. As part of its territorial jurisdiction, foreign companies listed on a US stock exchange are subject to the *FCPA*. For a detailed description of jurisdiction under the *FCPA*, including a discussion of due process and relevant cases, see Tarun's *Foreign Corrupt Practices Handbook*.³⁰ The following excerpt from the US DOJ and SEC's *Resource Guide to the Foreign Corrupt Practices Act (Resource Guide)* details how these two *FCPA* enforcement agencies interpret the *FCPA*'s jurisdiction:³¹

BEGINNING OF EXCERPT

Who is Covered by the Anti-Bribery Provisions?

The *FCPA*'s anti-bribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and stockholders acting on behalf of an issuer; (2) "domestic concerns" and their officers, directors, employees, agents, and stockholders acting on behalf of a domestic concern; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

Issuers—15 U.S.C. § 78dd-1

In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer

...

Domestic Concerns—15 U.S.C. § 78dd-2

A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, jointstock company, business trust, unincorporated organization, or sole proprietorship, other than an issuer, that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States. Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.

Territorial Jurisdiction—15 U.S.C. § 78dd-3

The *FCPA* also applies to certain foreign nationals or entities that are not issuers or domestic "trade, commerce, transportation, or communication among the several States,

³⁰ Robert W Tarun & Peter P Tomczak, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 5th ed (Chicago: American Bar Association, 2018).

³¹ Department of Justice and Security Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed (2020) [DJSEC Resource Guide (2020)] at 9-10, online: <<https://www.justice.gov/criminal-fraud/file/1292051/download>>.

or between any foreign country and any State or between any State and any place or ship outside thereof....” The term also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality. Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States. [footnotes omitted]

END OF EXCERPT

Jurisdiction of US courts under the *FCPA* can be limited by due process requirements. In civil cases, the defendant must have “minimum contacts” with the court’s jurisdiction, and the exercise of jurisdiction must be reasonable. If a defendant’s actions have no effect in the US and the defendant has negligible contact with the US, these requirements might not be met. For example, in *SEC v Steffen*,³² the defendant’s role in falsified records was too “tangential,” and the defendant had no geographic ties to the US. The US forum had little continuing interest in pursuing the particular defendant, who also spoke little English. As a result, the court found that exercising jurisdiction over the defendant would exceed the limits of due process.³³

In criminal cases, personal jurisdiction arises from a defendant’s arrest in the US, voluntary appearance in court or lawful extradition to the US.³⁴

Foreign individuals or legal entities that would otherwise be outside the jurisdictional reach of the *FCPA* may be held criminally liable pursuant to the *FCPA* if they aided, abetted, counselled or induced another person or entity to commit a *FCPA* offense or if they conspired to violate the *FCPA*. The *Resource Guide* explains the SEC’s and DOJ’s interpretation of the scope of secondary liability provisions of the *FCPA*.³⁵

Notwithstanding the DOJ’s and SEC’s wide claims of jurisdiction over the offence, they may have difficulty prosecuting some foreign persons or entities if they have no extradition treaty with the foreign state or if the foreign state rejects the US claim of jurisdiction and the legal person no longer does business in the US and has no assets in the US to seize or forfeit.

1.7.2 DOJ and SEC’s Broad View of Territorial Jurisdiction

As noted, the DOJ and the SEC take a very broad view of the territorial jurisdiction of the *FCPA*. Some commentators refer to US jurisdiction over bribery as “potentially quasi-universal.”³⁶ It is also possible to understand the *FCPA*’s jurisdiction over issuers as one

³² *SEC v Sharef et al*, 924 F Supp 2d 539, 541 (SDNY 2013).

³³ Tarun & Tomczak, *supra* note 30 at 77-79.

³⁴ *Ibid* at 80, citing *United States v Bodmer*, 342 F Supp 2d 176 (SNDY 2004) at 188.

³⁵ DJSEC Resource Guide (2020), *supra* note 31 at 35-36.

³⁶ Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, “The International Legal Framework against Corruption: Achievements and Challenges” (2013) 14 Melbourne J Intl L 1 at 49, online (pdf): <http://law.unimelb.edu.au/__data/assets/pdf_file/0008/1687445/08Wouters,-Ryngaert-and-Cloots1.pdf>.

based on the effects doctrine of territoriality, as the corrupt acts made on behalf of foreign corporations listed on the US markets have the potential to negatively affect the American competitors of the offending corporations. As most cases are settled with the SEC rather than proceeding to court, the interpretation and application of the statute has been largely driven by the SEC and DOJ.³⁷ Some commentators have critiqued the 2012 version of the *Resource Guide* published by the SEC and DOJ as an “advocacy piece ... filled with selective information, half-truths, and information that was demonstratively false.”³⁸

Indeed, in 2007, Judge Scheindlin, arguably the most remarkable jurist on *FCPA* cases stated, “there are surprisingly few [judicial] decisions throughout the country on the *FCPA*”³⁹ thirty years after the *FCPA* was enacted. The lack of case law is particularly problematic because the *FCPA* is ambiguous even to the court, making its application and interpretation almost exclusively by administrative bodies more troublesome.⁴⁰ This leaves the interpretation to “prosecutorial common law.”⁴¹

However, in 2018 the Second Circuit in *Hoskins*⁴² “dealt a blow to the US Department of Justice’s ... ongoing efforts to expand the extraterritorial reach of the [*FCPA*],”⁴³ making the future of territorial jurisdiction under the *FCPA* unsettled and less clear. *Hoskins* appears to reign in the ability to use inchoate offences to broaden the effect of the act beyond the parties specifically mentioned in the *FCPA* that may draw criminal liability. In 2018, Jeffrey Lehtman and Margot Laporte posited that *Hoskins* may suggest that some of the DOJ’s “expansive jurisdictional theories are not grounded in law,”⁴⁴ and noted that the SEC and DOJ may assess their guidance in response to this judgement. That said, the excerpt from the recently updated *Resource Guide* does little to address the implications of *Hoskins*, which suggests that the case may not have significant impact on the DOJ and SEC’s interpretation of territorial jurisdiction that many observers had anticipated. See also discussion on this point by Gibson Dunn & Crutcher LLP.⁴⁵ The *Hoskins* case, and the resulting division in the courts, is discussed further in Sections 3 and 4.

³⁷ For *FCPA* enforcement actions by year, see “SEC Enforcement Actions: *FCPA* Cases” (last modified 8 July 2021), online: *US Securities and Exchange Commission* <<https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>.

³⁸ Mike Koehler, “The Foreign Corrupt Practices Act Jurisprudence of Shira Scheindlin” (2019) 69 *Syracuse L Rev* 543 at 608.

³⁹ *Ibid* at 544 quoting *United States v Kozeny*, 493 F Supp 2d 693, 697 (SDNY 2007).

⁴⁰ *Ibid* at 605.

⁴¹ *Ibid* quoting Michael Levy, “Prosecutorial Common Law” (16 March 2011), online (blog): *FCPA Professor* <<http://fcpaprofessor.com/prosecutorial-common-law/>>.

⁴² 902 F3d 69 (2d Cir 2018).

⁴³ Jeffrey A Lehtman & Margot Laporte, “Second Circuit Rejects DOJ’s Expansive *FCPA* Jurisdictional Theory” (2018), online: <<https://www.lexology.com/library/detail.aspx?g=9f637933-3b50-48c2-9858-cefe45fe9115>>.

⁴⁴ *Ibid*.

⁴⁵ Warin et al, “US DOJ and SEC Issue First Comprehensive Update to *FCPA* Resources Guide Since 2012” (7 July 2020), online: *Gibson Dunn* <<https://www.gibsondunn.com/us-doj-and-sec-issue-first-comprehensive-update-to-fcpa-resource-guide-since-2012/>>. For more law firm client reports on the *Hoskins* judgment, see “What Others are Saying About *US v Hoskins*” (31 August 2018), online (blog): *FCPA Professor* <<https://fcpaprofessor.com/others-saying-u-s-v-hoskins/>>. See also “*US v Hoskins*

With the limited recognition of *Hoskins* in the Resource Guide, it is likely that the implications of the DOJ and SEC's broad interpretation of territorial jurisdiction recognized by Sean Hecker and Margot Laporte will continue to be salient.⁴⁶

The DOJ and SEC's expansive interpretation of territorial jurisdiction in corruption cases is reflected by the assertion of US jurisdiction over FIFA officials. However, the *FCPA* was not used. Since the *FCPA* only covers bribes to government officials, the DOJ used non-bribery charges under *The Racketeer Influenced and Corrupt Organizations Act (RICO)* and the *Travel Act*, which prohibit the use of interstate travel and commerce to further an illegal activity. This assertion of jurisdiction has been criticized in relation to the officials who barely have tangential connections to the US. The DOJ claims jurisdiction because several of the FIFA officials and marketing executives were allegedly involved in palm-greasing-related activities on American soil and some of the involved marketing companies and associations have offices in the US.⁴⁷

Prior to *Hoskins*, Hecker and Laporte noted that there is case law to suggest that the *FCPA*'s territorial jurisdiction is not inexhaustible. Mike Koehler also made this observation and criticized the previous DOJ guidance for basing its advice on settled enforcement actions lacking in judicial scrutiny rather than case law.⁴⁸ Hecker and LaPorte cited a district court decision, *US v Patel*,⁴⁹ in which the Court rejected the DOJ's argument that the act of mailing a corrupt purchase agreement from the UK to the US was sufficient to establish a territorial nexus with the US. The Court held that, in order for the *FCPA* to apply to foreign entities that are not considered "issuers," the act in furtherance of a corrupt payment must have taken place within US territory.

Annalisa Leibold criticizes the broad extraterritorial application of the *FCPA* and argues that the extension of *FCPA* jurisdiction to foreign non-issuers may be contrary to principles of customary international law.⁵⁰ Leibold considered the discrepancy in the amount of fines paid by foreign businesses versus domestic businesses and suggests that these statistics may be explained either by the fact that foreign corporations are more corrupt than the US firms, foreign corporations do not cooperate with the US law enforcement authorities, or the SEC

and the Big Picture" (28 August 2018), online (blog): *FCPA Professor* <<https://fcpprofessor.com/u-s-v-hoskins-big-picture/>>; and "Second Circuit Rejects DOJ's Expansive Jurisdictional Theory of Prosecution In *US. v Hoskins*" (27 August 2018), online (blog): *FCPA Professor* <<https://fcpprofessor.com/second-circuit-rejects-doj-s-expansive-jurisdictional-theory-prosecution-u-s-v-hoskins/>>.

⁴⁶ Sean Hecker & Margot Laporte, "Should *FCPA* 'Territorial' Jurisdiction Reach Extraterritorial Proportions?" (2013) 42 Intl Law News 7. For an update on the ongoing *Hoskins* appeals (particularly on the issue of whether *Hoskins* was an "agent of domestic concern") see Mike Koehler, "Second Circuit Once Again Hears Appeal In *US V Hoskins*" (19 August 2021), online (blog): *FCPA Professor* <<https://fcpprofessor.com/second-circuit-hears-appeal-u-s-v-hoskins/>>.

⁴⁷ "The World's Lawyer: Why America, and Not Another Country, Is Going after FIFA", *The Economist* (6 June 2015).

⁴⁸ Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham: Edward Elgar, 2014) at 114.

⁴⁹ *US v Patel*, No 1:09-cr-00335, Trial Tr 5:11-14, 7:17-8:2 (DDC June 6, 2011).

⁵⁰ Annalisa Leibold, "Extraterritorial Application of the *FCPA* under International Law" (2015) 51 *Willamette L Rev* 225 at 253-259, online: <<https://ssrn.com/abstract=2489675>>.

and DOJ are unfairly targeting foreign businesses with higher penalties for *FCPA* violations.⁵¹ Finally, given the ease with which the DOJ and the SEC can bring charges against a foreign company, and the fact that most foreign corruption charges are settled rather than litigated, the *FCPA* may be closer to an international anti-corruption business tax than to a domestic criminal law with limited extraterritorial application.⁵² Leibold suggests that, to minimize potential foreign policy concerns and violations of international law, the SEC and DOJ should focus the enforcement of the *FCPA* on cases of bribery that have a close connection or substantial effect on the United States.⁵³ Michael Diamant et al. illustrate a gap in domestic and foreign corporations as follows:

The *FCPA* has been enforced against U.S. companies more frequently, but there is no question that foreign corporations have disproportionately borne the lion's share of *FCPA* fines and penalties. Foreign companies are 35% of all *FCPA* corporate resolutions but account for more than 69% (\$7.8 billion) of all *FCPA* monetary settlement amounts since that statute was enacted. Foreign companies' average monetary settlement amounts have exceeded those of domestic corporations by \$54,699,843, or 312%. From 1978 through 2018, the average *FCPA* monetary resolution in an action against a domestic corporation was \$17,559,982, compared with \$72,259,825 for foreign corporations. And while *FCPA* enforcement actions against foreign corporations were uncommon until approximately 2004, the same trend holds true when focusing only on 2004 through 2018. During those years, the average *FCPA* monetary resolution against U.S. companies was \$21,182,931, compared with \$75,016,934 for non U.S. companies. In other words, in *FCPA* enforcement actions from 2004 through 2018, non-U.S. companies have been subject to monetary penalties that on average are nearly four times greater than those imposed on U.S. companies. In absolute terms, monetary resolutions from 2004 through 2018 against foreign companies have [totalled] \$7.8 billion compared with \$3.4 billion against domestic corporations.⁵⁴

The *FCPA* blog maintains a list of the top 10 biggest *FCPA* settlements. The 2020 list shows only one American company (Goldman Sachs) on the list.⁵⁵

⁵¹ *Ibid* at 238.

⁵² *Ibid* at 227, 259-260.

⁵³ *Ibid* at 262.

⁵⁴ Michael S Diamant et al, "FCPA Enforcement against US and Non-US Companies" (2019) 8:2 Mich Bus & Entrepreneurial L Rev 353 at 371.

⁵⁵ Harry Cassin, "Wall Street bank earns top spot on FCPA Blog top ten list" (26 October 2020), online (blog): *FCPA Blog* <<https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/>>. See also the following post from 2015, which suggests some of the reasons that enforcement against non-US companies is so prevalent: Richard L Cassin, "From Alstom: Six reasons why non-US Companies dominate the FCPA top ten list" (5 January 2015), online (blog): *FCPA Blog* <<https://fcpablog.com/2015/01/05/from-alstom-six-reasons-why-non-us-companies-dominate-the-fc/>>.

1.8 UK

For offences under sections 1, 2, and 6 (active and passive bribery and bribing a foreign public official), the *Bribery Act* asserts jurisdiction based on both the territoriality principle and the nationality principle:

12. Offences under this Act: territorial application

- (1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.
- (2) Subsection (3) applies if—
 - (a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,
 - (b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and
 - (c) that person has a close connection with the United Kingdom.
- (3) In such a case—
 - (a) the acts or omissions form part of the offence referred to in subsection (2)(a), and
 - (b) proceedings for the offence may be taken at any place in the United Kingdom.
- (4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—
 - (a) a British citizen,
 - (b) a British overseas territories citizen,
 - (c) a British National (Overseas),
 - (d) a British Overseas citizen,
 - (e) a person who under the British Nationality Act 1981 was a British subject,
 - (f) a British protected person within the meaning of that Act,
 - (g) an individual ordinarily resident in the United Kingdom,
 - (h) a body incorporated under the law of any part of the United Kingdom,
 - (i) a Scottish partnership.
- (5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

- (6) Where no act or omission which forms part of an offence under section 7 takes place in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom.
- (7) Subsection (8) applies if, by virtue of this section, proceedings for an offence are to be taken in Scotland against a person.
- (8) Such proceedings may be taken—
 - (a) in any sheriff court district in which the person is apprehended or in custody, or
 - (b) in such sheriff court district as the Lord Advocate may determine.
- (9) In subsection (8) “sheriff court district” is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

In summary, the *Bribery Act* applies if “any act or omission which forms part of the offence” occurs within the UK (section 12(1)). In addition, the *Bribery Act* applies to conduct occurring wholly outside the UK by persons with a “close connection” to the UK. Section 12(4) lists those considered to have a close connection to the UK, including British citizens, British nationals living overseas and all individuals ordinarily resident in the UK. Companies incorporated under UK law are also deemed to have a close connection with the UK. Foreign subsidiaries of UK parent companies are not subject to UK jurisdiction, even if wholly owned by UK parent companies. But, if a foreign subsidiary acts as an agent for a UK company, the agent’s conduct can be attributed to the parent company. Pursuant to section 14, senior officers or directors of a UK corporation who are convicted of a section 1, 2 or 6 offence are also guilty of the offence if they consented or connived in the commission of the offence.

The offence of commercial organizations failing to prevent bribery under section 7 of the *Bribery Act* has much broader extraterritorial application. Section 7 reads (in part):

7 Failure of commercial organisations to prevent bribery

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section **if a person (“A”) associated with C** bribes another person intending—
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.
 - ...
- (3) For the purposes of this section, A bribes another person if, and only if, A—
 - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section —

“relevant commercial organisation” means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.

As James Painter explains:

Section 7 stands in stark contrast to the much narrower jurisdictional provisions of Sections 1, 2, and 6 of the *Bribery Act*, and it is this provision that is so striking in its extraterritoriality and scope of potential criminal liability. Three separate provisions embedded within Section 7 lead to this expansive jurisdictional reach and scope. First, the Section applies to “relevant commercial organizations”. This term is defined in Section 7(5) of the *Bribery Act* to include both entities organized under UK law as well as entities organized under the laws of any other jurisdiction if the entity “carries on a business, or part of a business, in any part of the United Kingdom”. Second, unlike the Section 1, 2, and 6 offenses that require either an act or omission in the UK or at least a “close connection”, a relevant commercial organization can be exposed under Section 7 of the Act for failing to prevent bribery “irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.” Third, the predicate offenses for an organization to be criminally liable under Section 7 are triggered by the acts or omissions of a person “associated with” the relevant commercial organization. Under Section 8 of the Act, an “associated person” is a person who performs services for or on behalf of the organization. The term includes employees, agents and subsidiaries, and the capacity in which the associated person

performs services does not matter. These three concepts work to create an extraordinarily broad statute.⁵⁶

As Jessica Lordi notes, it is likely that the words “carry on a business” are intended to capture all commercial organizations doing business in the UK, not just those with a physical office in the UK.⁵⁷ In effect, section 7 appears to extend its reach to “virtually all major multinational corporations,”⁵⁸ with some commentators describing it as “the most outrageously overreaching aspect of the Act.”⁵⁹ This approach, drawing criticism partly due to the UK’s former adherence to strict territoriality, “shows that legal attitudes to criminal jurisdiction are changing in the light of transnational crime and its effects across jurisdictions.”⁶⁰ Described as an “FCPA on steroids,”⁶¹ the *Bribery Act* reflects the prevailing trend toward more FCPA-like corruption enforcement.⁶²

The *Guidance* document to the UK *Bribery Act*, produced by the Ministry of Justice, attempts to assuage concerns about the extraterritorial scope of section 7 by anticipating that a “common sense approach” will be employed when determining whether an organization carries on a business in the UK.⁶³ According to the *Guidance*, the mere fact that a company is listed for trading on the London Stock Exchange would not be sufficient to bring it under the jurisdiction of section 7 of the *Bribery Act* without further evidence of a “demonstrable business presence” in the UK. The *Guidance* also states that “having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.”⁶⁴

⁵⁶ James D Painter, “The New UK *Bribery Act*—What US Lawyers Need to Know” (2011) 82 Penn Bar Assoc Q 173 at 174.

⁵⁷ Jessica Lordi, “The UK *Bribery Act*: Endless Jurisdictional Liability on Corporate Violators” (2012) 44 Case W Res J Intl L 955 at 972.

⁵⁸ J Warin, C Falconer & M Diamant, “The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption” (2010-2011) 46 Tex Intl LJ 1 at 28.

⁵⁹ Bruce W Bean & Emma H MacGuidwin, “Expansive Reach - Useless Guidance: An Introduction to the U.K. *Bribery Act* 2010” (2012) 18 ILSA J Intl & Comp L 323 at 339. Additionally, the authors titled the section of the paper where this comment appeared as, “Section 7: Reestablishing British Dominion over the Planet” to illustrate just how overreaching they believed section 7 to be.

⁶⁰ Adefolake Adeyeye, “Foreign Bribery Gaps and Sealants: International Standards and Domestic Implementation” (2014) 15 Bus L Int'l 169 at 180. The UK’s former adherence to strict territoriality is also reflected in Lord Halsbury’s *dictum* which stated, “all crimes are local ... jurisdiction is only territorial.” See Currie *supra* note 1 at 51.

⁶¹ Nathan Koppel, “Introducing the New “FCPA on Steroids”, *Wall Street Journal* (28 December 2010), online: <<https://www.wsj.com/articles/BL-LB-37318>>.

⁶² Steven R Salbu, “Redeeming Extraterritorial Bribery and Corruption Laws”, *supra* note 21 at 646-647.

⁶³ United Kingdom, Ministry of Justice, *The Bribery Act 2010: Guidance*, (2011) online (pdf): <<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>.

⁶⁴ *Ibid* at 16. For example, the bribery for which the Sweett Group was convicted was committed by the UK company’s subsidiary. One commenter writes, “The actions of a foreign subsidiary, carried on outside the UK, in relation to a UAE contract were caught by the *Bribery Act*. While Sweett’s Cypriot subsidiary may (as the defence suggested) have been a ‘gangrenous limb’ within the organisation, the systemic failures of Sweett, as the parent company, properly to supervise its subsidiary made Sweett liable”: “Lessons from the first s 7 UK *Bribery Act* Case” (14 April 2016),

Commentators question whether the *Guidance* document has capitulated to business interests that objected to the reach of the *Bribery Act*. According to Jaqueline Bonneau, the Ministry of Justice's *Guidance* "has created loopholes that simply do not exist on the face of the *Bribery Act* text, risking the resurrection of some of the most infamous problems of the old common law bribery regime."⁶⁵

Further, given the infrequency of *Bribery Act* cases taken to court (five between the *Act*'s introduction and March 2020),⁶⁶ there is little opportunity for the court to influence the interpretation of the "common sense approach" and how jurisdiction ought to be determined. As of March 2020, only one conviction had been entered under section 7(1).⁶⁷ At least five deferred prosecution agreements under section 7 have been entered, but the details of these agreements are limited, and only one of included circumstances where the entirety of the bribery occurred outside of the UK. The latter case, *SFO v Airbus SE*,⁶⁸ hints at the extensive breadth which may be ascribed to section 7, even where the connection to the UK is nearly limited to the presence of a subsidiary unconnected to the bribery.⁶⁹

In June 2021, Anneka Randhawa and Mhairi Fraser confirmed the ongoing lack of clarity:

[T]he jurisdictional application of the section 7 offence, which applies to a corporate which "carries on a business or part of a business" in the UK, has so far evaded substantive clarification. The recent DPA entered into by Dutch-domiciled Airbus SE may provide some indication of approach. The court approving the DPA accepted that the jurisdictional test was satisfied on the basis that part of Airbus' business was carried out in the UK through two of its subsidiaries. This was despite the fact that Airbus' operational headquarters were in France and the conduct to which it admitted took place outside of the UK. However, the fact that Airbus did not contest

online: *Allen & Overy* <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/lessons-from-the-first-s7-uk-briberyact-case>>.

⁶⁵ Jaqueline Bonneau, "Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement" (2010-2011) 49 *Colum J Transnat'l L* 365.

⁶⁶ The following is a response to a Freedom of Information request, outlining the number of court cases, convictions and deferred prosecution agreements under the *Bribery Act* until March 2020: "2020-040-Bribery Act 2010" (1 March 2020), online: *Serious Fraud Office* <<https://www.sfo.gov.uk/foi-request/2020-040-bribery-act-2010/>>.

⁶⁷ See "Sweett Group" (last modified 17 May 2021), online: *Serious Fraud Office* <<https://www.sfo.gov.uk/cases/sweett-group>>.

⁶⁸ *Director of the Serious Fraud Office v Airbus SE*, Southwark Crown Court (Case No: U20200108), online (pdf): <<https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/?ind=1580489623893&filename=R%20v%20Airbus%20Approved%20Judgment.pdf&wpdmdl=25653&refresh=606396292cfaa1617139241>>.

⁶⁹ See Emmanuel Breen, "UK flexes extraterritorial reach with Airbus settlement" (2020), online (blog): *FCPA Blog* <<https://fcpublog.com/2020/02/10/uk-flexes-extraterritorial-reach-with-airbus-settlement/#:~:text=In%20terms%20of%20jurisdiction%2C%20the,they%20were%20incorporated%20or%20formed>> who summarizes the key dilemmas in this case.

jurisdiction means the law on this point still remains fundamentally untested.⁷⁰

1.9 Canada

Until 2013, the *Corruption of Foreign Public Officials Act (CFPOA)*, which implements the OECD Convention,⁷¹ determined jurisdiction based exclusively on the principle of territoriality. Territoriality is the jurisdictional principle which governs most criminal offences under Canadian law (*Criminal Code*, section 6),⁷² including the secret commissions offence in section 426. However, Canada has asserted jurisdiction based on nationality for a few crimes, such as offences under the *CFPOA* (since 2013), offences involving child sex tourism and certain terrorism offences committed outside of Canada. See *Criminal Code*, sections 7 (3.73) (3.74) (3.75) (4.1), and (4.11).⁷³ Canada also extends jurisdiction through the universality principle, such as through *Crimes Against Humanity and War Crimes Act*.⁷⁴

Since the *Criminal Code* does not define “territorial jurisdiction,” its meaning has been determined by case law. The leading case was decided 30 years ago by the Supreme Court of Canada (SCC), but its definition is now outdated in the context of bribery and other transnational offences. In *Libman v The Queen* (1985), the SCC held that in order for a Canadian criminal statute to apply, “a significant portion of the activities constituting that offence” must take place in Canada.⁷⁵ If a significant portion of the criminal conduct occurs in Canada and other parts occur in a foreign state, then Canada and that foreign state have concurrent jurisdiction (or qualified territorial jurisdiction). In *Libman*, the Court went on to state that there must be a “real and substantial link”⁷⁶ between the offence and Canada. In addition, the court must be satisfied that prosecution does not offend the principle of international comity. The term “comity” refers to the principle of legal reciprocity and consideration for the interests of other states. Under this principle, a state displays civility towards other nations by respecting the validity of their laws and other executive or judicial actions.⁷⁷ Penney, Rondinelli, and Stribolpolous note that the provisions which “define the

⁷⁰ Anneka Randhawa & Mhairi Fraser, “Reflections on the UK *Bribery Act* (part II): Unfulfilled potential?” (23 June 2021), online: *White&Case* <<https://www.whitecase.com/publications/alert/10-year-anniversary-bribery-act-2010>>.

⁷¹ Currie, *supra* note 1 at 405.

⁷² Specifically, section 6(2) reads, “Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.”

⁷³ For a fuller list and a discussion of extraterritoriality, see S Penney, V Rondinelli & J Stribolpolous, *Criminal Procedure in Canada*, 2nd ed (LexisNexis, 2017) at §12.15-§12.30 and Currie, *supra* note 1 generally.

⁷⁴ Penney et al, *ibid* at §12.10.

⁷⁵ *Libman v the Queen*, [1985] 2 SCR 178.

⁷⁶ The cases *R v Greco*, [2001] OJ No 4147 (Ont CA) (where a Canadian court order prohibiting behaviour was found to create a “real and substantial link” to Canada, despite the behaviour occurring abroad) and *R v B(O)*, [1997] OJ No 1850 (Ont CA) (where the use of a Canadian registered vehicle by a Canadian trucker who sexually assaulted his Canadian granddaughter while in the USA was not considered to be significantly linked to Canada) illustrate applications of the *Libman* test: See Penney et al, *supra* note 73 at §12.5-§12.6.

⁷⁷ For more information on the *Libman* test, see Currie, *supra* note 1 at 481-498.

reach of Canada's criminal laws beyond its borders ... do not operate to the exclusion of the real and substantial connection test from *Libman*.... Rather, they supply a further and alternative basis for Canadian courts to assume jurisdiction."⁷⁸

Libman sets a fairly high test for territorial jurisdiction. While Canada requires "significant portions" of the offence to occur within Canada, the US and UK assert territorial jurisdiction as "any act or omission," which constitutes an element of the offence occurs within their borders. It appears that prior to the 2013 amendments adding nationality jurisdiction to *CFPOA*, the *Libman* test would have excluded Canadian prosecution of bribery by Canadian individuals or companies engaged in foreign bribery, if the conduct constituting bribery occurred largely in other countries without any significant conduct in or substantial link to Canada. As noted, such a demanding test for territorial jurisdiction is not well suited to the modern realities of global business, in which the transfer of information, contracts, and money between countries can occur instantaneously.

The OECD Working Group expressed concerns that Canada's standard of a "real and substantial link" failed to comply with the OECD Convention, which mandates that even a minor territorial link should be sufficient. However, the *Libman* standard has been relaxed somewhat in practice. For example, in *R v Karigar*, the first conviction of an individual under *CFPOA*, the accused was a Canadian acting on behalf of a Canadian company while in India.⁷⁹ Even though the actual financial element of the offence (i.e., approval or funding of the bribe) did not occur in Canada, the court found there was still a real and substantial connection because the accused was acting on behalf of a Canadian company and the unfair advantage would have flowed to that Canadian company. The substantial link seems to be that the accused was a Canadian citizen working for a Canadian company (compare with *Chowdhury* noted below).

Canada's failure to expressly assert jurisdiction based on nationality was repeatedly criticized by commentators prior to the 2013 amendments. In the 2011 *Phase 3 Report*, the OECD Working Group called *CFPOA*'s lack of extraterritorial jurisdiction based on nationality "a serious obstacle to enforcement," and urged Canada to rectify this as a "matter of urgency."⁸⁰ Prior to the 2013 amendments, Canada responded to such criticisms by arguing that the establishment of nationality jurisdiction was not explicitly mandated under its treaty obligations.

In June 2013, the *CFPOA* was amended by Bill S-14 to extend the *Act*'s prescriptive jurisdiction to Canadian citizens, permanent residents, and any public body or entity formed under Canadian law (called an "extended nationality basis"⁸¹). These individuals or legal persons are subject to Canadian criminal liability with respect to acts of bribing a foreign

⁷⁸ Penney et al, *supra* note 73, cites *R v Rowbotham*, [1993] SCJ No 136 (SCC) to support this assertion at §12.14.

⁷⁹ *R v Karigar*, 2013 ONSC 2199.

⁸⁰ OECD, *The OECD Anti-Bribery Convention and the Working Group on Bribery*, online (pdf): <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Anti-Bribery_Convention_and_Working_Group_Brief_ENG.pdf>.

⁸¹ Currie, *supra* note 1 at 405.

public official, irrespective of whether any part of the act constituting the offence takes place in Canada. With these amendments, a Canadian accused (such as Mr. Karigar) would clearly fall within Canada's jurisdiction.

However, the *CFPOA*'s reach is not without limits. In *Chowdhury v HMQ*, the accused was a citizen and resident of Bangladesh acting as an agent for a Canadian corporation, SNC-Lavalin.⁸² The accused had never been to Canada. In his capacity as agent for SNC-Lavalin, he allegedly facilitated the offer of bribes to foreign officials in Bangladesh in an attempt to secure for SNC-Lavalin an engineering contract for the Padma Bridge proposal.

Chowdhury launched an application claiming Canada had no jurisdiction to prosecute him for an offence of bribery under section 3(1)(b) of the *CFPOA*. The application was successful, and the bribery charge against Chowdhury was stayed. The Court gave a very helpful analysis of the complexity of the various concepts of jurisdiction.⁸³ As the Court noted:

[21] The decision in *Hape* dealt with the issue of the "extraterritorial application" of Canadian law. It noted the general prohibition in s. 6(2) of the *Criminal Code* that I have set out above. The court went on to find that Parliament has "clear constitutional authority" to pass legislation governing conduct by non-Canadians outside of Canada. However, in exercising that authority, the court noted certain parameters that will generally apply. LeBel J. said, at para. 68:

[Parliament's] ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law.

[22] A basic part of international law is the principle of sovereign equality. Countries generally respect each other's borders ...

[23] Nevertheless, there are situations where a country will reach beyond its borders to prosecute individuals who commit an offence in another country. This normally only occurs where the offence committed in the other country is committed by the first country's own nationals or where the harm arising from the criminal acts in the other country is visited upon the citizens of the first country. In the former case, the basis for jurisdiction is nationality. At common law, we recognize that Canada may have a legitimate interest in prosecuting an offence involving the actions of Canadians outside of our borders. In the latter case, the basis for jurisdiction is qualified territoriality, which extends the notion of territorial jurisdiction beyond our strict borders. Under the "objective territorial principle", Canada will have a legitimate interest in prosecuting non-Canadians for criminal actions that

⁸² *Chowdhury v HMQ*, 2014 ONSC 2635.

⁸³ See *ibid* at paras 10-36.

cause harm in Canada provided a real and substantial link between the offence and Canada is established and international comity is not offended.: *Libman*; *Hape* at para. 59; Robert J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2010) at pp. 63-65.

...

[35] There is a last point to be taken from *Hape* and that is with respect to the issue that arises here, namely, the assumption of jurisdiction over foreign nationals. The court in *Hape* held that it was open to Parliament to pass legislation that sought to govern conduct by non-Canadians outside of Canada. The court pointed out, however, that if Parliament chose to do so, Parliament would likely be violating international law and would also likely offend the comity of nations. Again, LeBel J. said, at para. 68:

Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada. Its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations.

[36] As a consequence of that reality, courts will approach the interpretation of any legislation with the presumption that Parliament did not intend to violate international law and offend the comity of nations. Thus, absent clear language compelling such an interpretation, courts will adopt an interpretation that leads to the opposite outcome.

The Court also emphasized the importance of the distinction between jurisdiction over the offence and jurisdiction over the person:

[37] At the risk of being repetitive, but so that it is clear, there is a distinction between Canada extending its jurisdiction over the offence, because the offence has some extraterritorial aspects, and Canada extending its jurisdiction over a person who is outside of Canada's territorial jurisdiction. Jurisdiction over the former is governed by the "real and substantial link" test set out in *Libman*. The latter is governed by the legislative language used in the offence creating statute. This point is made by Robert J. Currie in *International & Transnational Criminal Law* where the author observes, at p. 421:

When Parliament wishes the courts to take extraterritorial jurisdiction over persons or conduct completely outside

Canadian borders, it must instruct the courts to this effect by making it explicit or necessarily implied in the legislation. Otherwise, territorial jurisdiction — as expanded by the *Libman* criteria — is the default.

The Court held that neither section 3(1)(b) nor other provisions of *CFPOA* contained such clear language, rejecting the position that jurisdiction over the offence establishes jurisdiction over all parties to the offence and noting that jurisdiction over Chowdhury would depend on his physical presence in Canada.⁸⁴

Since Canada has no extradition treaty with Bangladesh, Canada cannot “lay hands” on Chowdhury. The Court also rejected the Crown’s argument that Chowdhury would get away with impunity unless Canada claimed jurisdiction over him.⁸⁵ The 2013 amendments to *CFPOA* (adding nationality jurisdiction) would not give Canada jurisdiction over a person like Chowdhury.

Despite the addition of nationality to jurisdiction, however, Canada still faces OECD scrutiny for the scope of jurisdiction expressed in the *CFPOA*. While Canada has “maintained that its approach to qualified territoriality under *Libman* provides a sufficiently broad approach,”⁸⁶ OECD reviewers find that the “substantial links” requirement makes Canada’s approach more restrictive than most other parties to the Convention.

On June 4, 2014, the RCMP charged US nationals Robert Barra and Dario Berini (former CEOs of Cryptometrics), and UK national Shailesh Govindia (an agent for Cryptometrics) with an offence under section 3 of *CFPOA*. Canada-wide warrants were issued for all three (extradition proceedings in US and UK are an option). Based on *Chowdhury*, Ferguson predicted, in the previous edition of this book, that prosecutors would no doubt argue that Canada has a legitimate interest in prosecuting these foreign nationals in Canada because the bribery scheme had its genesis in Canada and Cryptometrics is a Canadian company. However, in finding that Canada had territorial jurisdiction, the case focused on the “fruits of the transaction” being connected to Canada, and surprisingly did not cite *Chowdhury* at all:

[27] At pp. 212-13 of *Libman*, the Supreme Court stated that a significant portion of the activities constituting that offence must have taken place in Canada. Barra and Govindia argue that if they made an agreement with Berini to bribe Air India and Indian public officials, it occurred at the meeting between Berini, Barra and Govindia in New York City on November 2, 2007 or shortly thereafter, all of which occurred outside of Canada. This conspiracy would have been completed when they reached an agreement to pay \$500,000 to bribe the Indian Minister of Civil Aviation

⁸⁴ See paras 54-57.

⁸⁵ See paras 49-51.

⁸⁶ Currie, *supra* note 1 at 406. Currie does note however in footnote 289 that these criticisms of Canada seem to have somewhat abated in more recent Working Group on Bribery reports.

(Praful Patel) to approve the contract between Air India and Cryptometrics Canada, which was separate from any previous agreement with Karigar.

[28] At p. 211 of the *Libman* decision, the Supreme Court also stated as follows:

It also ignores the fact that the **fruits of the transaction** were obtained in Canada as contemplated by the scheme. Their delivery here was not accidental or irrelevant. It was an integral part of the scheme. While it may not in strictness constitute part of the offence, it is, I think, relevant in considering whether a transaction falls outside Canadian territory. For in considering that question we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. One must then consider whether there is anything in those facts that offends international comity. If I may borrow the expression of Meredith J.A., in *Bachrack*, *supra*, the law would be lame indeed if its strictures could be avoided by the simple artifice of going outside the country to obtain the fruits of a scheme that was hatched in and largely put into effect in Canada. In this case, the whole operation of obtaining the proceeds of the fraud outside the country was a mere sham and should be treated as such. [emphasis added]

[29] In this case, the fruits of the transaction were intended to be obtained in Canada, namely by obtaining a profitable contract for Cryptometrics Canada. The court must take into account all relevant facts that took place in Canada that may legitimately give this country an interest in prosecuting this offence.

[30] At p. 211 of *Libman*, Laforest J. went on to state that “the law would be lame indeed if its strictures could be avoided by the simple artifice of going outside the country to obtain the fruits of a scheme that was hatched and largely put into effect in Canada.” In this case, the Canadian Corruption of Foreign Public Officials Act would be lame if it did not apply to a situation where members of senior management of a Canadian company could with impunity arrange to meet with others outside of Canada and agree to pay bribes to foreign officials to obtain a contract for the Canadian company.

[31] In the case of *R. v. Karigar*, 2017 ONCA 576 at para. 26, the Court of Appeal quoted *Libman*, where La Forest J. stated that rather than confining the analysis to only acts that were strictly part of the offence, the court must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting this offence. The Ontario Court of Appeal upheld Hackland J.’s decision (2013 ONSC 5199) and rejected the appellant’s position that Canada did not have the requisite territorial connection to the offence involving Karigar.

...

[33] The main difference between the *Karigar* case and the case before me was that Karigar was a Canadian citizen who lived in Toronto, while Govindia was never a citizen or resident of Canada, but this was found by the Court of Appeal to be **only one of the factors linking the offence to Canada** (para. 31).

[34] There is evidence that Govindia agreed to act as the second agent, replacing Karigar. There is evidence that on November 2, 2007 or shortly thereafter, he agreed with Berini and Barra to pay the sum of \$500,000 to the Indian Minister of Civil Aviation to obtain the Air India contract for Cryptometrics Canada.

[35] The presence of Berini at the meeting with Govindia and Barra in New York City provides a direct connection to Canada, because Berini was the Chief Operating Officer and the Manager of Cryptometrics Canada when he met with them and allegedly agreed to pay a bribe of \$500,000 to the Indian Civil Aviation Minister to obtain the contract. In addition to the other factors identified in the *Karigar* decision, the active participation of the Chief Operating Officer and Manager of the Canadian company at a meeting outside of Canada, where there is evidence that he agreed with Barra and Govindia to pay a bribe of \$500,000 to the Indian Minister to obtain a contract for the Canadian company that he managed, constitutes a “real and substantial link” between the offence and Canada. [emphasis added]⁸⁷

This judgment’s emphasis on the fruits of the transaction, and its choice to highlight that other factors besides citizenship connected Karigar to Canada in the *Karigar* judgment may foreshadow an increasingly flexible approach to the “significant links” that may connect an offence to Canada for the purposes of the *CFPOA*.⁸⁸

For more on Canada’s jurisdiction over transnational criminal offences, see Robert J. Currie & Dr. Joseph Rikhof, *International & Transnational Criminal Law*, 3rd ed (Irwin Law, 2020).

⁸⁷ *R v Barra and Govindia*, 2018 ONSC 2659 (CanLII).

⁸⁸ Barra and Govindia were both ultimately sentenced to two and a half years of prison in 2019: *R v Barra and Govindia*, 2019 ONSC 1786 (CanLII).

1.10 Concurrent Jurisdiction and Parallel Proceedings: A Cause for Caution

Skinnider, in *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* [written in 2012, before Canada extended jurisdiction to include nationality], reviews some of the major arguments for and against expanding jurisdiction beyond territoriality:⁸⁹

BEGINNING OF EXCERPT

The broadening of jurisdiction beyond the principle of [strict] territoriality will likely result in higher incidences of concurrent jurisdiction. This could give rise to conflicting assertions of civil or criminal jurisdiction, conflicts of laws and concerns of dual criminality and double jeopardy. Companies have raised concerns as to how they are to do business and respond to investigations and prosecutions in multiple jurisdictions that have different substantive laws, enforcement procedures, penalties and available resources. Companies have also expressed concern regarding the “legalization of compliance codes” and the multiplicity of possible compliance codes found in different States.

Some commentators counter these concerns by pointing out that the reality is there is an appalling lack of enforcement, and not to waste time worrying about multiple jurisdictional issues. However, the IBA Legal Practice Division Task Force on Extraterritorial Jurisdiction has studied this issue and calls for harmonizing guidelines to alleviate this potential challenge. The Task Force also calls for States to consider adopting a “soft” form of double jeopardy or *ne bis in idem* that takes into account not just criminal liability, but “functional equivalent” civil liability for corporations and individuals. The lack of harmonization of corruption statutes in terms of corporate and individual liability, penalties, major elements of offences and defences, needs to be considered in devising any double jeopardy rule.

Whether a corporation may be regarded as national differs amongst States. Some States regard a corporation as national if it has been founded according to the national law or if the corporation resides in the territory. Other States relate the question of jurisdiction to the nationality of the acting natural person, not to the nationality of the legal person. Thus, States would require that the person who has acted corruptly within the structure or in favor of the legal person is one of its citizens. However, this may cause “serious legal loopholes since in the crucial cases of corporate liability investigative agencies may not be able to identify the individual instigator or perpetrator.”

Moreover States “may consider that the principle of liability of legal persons links legal consequences to the legal entity itself, hence abstracting from individual persons and their nationality”. The application of nationality jurisdiction to legal persons remains untested.

⁸⁹ Eileen Skinnider, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* (International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 2012) at 12–13. See also updated version by Skinnider & Ferguson (2017), online: <<https://icclr.law.ubc.ca/publication/test-publication/>>.

Whether the authorities in a parent company's country can take action against the parent company where one of its foreign subsidiaries bribes a foreign public official is a priority issue for OECD.

END OF EXCERPT

For a discussion of risks of parallel proceedings, see Chapter 6, Section 7.2.

2. CORPORATE CRIMINAL LIABILITY AND OTHER COLLECTIVE ENTITIES

It is well recognized among commentators that in order to effectively combat transnational corruption, mechanisms must be in place to hold corporations and other collective entities liable when they engage in bribery. For convenience, we will generally use the expression "corporate liability," but when doing so I intend to include other legally recognized collective entities. In many cases, particularly when dealing with large, decentralized multinational corporations, it may be impossible for an enforcement agency to determine who within the huge organization actually made the decision to offer a bribe.⁹⁰ Often the decision to offer a bribe by a frontline employee is either supported or tolerated by the upper echelons of management.⁹¹ In such a case, punishing only the frontline employee would not sufficiently punish the corporate culture that facilitated the wrongdoing, nor would it effectively deter other corporations from allowing this culture to persist. There is therefore a need to hold corporations liable in these instances.

For many years, both common law and civil law jurisdictions resisted the idea that a corporation could be found guilty of a "crime."⁹² This reluctance was based on the traditional notion that "crimes" required proof of "personal mental fault" (also referred to as subjective fault), which usually took the form of acting intentionally or recklessly (i.e., the *accused foresees* that his/her conduct may cause a criminal harm, but engages in that conduct, thereby knowingly taking the risk that the criminal harm may occur). It was thought that

⁹⁰ In a 2007 study of international business organizations, almost 70,000 multinational parent companies operated through nearly 700,000 foreign affiliates and the largest 100 companies had an average of 187 subsidiaries per group: PI Blumberg et al, *The Law of Corporate Groups: Jurisdiction, Practice and Procedure* (Aspen Publishers Online, 2007), cited in OECD Stocktaking (2016), *supra* note 28 at 11, n 4. Also see the updated version of this text, PI Blumberg et al, *Blumberg on Corporate Groups*, 2nd ed (New York: Wolters Kluwer, 2021). This latter text at 1-3 of the 2009 Supplement also reminds us that, despite having some statistics for subsidiaries and affiliates of large corporations, the landscape of multinational corporations (and their control or accountability over corporate actions) is increased significantly by "franchisees, licensees, dealers and contractors for which statistics are unavailable."

⁹¹ Mark Pieth, "Article 2. The Responsibility of Legal Persons" in Pieth, Low & Bonucci, *supra* note 25, 212 at 212-51.

⁹² Mark Fenwick, "The Multiple Uncertainties of the Corporate Criminal Law" in Mark Fenwick & Stefan Wrba, eds, *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (Singapore: Springer, 2016) 147 at 149.

corporations, as non-human legal fictions, could not form personal states of mind such as intention or subjective recklessness. In other words, “a corporation was an incorporeal entity that lacked the necessary degree of fault or blameworthiness that is a necessary condition for the imposition of criminal liability.”⁹³ As industrialization spread in the 18th and 19th centuries and “corporations acquired a greater social presence as the scope and impact of their activities expanded dramatically,”⁹⁴ many new offences were created to prevent or regulate industrial activities and industrialization’s harmful ancillary effects.⁹⁵ These offences were generally considered to be regulatory or administrative offences, as opposed to criminal offences. Since they were not crimes, they did not require proof of “personal fault.” They were strict or absolute liability and, therefore, corporations could be and were convicted of these types of offences.

The pressure to also hold corporations liable for criminal offences began to build in the early 20th century. Common law countries slowly adopted corporate *criminal* liability in the first half of the 20th century. However, even in its increasing acceptance, Mark Fenwick states that:

[F]or much of its history, corporate criminal law was marginalized from the mainstream of criminal justice, even in those jurisdictions that embraced the doctrine. In practice, criminal prosecution of corporate suspects remained something of an exception, perhaps reflecting both the power of large corporations and a recognition on the part of the state that prosecuting such cases was always going to be difficult and that – even in the best case – a conviction might result in socially undesirable collateral damage to innocent third parties.⁹⁶

The reluctance to charge corporations with criminal offences in a sanctions-based or punitive model, still finds support among some of today’s academics.⁹⁷ Generally speaking, in order to find corporate criminal liability, courts in common law countries began to hold that the “personal fault” of the “directing minds” of a corporation was deemed to also be the corporation’s personal fault. The critical question then became: which officers of a corporation are that corporation’s ‘directing minds’?

Civil law countries were less willing to accept the fiction that a corporation can have a guilty intent or mind, and instead focused on managerial personal liability.⁹⁸ However, since the

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ English law expanded criminal liability to municipalities first, and followed with corporations. The trend began first through “judicial rather than legislative action, and involved cases of criminal omission resulting in public nuisance. The scope of this new form of criminal liability gradually expanded, however, to include acts as well as omission and finally crimes requiring intent and not just absolute liability offences”: *ibid.* Criminal liability in the US developed in a similar manner: *ibid.*

⁹⁶ *Ibid* at 150.

⁹⁷ See for example, the “consent-based model” offered by Tom R Tyler in “Psychology and the Deterrence of Corporate Crime” in Jennifer Arlen ed, *Research Handbook on Corporate Crime and Financial Misdealing* (Cheltenham: Edward Elgar, 2018) 11. See also Jennifer Arlen, “Introduction” in Arlen, *ibid*, 1 at 1.

⁹⁸ Fenwick, *supra* note 92 at 150.

mid-20th century, many, but not all civil law countries began to recognize corporate criminal liability (an issue further discussed in Section 2.4).⁹⁹

There are currently three main legal mechanisms for imputing criminal liability to corporations. The differences between these mechanisms are significant. In addition, within each mechanism there can be variations in terms of broad or narrow attribution of criminal liability to corporations. The three mechanisms are:

1. strict vicarious liability (used in general for US federal laws);
2. directing mind or identification doctrine (used by countries such as England and Canada and by many states in the US and Australia); and
3. corporate culture (used in Australian federal laws).¹⁰⁰

Mark Pieth and Radha Ivory briefly summarize these three mechanisms:

- by imputing to the corporation offences committed by any corporate agent or employee – no matter what steps others in the corporation had taken to prevent and respond to the misconduct (strict vicarious liability), or if

⁹⁹ This evolution has occurred in part due to the OECD and UNCAC, but also due to the 2nd EU Protocol for European civil law countries:

In the technical sense, however, the 2nd EU Protocol required only a (neutral) “sanctioning” of the legal person for a limited number of criminal acts under certain (limited) conditions, but did not, despite some (erroneous) claims in that direction, oblige member states to introduce corporate criminal responsibility in the strict sense. Still, the 2nd EU Protocol outlines basic elements of corporate legal (penal) responsibility, among those most notably the “attribution model” (namely the concept of deriving corporate crime from the criminal acts of certain natural persons, whose behaviour is deemed attributable to the legal person), the distinction between an “inner” and an “outer” circle of individuals acting on behalf of the legal person (the behaviour by the “inner circle” being attributable as such as the legal person’s alter ego, while the more remote “outer circle” requires an additional surveillance or organisational mistake on the management level)

...

The idea of “corporate crime” has since the 2nd EU Protocol grown in EU law. Many EU legal acts (directives) use nowadays the language of a “standard clause” that requires penal sanctions against legal persons for deeds both by members of the inner and outer circle. Such “standard clauses” can, for example, be found in Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union’s financial interests. [footnotes omitted]

Peter Lewisch, “Corporate criminal liability for foreign bribery: perspectives from civil law jurisdictions within the European Union” (2018) 12:1 Law Financial Mark Rev 31 at 32.

¹⁰⁰ For an elaboration on these theories, see F Eriksson, M Kirya & M Stridsman, *OECD Public Consultation on Liability of Legal Persons*, (Submission by U4 Anti-Corruption Resource Centre, 2016) at 5-12, online (pdf): <<https://www.oecd.org/corruption/anti-bribery/U4-Submission-Corporate-Liability-28-10-2016.pdf>>.

others had not done enough to prevent the wrongdoing (qualified vicarious liability);

- by identifying the corporation with its executive bodies and managers and holding the corporation liable for their acts, omissions, and states of mind of those executives (identification); and
- by treating the collective entity as capable of offending in its own right, either through the aggregated thoughts and deeds of its senior stakeholders (aggregation) or through inadequate organizational systems and cultures (corporate culture, corporate (dis)organization).¹⁰¹

Countries such as France, Austria, Italy, and Switzerland have all enacted statutes that impose corporate criminal liability. Some jurisdictions, such as Germany, do not recognize corporate *criminal* liability, but instead impose quasi-criminal regulatory sanctions (or “administrative” regulation)¹⁰² on collective entities:

This approach reflected the view that the liability of legal persons is properly dealt with as part of public administrative law rather than the criminal law. Many countries in Europe... began to confront the growing power of business enterprises by introducing systems of administrative regulation, similar to “public welfare” offences in the United States or regulatory offences in the UK. These infractions are enforced by administrative agencies and have neither the status of criminal sanction and are thought to be morally neutral and lacking the element of condemnation and moral fault associated with criminal liability.¹⁰³

Outside of Europe, countries such as Korea, Japan and China recognize at least some form of corporate criminal liability. There remain, however, some countries, such as Uruguay that do not recognize criminal or quasi-criminal sanctions for companies.¹⁰⁴ In these countries, it is only possible to convict the employees, agents or executives of a company, but not the company itself. For a recent overview of corporate liability in Europe see: Clifford Chance’s, *Corporate Liability in Europe*.¹⁰⁵ The OECD Working Group on Bribery’s (WGB) 2016 review

¹⁰¹ Mark Pieth & Radha Ivory “Emergence and Convergence: Corporate Criminal Liability Principles in Overview” in M Pieth & R Ivory, eds, *Corporate Criminal Liability Emergence, Convergence and Risk* (Springer, 2011) 3 at 21–22.

¹⁰² Fenwick, *supra* note 92 at 150. See also Lewisch, *supra* note 99 at 32–33.

¹⁰³ Fenwick, *supra* note 92 at 150.

¹⁰⁴ Pieth & Ivory, *supra* note 101 at 21–22. See also OECD, *Corporate Liability for Corruption Offences in Latin America*, online (pdf): <http://www.oas.org/juridico/pdfs/enc_compilation.pdf> which states that Antigua and Barbuda; Argentina; Bahamas; Barbados; Bolivia; Brazil; Costa Rica; Dominica; Ecuador; Grenada; Guyana; Haiti; Honduras; Paraguay; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Suriname; Trinidad and Tobago; Uruguay and Venezuela have yet to create corporate criminal liability for corruption offences.

¹⁰⁵ Clifford Chance LLP, *Corporate Liability in Europe* (Clifford Chance, 2012), online (pdf): <http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>. See also Lewisch, *supra* note 99.

of corporate liability of the 41 countries that are parties to the OECD Convention is discussed in Section 2.2.2.¹⁰⁶

Among countries that recognize corporate criminal liability, there are significant variations regarding the offences for which criminal liability may be imposed and the way in which that liability is triggered. Most common law jurisdictions now accept that a corporation may be found to have *mens rea* through its human actors. Some civil law countries accept this proposition and impose corporate criminal liability for all crimes. Other civil law countries only accept this proposition for certain listed offences. Countries that employ a “list-based” approach generally restrict corporate criminal liability to economic and other types of offences associated with corporations, as well as offences established pursuant to international and regional conventions. A more detailed review of the ways in which various common law and civil law countries address corporate criminal liability can be found in Pieth and Ivory’s chapter “Emergence and Convergence: Corporate Criminal Liability Principles in Overview”¹⁰⁷ and in the 2016 OECD report *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*.¹⁰⁸

The attribution of criminal intent or fault to corporations also raises the possibility of a due diligence or compliance defence. The possible existence of that defence in the context of bribery and anti-corruption offences in the US, UK and Canada will be discussed in further detail.

2.1 UNCAC

UNCAC does not mandate that State Parties establish *criminal* sanctions for corporations involved in corruption offences. However, Article 26 requires State Parties to ensure that legal entities are liable (criminally or otherwise) for their participation in offences established under UNCAC. Fritz Heimann writes that, “[t]his is an important step because it should accelerate the abandonment of the antiquated concept that only individuals and not corporations shall be criminally liable for the offenses.”¹⁰⁹ Article 26 states:

Article 26. Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

¹⁰⁶ OECD Stocktaking (2016), *supra* note 28.

¹⁰⁷ Pieth & Ivory “Emergence and Convergence: Corporate Criminal Liability Principles in Overview”, *supra* note 101.

¹⁰⁸ OECD Stocktaking (2016), *supra* note 28.

¹⁰⁹ Fritz Heimann, “The UN Convention Against Corruption,” in Fritz Heimann & Mark Pieth, *Confronting Corruption: Past Concerns, Present Challenges and Future Strategies* (New York: Oxford University Press, 2018) 103 at 110.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

The *Legislative Guide* to UNCAC addresses corporate liability as follows:

[Article 26] complements the more general requirement of article 30, paragraph 1, that sanctions must take into account the gravity of the offence. Given that the investigation and prosecution of crimes of corruption can be quite lengthy, States with a legal system providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention are comparatively long (see also art. 29).

The most frequently used sanction is a fine, which is sometimes characterized as criminal, sometimes as non-criminal and sometimes as a hybrid. Other sanctions include exclusion from contracting with the Government (for example public procurement, aid procurement and export credit financing), forfeiture, confiscation, restitution, debarment or closing down of legal entities. In addition, States may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgment, the appointment of a trustee, the requirement to establish an effective internal compliance programme and the direct regulation of corporate structures.

The obligation to ensure that legal persons are subject to appropriate sanctions requires that these be provided for by legislation and should not limit or infringe on existing judicial independence or discretion with respect to sentencing. [footnotes omitted]¹¹⁰

2.2 OECD Convention

Corporate liability under the OECD Convention is similar to UNCAC.¹¹¹ Article 2 of the OECD Convention states:

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

The clause “in accordance with its legal principles” reflects the Convention’s goal of functional equivalency, meaning that State Parties are required to sanction the bribery of

¹¹⁰ Legislative Guide (2012), *supra* note 15 at paras 333-339. Reprinted with the permission of the United Nations. See also Rose et al, *supra* note 12 at 274-286.

¹¹¹ Heimann, *supra* note 109 at 110.

foreign public officials in the same manner that they would sanction other offences committed by corporations, without mandating changes in the fundamental principles of their respective legal systems.¹¹² In this regard, the *Commentaries on the Convention* state that if the concept of *criminal* responsibility of legal persons is not recognized in a nation's legal system, that nation is not required to establish it.¹¹³ Furthermore, Article 3(2) requires that if criminal liability for legal persons is not available, State Parties "shall ensure" that legal persons are subject to "effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials." This wording is very similar to the requirements regarding the sanctioning of legal persons later adopted by UNCAC. Pursuant to Article 3(4), State Parties shall also consider the imposition of additional civil or administrative sanctions, such as exclusion from participation in public procurement processes, exclusion from entitlement to certain benefits or a judicial winding-up order. These and other civil remedies are discussed in Chapter 7, Sections 7 to 10.

In 2009, the OECD Council adopted the 2009 *Recommendation for Further Combatting Bribery and Annex I*, which stated that member parties to the convention should not treat prosecution of natural persons as a prerequisite to also prosecuting the corporation, and secondly it provided guidance on different methods for attributing liability to the company based on the actions or inactions of natural persons associated with the company.¹¹⁴

Pieth notes that the OECD WGB has been reluctant to give directives on which sanctions it feels meet the standard of "effective, proportionate and dissuasive."¹¹⁵ Upon reviewing the WGB's Phase One evaluation of Japan (where it considered the sanctions available in Japan to be insufficient), Pieth argues that two principles are discernible:

[F]irst, that sanctions against corporations must be sufficiently 'tough' to have an impact on large multinational corporations, second, that according to the concept of functional equivalence a trade-off is possible between two theoretically quite different instruments, i.e. the corporate fine and the forfeiture/confiscation of illicit profits (Article 3(3) of the Convention).¹¹⁶

Pieth goes on to address how the different concepts of corporate criminal liability compare to the standard of effective, proportionate and dissuasive sanctions:

With respect to those countries which have implemented corporate criminal liability, the application of a mere identification model, imputing only offences of the most senior management to corporations and also frequently

¹¹² Pieth, *supra* note 91.

¹¹³ *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 13, online (pdf): <https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.

¹¹⁴ *Ibid* at 25.

¹¹⁵ Pieth, *supra* note 94 at 242. See also OECD, *Public consultation on liability of legal persons: Compilation of Responses* (2016), online (pdf): <<https://www.oecd.org/daf/anti-bribery/Online-consultation-compilation-contributions.pdf>> for some opinions on what may constitute appropriate sanctions.

¹¹⁶ *Ibid*.

refusing a concept of 'aggregate knowledge', would in our view fail to meet the requirements of 'effective, proportionate and dissuasive sanctions.'¹¹⁷

The comments above are relevant to the UK. They were also applicable to Canada before the 2004 legislative changes which provided a broader definition of corporate liability. Pieth then adds:

On the other hand, the terms of Articles 2 and 3 of the Convention would be met by countries whose liability concept includes lack of due diligence by senior management, allowing junior agents to engage in bribery.¹¹⁸

According to this view, the many State Parties that rely on the identification theory to trigger liability of corporate entities are failing to meet their full OECD Convention obligations.

2.2.1 Approaches to Corporate Criminal Liability

As demonstrated, the OECD and UNCAC provide for some flexibility in domestic approaches to corporate criminal liability. However, Elizabeth Acorn suggests that the frequency with which states enforce anti-bribery legislation is tied to the available methods of enforcement. For example, she writes:

[W]hile Canadian authorities exclusively respond to allegations of foreign bribery with the traditional criminal-law methods of lengthy trials and guilty pleas, prosecutors in other states, like the US and Germany, deploy a variety of tools to enforce their foreign-bribery prohibitions, including diversionary resolution mechanisms that do not require a determination of criminal guilt.¹¹⁹

Some commentators believe these other mechanisms may be more effective, and the addition of "criminal" punishment per se is not necessarily the most appropriate doctrinal or practical solution to curbing international corruption. When writing of Austria's reluctance to impose, or rather "late start" in imposing, corporate criminal liability, Peter Lewisch writes:

On the one hand, Austria had an elaborate, differentiated legal system that made it possible for new legal phenomena/challenges to be dealt with in a well-balanced way by "turning all available screws" in all legal fields concerned to accomplish an overall satisfactory outcome. Reliance on changes in all relevant pertinent fields (tort law, administrative law, administrative penal law, traditional criminal law) makes it possible to avoid overburdening one single legal field (say, criminal law) with tasks for which another field is better suited. In the case of "corporate crime", vicarious tort liability could go hand in hand with administrative penal

¹¹⁷ *Ibid* at 246.

¹¹⁸ *Ibid*.

¹¹⁹ Elizabeth Acorn, "Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization" (2018) 51:3 UBC L Rev 613 at 616.

sanctions and individual criminal punishment, thus accomplishing all relevant policy goals without “deforming” fundamental concepts of criminal law. There was hence no need to introduce corporate criminal responsibility: If it ain’t broken, don’t fix it. On the other hand, there were (and still are) substantial reservations both from the doctrinal self-understanding of criminal law and from constitutional law regarding the introduction of a new criminal sanction that would, while in substance equivalent to traditional criminal punishment, abandon the guilt requirement.¹²⁰

Acorn looks “to national policies to combat corporate and economic crime more generally and trace how they interact with the shared obligation to criminalize foreign bribery.”¹²¹ A divergence in policy between states can have significant impacts:

For instance, in the 20 years since the Convention's signing, the UK has experimented with several different approaches to anti-foreign-bribery enforcement, including a new offence that punishes corporations for the failure to prevent bribery. Much of this experimentation can be traced back to the challenging anti-foreign-bribery enforcement environment in the UK created by its high standard for corporate criminal liability. In contrast, in the US, the relatively low bar for corporate criminal liability and the pivot by federal prosecutors in the mid-2000s to the use of diversionary settlement procedures for corporate wrongdoing at large has enabled prolific anti-foreign-bribery enforcement.¹²²

Acorn identifies a spectrum of approaches to corporate anti-bribery enforcement, noting that there is a “traditional criminal-law approach on one end and a more flexible and regulatory approach on the other,” and that “[w]here a state falls on this continuum can influence the frequency, duration, and outcome of foreign-bribery prosecutions.”¹²³ Criminal trials are slower enforcement processes and take significant resources, while “negotiated resolutions ... can be much quicker and less resource intensive.”¹²⁴ Some commentators also question the effectiveness of heavy sanctions that have been increasingly levied in the recent past.¹²⁵

¹²⁰ Lewisch, *supra* note 99 at 32. Austria only began imposing such liability in 2006 through the “Act on Corporate Criminal Responsibility.”: *ibid* at 33.

¹²¹ Acorn, *supra* note 119 at 616.

¹²² *Ibid* at 616-617.

¹²³ *Ibid* at 631.

¹²⁴ *Ibid*.

¹²⁵ Vincent M Di Lorenzo, “Corporate Wrongdoing: Interactions of Legal Mandates and Corporate Culture” (2016) 36:1 *Rev Banking & Fin L* 207 at 209. Di Lorenzo at 252-153 offers an alternative approach to assessing the influences on corporate behaviour. See also Cindy R Alexander & Jennifer Arlen, “Does Conviction Matter? The Reputational and Collateral effects of corporate crime” in Jennifer Arlen, ed, *Research Handbook on Corporate Crime and Financial Misdealing* (Cheltenham: Edward Elgar, 2018), which explores whether settlements are as effective as criminal convictions in deterring corporate crime.

2.2.2 Corporate Liability in the 41 State Parties

The OECD's WGB conducted a comparative study on the liability of legal persons in the 41 Parties to the OECD Convention. In December 2016, the WGB released its final stocktaking report.¹²⁶

The report notes the vast global expansion of liability for "legal persons" that has taken place since the Convention's adoption in 1997, through creating legal person liability frameworks for foreign bribery in absence of prior traditions, adapting pre-existing frameworks for legal person liability to cover foreign bribery, or a multi-stage process of continued refinement for a corporate liability. The latter form is indicated by "multiple entries [which] suggest that the creation of an LP liability regime may be, for many countries, an ongoing search for an appropriate fit with the local legal system through experimentation and adaptation as they apply their laws."¹²⁷

The 2019 OECD report, *Strengthening Trust in Business*, reported the following:

The creation and refinement of corporate liability systems are key elements of this progress. At the time the Anti-Bribery Convention entered into force, a third of the Parties had no legal framework for corporate liability and many of the others had only very sketchy systems that did not reflect the complexities of business management. **Now, all Parties to the Anti-Bribery Convention can hold business organisations liable for crime in some form or other.** In most cases, corporate liability systems make companies accountable for foreign bribery and for a wide variety of other unlawful acts. This, along with the adoption of increasingly dissuasive sanctions for foreign bribery, strengthens incentives for companies to adopt management systems designed both to prevent corporate crime and to encourage them to cooperate with law enforcement. [emphasis added]¹²⁸

Regarding the "sketchy systems" just mentioned, the report states, "[f]or example, many of the common law members of the [WGB] had a 'directing mind' approach to the standard of corporate liability, meaning that involvement by the top decision-making echelons of the company must be proved, if liability is to be established."¹²⁹ The progress towards less "sketchy" (but nevertheless of great variation) corporate liability demonstrates an

¹²⁶ OECD Stocktaking (2016), *supra* note 28.

¹²⁷ *Ibid* at 14-15.

¹²⁸ OECD, *Business and Finance Outlook 2019: Strengthening Trust in Business* (OECD, 2019), online: <<https://www.oecd-ilibrary.org/sites/3afd3bc5-en/index.html?itemId=/content/component/3afd3bc5-en>>.

¹²⁹ *Ibid*. See also Stefan HC Lo, "Context and Purpose in Corporate Attribution: Can the Directing Mind Be Laid to Rest" (2017) 4:2 J Int'l & Comp L 349 for a critique of the directing mind doctrine.

overwhelming success in the persuasive nature of the OECD and indicates a shift in the prevailing attitudes towards corporate criminal liability.¹³⁰

In regard to each OECD country, the 2016 report also examines nine distinct aspects of the legal test or standard for liability of legal persons as well as three aspects of sanctions for legal persons found liable. As might be expected, there is significant variance in these features of legal person liability. These sections of the 2016 report make for very interesting reading for those who are interested in the nature and scope of corporate criminal liability amongst the 41 countries that are parties to the OECD Convention. Two of the most interesting aspects that are reviewed are:

- (1) *Liability of Legal Persons for Acts of Intermediaries*: The complexity of the global marketplace, and the variety of licit financial vehicles create significant obstacles for attribution of liability, and consequently, enforcement. Nicholas Lord et al. illustrate a “simple” scheme through which international corporate crime may be conducted:

Professional intermediaries are central to how corporate vehicles are misappropriated by those with illicit finances. To give a hypothetical example of how this functions, an intermediary such as a [Trust and Company Service Provider] or [Company Formation Agent], in country A, would be contacted by a representative, such as a lawyer, of the end client in country B and be hired to set up a corporate vehicle. The TCSP/CFA would then contact one of their agents in a jurisdiction known for its protection or obscuring of beneficial owners, country C. The agent in country C would then contact a local lawyer or professional who would incorporate or set up a corporate vehicle, such as a trust or limited company. The particulars of the corporate vehicle would then be sent back through the chain from the lawyer in country C to the agent in country C and back to the TCSP/CFA in country A and then back to the representative in country B. In these cases, the actual client in country B would never have contact with the TCSP/CFA or any other actor along the network but would pay all the associated fees and thus have the product, that is, the company or trust. Funds could then be remitted to a corresponding bank, as directed by the TCSP/CFA. This is a relatively simple scheme, but in practice, such arrangements can be layered, and in some cases, circular ownership structures will be created to obscure the

¹³⁰ OECD in 2020 also reported that 44 (or all) parties to the Convention had “strengthened or created corporate liability laws in compliance with commitments made under the Anti-Bribery Convention”: OECD, Working Group on Bribery, *Fighting the Crime of Foreign Bribery*, (OECD, 2018), online (pdf): <<https://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf>>.

beneficial owners. Contrived ownership networks create major obstacles to enforcement.¹³¹

Interactions between legal and natural persons, and legal and other legal persons, give rise to significant questions about the extent to which the criminal actions of one may be attributed to another.

Intermediaries can be “related” (i.e., subsidiaries or individual entities within a corporate group) or unrelated (i.e., third-party agents, consultants or contractors). The law on liability of legal persons for acts of intermediaries varies significantly. The 2016 report studies each country on the basis of various circumstances. In respect to related intermediaries, some of the more noteworthy models of liability recognized in the report are:

- *In the spirit of the organisation* [e.g., the Netherlands].
- *“On behalf of”*. In some countries, a parent company can be liable for the acts of its subsidiary, if the subsidiary is an “agent” or otherwise acting on its behalf. According to Norwegian officials and other panellists at the WGB’s on-site visit, Norway can hold the parent liable whenever the subsidiary acts “on behalf of” the parent. In the United States, “a parent may be liable for its subsidiary’s conduct under traditional agency principles”, whenever it has sufficient “control”, whether formally or in fact, over the subsidiary’s operations or conduct. Whenever such an “agency relationship” arises, the “subsidiary’s actions and knowledge” can trigger criminal or other liability for the parent company.
- *“For the benefit of”* [e.g., Slovenia].
- *Corporate Groups* [e.g., Brazil]. [footnotes omitted]

(2) Successor Liability: The 2016 report explains the importance of robust successor liability principles to the effective enforcement and sanctioning of corruption offences.¹³² Neither the OECD Convention, nor the 2009 Recommendation, specifically refer to successor liability.

¹³¹ Nicholas J Lord, Liz J Campbell & Karin Van Wingerde, “Other People’s Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-collar, Corporate and Organized Crimes” (2019) 59:5 British J Crim 1217 at 1224.

¹³² OECD Stocktaking (2016), *supra* note 28 at 101. For a critique of (and alternative to) successor liability, see Mihailis E Diamantis, “Successor Identity” (2019) 36:1 Yale J on Reg 1. At 4-5, Mihailis states:

The current state of successor liability should worry everyone from law and economics scholars to justice theorists. In a world where the annual social costs of white-collar crime often exceed half a trillion dollars and prosecutors regularly resolve corporate investigations for penalties exceeding one hundred million dollars, the stakes of getting corporate liability right are high. By automatically transmitting any criminal liability from predecessors to successors, current doctrine fails to distinguish between ways corporations can reorganize.

2.3 US

Under the US common law doctrine of *respondeat superior*, a corporation will be vicariously liable for acts of its employees that violate the *FCPA* if the employee was acting within the scope of his or her authority, and the employee acted, at least in part, for the benefit of the company.¹³³ Under this principle, even low-level employees acting in contravention of an express direction not to bribe a foreign official may still trigger liability for the corporation under federal law.¹³⁴ The term “scope of authority” means within the course of the employee’s ordinary duties. Robert Tarun and Peter Tomczak explain:

For example, an international salesman agreeing to bribe a foreign official in order to obtain or retain business will be deemed to be acting within the scope of his authority. The focus is on the function delegated to the agent or employee and whether the conduct falls within that general function. So long as the agent or employee’s acts are consistent with his general employment function, his employer may be held liable for those acts, even if they were contrary to express corporate policy. [footnotes omitted]¹³⁵

In addition, “the benefit of the corporation” need not be the sole motivating factor behind the employee’s decision to offer a bribe: “So long as the motive includes a direct or ancillary benefit to the corporation—either realized or unrealized—a corporation will be accountable

Reorganizations can differ widely. Corporations know this. It is no secret that they try to use their fluid form and the potentialities of reorganization to manage their liabilities, both criminal and civil. Law influences the choices corporations make during reorganization, and these choices can have important implications for criminal justice policy. One crucial lever of influence is how reorganization impacts corporate criminal liability. That lever is currently stuck in “transmit.”

Some reorganizations are socially preferable, and the law should incentivize them. More specifically, current law fails to recognize that corporate reorganizations are pivotal moments when corporations could be encouraged to make significant improvements to compliance. By ignoring the details of each reorganization, current doctrine also cannot distinguish between cases when punishing successor corporations would advance social goals, and when not. Though corporations may be fictional people, they are composed of largely innocent real people—shareholders, employees, etc. who bear the burdens of corporate sanctions: “When the corporation catches a cold, someone else sneezes.” The criminal law must balance considerations of social policy and justice where corporations are concerned because punishing them effectively sanctions their constituents. [footnotes omitted]

¹³³ Alexandra Babin, “Corporate Criminal Liability” (2021) 58:3 Annual Survey of White Collar Crime Am Crim L Rev 671 at 675.

¹³⁴ Tarun & Tomczak, *supra* note 30 at 73. See also Babin, *supra* note 133 at 676-677, which acknowledges that individual states have “varied methods of establishing liability based on employee behaviour.”

¹³⁵ Tarun & Tomczak, *supra* note 30 at 73.

for the agent or employee's acts."¹³⁶ However, where an employee's actions are a breach of their fiduciary duty to a corporation (that is, acting contrary to a corporation's best interests), their actions will not be imputed to the corporation.¹³⁷

Corporate criminal liability through *respondeat superior* has been the subject of significant critique, and these critics have espoused some standards and guidelines used by the DOJ and Sentencing Commission to respond to the ambit of *respondeat superior* in federal prosecutions.¹³⁸ For example, the *Principles of Federal Prosecution of Business Organizations* (*Principles of Prosecution*) "makes it clear that federal prosecutors should not bring criminal charges merely because a case can be made on the basis of *respondeat superior*. Rather, prosecutors must consider a variety of factors that identify corporate blameworthiness and assess the adequacy of alternatives to federal prosecution, including those deemed most important by the critics of *respondeat superior*."¹³⁹ Among these factors are the nature of the offence, risk to the public, pervasiveness and history of wrongdoing in the corporation, and the corporation's willingness to co-operate.¹⁴⁰ Sara Sun Beale observes that, "the discretionary approach under the *Principles of Prosecution* has substantially narrowed the effective reach of corporate liability."¹⁴¹

Despite some of the "cooling" of corporate criminal prosecutions in response to the *Principles of Prosecution*, some critics (including Senator Elizabeth Warren and prominent scholar Brandon Garrett) have also maintained that, "the Government too seldom employs the fruits of corporate cooperation to bring individual prosecutions, even when a corporation's own admissions have made it clear that there were culpable individuals."¹⁴² The DOJ faced significant criticism for the lacunae of prosecutions against individuals in the wake of the 2008 financial crisis.¹⁴³ This criticism resulted in the Yates Memo, which "restates the DOJ's view of criminal law and prosecutorial discretion as utilitarian tools that should be used pragmatically to protect the public, but it also emphasizes a new element: the public demand for individual accountability."¹⁴⁴ The Yates Memo provides "procedural adjustments [which are intended to implement the policy decision to 'strengthen [the] pursuit of individual corporate wrongdoing'" [footnote omitted]¹⁴⁵ and to ultimately provide deterrence and encourage changing corporate culture.¹⁴⁶ To put a finer point on the reception of the Yates Memo, Norton Rose Fulbright stated:

¹³⁶ *Ibid* at 74. For an overview of corporate *mens rea* in the United States, see Babin, *supra* note 133 at 679-681.

¹³⁷ Babin, *supra* note 133 at 679.

¹³⁸ Sara Sun Beale, "The Development and Evolution of the US Law of Corporate Criminal Liability and the Yates Memo" (2016) 46:1 *Stetson L Rev* 41 at 50.

¹³⁹ *Ibid* at 50-51.

¹⁴⁰ *Ibid* at 51. The *Principles of Prosecution* also consider the appropriateness of pursuing DPAs or NPAs instead of criminal prosecution. See *ibid* at 55.

¹⁴¹ *Ibid* at 56.

¹⁴² *Ibid* at 62.

¹⁴³ *Ibid* at 63.

¹⁴⁴ *Ibid* at 64.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

The extent to which these items represent policy changes, rather than mere clarifications of existing policy, is the subject of some debate. But whatever else might be said about the Yates Memo, the Memo's aggressive language and ambitious rhetoric combine to send a clear signal: individuals are in the crosshairs.¹⁴⁷

While the Yates Memo may signal a greater attention to individual over corporate criminal liability, Beale notes a significant and ongoing issue: bringing successful prosecutions against individuals in the corporate setting is notoriously difficult. Shifting away from corporate criminal liability (particularly to appease public opinion, which Beale opines was a significant motivation behind the shift in policy reflected in the Yates Memo) may not be an advisable way forward.¹⁴⁸ However, it may be the case that the Yates Memo has little actual influence on prosecutorial attitudes towards corporate criminal prosecutions. Koehler, for example, stated in 2015:

While many will likely view the Yates Memo as articulating new DOJ policy it really does not ... [T]he reality is that few DOJ corporate enforcement actions result in any related charges against company employees. In the FCPA context ... between 2008-2014, 75% of DOJ corporate enforcement actions have not (at least yet) resulted in any DOJ charges against company employees.¹⁴⁹

In 2018, during the Trump Administration, individual prosecutions post-Yates Memo remained high. However, a "more institution-friendly approach" was adopted. Among other measures, the Yates Memo was revised to limit the information corporations needed

¹⁴⁷ "The Yates Memo - a renewed US focus on individual misconduct in corporate investigations" (June 2016), online: *Norton Rose Fulbright* <<https://www.nortonrosefulbright.com/en/knowledge/publications/60f9aa82/the-yates-memo---a-renewed-us-focus-on-individual-misconduct-in-corporate-investigations>>. For another analysis of the Yates Memo, see also "Our view: (Unintended) Consequences of the Yates Memorandum" (28 October 2015), online: *Allen & Overy* <<https://www.allenoverly.com/en-gb/global/blogs/investigations-insight/our-view-unintended-consequences-of-the-yates-memorandum>>.

¹⁴⁸ The impact of the Yates Memo and shift to individual accountability is reflected in the self-reporting FCPA mechanisms. Beginning as a pilot program in 2016, Claire Rajan wrote that the "pilot program and cooperation requirements [which have been maintained since] are intended to supplement the existing sentencing guidelines for corporations and the so-called 'Yates Memo' that addresses individual responsibility – corporations will be required to provide information related to senior executives, officers, and employees' criminal misconduct to be considered for cooperation credit": Claire Rajan, "Self-reporting FCPA misconduct: A one-year pilot from the DOJ" (18 April 2016), online: *Allen & Overy* <<https://www.allenoverly.com/en-gb/global/blogs/investigations-insight/self-reporting-fcpa-misconduct-a-one-year-pilot-from-the-doj>>.

¹⁴⁹ "The Yates Memo" (11 September 2015), online (blog): *FCPA Professor* <<https://fcpaprofessor.com/the-yates-memo/>>.

to provide about individuals while still receiving cooperation credit.¹⁵⁰ It is predicted that the Biden Administration may roll back some of these adjustments:

While the [2018] revisions to its policies leave the DOJ with substantial flexibility to grant or decline cooperation credit, require a monitor and define its role, and impose appropriate penalties in multiagency investigations, financial institutions and other companies should expect the new department leadership under Attorney General nominee Merrick Garland to closely review these policies and potentially revise them. In light of the new administration's anticipated approach to corporate enforcement, **the DOJ may choose to increase the demands on cooperating institutions in providing information about potentially culpable individuals** and with regard to requiring monitors with a broad mandate and greater frequency. [emphasis added]¹⁵¹

Regardless, the landscape for corporate criminal liability in the United States appears to be in a continued state of oscillation, shifting in emphasis in response to public opinion, the practical realities of individual prosecutions, scholarly debate, and the point of view of the political party in power.

2.3.1 Corporate Criminal Liability: Foreign Subsidiaries

According to Tarun and Tomczak, whether US corporations are directly liable for the acts of their foreign subsidiaries is somewhat uncertain. They state:¹⁵²

While the legislative history and one case indicate that foreign subsidiaries of US companies acting on their own and not as agents of a US parent are not subject to the anti-bribery provisions ... the Resource Guide to the US *FCPA* states that there are two ways in which a parent company can be liable for bribes paid by a subsidiary:

First, a parent may have participated sufficiently in the activity to be directly liable for the conduct – as, for example when it directed its subsidiary's misconduct or otherwise directly participated in the bribe scheme. Second, a parent may be held liable for its subsidiary's conduct under traditional agency principles.

¹⁵⁰ David Meister et al, "Biden Administration Signals Intention to be Tougher on Corporate Crime" (11 February 2021), online: *Harvard Law School Forum on Corporate Crime* <<https://corpgov.law.harvard.edu/2021/02/11/biden-administration-signals-intention-to-be-tougher-on-corporate-crime/>>. For more detail on the 2018 adjustments, see Thomas Jones et al, "FCPA Digest: Cases and Review release Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977" (January 2019), online (pdf): *Shearman & Sterling* <<https://www.shearman.com/-/media/Files/Perspectives/2019/FCPA-Digest-LIT-01042019.pdf?la=en&hash=3FAF317C69E60D59CEAFF9F8D89E31261CBBD068>>.

¹⁵¹ Meister et al, *supra* note 150.

¹⁵² Tarun & Tomczak, *supra* note 30 at 33.

According to the *Resource Guide*, control over the subsidiary, both general and in terms of the specific transaction, is the key factor in determining whether an agency relationship exists. If the relationship exists, the subsidiary's actions and knowledge are imputed to the parent.

Tarun and Tomczak state that although the *FCPA* does not specifically address liability arising from the behaviour of foreign subsidiaries, there are "at least five" bases in American law under which a parent corporation could be liable for acts of bribery undertaken by its foreign subsidiaries:

First, a US company may be liable for bribery under agency principles if it had knowledge of or was willfully blind to the misconduct of its subsidiary. Second, a US parent corporation that authorizes, directs, or controls the wayward acts of a foreign subsidiary may be liable. Third, a US company may be held liable under principles of *respondeat superior* where its corporate veil can be pierced. Fourth, a US Company that takes actions abroad in furtherance of a bribery scheme may be found liable under the Act's 1998 alternative theory of nationality jurisdiction. Fifth, foreign subsidiaries may be liable if any act in furtherance of an illegal bribe took place in the United States territory.¹⁵³

In addition, under the accounting provisions of the *FCPA*, if the records of the parent and the subsidiary are consolidated for the purposes of filing documents pursuant to the SEC's mandatory reporting requirements, a parent company may be liable for the accounting violations of a foreign subsidiary.¹⁵⁴

Despite the *Resource Guide*, the SEC appears to be taking an increasingly liberal view of the ambit of parent-subsidiary liability. Koehler writes:

It is relatively common for the SEC to advance a strict liability theory of enforcement under the *FCPA*'s books and records and internal controls provisions against issuers for subsidiary actions.

However, in the WAC enforcement action the SEC took it a step further and held WAC strictly liable for *FCPA* anti-bribery violations by WAC de Mexico (a former wholly-owned subsidiary).

Under the heading "The Bribery Scheme," the SEC order contains five paragraphs of findings but there is not one finding as to WAC itself.

It is black-letter law that the legal liability of each distinct corporate entity is to be contained within that entity absent a finding of abuse of corporate form such as insufficient capitalization, failure to hold annual meetings or the like. In short, legal liability does not ordinary hop, skip and jump around a multinational company. However, in the WAC enforcement action (like certain others in the modern era of *FCPA* enforcement), the SEC

¹⁵³ *Ibid* at 33-34.

¹⁵⁴ *Ibid* at 34.

advanced the theory that a parent corporation is legally responsible for the acts of subsidiary employees **absent any allegation or suggestion that the parent company was aware of, or participated in, the alleged improper conduct.** [emphasis added]¹⁵⁵

2.3.2 Successor Liability

After a merger or acquisition, the successor company assumes the predecessor company's liabilities, including those arising under the *FCPA*. No liability will be created where there was none before, however; for example, if the predecessor was outside *FCPA* jurisdiction, it will not be retroactively subject to the *FCPA* after acquisition. Generally, the DOJ will only pursue *FCPA* actions against successor companies in extreme, egregious scenarios, such as the continuation of violations by the successor company.¹⁵⁶ This approach balances the "potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as

¹⁵⁵ "Issues To Consider From The World Acceptance Corp. Enforcement Action" (10 August 2020), online (blog): *FCPA Professor* <<https://fcprofessor.com/issues-consider-world-acceptance-corp-enforcement-action/>>. Another example is referenced in Shearman & Sterling's "FCPA Digest", *supra* note 150 at 21, which states:

The SEC's habit of charging parent issuers with violations of the anti-bribery provisions of the *FCPA* for the acts of a subsidiary without establishing that the parent authorized, directed, or controlled the subsidiary's corrupt conduct continues to be a problem. Instead of applying traditional concepts of corporate liability, the SEC often applies a theory of strict liability, taking the position that a subsidiary was ipso facto an agent of its parent. Therefore, applying the test for liability applicable to an employee's or agent's actions, any illegal act committed within the scope of the employee's or agent's duties, and at least in part for the benefit of the corporation results in corporate criminal liability. The latest example of this practice seems to be the *UTC* [United Technologies Corporation] enforcement action.

UTC involved allegations of corrupt payments in a number of countries—Azerbaijan, China, Kuwait, South Korea, Pakistan, Thailand, and Indonesia. The SEC's order was clear, however, that only the alleged payment of bribes to government officials in Azerbaijan by *UTC* subsidiary Otis Russia violated the antibribery provisions of the *FCPA*. According to the SEC, the remainder of the conduct alleged in the SEC's order violated only the internal controls and books-and-records provisions of the *FCPA*.

Notably absent from the allegations contained in the SEC's order, however, is any indication that United Technologies authorized, directed, or controlled the conduct at Otis Russia. Instead, it seems that the best link the SEC could draw between *UTC* and Otis Russia was that "UTC failed to detect the conduct and first learned of it in April 2017" — nearly five years after the alleged conduct had commenced. If this is truly the only basis for holding *UTC* liable for the conduct at Otis Russia, then it is the latest example of disregard for established limits on corporate criminal liability.

¹⁵⁶ DJSEC Resource Guide (2020), *supra* note 31 at 30.

practicable at the merged or acquired entity,”¹⁵⁷ with successor liability’s aptitude for addressing attempts to avoid criminal liability through corporate reorganization.¹⁵⁸

A 2018 example of successor liability under the *FCPA* is commented on by Shearman:

Kinross Gold provides another warning of the risks of successor liability in M&A transactions. In this case, Kinross was allegedly aware of inadequate internal controls at its two newly acquired subsidiaries even before it closed the acquisition and was on warning through internal audits that these issues continued post-closing. During this time, the subsidiaries continued to make improper payments to local vendors without confirming that the vendors provided the services, including after Kinross finally attempted to implement policies and adequate procedures at these companies. Kinross purportedly knew that the companies it had acquired “lacked an anti-corruption compliance program and associated internal accounting controls” and required “extensive remediation” but it failed to make the necessary remediation and the improper behavior continued and Kinross was held responsible.

Kinross serves as a cautionary tale for acquiring companies, but realistically it’s a pretty clear case. Based on the SEC’s order, the compliance risks appear to have been clearly known by Kinross, but the company did virtually nothing for at least three or four years after the acquisition to address the problems. We should let that serve as a fairly obvious lesson—if there are known risks in an acquisition, waiting four years to address them is far too long.¹⁵⁹

The bottom line, stated by Richard L. Cassin in his blog post referencing the risks of successor liability (particularly in the post COVID-19 landscape, where “two very different groups of companies will emerge from the lockdown: thousands with liquidity problems and uncertain futures, and hundreds with piles of cash and an appetite for growth”) is:

What’s most important to know about successor liability is this: *No compliance program on earth can guarantee that an acquiring company won’t be prosecuted for the acquired company’s prior FCPA violations.* [emphasis in original]¹⁶⁰

¹⁵⁷ *Ibid* at 29.

¹⁵⁸ *Ibid*.

¹⁵⁹ Shearman & Sterling, *supra* note 150 at 21-22. Shearman & Sterling provides a case summary at 350.

¹⁶⁰ Richard L. Cassin, “At Large: It’s time to have ‘the talk’ with your boss about successor liability” (28 May 2020), online (blog): *FCPA Blog* <<https://fcpublog.com/2020/05/28/at-large-its-time-to-have-the-talk-with-your-boss-about-successor-liability/>>.

2.4 UK

According to the traditional principles of corporate criminal liability in the UK, corporations, partnerships, and unincorporated bodies may be held criminally liable for offences under section 1, 2, and 6 of the *Bribery Act*.¹⁶¹ Under UK law, a corporation is its own legal entity with its own legal personality. This means that the corporation, separately from the natural persons who perform the activities of the corporation, can be involved in a corrupt transaction. The corporation may be involved in corrupt transactions either as an offender or as a victim. A corporation can be convicted of common law and statutory offences, including offences which require *mens rea*.¹⁶²

There are a few ways in which a corporation may be held criminally liable in the UK. If the offence is strict liability and requires no *mens rea*, there is no problem attributing liability to a corporation. A corporation can also be held vicariously liable for the acts of its employees or agents in situations where a natural person would also be vicariously liable, for example, where a statute imposes vicarious liability. This means that the acts and state of mind of employees or agents are attributed to the corporate body.¹⁶³

For offences that require *mens rea* and do not allow vicarious liability, corporate liability depends on the identification principle. If the offence is committed by an officer who is senior enough to be part of the directing mind and will of the company, and if the offence was committed within the scope of the offender's authority as a corporate officer, the offender's acts and state of mind will be deemed those of the company itself. The act does not need to benefit or intend to benefit the legal person.¹⁶⁴ The corporation can be convicted of an offence without a natural person being prosecuted for that offence. The identification principle is used to determine corporate liability for offences under sections 1, 2, and 6 of the *Bribery Act*, as well as the false accounting offences under the *Theft Act*.

Because of the need to find subjective fault (*mens rea*) in one of the company's directing minds, the identification doctrine is often ineffective in establishing corporate liability. Firstly, identifying the directing minds of a large multinational corporation can be a challenge, due to the 'diffusion of managerial power,' meaning "a company's layers of management and decision makers [which] insulate the directing mind and will from any attribution of intent. These days, the board of a company will not be involved in the day-to-day decision making."¹⁶⁵ Even when the directing minds can be identified, attributing fault to senior officers presents difficulties. Andrew Ashworth explains that the doctrine "allows large companies to disassociate themselves from the conduct of their local managers, and

¹⁶¹ For further detail concerning corporate criminal liability in the UK see: A Pinto and M Evans, *Corporate Criminal Liability*, 4th ed (Sweet & Maxwell, 2021) and Celia Wells, "Corporate Criminal Liability in England and Wales: Past, Present, and Future" in Pieth & Ivory, *supra* note 101, 91 at 91.

¹⁶² Nicholls et al, *Corruption and Misuse of Public Office*, 3rd ed (Oxford University Press, 2017) at 41.

¹⁶³ David Ormerod, *Smith and Hogan's Criminal Law*, 15th ed (Oxford University Press, 2018) at 248–249.

¹⁶⁴ Nicholls et al, *supra* note 162 at 42.

¹⁶⁵ "Corporate Criminal Liability in the UK: A new era is coming... isn't it?" (18 November 2020), online: Bryan Cave Leighton Paisner LLP <<https://www.bclplaw.com/en-US/insights/corporate-criminal-liability-in-the-uk-a-new-era-is-coming-isnt-it.html>>.

thus to avoid criminal liability. Moreover, where a large national or multi-national company is prosecuted, the identification principle requires the prosecution to establish that one of the directors or top managers had the required knowledge or culpability. Managers at such a high level tend to focus on broader policy issues, not working practices.”¹⁶⁶ As a result, in cases of bribery committed by a foreign agent in a foreign country to secure business for a company, it can be very difficult to prove that a senior officer of that company was the directing mind behind the bribery offence. The identification doctrine also fails to establish liability for corporate culture, which can develop independently from senior officers at the highest levels. Further, English law does not allow aggregation of the states of mind of more than one person in the corporation in order to satisfy *mens rea* requirements, and in modern corporations, decision-making is more often generated through overarching procedures and policies more-so than the choices of particular individuals.¹⁶⁷ Thus, historically it was very difficult for corporations to be convicted of bribery. Indeed, at the inception of the UK *Bribery Act*, James Maton said, “there has never been a successful prosecution in England of a company for bribery.”¹⁶⁸ Additionally, Bryan Cave Leighton Paisner LLP observe:

¹⁶⁶ Andrew Ashworth, *Principles of Criminal Law*, 9th ed (Oxford University Press, 2019) at 170.

¹⁶⁷ Bryan Cave Leighton Paisner, *supra* note 165.

¹⁶⁸ James Maton, “The UK *Bribery Act* 2010” (2010) 36:3 Employee Rel LJ 37 at 40. Lucy Rogers and Anneka Randhawa recently noted that “[p]rior to 2010, UK bribery laws were considered inadequate.... This was evidenced in the UK’s failure to prosecute a single case of bribery against a company,” suggesting that the simplification of corporate criminal liability in section 7 is one of the *Act*’s key achievements: Anneka Randhawa & Lucy Rogers, “Reflections on the UK *Bribery Act* (Part I): The *Act*’s Key Achievements” (14 June 2021), online: *White & Case LLP* <<https://www.whitecase.com/publications/alert/reflections-uk-bribery-act-part-i>>. Furthermore, English case law has generally defined “directing mind” quite narrowly: See *Tesco Supermarkets Ltd v Natras*, [1972] AC 153 (HL); *Director General of Fair Trading v Pioneer Concrete (UK) Ltd*, [1995] 1 AC 456; and *Meridian Global Funds Management Asia Ltd v Securities Commission*, [1995] 2 AC 500. While M Jefferson, “Corporate Criminal Liability in the 1990s” (2000) 64 J Crim L 106 argues that there has been some expansion of the directing mind test, E Ferran, “Corporate Attribution and the Directing Mind and Will” (2011) 127 Law Q Rev 239 suggests the wider *Meridian* test is not always applied. Ferran’s observations were confirmed in the Law Commission’s Discussion Paper 2021 at 12-16 (UK, Law Commission, *Corporate Criminal Liability: A discussion paper* (9 June 2021), online (pdf): <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/06/Corporate-Criminal-Liability-Discussion-Paper.pdf>>).

In our 2010 consultation paper on Criminal Liability in Regulatory Contexts, we said: “It is clear from the decisions in *Pioneer Concrete* and in *Meridian* that the courts now have the latitude to interpret statutes imposing corporate criminal liability as imposing it on different bases, depending on what will best fulfil the statutory purpose in question” [“the special rule”]. Consequently we concluded,

There is no pressing need for statutory reform or replacement of the identification doctrine. That doctrine should only be applied as the basis for judging corporate conduct in the criminal law if the aims of the statute in question will be best fulfilled by applying it... We encourage the courts not to presume that the identification doctrine applies when interpreting the scope of statutory criminal offences applicable to companies.

[t]he [identification] principle has the perverse effect of making it easier to prosecute smaller companies. It will always be easier to link the intent of a smaller company's directing mind and will with the criminal act. This creates an unbalanced corporate criminal landscape that favours larger entities. As a matter of legal principle this is an unfortunate outcome.¹⁶⁹

This ramification of the identification principle is hardly compatible with the goal of addressing global corruption. That is, a doctrine that provides for the ease of prosecuting small companies does little to further the more important objective of prosecuting massive corruption by multinational and powerful entities.

The difficulty of attributing liability to corporations, especially large multinational corporations, prompted criticism in Phase 1 and Phase 2 Evaluations of the UK by the OECD WGB. The UK has addressed the difficulties of the identification doctrine by creating offences that impose a duty on companies, for example, in the *Corporate Manslaughter and Corporate Homicide Act* of 2007¹⁷⁰ and *Criminal Finances Act 2017* (the latter albeit in a limited manner).¹⁷¹ The imposition of a corporate duty bypasses the difficulty of establishing culpability on the part of a controlling mind in the company. Section 7 of the *Bribery Act* is

However, that ambition has not been realised. In fact, the courts have strongly reaffirmed the identification doctrine as the primary rule of attribution. In *Serious Fraud Office v Barclays*, Lord Justice Davis ... held that the "special rule" of attribution only comes into play when insistence on the primary rule would defeat Parliament's intention ...

That is to say, rather than "not presuming" that the identification principles applies (as we had proposed), and only applying it if this would best fulfil the aims of the statute, *Barclays* holds that it is presumed that the identification doctrine does apply, and can only be displaced if applying it would *defeat* the aims of the statute.

...

Barclays makes the law more restrictive than under *Tesco v Natrass*. The judges in *Tesco* appeared to accept that a Managing Director was likely to constitute a DMW as the company's ego without needing to look whether the extent of delegation made them its alter ego. *Barclays* suggests that it is not enough to identify one or more directors with the requisite intent. Rather, it is also necessary to show that the board collectively possessed the necessary *mens rea* or that those identified directors had sufficient de jure authority to engage in the conduct on the behalf of the board of directors.

SFO v Barclays therefore can be seen as signalling the reversal of a period in which the courts had adopted a much more flexible approach to attribution of criminal liability [and] arguably makes the law harder to apply to a large corporation than *Tesco* envisaged.... Our conclusion in 2010 that there was no pressing need for reform of the identification doctrine was based on the trajectory of legal development.... In the light of *Barclays*, the assumptions on which that conclusion was based no longer hold true.

¹⁶⁹ Bryan Cave Leighton Paiser, *supra* note 165.

¹⁷⁰ Ormerod, *supra* note 163 at 246.

¹⁷¹ Nicholls et al, *supra* note 162 at 42.

another example of this form of corporate liability, sometimes referred to as “failure to prevent” or “FTP” offences, further discussed in Section 2.4.1.

Since the adoption of the FTP offence in section 7, there has been a “growing appetite” for broader implementation of this kind of offence in other areas of economic crime, such as money laundering.¹⁷² This may indicate a broader shift that may be anticipated in UK corporate criminal law.¹⁷³

Some commentators argue that FTP offences, however, should not overtake prosecution of substantive offences. The Law Commission recognized this critique:

[A] criticism of “failure to prevent” offences as an alternative to prosecuting the substantive offence is that these offences do not carry the same culpability (although the company might in appropriate cases be convicted of the substantive offence). As Dsouza puts it,

Bespoke corporate offences that are used to sidestep questions of attribution also carry bespoke labels.... At least part of why we want to hold corporations criminally responsible relates to a conviction’s morally loaded content.... Shifting the locus of culpability away from the objectionable conduct weakens the basis for the public and morally loaded condemnation that is the currency of a conviction.¹⁷⁴

The Commission further noted that, if FTP offences are to be implemented more broadly, they would need to consider the scope of offences, whether the offence is to be limited to associated persons or may be extended to the use of third-party platforms or financial services, and what defences ought to be available.¹⁷⁵ Alternatively, the Law Commission also stated that the SFO has proposed that FTPs could overtake the identification principle all together:

Under this model, where a substantive offence was committed by an associated person, to obtain or retain business or a business advantage for a company or otherwise to benefit the company financially, the conduct would be attributed to the company and the company would be guilty of the substantive offence.¹⁷⁶

¹⁷² Anneka Randhawa & Margot Davies, “Reflections on the UK *Bribery Act* (Part II): The legacy of the *Bribery Act*: Beyond bribery and towards a wider ‘failure to prevent’ offence” (29 June 2011): *White & Case LLP* <<https://www.whitecase.com/publications/alert/reflections-uk-bribery-act-part-iii>>.

¹⁷³ *Ibid.*

¹⁷⁴ Law Commission, *supra* note 168 at 24, citing Mark Dsouza, “The Corporate Agent in Criminal Law – An argument for comprehensive identification” (2020) 79:1 Cambridge LJ 91.

¹⁷⁵ *Ibid* at 24-25.

¹⁷⁶ *Ibid* at 25.

2.4.1 *Bribery Act Section 7*

Section 7 creates a new strict liability offence of failure of a commercial organization to prevent bribery. It is triggered when a person associated with a “relevant commercial organization” (bodies corporate or partnerships) bribes another person for the benefit of the commercial organization. A conviction under section 7 does not require a conviction for a section 1, 2 or 6 offence, but there must be sufficient evidence that the act of bribery did occur.

A codified defence to the charge exists. The organization is exonerated if it can prove, on a balance of probabilities, that notwithstanding the actions of the associated person, it had adequate procedures in place to prevent such persons from engaging in bribery.

Section 7 defines the scope of this new offence in the following words:

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.¹⁷⁷

Under section 7, a commercial organization may be found guilty of an offence if anyone associated with the company’s business participates in bribery, unless the organization has adequate procedures in place to prevent the bribery. The offence can be made out even if the controlling minds of the organization were completely unaware of the bribery. To be “associated” with the organization, person A must be a “person who performs services for or on behalf of”¹⁷⁸ the organization. The capacity in which he or she performs these services does not matter; for example, person A may be an employee, agent or subsidiary, and there need not be a formal contract or in fact any degree of control.¹⁷⁹ Person A does not need to have a close connection with the UK and may be an individual, a body corporate or a partnership. If person A is a subsidiary, the parent company will only be liable if the subsidiary acts in the parent’s interest, or phrased differently, they must be *performing services on behalf of the parent, not simply on their own account* (as the “offence has been specifically designed to prevent parent companies from avoiding liability under the cover of separate subsidiary companies”¹⁸⁰). If the subsidiary bribes in its own interests, the parent will not be liable, even if the subsidiary is wholly owned by that parent.¹⁸¹

The phrase “bribes another person” means that to be convicted under section 7, person A is or would be guilty of an offence under sections 1 or 6 (whether prosecuted or not), or would be guilty of such an offence if section 12(2)(c) and (4) dealing with jurisdiction to prosecute

¹⁷⁷ Interestingly, there is no corresponding offence of failure to prevent the taking of a bribe.

¹⁷⁸ Nicholls et al, *supra* note 162 at para 3.105.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid* at para 3.107.

¹⁸¹ Bob Sullivan, “Reformulating Bribery: A Legal Critique of the *Bribery Act 2010*” in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law* (Cambridge University Press, 2013) 13 at 30.

were omitted.¹⁸² Furthermore, the person will be deemed to have committed the offence if their conduct amounted to aiding, abetting, counselling or procuring the offence.¹⁸³

Section 7 applies to “relevant commercial organisations,” that is, companies incorporated in the UK or partnerships formed in the UK, as well as to bodies corporate and partnerships incorporated or formed anywhere and carrying on a business or part of a business in the UK. As Stephen Gentle notes, the careful drafting of “carries on a business,” rather than simply “carries on business,” is reflective of the wide jurisdiction of the offence.¹⁸⁴ The mere business presence of an overseas entity in the UK, irrespective of whether business is actually carried out in the UK, is enough to fulfill the jurisdictional requirements of the offence.¹⁸⁵ That being said, the Government intends a “common sense approach” and has suggested that organizations without a “demonstrable business presence in the United Kingdom”¹⁸⁶ will not be caught by this section.

It should be noted that the *Bribery Act* contains no provision specifically insulating person A from secondary liability in respect to the offence under section 7 (in contrast to, for example, the offence in the UK of corporate manslaughter).¹⁸⁷ However, person A is already guilty of the intentional offence of bribery under sections 1 or 6, so it would be somewhat pointless to also charge or convict person A of the strict liability offence under section 7, where person A’s conduct of aiding and abetting the section 7 offence is exactly the same conduct that constitutes the section 1 or section 6 offence.

Section 7(2) states that a full defence to the charge is available if the company can prove on a balance of probabilities that it had adequate procedures in place and followed those procedures at the time the bribery occurred in order to prevent associated persons from engaging in bribery. For more information on the adequate procedures defence, refer to Chapter 2, Section 2.4.3(i).

According to Celia Wells, the significance of this relatively new offence to UK law “cannot be over emphasized,”¹⁸⁸ and as shown, its presence is already foreshadowing significant potential changes to corporate criminal liability in the UK more generally (or at the very

¹⁸² Section 12 deals with the territorial application of the *Bribery Act*. If the offence takes place outside the UK but would constitute an offence if committed within the UK, and the individual in question has a close connection with the UK, the person may still be charged under sections 1, 2, and 6. Sections 12(2)(c) and 12(4) deal with the “close connection to the UK”; therefore persons associated with commercial organisations can be found to be “bribing another person” for the purposes of the organisation failing to prevent bribery, even if the activity took place outside of the UK and the individual had no close connection with the UK, so long as the organisation fell within the definition of a commercial organization.

¹⁸³ Nicholls et al, *supra* note 162 at para 3.111.

¹⁸⁴ Stephen Gentle, “The *Bribery Act* 2010: (2) The Corporate Offence” (2011) 2 Crim L Rev 101 at 105.

¹⁸⁵ *Ibid.*

¹⁸⁶ UK, Ministry of Justice, *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)* (London: Her Majesty’s Stationary Office, 2012) [UK Min J Guidance (2012)] at para 36, online (pdf): <<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>.

¹⁸⁷ GR Sullivan, “The *Bribery Act* 2010: (1) An Overview” (2011) 2 Crim L Rev 87 at 95.

¹⁸⁸ Wells, *supra* note 161 at 107.

least, for economic crime). The provision places important obligations on companies to proactively prevent corruption within their organization. Wells views the provision as key to ensuring corporate accountability for bribery. However, the OECD WGB's *Phase 3 Report* (March 2012) notes that the section 7 offence does not completely eliminate the limitations of the UK's narrow identification doctrine.¹⁸⁹ If the "associated person" is a subsidiary or another company, the identification doctrine is still necessary to determine whether the associated person committed bribery. That said, this issue was not raised again in the *Phase 4 Report*, where the OECD provides the following commentary on the identification doctrine (and UK's corporate criminal liability in the *Bribery Act*):

Since Phase 3, while criminal liability for foreign bribery has been imposed on six companies ... the various concepts of corporate liability for foreign bribery have not been interpreted by the courts. Section 7 of the *Bribery Act* was the basis for criminal liability in four cases – *Rolls Royce*, *Sweett Group*, *Standard Bank* and *XYZ Limited*. Sweett Group pleaded guilty. Rolls Royce, Standard Bank and XYZ entered into DPAs. Accordingly, the defence of adequate procedures has not been tested in the courts. The identification theory was the basis for criminal liability in *Rolls Royce* (some of the offending occurred prior to the *Bribery Act*) and in *XYZ Limited* (the offending in that case occurred from 2004-2012, spanning both the old and the new UK foreign bribery regimes) and *Smith & Ouzman*. These cases were resolved through DPAs and, for *Smith & Ouzman* by a finding of guilt by the court. Although the *Smith & Ouzman* case involved a contested trial in which the legal person and natural persons accused pleaded not guilty, the case does not advance the identification theory of corporate liability because the company directors themselves committed the bribery. Consequently, there have been no relevant developments with regard to the identification theory in foreign bribery.¹⁹⁰

Additionally, the OECD did note the possible disproportionate effects of the identification theory on small and medium sized enterprises (SMEs), but these seem to be addressed through prosecutorial discretion:

SMEs may face other challenges that are not as apparent for large multinational corporations. While these challenges are a horizontal issue across many WGB members, they are perhaps particularly acute in the UK context because of the specificities of the systems of corporate liability. These challenges include limited ability to find resources to defend foreign bribery charges. Furthermore, SMEs are arguably exposed to greater risk of law enforcement, since it is easier to establish the corporate liability of an SME under the identification doctrine because the "directing mind of the entity" would usually be much easier to establish than in a vast, complex

¹⁸⁹ "United Kingdom - OECD Anti-Bribery Convention" (last visited 21 July 2021), online: *OECD* <<http://www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm>>.

¹⁹⁰ OECD, Working Group on Bribery, *Implementing the OECD Bribery Convention - Phase 4 Report: United Kingdom*, (2017) at 75, online (pdf): <<https://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>>.

corporate structure.... Civil society and lawyers at the on-site visit also urged law enforcement to resist any temptation to only pursue these easier targets and to be careful to also pursue major corporates and their senior officials. The sanctions imposed on Rolls-Royce since the on-site visit and the fact that the SFO is looking into allegations of foreign bribery involving other major household brand companies, including Airbus and GlaxoSmithKline, suggest the SFO is serious about pursuing major corporates and is not targeting only SMEs. Nevertheless, support from the UK Government to SMEs to better understand and develop adequate anti-corruption compliance is crucial.¹⁹¹

Section 7 has received criticism for being overly broad. Jon Jordan, Senior Investigations Counsel with the Foreign Corrupt Practices Unit of the US SEC, believes the “provision is both revolutionary and dangerous.”¹⁹² That said, as the *Bribery Act* reaches its 10th birthday, commentators have noted that the provision has “had a significant impact on corporate culture in the UK”¹⁹³ through its rejection of the identification principle, reversal of the burden proof, and capacity to lower the evidential bar for prosecution:

This fundamental change prompted many organisations to completely overhaul their compliance programmes, with a view to preventing bribery by associated persons, and therefore being able to rely on the adequate procedures defence provided by the Act should they fail to do so. As the OECD noted, the Bribery Act has “prompted substantial progress” in the adoption of anti-corruption measures, which are “well advanced” in UK companies. On that measure, before assessing prosecutions and convictions under the Act, it may be judged a success. [footnotes omitted]¹⁹⁴

Alison Lepeuple et al. go on to note that if the success of section 7 were to be measured by the number of prosecutions, then there is much less to celebrate. Only two companies were convicted of section 7 offences as of their May 2021 blog post, and this lack of enforcement may prompt corporations to “cut corners”:

In light of these figures, companies that spent significant sums adopting stronger anti-bribery programmes ten years ago might reconsider whether the cost of maintaining or improving these programmes is proportionate to the risk of prosecution.

In an OECD study on the drivers of anti-corruption compliance internationally, over 80% of respondents stated that avoiding prosecution

¹⁹¹ *Ibid* at 79-80.

¹⁹² Jon Jordan, “Recent Developments in the *Foreign Corrupt Practices Act* and the New UK *Bribery Act*: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery” (2011) 7 NYU JL & Bus 845 at 865.

¹⁹³ Alison Lepeuple, Josef Rybacki & Frederick Saugman, “*Bribery Act* 2010: 10 Years On” (21 May 2021), online (blog): *Wilmerhale Wire UK* <<https://www.wilmerhale.com/en/insights/blogs/wilmerhale-w-i-r-e-uk/20210521-bribery-act-2010-ten-years-on>>.

¹⁹⁴ *Ibid*.

or protecting their company's reputation was a "significant" or "very significant" factor in their decision to adopt an anti-bribery programme. If prosecution does not appear to be a realistic prospect, motivation to maintain high standards in such programmes may start to wane, particularly among smaller organisations.

A March 2012 survey by FTI Consulting found that 29% of respondents were "risk takers" who were prepared to contravene the Act to win new business, while 20% of respondents were "confident" that they could do so "without getting caught." These more cavalier companies and individuals are unlikely to have been cowed into compliance by prosecution figures to date. [footnotes omitted]¹⁹⁵

On the other hand, there has been more enforcement through DPAs, particularly in cases that are significant in scale.¹⁹⁶

Additionally, the lack of case law, definitions in the *Act* or Government guidance on "adequate procedures" makes it difficult for even motivated corporations to comply with the *Act*. The 2012 *Guidance* is too "high-level" and at times, confusing.¹⁹⁷ Notably, the US also considered codifying this type of compliance defence, but ultimately rejected this approach. Instead, the US *FCPA* places positive obligations on companies to make and keep accurate

¹⁹⁵ *Ibid.*

¹⁹⁶ For example, Lepeuple et al, *ibid*, state:

The six section 7 DPAs have resulted in financial sanctions totalling over a billion pounds. In contrast, one of the two section 7 convictions resulted in a financial penalty of £2.25 million following a guilty plea and the other, prosecuted by the CPS, resulted in an absolute discharge—the only outcome possible against a dormant company. The authorities appear content to reserve their prosecutorial teeth for the lowest-hanging fruit.

It would be surprising to see the SFO deviate from this pattern. Against the vulnerable, it can afford to expend the energy required for the hunt, confident of the kill or of finding its prey dead on arrival. Against more robust targets, a more circumspect approach is required. Through the DPA process, the SFO can hedge against the risk that a lengthy and expensive investigation will fail to yield results by passing the investigative burden to the company and, on current form, securing lucrative financial penalties, never mind the lack of convictions.

¹⁹⁷ Lepeuple et al, *ibid*, write:

One confusing example from the guidance is the suggestion that "flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York ... and some reasonable hospitality ... such as fine dining and attendance at a baseball match" are unlikely to fall within the scope of the *Act*. The OECD noted that this was "this is a high-risk activity under almost all circumstances." In other words, the guidance is not only vague but also potentially unreliable. Commercial organisations seeking to comply with the *Act* are left unable to ascertain whether their existing or proposed compliance programmes meet the required standard.

books and records, and to maintain a system of internal accounting controls. In Skinnider's paper, "Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response," the compliance defence is described as follows:

The Affirmative Compliance Defences

The compliance defence provides that corporations will not be held vicariously liable for a violation of the foreign corruption act by its employees or agents if the company established procedures reasonably designed to prevent and detect such violations by employees and agents. Generally this refers to employees and not officers or directors. Such a defence is an affirmative defence for corporations faced with possible criminal charges if the corporation can present "good faith efforts" to achieve compliance with the laws, usually demonstrated by corporate compliance programmes. This defence recognises that despite best efforts and with the utmost diligence, corporations can still find themselves the subject of criminal prosecutions. [footnotes omitted]¹⁹⁸

Another development in the UK to note is the lack of enforcement against individuals in the UK through the *Bribery Act*, suggesting a significant *emphasis* on corporate liability for bribery. While the United States has repeatedly stated their focus on individual accountability (as evidenced in the Yates Memo), and in 2018, more explicitly created a more institution-friendly environment, there is a striking disconnect "between corporate resolutions under the [UK Bribery] Act and the subsequent prosecution of individuals connected to corporate misconduct."¹⁹⁹

2.5 Canada

Pursuant to section 2 of *CFPOA*, the offence provisions *apply* to "persons," as defined in section 2 of the *Criminal Code*. Section 2 of the *Criminal Code* states that "person" includes an organization, which is defined as:

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that

¹⁹⁸ Skinnider, *supra* note 89 at 15–17. See also updated version by Skinnider and Ferguson (2017).

¹⁹⁹ Lepeuple et al, *supra* note 193, continue:

The SFO prosecuted three individuals connected to the misconduct described in each of the Güralp Systems Ltd and Sarclad Ltd DPAs. All were acquitted. The DPAs with Airline Services, Rolls-Royce and Standard Bank did not lead to the prosecution of any individuals. To date, no individuals have been successfully prosecuted under the Bribery Act for conduct linked to a DPA. Given that the underlying premise of the DPAs is that offences have been committed under sections 1 or 6, this lack of convictions is noteworthy. [footnotes omitted]

- (i) is created for a common purpose,
- (ii) has an operational structure, and
- (iii) holds itself out to the public as an association of persons.

Therefore, companies and other organizations are considered “persons” under *CFPOA* and the *Criminal Code* and may be prosecuted for *CFPOA* and *Criminal Code* offences. It should also be noted that by knowingly engaging in corruption offences on three or more occasions, companies meet the definition of “criminal organization” under section 467.1, and can therefore be prosecuted for the additional criminal organization offences in the *Criminal Code*. Notably, the broad definition of “organization” extends liability to types of organizations that do not have the status of legal persons in the same way that corporations do. It is also notable that the *CFPOA*, unlike the *FCPA*, does not have a civil component—it solely addresses criminal conduct.²⁰⁰

Prior to 2004, corporate criminal liability was based on the common law principle of the directing mind (also known as the “identification doctrine”). In 2003, the Canadian Government amended the *Criminal Code* and replaced the common law “directing minds” doctrine with a statutory scheme for corporate criminal liability. This new statutory scheme uses a much broader and more flexible definition of which officials in a corporation are to be “identified” as the corporation in respect to their acts, omissions and states of mind. Via section 34(2) of the federal *Interpretation Act*, the new *Criminal Code* corporate liability scheme also applies to *CFPOA* offences. Section 22.1 of the *Criminal Code* widens the scope of corporate criminal liability in the context of criminal and penal negligence offences, and section 22.2 provides the test for other *mens rea*-based offences. Section 22.2 is the relevant section of the *Criminal Code* for determining corporate liability under the *CFPOA* since those offences require the prosecutor to prove subjective fault. It reads as follows:

22.2 In respect of an offence that requires the prosecution to prove fault—other than negligence—an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

This statutory scheme for corporate liability for crimes which require subjective fault still relies on the identification theory. However, the common law concept of “directing minds”

²⁰⁰ “Guide to Doing Business in Canada: White Collar Crime/Corruption” (1 October 2020), online: *Gowling WLG* <<https://gowlingwlg.com/en/insights-resources/guides/2020/doing-business-in-canada-white-collar-crime/>>.

has been replaced with the broader concept of “senior officers.” A “senior officer” is defined in the *Criminal Code* as follows:

a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

“Representative” is defined to mean “a director, partner, employee, member, agent or contractor of the organization.”

The term “senior officer” is broader than the common law directing minds concept as it includes persons who are responsible for managing an important aspect of the company’s activities. Under the old test, in order for a person to be considered a directing mind, they had to be more than a manager of an important aspect of the company’s activities; they also had to have the authority to design or implement corporate policy.²⁰¹ In practice, this made establishing corporate criminal liability very difficult.²⁰²

Despite these adjustments to the directing minds doctrine and thus, corporate criminal liability, there has been little enforcement against corporations. Ultimately, “the amendments have not been very successful, and corporate crime continues to primarily be an issue at the locus of the accused individual.”²⁰³ Further, Lincoln Caylor and Nathan Shaheen observe:

Canadian law enforcement has also focused primarily on individual prosecution. As such, the American approach wherein corporations have an incentive to conduct internal investigations and aid law enforcement in uncovering corporate crime does not necessarily apply to the ‘background’ structure of corporate criminal law in Canada.²⁰⁴

Nevertheless, the new definition of “senior officer,” the terms “managing” and “an important aspect of the organization’s activities” require further examination. So far, there have been very few cases that have interpreted these key parts of the definition of “senior

²⁰¹ Lincoln Caylor & Nathan Shaheen, “Canada: Lincoln Caylor: Canadian Corporate Criminal Liability”, *Mondaq* (18 March 2019), online: <<https://www.mondaq.com/canada/crime/789650/lincoln-caylor-canadian-corporate-criminal-liability>> citing *Rhône (The) v Peter AB Widener (The)*, 1993 1 SCR 497 at para 32.

²⁰² See Gerry Ferguson, “The Basis for Criminal Responsibility of Collective Entities in Canada” in A Eser, G Heine & B Huber, eds, *Criminal Responsibility of Legal and Collective Entities* (Max-Planck Institute, 1999) at 153-180. See also Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 264-265; and Paul Blyschak, “Corporate Liability for Foreign Corrupt Practices under Canadian Law” (2014) 59:3 McGill LJ 655.

²⁰³ Caylor & Shaheen, *supra* note 201.

²⁰⁴ *Ibid.*

officer.”²⁰⁵ In *R v Metron Construction Corporation*, the Ontario Court of Appeal imposed a fine of CDN\$750,000 on the accused corporation for criminal negligence causing death contrary to section 221 of the *Criminal Code*.²⁰⁶ The negligence charge arose out of a workplace accident caused primarily by serious negligence on the part of the site supervisor and the foreman. The foreman died in the accident along with three other workers. Metron Construction plead guilty to one count of criminal negligence causing death under section 221 of the *Criminal Code*. No doubt the guilty plea was premised on the conclusion that if they disputed criminal liability at trial, they would be convicted on the basis of the new test for criminal liability under section 22.1 and the new duty in section 217.1 of the *Criminal Code*, which requires persons who have the authority to direct the work of others “to take all reasonable steps to prevent bodily harm” to those persons. In a subsequent trial, the site supervisor was found guilty of four counts of criminal negligence causing death.²⁰⁷ As noted, had Metron plead not guilty, undoubtedly the court would have held that the site supervisor was a “senior officer” and therefore the senior officer’s criminal negligence was also Metron’s criminal negligence. Under the narrower “directing minds” test applied in Canada before the 2004 amendments, it is highly unlikely that the site supervisor would have been held to be a directing mind of Metron since he had not been delegated “governing executive authority” over a part of the company business.²⁰⁸ As Jeremy Warning, Cheryl Edwards, and Shane Todd note, the case demonstrates how sections 22.1 and 22.2 of the *Criminal Code* expand the criminal liability of corporations in Canada to include criminal conduct by employees who are not in an executive management position, but nevertheless hold a significant amount of “localized responsibility” within the corporation.²⁰⁹ As a result, if a company delegates responsibility to a foreign agent to engage in an important aspect of the company’s business, the agent is likely to be deemed a senior officer and his or her bribery could be imputed to the company, even if no one else in the company knew the foreign agent was bribing officials.²¹⁰

²⁰⁵ In *R v Ontario Power Generation*, [2006] OJ No 4659 (Ont CJ), *R v Tri-Tex Sales & Services Ltd*, [2006] NJ No 230 (NL Prov Ct), and *R v ACS Public Sector Solutions Inc*, [2007] AJ No 1310 (Alta Prov Ct), the courts did not apply sections 22.1 or 22.2 since the alleged offences occurred before Bill C-45 came into force on April 1, 2004. In *R v Watts and Hydro Kleen Services*, [2005] AJ No 568, *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (Alta QB), and *R v Griffiths Energy International*, 2013 AJ No 412 (QB), all three companies plead guilty. The acts of bribery in those three cases all came from the very top officers of the companies, and therefore the companies would have been convicted on the basis of section 22.1 of the *Criminal Code* had the companies not plead guilty.

²⁰⁶ *R v Metron Construction Corporation*, 2013 ONCA 541.

²⁰⁷ *R v Kazenelson*, 2015 ONSC 3639.

²⁰⁸ The directing mind test in *Canadian Dredge & Dock Co*, [1985] 1 SCR 662, was narrowly interpreted in the subsequent cases of *The Rhône v The Peter AB Widener*, [1993] 1 SCR 497, and *R v Safety Kleen Canada Inc*. (1997), 16 CR (5th) 90 (Ont CA), where the concept of “executive governing authority” was emphasized as an essential requirement for holding an employee, agent or manager to be a “directing mind” of the corporation.

²⁰⁹ Jeremy Warning, Cheryl Edwards & Shane D Todd, “Canada: After Metron: The Corporate Criminal Liability Landscape in Canada”, *Mondaq* (20 August 2012).

²¹⁰ Todd Archibald & Kenneth Jull, *Profiting From Risk Management and Compliance* (Toronto: Thomson Reuters, 2019) (loose-leaf updated 7/2020, release 6) at 10-34.

In *R c Pétroles Global Inc.*,²¹¹ the accused company was convicted of price-fixing under the federal *Competition Act*.²¹² The company operated 317 gas stations in Ontario, Quebec and New Brunswick. A regional manager (Payette) managed over 200 gas stations in Quebec and New Brunswick and six subordinate territory managers who were responsible for their portion of those 200 stations. The regional manager and two of the territorial managers were involved in the price fixing. At the preliminary inquiry, the judge held that all three were “senior officers” on the ground that each of them managed an “important aspect of the company’s activities.”²¹³ At trial, Justice Toth found that the regional manager was definitely a senior officer and therefore his actions and state of mind were the actions and state of mind of the company. Justice Toth held that it was therefore unnecessary to decide whether the two territorial managers were also “senior officers” and he expressly declined to rule on that issue. Justice Toth did note that the definition of senior officer involves a functional analysis that goes beyond the mere title “manager.” The management under consideration must involve an important aspect of the company’s activities. Since that case, commentators seem to accept that mid-level employees who have significant managerial responsibility may be considered “senior officers.”²¹⁴

Under section 22.2(a), quoted above, a corporation may be criminally liable if a senior officer acting within the scope of their authority is a party to a *CFPOA* offence (this would include situations where the senior officer is a party to an offence by virtue of aiding or abetting another in the commission of an offence). In addition, the acts of the senior officer must have been done with the intention, at least in part, of benefiting the corporation. Section 22.2(b), quoted above, does not appear to expand the liability of corporations beyond the combined effect of section 22.2(a) and the common law doctrine of innocent agents.²¹⁵

²¹¹ *R c Pétroles Global inc.*, 2012 QCCQ 5749 (QC) (preliminary inquiry), 2013 QCCS 4262 (trial decision).

²¹² SC 2009, c 2, s 45(1). It is a “true crime,” and therefore the presumption of full subjective *mens rea* applies to it (i.e., intent, recklessness or wilful blindness): *R v H (AD)*, 2013 SCC 28. See also Blyschak, *supra* note 202.

²¹³ The case is only reported in French. This summary is based on a summary of the case in Archibald & Jull, *supra* note 210 at 10-27-28.

²¹⁴ Benjamin Bathgate, Guy Pinsonnault, Neil Campbell & Timothy Cullen, “Anti-corruption” (2021) at 8, online (pdf): *McMillan LLP* <<http://mcmillan.ca/wp-content/uploads/2020/07/Anti-Corruption-CANADA-LP.pdf>>. See also Norm Keith, “Corporate Compliance to Prevent Criminal Liability in Canada” (9 December 2016), online: *Fasken* <<https://whitecollarpost.com/corporate-compliance-prevent-criminal-liability-canada/>> and Tudor Carsten, “Canada - Global bribery offences guide” (4 December 2019), online: *DLA Piper* <<https://www.dlapiper.com/en/us/insights/publications/2019/09/bribery-offenses-guide/canada/>>.

²¹⁵ This same point is made in Darcy Macpherson, “Extending Corporate Criminal Liability: Some Thoughts on Bill C-45” (2004) 30 *Man LJ* 253 at 262. He explains the redundant nature of section 22.2(b) as follows:

In the end, I believe that paragraph 22.2(b) is redundant. If the senior officer directs another representative to commit the *actus reus*, and the other representative does so with the requisite fault element, then the other representative commits the offence and the senior officer abets the other representative. Both are parties to the offence and are thus liable. As long as the senior officer acts within the scope of his or her authority, paragraph 22.2(a) is

Section 22.2(c), however, does significantly expand the law. Under the common law directing minds doctrine, it was not clear to what extent, if any, a company could be held liable for its omission to take action to prevent bribery. However, this is no longer the case under section 22.2(c). A senior officer's failure to take reasonable steps to stop an employee's offence can now attach liability to the corporation for that offence. Under the Canadian criminal law, citizens are not guilty of an offence for failing to try to stop it or failing to report it, unless the law places a specific duty on specific people in specific circumstances to take reasonable steps to stop the commission of the crime. Section 22.2(c) places obligations on company managers and other senior officers to take all reasonable measures to stop others connected with the organization from being parties to an offence when they are aware that an offence is occurring or is about to occur. This requires a significant level of cooperation among senior officers and encourages timely reporting of any violations. As Darcy Macpherson notes, if a senior officer of one department became aware that a representative reporting to another department intended to offer a bribe to a foreign public official, the fact that the senior officer might have no managerial powers within that department is irrelevant; the corporation will be criminally liable unless the senior officer takes all reasonable measures to stop the bribery.²¹⁶ Macpherson suggests that reporting up the chain of command, rather than requiring outside reporting to police, should satisfy the "all reasonable measures" requirement; otherwise some senior officers may be placed in conflicts of interest. However, whether the law requires external reporting is not clear.²¹⁷ When determining whether a senior officer took all reasonable measures, courts will also likely consider factors relevant to the due diligence defence, such as industry standards and risk management techniques.²¹⁸

Unlike section 7 of the UK *Bribery Act*, section 22.2(c) stops short of prescribing positive obligations to prevent wrongdoing on behalf of company representatives. Section 22.2(c) is only implicated when a senior officer "knows" the representative is or is about to become a party to an offence or when the senior officer is willfully blind to this. It does not include instances when a senior officer is recklessly or negligently unaware that bribery or false accounting is taking place within the corporation.

Additionally, it is likely that a parent company will be liable for its subsidiary's involvement in bribery:

satisfied and there is no need to resort to paragraph 22.2(b). If, on the other hand, the senior officer directs another representative to commit the *actus reus* and the other representative does so *without* the requisite fault element, then the other representative is an "innocent agent". The innocent agent is ignored for the purposes of the *actus reus*, and the senior officer would commit the offence. In either case, subsection 21(1) of the *Code* would make the senior officer a party to the offence (by virtue of paragraph 21(1)(c) in the former case, or by virtue of paragraph 21(1)(a) in the latter). In my view, paragraph 22.2(b) does not expand the conditions for corporate criminal liability.

²¹⁶ *Ibid* at 263.

²¹⁷ *Ibid* at 264-265.

²¹⁸ Archibald & Jull, *supra* note 210 at 10-60-61.

[T]he relevant provisions of the *Criminal Code* and the *CFPOA* impute liability in most instances upon anyone who “directly or indirectly” commits an offence contrary to the *Act*. The court may find that a parent company has indirectly committed an offence if its subsidiary is involved in bribery. This will be decided on a case-by-case basis. A parent company could also be found liable for aiding and abetting or counseling an offence committed by a subsidiary under the *Criminal Code*.²¹⁹

Insofar as successor liability is concerned, McMillan LLP states the following:

Whether the acquirer of a business can be held liable for pre-acquisition conduct of a corporation depends upon the manner in which the transaction is effected. In share acquisitions and amalgamations, the potential liabilities of the acquired corporation continue to exist. However, in an asset acquisition, it will be necessary to assess the contract between the parties to determine whether such potential liabilities were assumed by the purchaser or retained by the vendor.²²⁰

3. PARTY OR ACCOMPLICE LIABILITY

In most legal systems, the person who gives a bribe and the person who receives a bribe are referred to as the principal offenders. But most legal systems also criminalize the conduct of persons who aid (assist), abet (encourage) or counsel (solicit, incite or procure) the principal offender in the commission of the offence. These persons are referred to as parties, accomplices or secondary parties to an offence. In the US, the UK, and Canada, these secondary parties are deemed guilty of the same offence as the principal offender. They are also liable for the same punishments as the principal offender. The actual sentence imposed will depend on the degree of involvement and the degree of responsibility of each offender. Some civil law countries treat secondary parties differently. German law, for instance, punishes a person who incites an offence (a solicitor) in the same way as it punishes a perpetrator of the offence if he or she intentionally induces the perpetrator to commit the offence. A person who intentionally assists the principal (a facilitator) in the commission of the offence is criminally liable, but his or her sentence will be less severe than that of a

²¹⁹ Carsten, *supra* note 214. On this same point, the Jones Day White Paper, “2020 Cross-border Corporate Criminal Liability Survey” (2020), online (pdf): *Jones Day* <<https://www.jonesday.com/-/media/files/publications/2020/12/2020-crossborder-corporate-criminal-liability-survey/files/2020-crossborder-corporate-criminal-liability-sur/fileattachment/2020-crossborder-corporate-criminal-liability-su.pdf>> states:

Canadian courts recognize the “corporate veil” but may pierce the corporate veil, exposing the parent corporation to criminal liability for the acts of its subsidiary, where it is established that: (i) the subsidiary corporation is merely the alter ego of the parent corporation, and (ii) the corporation was created for, or is being used for, a fraudulent or improper purpose.

²²⁰ Bathgate et al, *supra* note 214 at 8.

principal.²²¹ While virtually all countries criminalize some form of accomplice liability, there are both significant and subtle differences between legal systems with respect to accomplice liability.

3.1 UNCAC

UNCAC requires State Parties to criminalize acts of secondary participation in the offences set out in UNCAC in accordance with the State Party's domestic criminal law. Party liability is addressed in Article 27(1), which states:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

Note that Article 27(1) is a mandatory requirement for State Parties and that it requires criminalization of "participation in any capacity." For more on UNCAC's treatment of party liability, see Cecily Rose, Michael Kubiciel and Oliver Landwehr's *United Nations Convention Against Corruption: A Commentary* (Oxford University Press, 2019) at 287-291.

3.2 OECD Convention

Similarly, the OECD Convention mandates that those who are complicit in the act of bribing a foreign public official must be held liable. Article 1(2) requires that each State Party "shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence."

3.3 US

Under section 2 of US Federal Criminal Law (18 USC § 2), an individual, corporation or other legal entity who "aids, abets, counsels, commands, induces or procures" the commission of an offense or "willfully causes an act to be done which if directly performed by him or another would be an offense" is guilty of that offence and "is punishable as a principal." In this sense, the liability of the aider, abettor, etc., is derivative—it is based on the offense committed by the principal offender. The aider, abettor, etc., is sometimes referred to as a secondary party to distinguish him or her from the principal offender; but, in law the principal offender and the secondary offender are guilty of the same offence. Section 2 of the US Code applies to all federal offenses including the bribery offences in the *FCPA*. For further discussion of corporations as principal offender or aider, abettor or counsellor, see Section 2.3.

²²¹ For a comparison of the criminalization of secondary liability in the German and American legal systems, see Markus Dubber, *Criminalizing Complicity: a Comparative Analysis* (2007) 5 J Intl Crim Just 977.

There is a limit, however, on the reach of accomplice liability. This is called the “*Gebardi* principle.”²²² Arising from *Gebardi v United States*,²²³ accomplice liability is limited where Congress demonstrates an affirmative intent to shield accomplices from criminal liability.²²⁴ Some suggest that the “traditional bases for secondary liability” are being used by the DOJ to “stretch the [FCPA]’s extraterritorial application even further” in recent cases.²²⁵ The subject of the charge may not have ever set foot in the United States nor have they taken action in the United States, but instead have acted as an accomplice to another person subject to liability under the FCPA.

The DOJ has taken the position that common law allows secondary liability when the statute is silent.²²⁶ In *Hoskins*, the Second Circuit did not accept this argument, finding that imposing liability on the subject of the charge was against the principle of extraterritoriality, and that accomplice liability could not be used to extend the FCPA’s extraterritorial reach. According to Stephanie Teplin and Harry Sandick, amongst other points, the Second Circuit in *Hoskins* held:

Independent of the legislative history, the presumption against extraterritoriality would be enough to support the court’s finding. Because some provisions of the FCPA expressly have extraterritorial application, the presumption works to “limit those provisions to their terms.” (Quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102 (2016) (alterations omitted).) Because the FCPA only imposes liability on non-agent foreign nationals if they are physically present in the United States, the conspiracy and complicity statutes cannot be used to expand the law’s extraterritorial reach.²²⁷

In *US v Firtash*,²²⁸ however, the DOJ was successful in arguing that Seventh Circuit precedent was inconsistent with *Hoskins*. In the issue of the failure to state an offence regarding both the conspiracy and aiding and abetting charges, the Seventh Circuit did not follow *Hoskins*:

[A]lthough the Seventh Circuit has not yet ruled on this precise question, its disagreement with the Second Circuit’s approach in *Hoskins* is evident from a pair of existing cases discussing exceptions to secondary liability:

²²² Evan Forbes, *Extraterritorial Enforcement of the Foreign Corrupt Practices Act: Asserting US Interest or Foreign Intrusion* (2020) 93 S Cal L Rev Postscript, online (pdf): <<https://southerncalifornialawreview.com/2020/04/29/extraterritorial-enforcement-of-the-foreign-corrupt-practices-act-asserting-u-s-interest-or-foreign-intrusion/>>.

²²³ 287 US 112 (1932).

²²⁴ Forbes, *supra* note 222.

²²⁵ Cassandra Burke Robertson, “Conspiracy and Complicity under the FCPA” (2019) 55:3 Willamette L Rev 539 at 548-549.

²²⁶ *Ibid.*

²²⁷ Stephanie Teplin & Harry Sandick, “Second Circuit Limits Reach of FCPA to Persons Present in the United States” (31 August 2021), online (blog): *Second Circuit Criminal Law Blog* <<https://www.pbwt.com/second-circuit-blog/second-circuit-limits-reach-of-fcpa-to-persons-present-in-the-united-states>>.

²²⁸ 392 F Supp 3d 872 (ND Ill 2019), online: <<https://casetext.com/case/united-states-v-firtash>>.

United States v. Amen, 831 F.2d 373 (2d Cir. 1978) and *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989).

In the wake of these cases, the effect of the federal aiding and abetting provision has been left unclear. However, commentators predict that the Resource Guide foreshadows a continued broad application of the aiding and abetting and conspiracy charges in most jurisdictions.²²⁹

For additional analysis of party liability in the US, see Wayne LaFave's book *Substantive Criminal Law*.²³⁰

3.4 UK

Section 8 of the *Accessories and Abettors Act 1861*, as amended by the *Criminal Law Act 1977*, provides that anyone "who aids, abets, counsels or procures" the commission of any indictable UK offence is liable and punishable for that offence as a principal offender.²³¹ Therefore, anyone who, by an act or omission of a legal duty, assists or encourages the commission of an offence under the *Bribery Act* will be punished in the same way as the principal offender. The accessory must intend to assist the principal offender and must have knowledge of the essential elements of the principal offender's offence.²³² Voluntary attendance at the scene of the crime and a failure to stop the crime are not necessarily sufficient to constitute an act of assistance.²³³ The actual breadth of aiding and abetting, insofar as causation is concerned, is unclear.²³⁴

A recent development in English criminal law is the abolition of parasitic accessory liability through *R v Jogee; Ruddock v The Queen* [2016] UKSC 8.²³⁵ Previously, liability was extended to all persons who belonged to a common unlawful purpose (sometimes called a joint venture) for further offences that are committed by one member of that group in carrying out the common unlawful purpose, provided these further offences were a reasonably foreseeable consequence of carrying out the unlawful purpose. In particular:

The Court in *R v Jogee* held that *Chan Wing-Siu* [[1985] AC 168] took a wrong turn and was in error, as it equated foresight that D1 might commit crime B

²²⁹ Bill Steinman, "2020 has been a crazy year for the FCPA too" (22 July 2020), online (blog): *FCPA Blog* <<https://fcpublog.com/2020/07/22/2020-has-been-a-crazy-year-for-the-fcpa-too/>>.

²³⁰ Wayne R LaFave, *Substantive Criminal Law*, vol 2, 3rd ed (Thomson Reuters, 2018) at 441-563.

²³¹ In modern case law, however, the distinction between these terms appears to be abating, and it is more common to use "encourage" in lieu of "counsel," and "assist" in lieu of "aid" and "abet." Ashworth notes, however, that maintaining a distinction between terms is important because "encouraging" for example, is a narrower term than "counselling": Ashworth, *supra* note 166 at 458-9.

²³² *Ibid* at 468.

²³³ *Ibid* at 460-462.

²³⁴ *Ibid* at 459-460.

²³⁵ "Secondary Liability: charging decisions on principals and accessories" (4 February 2019), online: *Crown Prosecution Service* <<https://www.cps.gov.uk/legal-guidance/secondary-liability-charging-decisions-principals-and-accessories>>.

with intent to assist D1's commission of crime B. The correct approach is to treat such foresight as evidence of intent to assist D1 in crime B. Although foresight may sometimes be powerful evidence of intent, it is not conclusive of it.²³⁶

Pursuant to section 14, the *Bribery Act* establishes liability for senior company officers, such as directors, managers, company secretaries or those purporting to act in such a capacity, who "consent or connive" in the commission of a *Bribery Act* offence under sections 1, 2 or 6 by a legal entity (see Chapter 2, Section 2.4.2(iv)). It has been suggested that the concept of "consent and connivance" is wider and more flexible than accomplice liability.²³⁷ The concept does not necessarily require that aid be given intentionally; it could also criminalize reckless behaviour. It likely also captures instances where a senior officer knows the bribery offence is occurring, but does nothing to stop it even if the senior officer did not actually aid or encourage the offence's commission. The explanatory notes write that the section does not create a separate offence of "consent or connivance," but rather that the body corporate and the senior manager will be guilty of the main bribery offence.²³⁸ Senior officers can also face party liability if they consent or connive in the commission of false accounting provisions under the *Theft Act*. The practical utility of this provision is questionable, however, given that sections 1, 2, and 6 would still rely on the identification doctrine in order to find the body corporate liable for the main bribery offence and the first step for section 14 is "to ascertain that the body corporate or Scottish partnership has indeed been guilty of an offence under section 1, 2 or 6."²³⁹

3.5 Canada

The *CFPOA* does not explicitly mention secondary parties to the indictable offence of bribery of foreign public officials. However, via section 34(2) of the federal *Interpretation Act*,²⁴⁰ all the provisions of the *Criminal Code* that relate to indictable offences also apply to bribery of foreign public officials.²⁴¹ Sections 21 and 22 of the *Criminal Code* address secondary party liability. Section 21(1) of the *Criminal Code* criminalizes the actions (or omissions of legal duties) of anyone who aids in the commission of an offence or abets any person in committing an offence. Pursuant to section 21(1), aiders, abettors and principal offenders who actually commit the offence are all guilty of the same offence and subject to the same

²³⁶ *Ibid.*

²³⁷ Tarun & Tomczak, *supra* note 30 at 99-101, quoting from M Raphael, *Blackstone's Guide to the Bribery Act* (Oxford University Press, 2010).

²³⁸ UK, *Bribery Act 2010 Explanatory Notes*, online: <<https://www.legislation.gov.uk/ukpga/2010/23/notes/division/5/14?view=plain>>.

²³⁹ *Ibid.*

²⁴⁰ *Interpretation Act*, RSC 1985, c I-21.

²⁴¹ Despite some contrary views, this includes the *Criminal Code* provisions that criminalize complicity in the committal of an indictable offence. In *Naglingam v Canada (Minister of Citizenship & Immigration)*, 2008 FCA 153, the Court reasoned that pursuant to section 34(2) of the federal *Interpretation Act*, a refugee can be removed from Canada if he or she was a secondary party to one of the serious offences set out in the *Immigration and Refugee Protection Act* (see Fanny Lafontaine, "Parties to Offences under the Canadian Crimes against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity" (2009) C de D 967 at 982).

penalties set out for that offence. As well, pursuant to section 21(2), when two or more people form a common unlawful purpose to commit an offence and during the course of that unlawful purpose one of them commits an ancillary offence, they are all parties to that offence if they knew or ought to have known that the commission of the ancillary offence was a probable consequence of carrying out the common unlawful purpose. A corporation or other organization can also be a member of a conspiracy if the requirements of sections 22.1 or 22.2 of the *Criminal Code* are met (further discussed in Section 2.5).

Additionally, section 5 of the *CFPOA* states the following:

5 (1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 or 4 — **or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to,** an offence under that section — is deemed to have committed that act or omission in Canada if the person is

(a) a Canadian citizen;

(b) a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act who, after the commission of the act or omission, is present in Canada; or

(c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province. [emphasis added]²⁴²

Section 22(1) of the *Criminal Code* makes those who counsel an offence liable for that offence if that offence is committed. If the offence is counselled but not committed, the counsellor is liable for a separate inchoate offence of incitement under section 464 of the *Criminal Code*; that offence is subject to the same punishment as an attempt to commit the offence that was counselled. Section 22(2) creates party liability for the counsellor for all reasonably foreseeable ancillary offences committed by the person counselled. For a more detailed analysis of party liability, see a standard Canadian criminal law textbook.²⁴³

4. INCHOATE OFFENCES

Certain offences are described as inchoate (or uncompleted) crimes, as opposed to “full or complete crimes.”²⁴⁴ The major inchoate crimes are attempt and conspiracy. Many common

²⁴² See online: <<https://laws-lois.justice.gc.ca/eng/acts/c-45.2/page-1.html#h-112316>>.

²⁴³ Don Stuart, *Canadian Criminal Law, Student Edition*, 8th ed (Toronto: Thomson Reuters, 2020) at 691-722; E Colvin & S Anand, *Principles of Criminal Law*, 3rd ed (Carswell, 2007) at 553-584; and M Manning & P Sankoff, *Criminal Law*, 5th ed (LexisNexis, 2015) at 306-332.

²⁴⁴ While introducing inchoate crimes, Ormerod, *supra* note 163 at 410-11, writes:

Criminalizing inchoate offences raises particular difficulties because the conduct involved will often be far removed from the type of harm that would be needed to give rise to a charge under the relevant substantive offence ...

law legal systems (including the UK and Canada) also criminalize the inchoate offence of counselling an offence which is not committed (sometimes termed incitement). Although referred to as inchoate or incomplete, these offences are nonetheless distinct crimes on their own. Generally, common law states are more willing to punish inchoate crimes than civil law countries. Sweden, for example, only punishes attempts for certain crimes, attempted bribery not being one of them.²⁴⁵ In this section, the UNCAC and OECD provisions on each of these three forms of inchoate offences will be examined, followed by a description of how the law in the US, UK and Canada deals with each offence.

4.1 Attempts

Countries around the world treat attempts to commit an offence in different ways. Some countries do not criminalize attempts at all. In countries that do punish attempts, there is general agreement that the criminal law should not punish criminal thoughts alone; attempts are not committed until the offender engages in *some acts* for the purpose of committing the crime. But do *all* acts engaged in for the purpose of committing the offence in question constitute the offence of an attempt? Put another way, “how much [evidence of] illegality has to be present in order for something to be qualified as an attempt.”²⁴⁶ In some countries, certain preliminary acts are classified as mere acts of preparation rather than an attempt, but at a certain point, acts will cross the line from preparation to attempt. Most common and civil law countries do not punish preparatory acts until they have reached the threshold of an “attempt.” However, there are some European states that do consider preparatory acts in respect to at least some criminal offences to be a crime. These countries include Poland (Article 16 of the *Criminal Code*)²⁴⁷ and Russia (section 66 of the *Criminal Code*).²⁴⁸

In practice, the distinction between mere preparatory acts and actual attempts is often difficult to draw, and the line between them is unclear in many states. Gideon Yaffe writes

The *actus reus* of inchoate offences can extend to cover a wide range of behaviour, sometimes seemingly innocuous as, for example, with ‘an agreement’ in conspiracy, or mere words of encouragement in assisting and encouraging. However, there are sound reasons in policy and principle for punishing these types of wrongdoing, a central one being that the defendant has demonstrated by his actions his willingness that a substantive offence be committed.

There is nevertheless a clear risk of over-criminalisation. Since the *actus reus* is so broad, it is important that inchoate are kept within reasonable limits by requiring substantial *mens rea* elements. In inchoate crimes it is not uncommon to find requirements of intention or knowledge that the substantive offence will be committed. But this emphasis on *mens rea* does not mean that inchoate can be regarded as thought-crimes; there remains a requirement that the defendant’s blameworthy state of mind manifests itself by some words or other conduct

²⁴⁵ Ingeborg Zerbies, “Article 1–The Offence of Bribery of Foreign Public Officials” in Pieth, Low & Bonucci, *supra* note 25, 59 at 205.

²⁴⁶ Ivan Vukusic, “Punishment of Attempt in EU Criminal Instruments” (2019) 3 ECLIC 623 at 623.

²⁴⁷ See online (pdf):

<https://www.legislationline.org/download/id/7354/file/Poland_CC_1997_en.pdf>.

²⁴⁸ See online (pdf): <<https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru080en.pdf>>.

that there is a general lack of clarity on “what, exactly, we have criminalized in criminalizing attempt.”²⁴⁹ He comments that, “[t]his confusion manifests itself, for instance, in the many and various descriptions of the conditions that must be met in order for the defendant's conduct to constitute more than ‘mere preparation,’ several of which are metaphorical (‘direct movement towards’ completion, for instance).”²⁵⁰

Germany, France, and a number of other European countries consider the point at which preparation becomes an attempt to be “with the act which immediately precedes the execution of the full offence.”²⁵¹ In other words, attempted offences are not committed until the offender is very close to executing or completing the full offence. On the other hand, in many common law countries, including the UK, US, and Canada, the threshold of an attempt is reached earlier, before the perpetrator has reached the “last act” stage. Stephen Matis characterizes the English criminal law approach as a “midway course” between the point of mere preparation and the last act stage.²⁵² In the US, the Model Penal Code suggests that an attempt begins when the offender has taken “a substantial step” towards the commission of the substantive offence. The point at which countries draw the line between an act of preparation and an attempt is often influenced by the rationale which that country relies upon in criminalizing an attempt. There are three possible rationales:

- a) *Prevention*;
- b) *Moral fault*; and
- c) *Deterrence*.

The law of attempts also raises the issue of whether voluntary withdrawal from an attempt forms a defence. Withdrawal, or voluntary desistance, refers to instances where the perpetrator has reached the stage of attempt, but has a change of heart before the full offence is completed. France, Germany and Norway accept a defence of voluntary withdrawal, while other countries like Australia have rejected this notion.²⁵³ Some argue that voluntary withdrawal ought to serve as a mitigating factor for sentencing rather than an affirmative defence.²⁵⁴

4.1.1 UNCAC

In consideration of the different approaches to the criminalization of attempts among the international community, UNCAC does not impose mandatory obligations on states to criminalize attempts or other types of preparatory actions in regard to most corruption-related offences. Article 27(2) provides a State Party “may” create an offence of attempted

²⁴⁹ Gideon Yaffe, “Criminal Attempts” (2014) 124:1 Yale LJ 92 at 96.

²⁵⁰ *Ibid.*

²⁵¹ Zerbes, *supra* note 245 at 167.

²⁵² Stephen Matis, “Criminal Attempts and the Subjectivism/Objectivism Debate” (2004) 17 Ratio Juris 328 at 333.

²⁵³ Stuart, *supra* note 243 at 740-741.

²⁵⁴ For an analysis on the principles that animate voluntary withdrawal as a mitigation factor or defence, see Yaffe, *supra* note 249 at 141-154.

bribery. Article 27(3) provides that a State Party “may” create an offence for engaging in preparatory acts to commit bribery. Articles 27(2) and (3) state:

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.
3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

It is interesting to note that UNCAC is more prescriptive with regard to money laundering. Article 23(1) provides that State Parties “shall, subject to the basic concepts of its legal system ... establish criminal offences” in respect to “attempts to commit” any of the money laundering offences listed in Article 23. For more information, see Rose et al., *United Nations Convention Against Corruption: A Commentary* (Oxford University Press, 2019) at 289-291.

4.1.2 OECD Convention

The OECD Convention also respects the fact that countries take different approaches to the criminalization of inchoate offences. Article 1(2) states that an “[a]ttempt ... to bribe a foreign public official shall be a criminal offence to the same extent as an attempt ... to bribe a public official is an offence” in one’s own country. The *Commentaries on the OECD Convention* accompanying the Convention clarify that:

The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party’s legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.²⁵⁵

4.1.3 US

Most state penal codes and the US Model Penal Code have a provision in their general part which makes it an offense to attempt any offense (but “it is common for [specific sections criminalizing attempts] to say no more than that it is a crime to attempt a crime - without specifying what conditions need to be met for a person’s behaviour to constitute an attempt”²⁵⁶). Some state penal codes and the US Code only penalize attempts within the context of specific offences.²⁵⁷ In US law, a key point is whether the conduct of the accused has gone beyond mere acts of preparation and entered the realm of attempts. The details of

²⁵⁵ *Commentaries on the OECD Convention* (1997), appended to the Convention at 15, para 11.

²⁵⁶ Yaffe, *supra* note 249 at 96.

²⁵⁷ See e.g. the offences of attempts and conspiracy to commit bribery through the use of the mail, § 1349, 18 USC.

the US law of attempts can be found in any standard American textbook of criminal law.²⁵⁸ Voluntary abandonment of an attempt (i.e., the plan to commit an offense) is recognized as a defense under the Model Penal Code and under many state penal codes.²⁵⁹

Since the offense of bribery is broadly stated in section 78dd-1, it is not generally necessary to resort to attempted bribery. In section 78dd-1, bribery includes not only the completed offense “of paying the bribe and receiving the benefit,” but also the “uncompleted” offenses of “offering, authorizing or promising” to pay a bribe, even if nothing further happens in regard to the actual payment of the bribe. Thus, attempts to bribe a foreign official will be caught in the full offense of bribery as defined in section 78dd-1.

4.1.4 UK

Under section 1 of the *Criminal Attempts Act 1981*, it is an offence to attempt to commit any offences that are indictable in England and Wales.²⁶⁰ This act repealed the common law of attempt.²⁶¹ Section 1(4) stipulates that it is not an offence to attempt to commit conspiracy or to attempt to aid, abet or counsel a substantive offence. Under section 1(1), a person is guilty of attempting to commit an offence if, with the intention of committing an applicable offence, “a person does an act which is more than merely preparatory to the commission of the offence.” Once a person’s actions have reached the stage of attempting an offence, the attempt is complete. It is not a defence if the perpetrator voluntarily withdraws from the attempt, although voluntary desistance may be evidence that the accused never really had the requisite intent to commit the substantive offence to begin with.²⁶² Historically, UK courts applied the “last step” test, especially for property crimes (i.e., to be classified as an attempt the accused’s conduct must have reached the last step before completion of the full offence). More recent case law suggests that the offender does not need to have commenced the last act before the completion of the substantive offence, but the precise line between merely preparatory acts and actual attempts is still unclear. As with US law, the law of attempts is not frequently resorted to for *Bribery Act* offences since the offences of bribery in that *Act* involve not only giving or receiving a bribe, but also offering to give or promising to give, or requesting or agreeing to receive, a bribe.

In *DPP v Stonehouse*,²⁶³ the House of Lords found that if an act is performed abroad with the intent that it will cause the commission of an offence in England, and it had an effect on England, it is possible to prosecute that attempt in England.²⁶⁴ Additionally, the Privy

²⁵⁸ See, e.g. LaFave, *supra* note 230 at 285-348.

²⁵⁹ *Ibid* at 340-341.

²⁶⁰ For a more detailed discussion of the UK’s statutory crime of attempt, see Ormerod, *supra* note 163 at 412-434.

²⁶¹ *Ibid* at 412.

²⁶² D Baker and G Williams, *Textbook on Criminal Law*, 3rd ed (Sweet & Maxwell, 2012) at 547 (*please note that there is a 2021 version of Baker & Williams upcoming that the authors did not have access to*). See also Ormerod, *supra* note 163 at 434.

²⁶³ [1978] AC 55, [1977] Crim LR 544, HL.

²⁶⁴ Ormerod, *supra* note 163 at 433. Ormerod summarized the finding at 433-434 as follows:

D, in Miami, falsely staged his death by drowning with the intent that his innocent wife in England should claim life assurance monies. He was guilty of attempting to enable

Council in *Somchai Liangsiriprasert v United States Government*²⁶⁵ stated in obiter that the finding that a conspiracy abroad to commit an offence in England may be prosecuted in England even when no overt act has been done in that jurisdiction also applies equally to attempt.²⁶⁶ It is also likely that, where England has jurisdiction over an offence committed abroad (for example, those committed by a British citizen), an attempt to commit such an offence will also be prosecutable in England.²⁶⁷

4.1.5 Canada

Section 34(2) of the federal *Interpretation Act* states that all the provisions of the *Criminal Code* that relate to indictable offences also apply to the offence provisions of other federal statutes.²⁶⁸ Therefore, although not explicitly noted in *CFPOA*, the three major inchoate offences in Canada (counselling a crime not committed, attempt and conspiracy) apply to *CFPOA* offences of bribing a foreign public official and falsifying books and records.

Pursuant to section 24(1) of the Canadian *Criminal Code*, anyone who, with the intention to commit an offence, “does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.” However, section 24(2) clarifies that mere preparation to commit an offence is not considered an attempt, and states that whether something is “mere preparation” is considered a question of law.

Like other legal systems, Canadian courts have struggled with the distinction between preparatory acts and attempts. In the 1986 Supreme Court of Canada decision in *R v Deutsch*, the Court held that there is no general rule for distinguishing between preparation and an attempt and that the distinction should be left to the common sense of the trial judge.²⁶⁹ Writing for the majority, Justice Le Dain went on to state:

In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.²⁷⁰

his wife to obtain by deception. His acts abroad would have the ‘effect’ of communicating through the media to his wife and the insurance companies the false statement that he had died.

²⁶⁵ (1991) 92 Cr App R 77, PC at 87-90.

²⁶⁶ Ormerod, *supra* note 163 at 434.

²⁶⁷ *Ibid.*

²⁶⁸ RSC, 1985 c I-21.

²⁶⁹ *R v Deutsch*, [1986] 2 SCR 2.

²⁷⁰ *Ibid* at para 30. For more recent consideration of “mere preparation” versus “attempt,” see *R v Root*, 2008 ONCA 869 at paras 94-100, and *R v Senior*, 2021 ONSC 2729 (CanLII).

The Court's failure to express a clear test to determine whether particular acts fulfill the *actus reus* requirement of an attempt offence remains troubling to some commentators, who argue that criminal law principles demand that a clearer formulation of the *actus reus* of attempt offences be available to the public.²⁷¹ The issue of whether voluntary withdrawal is a defence to an attempt charge has not been fully considered in Canada.²⁷²

4.2 Conspiracy

The offence of conspiracy involves at its core an agreement between two or more persons to commit an offence. Many civil law countries only criminalize conspiracy to commit a limited number of very serious crimes, which generally do not include bribery. Most common law countries criminalize conspiracy to commit a broader range of offences, including the offence of bribery.²⁷³ Unlike the law of attempts, conspirators may be convicted when no concrete steps to carry out the agreement beyond reaching the agreement have been taken. The criminalization of conspiracy is more controversial than the criminalization of attempts. Conspiracy occurs well before an attempt to commit an offence, and its criminalization can lead to a form of collective guilt that may unfairly punish individuals for the wrongdoing of others. Some argue that conspiracy is an offence in itself because "it often poses a greater danger to society than a substantive offence committed by a single individual."²⁷⁴ To this end, the US Supreme Court has commented:

For two or more to ... combine together to commit ... a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.²⁷⁵

In the past, the criminalization of conspiracy has also been used to suppress political dissent. However, the availability of an offence of conspiracy to commit corruption offences allows enforcement agencies to arrest perpetrators before harm has occurred and can be an effective weapon against organized crime.²⁷⁶

²⁷¹ Stuart, *supra* note 243 at 735-740.

²⁷² *Ibid* at 740.

²⁷³ Zerbes, *supra* note 245 at 208.

²⁷⁴ Mitchell McBride, "Federal Criminal Conspiracy" (2020) 57:3 Am Crim L Rev 759 at 760.

²⁷⁵ *Ibid*, citing *Pinkerton v United States*, 328 US 640, 644 (1946) (quoting *United States v Rabinowich*, 238 US 78, 88 (1915)).

²⁷⁶ For a discussion of the arguments for and against the criminalization of conspiracy see Aaron Fichtelberg, "Conspiracy and International Criminal Justice" (2006) 17 Crim LF 149. See also Hiromi Sato, "The Separate Crime of Conspiracy and Core Crimes in International Criminal Law" (2016) 32:1 Conn J Intl L 73.

4.2.1 UNCAC

While Article 27 of UNCAC specifically references the adoption of provisions criminalizing parties to bribery and attempts to commit bribery, UNCAC is silent on conspiracy to commit bribery. However, Article 23 states that “subject to the basic concepts of its legal system, State Parties shall establish a criminal offence for conspiracy to commit” any of the money laundering offences in Article 23.

4.2.2 OECD Convention

As with attempts, rather than mandating a globally consistent approach, Article 1(2) focuses on consistency within the domestic context when dealing with criminalization of conspiracy. A conspiracy or an attempt to bribe a *foreign* official must be penalized in the same way (if any) as conspiracies or attempts to bribe *domestic* public officials.

4.2.3 US

The US criminalizes conspiracies to bribe foreign public officials. Charges under the *FCPA* will often be accompanied by a charge under the federal general conspiracy statute (18 USC § 371), which makes it a crime to conspire to commit an offense against the US or to conspire to defraud the US. The applicable punishment is either a fine or a prison term of up to five years (unless the object of the conspiracy is a misdemeanor offense, in which case the punishment shall not exceed the maximum punishment for that offense). The elements of the offense of conspiracy to commit bribery can be found in Tarun and Tomczak’s book *The Foreign Corrupt Practices Act Handbook*.²⁷⁷ They list the four elements of a federal conspiracy as follows:

- a. An agreement by two or more persons,
- b. To commit the unlawful object of the conspiracy,
- c. With knowledge of the conspiracy and with actual participation in the conspiracy, and
- d. The commission of an overt act in furtherance of the conspiracy by at least one co-conspirator.²⁷⁸

It is important to note that the conspiracy offense is not complete until one of the co-conspirators commits an overt act in furtherance of the conspiracy. This does not have to be a criminal act in its own right,²⁷⁹ but can be a non-criminal preparatory act, such as opening a bank account that is to be used as a part of the bribery scheme. By contrast, the offence of conspiracy in the UK and Canada does not require any overt acts in furtherance of the conspiracy. Mitchell McBride notes that the overt act requirement “demonstrates that the

²⁷⁷ Tarun & Tomczak, *supra* note 30 at 31-32.

²⁷⁸ For a more in-depth review of these elements, as well as defences to conspiracy, see McBride, *supra* note 274 at 762-768.

²⁷⁹ *Ibid* at 768.

conspiracy was operative, rather than a mere scheme in the minds of the actors.”²⁸⁰ The law of conspiracy in the US is set out in detail in LaFave’s book *Substantive Criminal Law*.²⁸¹

Tarun and Tomczak note that charging individuals or corporations with both a general conspiracy offence and a substantive *FCPA* offence offers several advantages to the prosecution. In this regard, they state:

First, the ongoing nature of conspiracy lends itself to expansive drafting, particularly in temporal terms. Conspiracies frequently are alleged to have continued for years and occasionally decades. Second, the breadth and vagueness of a conspiracy count allow the admission of much proof that might otherwise be inadmissible. Third, a conspiracy count enables the government to broadly join persons and allegations. A conspiracy can allege an agreement to defraud multiple entities, individuals, and companies or both the government (e.g., the Securities and Exchange Commission) and private entities and individuals. Fourth evidentiary rules with respect to co-conspirator declarations enlarge the admissibility of often-damaging statements in conspiracy trials [Under the US Federal Rules of Evidence, out of court statements made by a co-conspirator in furtherance of the conspiracy may be admitted against the accused]. Fifth, because the conspiracy is a continuing crime, its five-year statute of limitations does not begin to run until either the conspiracy’s objectives are met, the conspiracy is abandoned, its members affirmatively withdraw, or the last overt act committed in furtherance of the conspiracy occurs. [footnotes omitted]²⁸²

Additionally, it is as of yet unclear to what extent the general charge of conspiracy may be used to expand jurisdiction (see the discussion of *Hoskins* and *Firtash*, relating to the potential expansion of the general charge of accomplice liability in Section 3.3).

4.2.4 UK

For the purposes of most corruption-related offences, the old common law offence of conspiracy has been replaced with the *Criminal Law Act 1977*.²⁸³ Section 1(1) of the *Act* provides that a person is liable for conspiring to commit an offence if that person agrees with

²⁸⁰ On this point, McBride, *ibid*, references *Yates v United States*, 354 US 298, 334 (1957), where the Court stated, “[t]he function of the overt act in a conspiracy prosecution is ... to manifest ‘that the conspiracy is at work.’”

²⁸¹ LaFave, *supra* note 230 at 349-440. For more details concerning the law of conspiracy in the United States, see Neal Kumar Katyal, “Conspiracy Theory” (2003) 112 Yale LJ 1307, online: <<http://www.yalelawjournal.org/article/conspiracy-theory>>, and Paul Marcus, “The Crime of Conspiracy Thrives in Decisions of the United States Supreme Court” (2015) 64 U Kan L Rev 373, online: <<http://scholarship.law.wm.edu/facpubs/1797/>>.

²⁸² Tarun & Tomczak, *supra* note 30 at 32.

²⁸³ 1977 c 45. Note that the common law offence of conspiracy to defraud remains in force: Baker & Williams, *supra* note 262 at 568. For more on common law conspiracy, see Ormerod, *supra* note 163, beginning at at 435. For a summary on the common law of conspiracy, see also “Inchoate Offences” (updated December 2018) online: Crown Prosecution Service <<https://www.cps.gov.uk/legal-guidance/inchoate-offences>>.

at least one other person to pursue a course of conduct that, if carried out according to plan, would necessarily involve the commission of any offence. The key element is the agreement. Evidence of negotiations without proof of an agreement is insufficient.²⁸⁴ To be convicted, the defendant must have intended to enter the agreement, intended that the purpose of the agreement be carried out, and had knowledge of the relevant circumstances.²⁸⁵ Recklessness rather than actual knowledge of these circumstances is insufficient.²⁸⁶ If a defendant withdraws from a conspiracy immediately after entering the agreement, this does not provide a defence, but may be used to mitigate the sentence.²⁸⁷ A company may be a party to a conspiracy if an officer forming part of its directing mind enters the agreement on the company's behalf.²⁸⁸

The courts discourage the charging of both conspiracy and the substantive crime that the parties conspired to commit due to the length and complexity of resulting trials and the unfairness of convicting accused persons for two separate crimes for what constitutes one continuous transaction. However, charging both offences can provide the prosecution with evidentiary advantages.²⁸⁹

English courts will have jurisdiction over a conspiracy offence if the agreement is made in England or Wales to commit an offence abroad or if an agreement was made abroad to commit an offence in England or Wales, regardless of an absence of acts done in furtherance of the agreement in England or Wales.²⁹⁰

4.2.5 Canada

In *R v Karigar*,²⁹¹ the court noted that section 3 of the *CFPOA* incorporates the idea of conspiracy. As stated by the court, “a conspiracy or agreement to bribe foreign public officials is a violation of the *Act* ... the use of the term ‘agrees’ imports the concept of conspiracy.”²⁹² The court further elaborated that the agreement need not be between the giver and receiver of the bribe. Even if the word “agrees” in section 3 of the *CFPOA* does not import the concept of conspiracy, the *Criminal Code* provisions on conspiracy also apply to the bribery offences in the *CFPOA*.²⁹³ Conspiracy to commit an indictable offence is set out under section 465(1)(c) of the *Criminal Code* as follows:

every one who conspires with any one to commit an indictable offence ... is guilty of an indictable offence and liable to the same punishment as that to

²⁸⁴ Baker & Williams, *supra* note 262 at 570.

²⁸⁵ *Ibid* at 580.

²⁸⁶ *Ibid* at 586.

²⁸⁷ Ormerod, *supra* note 163 at 436.

²⁸⁸ AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 7th ed (Oxford: Hart, 2019) at 350.

²⁸⁹ Ormerod, *supra* note 163 at 459.

²⁹⁰ *Ibid* at 461.

²⁹¹ *R v Karigar*, 2013 ONSC 5199.

²⁹² *Ibid* at para 28.

²⁹³ Section 32(4) of the *Interpretation Act*, RSC 1985, C I-21.

which an accused who is guilty of that offence would, on conviction, be liable.

The essence of the offence consists of an agreement between two or more persons to commit an indictable offence. There must be a common agreement between the parties to work together to commit the offence(s). Unlike the US conspiracy offence, there is no requirement that one of the co-conspirators take any action in furtherance of the conspiracy. The offence is complete the moment the agreement is reached. Like in the US, hearsay evidence spoken by a co-conspirator is admissible against the other conspirators, although there must be independent evidence of a conspiracy before this information may be used in court. Because of this permissive evidence rule, the conspiracy charge is sometimes referred to as “the prosecutor’s darling.”²⁹⁴ The criminalization of conspiracy is generally justified by the principle that two people with a plan to commit an offence are more dangerous than one person plotting alone. This justification has been questioned, and numerous commentators and organizations have called on the Canadian government to narrow the offence of conspiracy.²⁹⁵

Canadian courts have territorial jurisdiction over defendants who conspire in Canada to commit an act abroad that constitutes an offence both in Canada and the foreign country. Further, Canada will have jurisdiction if the defendant conspires elsewhere to commit any act in Canada that is an offence in Canada.²⁹⁶

A more recent case on conspiracy in the bribery context is *R v Barra and Govindia*.²⁹⁷ In that case, the defendants argued that they were only part of “a third distinct agreement or conspiracy to bribe the Indian Minister to obtain the contract for Cryptometrics Canada, an alleged conspiracy that does not have a real and substantial connection to Canada,”²⁹⁸ as opposed to part of a larger conspiracy. The Crown argued that there was one overarching conspiracy, and that “the fact that Barra and Berini decided to change the agent they would use to deliver the bribe did not constitute a new separate or conspiracy but was rather a continuation of the same conspiracy.”²⁹⁹ The Court concluded that there “was evidence capable of supporting the inference that he was part of a single ongoing conspiracy.”³⁰⁰

4.3 Incitement (or Solicitation)

Inciting or counselling an offence that is later committed by the person who was counselled makes the incitor or counsellor a party to, and therefore guilty of, the offence committed. But suppose a person incites or counsels another person to commit an offence, but that other person does not commit it. The incitor or counsellor cannot be a party to the offence

²⁹⁴ Stuart, *supra* note 243 at 752.

²⁹⁵ *Ibid* at 767-769.

²⁹⁶ Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (New York: Oxford University Press, 2014) at 51.

²⁹⁷ 2018 ONSC 2659 (CanLII).

²⁹⁸ *Ibid* at para 37.

²⁹⁹ *Ibid* at para 38.

³⁰⁰ *Ibid* at para 46. For an explanation of the law applicable to the “one conspiracy vs multiple conspiracies” argument, see paras 42-45.

counselled because that offence was never committed and their acts of counselling or inciting are too preliminary to convict the person of an attempt to commit the offence. Some countries have created a separate inchoate offence for counselling an offence that is not committed, which is called incitement in the UK and Canada and solicitation in the US.

4.3.1 UNCAC and OECD Convention

The inchoate offence of incitement is not specifically mentioned in either UNCAC or the OECD Convention. There is no pressing need for this type of separate inchoate offence, since the definition of bribery under both conventions includes conduct such as “requesting a bribe,” regardless of whether the bribe is paid, or “offering a bribe,” regardless of whether the bribe is accepted or not.

4.3.2 US

The inchoate offence of incitement (which includes counselling, encouraging, instigating or soliciting) is referred to as the offence of solicitation in the US. The elements of this inchoate offence can be found in a standard American textbook on criminal law.³⁰¹ However, because of the expanded definition of the offense of bribery in section 78 dd-1, there is little or no need to use the offence of solicitation in respect to bribery offenses.

4.3.3 UK

In the UK, the common law offence of incitement was recognized by at least 1769.³⁰² The common law for all such offences committed after October 1, 2008 was abolished in section 59 of the *Serious Crimes Act 2007*³⁰³ and replaced by sections 44-46 of the same legislation (which refer to “encouraging or assisting an offence”). Under section 44, those that intentionally commit acts that are capable of encouraging or assisting in the commission of an offence are themselves committing an offence, regardless of whether the substantive offence is carried out and regardless of whether their acts actually encourage or assist the principal offender. Section 45, “encouraging or assisting an offence believing it will be committed,” creates an offence where a person does an act capable of encouraging the commission of an offence, believing that the offence will be committed and that their acts encourage or assist such a commission.³⁰⁴ Section 46 applies to encouraging or assisting offences with the belief that one or more offences will be committed. Section 65 clarifies that threats or pressure may be considered encouragement, and that taking steps to reduce the

³⁰¹ LaFave, *supra* note 234 at 263-285.

³⁰² *R v Vaughan*, 98 ER 308 (1769). See also *R v Higgins*, 102 ER 269 (1801).

³⁰³ *Serious Crime Act 2007*, 2007 c 27.

³⁰⁴ The Crown Prosecution Service (*supra* note 283) writes:

Belief is a state of mind which is more than suspicious, the word ‘belief’ is a word of ordinary usage and does not require any elaboration: *Treacy v DPP* (1971) 55 Cr.App.R. 113. If elaboration is required, a direction approved in *R v Moys* (1984) 79 Cr.App.R.72 should be given, confirming that suspicion, in addition with the fact that the defendant shut his eyes to the circumstances, is not enough, although such matters were relevant to the jury’s determination of the defendant’s knowledge or belief.

risk of criminal proceedings for the principal offender is considered to be doing an act capable of assisting or encouraging the commission of an offence.³⁰⁵

English courts have jurisdiction under Section 52 if the defendant knew or believed that the substantive offence would be committed in England or Wales, regardless of where the acts of encouragement or assistance took place. English courts also have jurisdiction if the encouragement or assistance took place in England or Wales, but the defendant knew or believed the substantive offence would take place abroad so long as the defendant knew the offence was illegal both in the UK and in the country of the substantive offence.³⁰⁶

4.3.4 Canada

A person who counsels another person to commit an offence that is later committed is considered a party to that offence (section 22 of the *Criminal Code*). However, a person who counsels another to commit an offence that is not committed is guilty of a different offence that is sometimes referred to as the offence of incitement. Section 464 of the *Criminal Code* states:

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

- (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and
- (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

The term “counselling” is wide and, pursuant to section 22(3) of the *Criminal Code*, “includes procuring, soliciting or inciting.”³⁰⁷

The *mens rea* of the offence of incitement per section 464 requires an intention that the counselled offence be committed or recklessness in the sense of a conscious disregard for a substantial and unjustified risk that the offence counselled was likely to be committed.³⁰⁸ The offence of incitement under section 464 has not been used in Canada so far to prosecute a person who counsels bribery that was not actually committed. It could have been used in the prosecution of Wallace and three other Canadians in respect to the alleged bribe offer in the Padma River Bridge project in Bangladesh (see Chapter 1, Section 1.2).

³⁰⁵ Ormerod, *supra* note 163 at 487.

³⁰⁶ Simester et al, *supra* note 288 at 385.

³⁰⁷ For further explanation of “counselling” see *R v Junius et al*, 2012 ONCJ 710 (CanLII) at 25, online (pdf): <<https://www.canlii.org/en/on/on/oncj/doc/2012/2012oncj710/2012oncj710.pdf>>.

³⁰⁸ *R v Hamilton*, [2005] 2 SCR 432.

CHAPTER 4

MONEY LAUNDERING

PETER GERMAN AND GERRY FERGUSON

CONTENTS

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The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

The term “money laundering” describes a range of practices used to disguise the source of proceeds of crime and integrate them into the legitimate economy. Simply put, money laundering means ‘washing’ dirty money so that it appears clean. Corrupt officials and other criminals use money laundering techniques to hide the true sources of their income. This allows them to avoid detection by law enforcement and to spend their profits freely. Money laundering in some form is an essential part of most illicit enterprises, although methods vary widely. Large drug-trafficking organizations and corrupt public officials use complex, multi-jurisdictional layering schemes; small-time criminals use simpler strategies.

As Raymond Baker points out in a 2013 article, all the illicit funds in the global economy flow through similar channels. Drug smugglers, tax evaders and corrupt officials use their money for different ends and acquire it by different means. Nonetheless, Baker notes:

All three forms of illicit money – corrupt, criminal, and commercial – use this structure, originally developed in the West originally for the purpose of moving flight capital and tax evading money across borders. In the 1960s and 1970s drug dealers stepped into these same channels to move their illicit money across borders. In the 1980s and 1990s, seeing how easy it was for the drug dealers to do it, other kinds of racketeers stepped into these same structures to move their illicit money across borders. In the 1990s and in the early years of this new century, again seeing how easy it was for drug dealers and racketeers, terrorist financiers also stepped into these same channels to move their illicit money across borders. Drug dealers, criminal syndicate heads, and terrorist masterminds have not invented any new ways of shifting illicit money across borders. They merely utilize the mechanisms we originally created to move corrupt and commercially tax evading money across borders.¹

Therefore, suppressing money laundering through a variety of anti-money-laundering (AML) schemes is essential to combatting terrorist financing, organized crime, and corruption. What Baker calls the “global shadow financial system” is integral to a broad range of corrupt and criminal activities worldwide.² Indeed, as Margaret Beare notes, while the 1931 arrest, conviction and downfall of Al Capone is often dismissed as being “merely for tax evasion,” his undoing was in fact due to a failure to launder illicit money adequately.³

¹ Raymond W Baker, “The Scale of the Global Financial Structure Facilitating Money Laundering” in Brigitte Unger & Daan van der Linde, eds, *Research Handbook on Money Laundering* (Edward Elgar, 2013) 190 at 191.

² *Ibid* at 190.

³ Margaret Beare, *Criminal Conspiracies - Organized Crime in Canada*, 2nd ed (Oxford, UK: Oxford University Press, 2015) at 208.

Because the purpose of money laundering is to conceal the source of illicit funds, it is inherently difficult to measure its global scope. In a recent article, Killian McCarthy summarizes some of the more common estimates:

The IMF and the World Bank, for example, have estimated that some 2-4 per cent of the world's GDP stems from illicit sources. Agarwal and Agarwal (2004; 2006), using regression analysis and forecasts, suggest an even higher level of 5-6 per cent. At this rate somewhere between \$2.0-2.5 trillion should flow through the money laundering market on an annual basis. Walker (1999, 2004, 2007) however, claims that this is too low a figure and, using input-output and gravity models, proposes that the true amount is more like \$3 trillion per annum. Each estimate is subject to some criticism (cf. Reuter 2007), and are variously said to be overblown – either by media hype, or measurement errors – by as much as +/- 20 per cent (Schneider, 2008). Despite all this the consensus remains that the market for money laundering is a significant one. [footnotes omitted]⁴

Despite the wide range of estimates, there is a degree of consensus among researchers. No one has an accurate estimate, but everyone agrees that a large amount of money is being laundered every year.

2. ESSENTIAL ELEMENTS

There are many ways to launder money. Most scholars break money laundering schemes into three stages to make it easier to compare, contrast, and analyze different methods. These three stages are:

1. **Placement:** illicit funds are used to make a purchase or deposit in the legitimate economy;
2. **Layering:** through repeated transactions, the source of the funds is concealed; and
3. **Integration:** the funds are fully and untraceably integrated into the legitimate economy.

The “layering” stage, in which the source of the funds is concealed, is where most of the activity occurs in any given scheme.

A useful and easily readable description of the basic concepts of money laundering and its prevention can be found in the Global Organization of Parliamentarians Against Corruption (GOPAC)'s 2011 *Anti-Money Laundering Action Guide for Parliamentarians*.⁵ GOPAC is a non-

⁴ Killian J McCarthy, “Why Do Some States Tolerate Money Laundering? On the Competition for Illegal Money” in Unger & van der Linde, *supra* note 1, 127 at 129. For a critique of these estimates, see also Chapter 1, Section 4.3 of this book.

⁵ Global Organization of Parliamentarians Against Corruption, *Anti-Money Laundering Action Guide for Parliamentarians*, (GOPAC, 2011), online (pdf):
<http://www.gopacnetwork.org/Docs/GOPAC_AML_ActionGuide_EN.pdf>.

profit organization made up of current or former legislators from around the globe. The organization is dedicated to promoting accountability and good governance in national parliaments in order to combat corruption.

3. MOST COMMON METHODS

As noted, the term “money laundering” encompasses a wide variety of different schemes used by everyone from small-time drug dealers to corrupt heads of state. As Beare stated, “[i]t is impossible to identify all the laundering possibilities - from cults to marathons and beyond,”⁶ noting in the 1990s the Solar Templar doomsday cult was accused of being a front for laundering, and the Los Angeles Marathon Corporation was convicted of money laundering. Methods of money laundering can be as simple as small businesses using illicit cash to generate greater profits or as complex as international schemes using methods of concealing funds including offshore laundering havens, shell companies and wire transfers.⁷ Beare identifies four typologies of money laundering schemes: 1) *Simple-limited* schemes that launder relatively small volumes of illicit proceeds through small cash-based businesses such as bars and vending machine companies; 2) *Simple-unlimited* schemes that launder large amounts of money with few transactions utilizing big-budget companies with unclear resources, materials and service costs; 3) *Serial-domestic* schemes that use numerous financial transactions; moving funds through a network of transactions that involve multiple banks; and 4) *Serial-international* schemes that use multiple transactions and international services, often returning funds into big banks in North America and Europe. Both *serial domestic* and *serial-international* schemes can use professionals such as lawyers and accountants.⁸ The Liberty Reserve Global case demonstrates complex schemes used by money launderers. Liberty Reserve offered a digital currency service based in Costa Rica. The Department of Justice (DOJ) created a diagram of the complexity of the investigation, which involved 17 countries and 36 mutual legal assistance treaty (MLAT) requests in 15 countries for execution of search warrants, wiretap authorizations, freezing or seizing assets, all of which culminated in 5 arrests.⁹

This chapter focuses on money laundering in the context of corruption. While a great deal of global AML efforts are directed towards controlling organized crime and preventing terrorist financing, those topics are beyond the scope of this book. The following excerpt from *Laundering the Proceeds of Corruption*, a report produced by the Financial Action Task Force (FATF), describes the most common money-laundering methods used by corrupt officials.¹⁰ The FATF is an inter-governmental policy group composed of 34 nations, including the US, UK, and Canada, which sets standards in the form of the FATF 40

⁶ Beare, *supra* note 3.

⁷ *Ibid* at 243-44.

⁸ *Ibid* at 215-16.

⁹ United States, Department of Justice, “The Liberty Reserve Global Takedown” (30 May 2013), online (pdf): <<https://www.justice.gov/sites/default/files/usao-sdny/legacy/2013/05/30/visual.pdf>>.

¹⁰ Financial Action Task Force, *Laundering the Proceeds of Corruption: FATF Report*, (FATF, July 2011), online (pdf): <[http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering the Proceeds of Corruption.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf)>.

Recommendations, promotes procedures for combatting money laundering and evaluates member states' performance.

BEGINNING OF EXCERPT

An Analysis of the Most Common Methods Used to Launder the Proceeds of Grand Corruption

40. Laundering of corruption proceeds can take a variety of forms, depending on the nature of the corrupt act. In the grand corruption context, the most prevalent forms of proceeds are those arising from 1) bribe-taking or kickbacks; 2) extortion; 3) self-dealing and conflict of interest; and 4) embezzlement from the country's treasury by a variety of fraudulent means. Understanding the typical methods by which PEPs ["politically exposed persons" – a technical term for public officials in the AML context] unlawfully obtain proceeds assists in understanding how those funds could be laundered.

41. In bribery, money flows from a private entity, generally speaking, to a PEP or associate in exchange for the grant of some sort of government concession: a contract for goods or services, for example, or the right to extract resources from the state. The proceeds of the bribery flow from the bribe giver to the corrupt PEP or an associate, possibly through a shell company or trust in which the PEP is the beneficial owner; it may never touch the home country of the corrupt PEP. A good example of this is found in the Bangkok film festival case, in which two promoters were able to bribe certain Thai officials to obtain the rights to sponsor and manage a government-funded film festival in Thailand.¹¹ The bribes were paid simply by means of the wire transfer of funds from US-based accounts, where the promoters were located, into offshore accounts in third countries maintained by family members of the PEP. The bribes never passed through Thailand, although that was the locus of the corrupt activity.

42. However, as noted later in the section on the use of cash, sometimes funds are retained in the country where the corruption takes place. For example, Joseph Estrada, then the President of the Philippines, often received cash or check payments from gambling operators in exchange for their protection from arrest or law enforcement activities. This money was simply deposited into domestic accounts in the name of a fictional person or in corporate vehicles established by Estrada's attorney, and then used for a variety of expenses.¹² Likewise, in the case of the bribery of US Congressman Randall Cunningham, who was a senior legislator with significant control over military expenditures, a military contractor bribed him both by checks to a corporation controlled by Cunningham, but also by agreeing to purchase real estate owned by Cunningham at a vastly inflated price.¹³

43. Proceeds are also generated through extortion schemes. In such schemes, funds are passed from the victim to the PEP. This can be done within the country or elsewhere.

¹¹ [39] *United States v. Green, et al*, (2010) court documents. Kickbacks and bribes generally have no legal distinction. In ordinary parlance, a kickback typically refers to the payment of a percentage of a specific contract, while bribery is simply the unrestricted payment of money.

¹² [40] *People of the Philippines v. Estrada* (2007), court decision.

¹³ [41] *United States v. Cunningham* (2006), court documents.

Pavel Lazarenko, former Prime Minister of Ukraine, regularly required entities that wished to do business in Ukraine to split equally the profits of the enterprise with him in exchange for his influence in making the business successful. These businesses would transfer a share of ownership to Lazarenko associates or family members, and money would be wired from the victim companies to offshore accounts controlled by Lazarenko.¹⁴

44. Self-dealing occurs when a PEP has a financial interest in an entity which does business with the state. The PEP is able to use his official position to ensure that the state does business with the entity, thereby enriching the PEP. A US Senate report noted a situation in which one West African PEP was responsible for selling the right to harvest timber from public lands, while at the same time owning the same company that had been awarded those rights.¹⁵ In such situations, money would flow from the affected country's accounts or central bank to accounts owned by the corporation or entity owned or controlled by the PEP.

45. Finally, embezzlement schemes are used in a number of corruption cases. Money flows can occur in a number of ways, using a variety of methods. In the case involving former governor of Plateau state in Nigeria, Joshua Dariye, for example, a grant for environmental contracts was made from the federal government to the State, and the money was deposited into a bank account established by the State. Dariye used his influence to cause the bank to issue a bank draft creditable to an account at a different Nigerian bank that Dariye had established under an alias about ten months previously.¹⁶ In the case involving Sani Abacha, then the President of Nigeria, Abacha directed his national security advisor to create and present false funding requests, which Abacha authorised. Cash "in truckloads" was taken out of the central bank to settle some of these requests. The national security advisor then laundered the proceeds through domestic banks or Nigerian and foreign businessmen to offshore accounts held by family members.¹⁷

46. Thus, it would appear that all stages of the money laundering process – placement, layering, and integration – are present in the laundering of proceeds regardless of the manner of corruption. The specific methods by which the funds are actually laundered are discussed below.

END OF EXCERPT

¹⁴ [42] *United States v. Lazarenko* (2006), court decision.

¹⁵ [43] Permanent Subcommittee on Investigations (2010), pp. 24-25.

¹⁶ [44] *Federal Republic of Nigeria v. Joshua Chibi Dariye* (2007) (UK) court documents.

¹⁷ [45] Okonjo-Iweala, *The Nigerian Experience* (2007) unpublished World Bank case study.

3.1 Use of Corporate Vehicles and Trusts

BEGINNING OF EXCERPT

47. The project team's review of the case studies showed that every examined case featured the use of corporate vehicles, trusts, or non-profit entities of some type. That this is the case should perhaps not be surprising; corporate vehicles and trusts have long been identified by FATF as posing a risk for money laundering generally, and are addressed in Recommendations 33 and 34.¹⁸ WGTYP [Working Group on Typologies] long ago noted in its 1996-1997 Report on Money Laundering Typologies of the common use of shell corporations, and the advantages they provide in concealing the identity of the beneficial owner and the difficulty for law enforcement to access records.

48. WGTYP issued a report detailing the risks of misuse of corporate vehicles and trusts in October 2006.¹⁹ The intervening ten years changed little. As that report noted, "[o]f particular concern is the ease with which corporate vehicles can be created and dissolved in some jurisdictions, which allows these vehicles to be ... misused by those involved in financial crime to conceal the sources of funds and their ownership of the corporate vehicles." This point was again made more recently in FATF's 2010 typology, *Money Laundering Using Trust and Company Service Providers*.²⁰

49. These typologies, as well as other publically available information, set forth the money laundering risks that corporate vehicles and trusts present, regardless of the predicate crime. Features of corporate vehicles that enhance the risk of money laundering include:

- the ease with which corporate vehicles can be created and dissolved in some jurisdictions;
- that a vehicle can be created as part of a series of multi-jurisdictional structures, in which a corporation in one jurisdiction is owned by one or more other corporations or trusts in other jurisdictions;
- the use of specialised intermediaries and professionals to conceal true ownership;
- the ease in which nominees may be used to disguise ownership, and corporations;
- and other vehicles whose only purpose is to disguise the beneficial owner of the underlying asset.²¹

¹⁸ [46] In preparation for the fourth round of mutual evaluations, the FATF has recently started a review of some key components of the Recommendations, including transparency of legal persons and arrangements. In February 2012, the FATF plenary will consider the WGEI [Working Group on Evaluations and Implementation] recommendation on amending the standards related to the transparency of legal persons and arrangements.

¹⁹ [47] FATF (2006).

²⁰ [48] FATF (2010b).

²¹ [49] See, e.g., United States Government Accountability Office (2006).

50. Moreover, each jurisdiction has its own set of requirements regarding identification of the beneficial owner and the circumstances under which that information may be accessed. As discussions within the FATF regarding clarification of the standards related to beneficial ownership have demonstrated, few jurisdictions collect beneficial ownership information at the time of company formation, increasing the challenges of international cooperation. Each of these features has the effect of making it more difficult for financial institutions, regulators, and law enforcement to obtain information that would allow for an accurate understanding of the ownership and control of the assets involved and the purposes for which specific financial transactions are conducted. Some vehicles are even designed to protect against asset confiscation; certain trusts, for example, require the trustee to transfer assets upon receiving notice of a law enforcement or regulatory inquiry.²²

51. The ease by which an individual can obtain a corporate vehicle is highlighted by J.C. Sharman's recently-published foray into purchasing shell corporations. Sharman, a professor at Griffith University in Brisbane, Australia, noted that of 45 service providers he was able to contact, 17 of them were willing to form the company with only a credit card and mailing address (to receive the documents).²³ Sharman acknowledged that the relatively small sample size of his study "necessitates a degree of modesty about the findings," and that obtaining a bank account for the corporations without divulging an identity would be more difficult. Nevertheless, as he notes, "If one law-abiding individual with a modest budget can establish anonymous companies and bank accounts via the Internet using relatively high-profile corporate service providers, how much simpler is it likely to be for criminals, who are not bound by any of these restrictions, to replicate this feat?"

52. In the corruption context, it is easy to understand why a corrupt PEP may wish to use a corporate vehicle. In some jurisdictions, PEPs are subject to public asset disclosure requirements, rules regarding engaging in outside transactions to prevent self-dealing and conflicts of interest, and a host of other codes of conduct, and ethical prohibitions.²⁴ Specific investigative bodies and watchdog groups may exist to guard against corruption, and in many countries a robust media is able to publicise missteps by public officials. Some countries have effectively implemented FATF Recommendation 6 [now Recommendation 12], and require financial institutions to conduct enhanced due diligence for those customers who are foreign PEPs. PEPs have their career and reputation at stake if found to be in possession of unexplained wealth. In this environment, corrupt PEPs have a greater need than others to ensure that specific criminal assets cannot be identified with or traced back to them. Corporate vehicles thus provide one of the most

²² [50] Baker, R.W. (2005), p. 37.

²³ [51] Sharman, J.C. (2010).

²⁴ [52] Many of these are obligations of member states under the UNCAC. A good description of the available legislative and regulatory schemes employed by some countries is described in the UNODC's UN Anti-corruption Toolkit (2004), found at [updated link: <<http://www.pogar.org/publications/finances/anticor/anticorruptiontoolkit.pdf>>].

effective ways to separate the origin of the illegal funds from the fact that the PEP controls it.

53. One example of this comes from the case of Augusto Pinochet, the former President of Chile. Pinochet was assisted by his US-based bank (and its U.K. branch) in setting up corporate vehicles in order to both hide his assets and shield them from the reach of asset freezing and confiscation or civil recovery orders. Specifically, Pinochet was able to set up offshore shell corporations and a trust in 1996 and 1998, even after a Spanish magistrate had filed a detailed indictment against Pinochet for crimes against humanity and issued world-wide freezing orders.²⁵ These corporations, established in jurisdictions that at the time had weak AML controls, were listed as the nominal owners of the US bank accounts and other investment vehicles that benefited Pinochet and his family. The bank's KYC documentation listed only the corporations, not Pinochet, as the owners of the accounts, despite the fact that the bank knew that Pinochet was the beneficial owner (since the bank itself had set up the corporations). The bank has since been convicted of AML-related criminal charges.

54. According to the case study of Vladimiro Montesinos, Peruvian President Fujimori's security advisor, he used shell corporations very effectively to disguise and move money illegally obtained through defence contracts with the Peruvian government.²⁶ Such a scheme, involving several corporate vehicles in a number of jurisdictions with each vehicle holding bank accounts in yet other jurisdictions, is designed to frustrate any financial institution, regulator or government investigator attempting to unravel the scheme.

END OF EXCERPT

3.2 Use of Gatekeepers

BEGINNING OF EXCERPT

55. Gatekeepers were significantly represented in the cases within the project team inventory. "Gatekeepers are, essentially, individuals that 'protect the gates to the financial system' through which potential users of the system, including launderers, must pass in order to be successful."²⁷ The issue of gatekeepers has been addressed by FATF on several occasions, including WGTYP's 2003- 2004 Report, which concluded:

Increasingly, money launderers seek out the advice or services of specialised professionals to help facilitate their financial operations. This trend toward the involvement of various legal and financial experts, or gatekeepers, in money laundering schemes has been documented previously by the FATF and appears to continue today. The work

²⁵ [53] Permanent Subcommittee on Investigations (2004).

²⁶ [54] ADB/OECD (2007b); UNODC and World Bank (2007).

²⁷ [55] FATF (2010c).

undertaken during this year's exercise confirmed and expanded the FATF's understanding of specific characteristics of this sector and what makes it vulnerable to money laundering. The most significant cases each involve schemes of notable sophistication, which were possible only as a result of the assistance of skilled professionals to set up corporate structures to disguise the source and ownership of the money.

56. In 2010, FATF published its Global Money Laundering and Terrorist Financing Threat Assessment, which described gatekeepers as a "common element" in complex money laundering schemes. The report noted that gatekeepers' skills are important in creating legal structures that could be used to launder money and for their ability to manage and perform transactions efficiently and to avoid detection. Recommendation 12 [now Recommendation 22] acknowledges the role that such gatekeepers can play by recommending that such individuals engage in due diligence and record keeping when engaged in certain activities.

57. The review of the cases illustrates the variety of ways in which gatekeepers, in particular lawyers, are used to launder the proceeds of corruption. They have been used to create corporate vehicles, open bank accounts, transfer proceeds, purchase property, courier cash, and take other means to bypass AML controls. In addition, lawyers have subsequently used rules of attorney-client privilege to shield the identity of corrupt PEPs.

58. West African PEPs: In four separate case studies of West African PEPs and their families, the US Senate discovered that lawyers were used to create corporate vehicles, open bank accounts and purchase property with the express purpose of bypassing AML controls set up to screen for PEPs.²⁸ For example, the son of the President of one West African nation, who himself was a minister within the government, wished to purchase real estate and aircraft within the United States. To do so, a lawyer for the PEP opened bank accounts there. However, because of US banking rules requiring enhanced level of due diligence for funds moving through those accounts, several US banks closed the accounts on the belief that they were being used to conduct suspicious transactions. In response, the lawyers for the PEP would deposit incoming funds into attorney-client or law office accounts, and then transfer the money into newly-created accounts for the PEP. Due to the fact that the lawyer's accounts were not subject to the same enhanced due diligence as the PEP, the lawyer was able to circumvent the enhanced AML/CFT measures. Ultimately, at least two banks were able to identify the fact that the attorney's accounts were being utilised in this manner and closed the attorney accounts, but not before hundreds of thousands of dollars had passed through.

59. Duvalier case: Haitian government assets diverted by Jean-Claude Duvalier were likewise disguised by the use of lawyers as intermediaries, who would hold accounts for the Duvalier family. This, according to the UK court that examined the matter, had the added advantage of the use of professional secrecy to avoid identifying the client.²⁹ The court opinion identified numerous accounts held by law firms for Duvalier and his family,

²⁸ [56] Permanent Subcommittee on Investigations (2010).

²⁹ [57] *Republic of Haiti v. Duvalier*, 1990 UK.

both in the UK and in Jersey. The use of professional secrecy was used to attempt to prevent an inquiry into the nature of the funds.

60. Chiluba case: Similarly, in a civil recovery suit instituted in the UK against the former President of Zambia, the court, in its factual findings, described in great detail the use of certain lawyers and law firms to distribute and disguise money embezzled from the coffers of the Zambian government.³⁰ Special corporate vehicles had been set up, purportedly for use by the country's security services, and government funds were transferred to accounts held by those entities. Thereafter, millions of dollars were transferred to the client accounts of certain law firms, from which the lawyers would then make certain disbursements upon instructions from complicit PEPs. These disbursements were to other accounts located both in Zambia and in other countries, as well as payments for personal expenses and asset acquisitions for the government officials and their families. As the Court noted in its opinion, "There is no reason for his client account to be used for any genuine currency transactions. This is ... money which has been traced back to [the Zambian Ministry of Finance]. It is a classic example of washing money through [the attorney's] client account to hide its origins and to clothe it with an aura of respectability."

61. The court also noted an instance in which the PEP's lawyer withdrew GBP 30 000 – an amount that vastly exceeded the President's annual salary – and delivered it personally to the President. Moving the money through the lawyer's accounts disguised the fact that the money originated from government accounts, and further hampered the ability to trace the proceeds. The court noted that the lawyers involved did not make any efforts to determine the source or the purpose of the money: "Yet [the lawyer] made no enquiry as to how the President could simply take such a large amount of money. An honest solicitor would not participate in such a transaction without a full understanding of its nature so that he could be satisfied it was lawful. [The lawyer] did not so satisfy himself because he was unwilling to ask the question because he was afraid of the answer." Additionally, the lawyers involved formed foreign shell corporations, which were then used to purchase properties with government money for the benefit of corrupt officials.

END OF EXCERPT

3.3 Use of Domestic Financial Institutions

BEGINNING OF EXCERPT

62. Much of the focus on PEPs to date has been to ensure that foreign PEPs are subject to enhanced due diligence regarding the source of funds deposited into financial institutions – in other words, measures to prevent corrupt PEPs from laundering their proceeds in foreign bank accounts. For example, the Third EU Directive requires enhanced due diligence only for foreign PEPs. The UNCAC, however, does not distinguish between foreign PEPs and those prominent political figures within the institution's own country.

³⁰ [58] *Attorney General of Zambia v. Meer Cares, et al*, UK court opinion (2007).

The World Bank policy paper on PEPs notes that many financial institutions do not distinguish between foreign and domestic PEPs.³¹

63. The Interpretive Note to Recommendation 6 encourages jurisdictions to extend its EDD requirements to domestic PEPs as well. Recently the FATF has discussed the degree to which domestic PEPs should be subject to enhanced due diligence, and in addressing the issue, has recommended that domestic PEPs continue to be considered on a risk-based approach, and that foreign PEPs continue to receive enhanced due diligence.³²

64. Some typology exercises the project team reviewed have concluded that domestic PEPs may present a significant risk for corruption-related money laundering. Professor Jason Sharman, in summarizing the ADB/OECD paper on PEPs, characterised the notion that domestic PEPs do not present a threat of money laundering as a “myth.”³³ The project team’s analysis of the case study inventory found that PEPs are not only using foreign financial institutions to transfer and hide the proceeds of corruption. PEPs are also using domestic financial institutions to launder funds.

65. Perhaps the most obvious example of this involves President Joseph Estrada of the Philippines, who was convicted in his country of the crime of plunder. The court’s ruling in that case noted that a significant portion of the money that Estrada collected as a result of kickbacks from illegal gambling and tobacco excise taxes ultimately ended up at a bank account in the Philippines in the name of an alias, Jose Velarde. The court noted that Estrada used the account and would simply sign Velarde’s name to deposit slips, oftentimes in the presence of bank personnel. Money that went through that account was used for various asset purchases, including real estate for the benefit of Estrada.³⁴

66. The US Senate, in its 2010 investigation of the use of US banks to launder corruption proceeds, described in two different reports the banking and asset purchase activities of the President of a West African oil producing country as well as that of his son, who was also a high-level government official. The son, for example, in purchasing in cash a house in the United States for USD 30 million, wire transferred money, in six different USD 6 million tranches, from a personal bank account he held in his own country, through an account in France and then to the United States. The son had an official government monthly salary of approximately USD 6 000.

67. The case involving assets stolen by Joshua Chibi Dariye also highlight the use of domestic accounts in at least the initial stages of a more complex scheme. Dariye, the Governor of Plateau State in the Federal Republic of Nigeria from May 1999 through May 2007, embezzled money belonging to the state in several ways. Checks issued from the central bank of Nigeria to Plateau State for ecological works were received by Dariye and, rather than being deposited into a government account, were instead diverted to an account in Nigeria Dariye had established using an alias. The money was then transferred

³¹ [59] Greenberg, T.S. et al. (2009).

³² [60] This is the situation as at the publication of this report (July 2011).

³³ [61] Sharman, J.C., (2009).

³⁴ [62] *People of the Philippines v. Joseph Estrada* court opinion.

to accounts held in Dariye's own name in the UK. Likewise, Dariye purchased real estate by diverting money destined for a Plateau State account into an account in Nigeria in the name of a corporation he controlled. That corporation, in turn, transferred money to UK accounts in the corporation's name to effectuate the real estate purchase.³⁵

68. Raul Salinas, the brother of the President of Mexico, likewise was able to move money out of his home country by using the Mexican branch of a US-based international bank. A US-based bank official introduced Salinas' then-fiancée to a bank official at the Mexico City branch of the bank. The fiancée, using an alias, would deliver cashier's checks to the branch, where they were converted to dollars and wired to US accounts.³⁶

69. PEPs need accounts in their own country in which to fund their lifestyles, and there have been examples in which the PEP, after secreting money overseas, then moved the money back to his home country. The US Senate, in its 2004 investigation of corruption-related money laundering, provided one such example. Augusto Pinochet of Chile, notwithstanding a modest official government salary, was able to secret millions of dollars in UK and US accounts, often through the use of aliases and family members. In 1998 a Spanish investigating magistrate instituted worldwide asset freeze orders as a result of an investigation into Pinochet's role in human rights abuses and other crimes and was subsequently facing charges in Spain and Chile. Pinochet was able however, to purchase USD 1.9 million in cashier's checks (in USD 50 000 increments) from his account in the US, which he was thus able to cash using banks in Chile.³⁷

70. That corrupt PEPs would seek to move money outside of their home jurisdiction is at the root of Recommendation 6, requiring enhanced due diligence for foreign PEPs. An examination of the corruption case studies revealed that in nearly every case foreign bank accounts were being used in part of the scheme. Beginning with one of the earliest cases, Marcos of the Philippines, through the significant and egregious activity of Sani Abacha and a number of Nigerian governors, and most recently with the US Senate's study of three West African heads of state, corrupt PEPs nearly universally attempt to move their money outside of their home country. This money is typically moved from developing countries to financial institutions in developed countries or those with a stable climate for investment.

71. Of course, corruption is not restricted to developing countries. The project team analyzed the Nino Rovelli judicial corruption matter, for example.³⁸ There, approximately USD 575 million was paid out to individuals as a result of bribes paid to judicial officials in Italy. The money ultimately was moved and disguised in a series of financial transactions involving accounts and corporate vehicles in the United States, British Virgin Islands, Singapore, Cook Islands and Costa Rica. Likewise, the developing world's financial systems may well be used to hide money. In the Titan Corporation bribery case

³⁵ [63] *Federal Republic of Nigeria v. Joshua Chibi Dariye* (2007) (UK).

³⁶ [64] Permanent Subcommittee on Investigations (1999).

³⁷ [65] Permanent Subcommittee on Investigations (2004).

³⁸ [66] *United States v. Proceeds of Crime Transferred to Certain Domestic Financial Accounts* (2007), court filings.

for example, bribes from a US corporation to the President of Benin, intended to secure government contracts in telecommunications, was moved, in cash, directly to Benin.³⁹

72. The reason for this preference is obvious. Foreign accounts hold the advantage of being harder to investigate for the victim country, are perceived of as more stable and safer, and are more easily accessed than accounts held in the PEPs home country. Moreover, a PEP can “stack” foreign jurisdictions: a bank account in one country could be owned by a corporation in another jurisdiction, which is in turn owned by a trust in a third jurisdiction. Each additional country multiplies the complexity of the investigation, reduces the chances of a successful result, and extends the time needed to complete the investigation.

END OF EXCERPT

3.4 Use of Nominees

BEGINNING OF EXCERPT

73. The use of associates or nominees – trusted associates or family members, but not necessarily the lawyers and accountants described in the gatekeepers section – to assist the PEP in disguising and moving the proceeds of corruption was common in the inventory of cases. FATF has documented the use of such nominees previously. The WGTYP annual report for 2003-2004 noted at paragraph 78:

PEPs, given the often high visibility of their office both inside and outside their country, very frequently use middlemen or other intermediaries to conduct financial business on their behalf. It is not unusual therefore for close associates, friends and family of a PEP to conduct individual transactions or else hold or move assets in their own name on behalf the PEP. This use of middlemen is not necessarily an indicator by itself of illegal activity, as frequently such intermediaries are also used when the business or proceeds of the PEP are entirely legitimate. In any case, however, the use of middlemen to shelter or insulate the PEP from unwanted attention can also serve as an obstacle to customer due diligence that should be performed for every customer. A further obstacle may be involved when the person acting on behalf of the PEP or the PEP him or herself has some sort of special status such as, for example, diplomatic immunity.

74. A typical use of nominees can be found in the case of Arnaldo Aleman. Aleman was able to siphon government funds through a non-profit institution known as the Nicaraguan Democratic Foundation (FDN), an entity incorporated by Aleman’s wife in Panama. In addition, Aleman and his wife set up both front companies and non-profit organisations to funnel money through. Lastly, Aleman was able to defraud the

³⁹ [67] *United States v. Titan Corporation (US)* (2005), court filings.

government in the sale of telecommunications frequency to a private entity, using companies set up by advisors to Aleman. Aleman was also assisted in his efforts to steal and subsequently move money through the active participation of Byron Jerez, the country's tax commissioner at the time.⁴⁰

75. The scheme set up by a high level PEP in a Central American country likewise depended on the assistance of both family members as well as other associates to succeed. The PEP would divert money that was intended to be paid to the country's treasury through a series of financial transactions, which would then ultimately end up in foreign bank accounts in the name of the PEP's former wife and daughter.⁴¹

END OF EXCERPT

3.5 Use of Cash

BEGINNING OF EXCERPT

76. The use of cash, and its placement into the financial system, has long been identified as a method for the laundering of proceeds of crime. Indeed, when the FATF 40 Recommendations were first issued in 1990, the focus of many of its preventative measures was on detecting money laundering at the cash proceeds stage. The anonymous nature of cash, with its lack of paper trail, is attractive and may outweigh other negatives. Some of the predicate crimes, such as drug trafficking, are historically cash businesses. Indeed, even for crimes that do not generate cash requiring placement into the financial system, WGTYP has noted (Report on Money Laundering Typologies, 2000-2001) some laundering schemes in which the proceeds are converted back to cash in order to break the paper trail.

77. While smaller-scale, endemic corruption (in which money is provided to lower- or mid-level government officials in order to act or refrain from acting in their official capacity), would be expected to generate cash in need of placement, the grand corruption cases would not be expected to have significant amounts of cash. A cash payment to a PEP would break the chain of bank records, of course, but it would require the PEP to run the gauntlet of AML/CFT controls designed to combat placement of illegally-derived cash into the system. This would include the possibility that the PEP's transactions (as well as those for his family and close associates) are subject to enhanced due diligence in accordance with Recommendation 6. In each case in which the PEP receives the cash, he must engage in a calculus to determine whether the risks associated with placement – including the possibility of EDD as a result of his PEP status – outweigh the benefits of having broken the chain. It appears that in a significant number of cases, the corrupt PEP wants the cash and, moreover is able to place the cash without attracting undue attention.

⁴⁰ [68] *United States v. \$125,938 (US)* (2008) court filings.

⁴¹ [69] *United States v. Alfanzo Portillo (US)* (2009) court documents.

78. The US Senate's investigation of corruption-related money laundering identified the President of one oil rich West African country, for which a US bank accepted nearly USD 13 million in cash deposits over a three-year period into accounts controlled by the President or his wife. The report noted that some of these deposits were for a million dollars at a time, and the currency was in shrink-wrap packaging. The report could identify no legitimate source for such currency. This same bank also provided USD 1.9 million in cashier checks to a PEP from a South American country, using the maiden name of the wife of the PEP as the payee. These cashiers' checks were ultimately cashed in the PEP's home country. The bank involved was fined and criminally prosecuted for these violations and ultimately was closed as a result.⁴²

79. The Zambian asset recovery lawsuit, noted above, also highlights the use of cash. As part of the scheme, the president of Zambia directed his UK-based lawyer to withdraw GBP 30 000 in cash from accounts containing diverted government money and deliver it to him personally. There were also other significant cash payments, including a USD 250 000 payment made from a diverted account to the Zambian Ambassador to the United States, which he then took in a suitcase to Switzerland and gave to the head of the Zambian security service, and hundreds of thousands of dollars in cash used to purchase property in the UK and elsewhere. The court found that there was no legitimate purpose for the large cash withdrawals.⁴³

80. Other case studies have shown the presence of significant amounts of unexplained cash. Diepreye Alamieyeseigha, for example, was found to have over GBP 1 000 000 in his apartment in the UK at the time of his arrest, notwithstanding the fact that as governor of Bayelsa State in Nigeria, his salary was a fraction of that. Another governor of a Nigerian state around that time, Joshua Chibi Dariye, previously discussed, was found to have deposited into his UK accounts in excess of GBP 480 000 during a four and a half year period. According to a US Senate report on the matter, immediately after Sani Abacha's death in 1998, his wife was stopped at a Lagos airport with 38 suitcases full of cash, and his son was found with USD 100 million in cash. According to the World Bank study he was able to place significant amounts of cash in the financial system by using associates. Lastly, Montesinos used cash couriers to transfer funds from Switzerland to Mexico and Bolivia.

81. PEPs have an advantage not usually available to the general public: the use (and abuse) of the so-called "diplomatic pouch." Intended to protect free communication between diplomats and their foreign missions, a diplomatic bag is protected from search or seizure by the 1961 *Convention on Diplomatic Relations*.⁴⁴ A diplomatic bag may only be used for official materials and, while the Convention protects it from search, it does not relieve the carrier of adherence to the laws of the host nation, including cross-border currency reporting requirements.

⁴² [70] Permanent Subcommittee on Investigations (2004).

⁴³ [71] *Attorney General of Zambia v. Meer Cares, et al*, (UK)(2007) court opinion.

⁴⁴ [72] <http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf>.

82. Such was the situation that the US Senate uncovered in its report on the financial affairs of one West African PEP. His daughter, who was in graduate school in the United States, asked her US bank to count certain cash she had stored in her safe deposit box. The bank found USD 1 million in cash, in USD 100 bills, wrapped in plastic. When asked about the source of the money, the daughter replied that her father, the PEP, provided her the cash when he came into the United States, and that he often brought cash into the United States. The PEP had never declared his transport of the cash, as he was required to do by US law.⁴⁵

END OF EXCERPT

4. INTERNATIONAL STANDARDS FOR PREVENTION AND CRIMINALIZATION

4.1 UNCAC

As discussed in previous chapters, UNCAC is the most extensive and most widely ratified international convention addressing corruption.⁴⁶ In addition to prohibiting bribery and other forms of corruption, the drafters of UNCAC recognized that effective anti-money laundering strategies are an important factor in preventing and detecting large-scale corruption. The transnational nature of money laundering necessitates international cooperation and consistent standards in anti-money laundering efforts. UNCAC therefore addresses money laundering in both Chapter II (Preventative Measures) and in Chapter III (Criminalization and Law Enforcement). Article 14 sets out standards for State Parties to follow in developing anti-money laundering measures, while Article 23 of UNCAC criminalizes the laundering of the proceeds of corruption. A more comprehensive overview of the anti-money laundering provisions of UNCAC can be found in Indira Carr and Miriam Goldby's paper, "The UN Anti-Corruption Convention and Money Laundering."⁴⁷

4.1.1 Article 23—Criminalization

Article 23 is ambitious in scope. It criminalizes the actions of those involved in money laundering in a number of different capacities. Unlike some of the other criminalization provisions of UNCAC, the criminalization of money laundering under Article 23 is mandatory, although the provision may be adapted if necessary to conform to the "fundamental principles" of the State Party's domestic law. It provides:

Article 23. Laundering of proceeds of crime

⁴⁵ [73] Permanent Subcommittee on Investigations (2010).

⁴⁶ For a comprehensive overview of UNCAC, see Cecily Rose, Michael Kubiciel & Oliver Landwehr, eds., *United Nations Convention Against Corruption: A Commentary* (New York: Oxford University Press, 2019).

⁴⁷ Indira Carr & Miriam Goldby, "The United Nations Anti-Corruption Convention and Money Laundering" (2009) Working Paper, online: <<http://ssrn.com/abstract=1409628>>.

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - (a)
 - (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
 - (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership or of rights with respect to property, knowing that such property is the proceeds of crime;
 - (b) Subject to the basic concepts of its legal system:
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
 - (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

The following excerpt from the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* provides guidance to legislators tasked with incorporating Article 23 into a state's domestic legislation:

BEGINNING OF EXCERPT

(e) Money-laundering

220. Article 23 requires the establishment of offences related to the laundering of proceeds of crime, in accordance with fundamental principles of domestic law. The related Convention articles addressing measures aimed at the prevention of money-laundering were discussed in the previous chapter.

221. In the context of globalization, criminals take advantage of easier capital movement, advances in technology and increases in the mobility of people and commodities, as well as the significant diversity of legal provisions in various jurisdictions. As a result, assets can be transferred instantly from place to place through both formal and informal channels. Through exploitation of existing legal asymmetries, funds may appear finally as legitimate assets available in any part of the world.

222. Confronting corruption effectively requires measures aimed at eliminating the financial or other benefits that motivate public officials to act improperly. Beyond this,

combating money-laundering also helps to preserve the integrity of financial institutions, both formal and informal, and to protect the smooth operation of the international financial system as a whole.

223. As noted in the previous chapter, this goal can only be achieved through international and cooperative efforts. It is essential that States and regions try to make their approaches, standards and legal systems related to this offence compatible, so that they can cooperate with one another in controlling the international laundering of criminal proceeds. Jurisdictions with weak or no control mechanisms render the work of money launderers easier. Thus, the Convention against Corruption seeks to provide a minimum standard for all States.

224. The Convention against Corruption specifically recognizes the link between corrupt practices and money-laundering and builds on earlier and parallel national, regional and international initiatives in that regard. Those initiatives addressed the issue through a combination of repressive and preventive measures and the Convention follows the same pattern (see also chap. II of the present guide).

225. One of the most important of the previous initiatives related to the Organized Crime Convention, which mandated the establishment of the offence of money-laundering for additional predicate offences, including corruption of public officials, and encouraged States to widen the range of predicate offences beyond the minimum requirements.

226. “Predicate offence” is defined as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention” (art. 2, subpara. (h)).

227. As a result of all these initiatives, many States already have money laundering laws. Nevertheless, such laws may be limited in scope and may not cover a wide range of predicate offences. Article 23 requires that the list of predicate offences include the widest possible range and at a minimum the offences established in accordance with the Convention against Corruption.

228. The provisions of the Convention against Corruption addressing the seizure, freezing and confiscation of proceeds (see art. 31) and the recovery of assets (see chap. V of the Convention and, especially, art. 57) include important related measures. States should review the provisions they already have in place to counter money-laundering in order to ensure compliance with these articles and those dealing with international cooperation (chap. IV). States undertaking such a review may wish to use the opportunity to implement the obligations they assume under other regional or international instruments and initiatives currently in place.

229. Article 23 requires that States parties establish the four offences related to money-laundering described in the following paragraphs:

(f) Conversion or transfer of proceeds of crime

230. The first offence is the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action (art. 23, para. 1 (a) (i)).

231. The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.

232. The term “proceeds of crime” means “any property derived from or obtained, directly or indirectly, through the commission of an offence” (art. 2, subpara. (e)).

233. With respect to the mental or subjective elements required, the conversion or transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds and the act or acts must be done for the purpose of either concealing or disguising their criminal origin, for example by helping to prevent their discovery, or helping a person evade criminal liability for the crime that generated the proceeds.

234. As noted in article 28 of the Convention against Corruption, knowledge, intent or purpose may be inferred from objective factual circumstances.

(g) Concealment or disguise of proceeds of crime

235. The second money-laundering offence is the concealment or disguise of the nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime (art. 23, para. 1 (a) (ii)).

236. The elements of this offence are quite broad, including the concealment or disguise of almost any aspect of or information about property.

237. Here, with respect to the mental or subjective elements required, the concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act. This mental state is less stringent than for the offence set forth in article 23, subparagraph 1 (a) (i). Accordingly, drafters should not require proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin.

238. The next two offences related to money-laundering are mandatory, subject to the basic concepts of the legal system of each State party.

(h) Acquisition, possession or use of proceeds of crime

239. The third offence is the acquisition, possession or use of proceeds of crime knowing, at the time of receipt, that such property is the proceeds of crime (art. 23, para. 1 (b) (i)).

240. This is the mirror image of the offences under article 23, paragraph 1 (a)(i) and (ii), in that, while those provisions impose liability on the providers of illicit proceeds, this paragraph imposes liability on recipients who acquire, possess or use the property.

241. The mental or subjective elements are the same as for the offence under article 23, paragraph 1 (a) (ii): there must be intent to acquire, possess or use, and the accused must have knowledge, at the time this occurred, that the property was the proceeds of crime. No particular purpose for the acts is required.

(i) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the foregoing offences

242. The fourth set of offences involves the participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by the article (art. 23, para. 1 (b) (ii)).

243. These terms are not defined in the Convention against Corruption, allowing for certain flexibility in domestic legislation. States parties should refer to the manner in which such ancillary offences are otherwise structured in their domestic system and ensure that they apply to the other offences established pursuant to article 23.

[Note – see Chapter 3, Sections 3 and 4, for a discussion on inchoate crimes and secondary liability.]

244. The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (art. 28). National drafters could see that their evidentiary provisions enable such inference with respect to the mental state, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.

245. Under article 23, States parties must apply these offences to proceeds generated by “the widest range of predicate offences” (art. 23, para. 2 (a)).

246. At a minimum, these must include a “comprehensive range of criminal offences established in accordance with this Convention” (art. 23, para. 2 (b)). For this purpose, “predicate offences shall include offences committed both within and outside the jurisdiction of the State party in question. However, offences committed outside the jurisdiction of a State party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State party implementing or applying this article had it been committed there” (art. 23, para. 2 (c)). So, dual criminality is necessary for offences committed in a different national jurisdiction to be considered as predicate offences.

247. Many States already have laws on money-laundering, but there are many variations in the definition of predicate offences. Some States limit the predicate offences to trafficking in drugs or to trafficking in drugs and a few other crimes. Other States have an exhaustive list of predicate offences set forth in their legislation. Still other States define predicate offences generically as including all crimes, or all serious crimes, or all crimes subject to a defined penalty threshold.

248. An interpretative note for the Convention against Corruption states that “money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and, in accordance with article 28, any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances” (A/58/422/Add.1, para. 32).

249. The constitutions or fundamental legal principles of some States do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. The Convention acknowledges this issue and, only in such cases, allows for the non-application of the money-laundering offences to those who committed the predicate offence (art. 23, para. 2 (e)).⁴⁸

END OF EXCERPT

4.1.2 Article 14—Measures to Prevent Money-Laundering

As mentioned above, in addition to mandating the criminalization of money laundering, UNCAC also requires State Parties to take measures to establish a regulatory regime intended to prevent money laundering:

Article 14. Measures to prevent money-laundering

1. Each State Party shall:
 - (a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for

⁴⁸ United Nations Office on Drugs and Crime (UNODC), *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed (United Nations, 2012) [Legislative Guide (2012)], at 46-74, paras 220-249, online (pdf): https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf. Reprinted with the permission of the United Nations. For more information on Article 23, see Rose, Kubiciel & Landwehr, *supra* note 46 at 251-258.

customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

- (b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.
2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.
 3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:
 - (a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;
 - (b) To maintain such information throughout the payment chain; and
 - (c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.
 4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.
 5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Carr and Goldby note that Article 14(1) requires states to implement a regulatory and supervisory regime that monitors both formal and informal methods of transferring money in order to combat money laundering.⁴⁹ They state that “[t]he system known as *Hawala* (in India) or *Fie Ch’ieu* (in China) is typically used by migrant workers to transfer small amounts of money to relatives in villages lacking bank accounts or access to banks, but can also be

⁴⁹ Carr & Goldby, *supra* note 47.

abused by criminals.”⁵⁰ Although Carr and Goldby welcome this inclusion of informal networks of money transfer into supervisory regimes, they argue that “much research still needs to be done in order to design an effective regime for the regulation and supervision of such informal networks.”⁵¹

Article 14 of UNCAC also requires states to develop comprehensive anti-money laundering regimes. Although not expressly mandated, there is a strong suggestion by UNCAC that states look to international standard setting bodies, such as the FATF, when designing anti-money laundering frameworks. Therefore, although the FATF recommendations are not themselves binding international law, in addition to their independent ability to set standards through peer pressure, they are given some degree of legal recognition under UNCAC.

The following excerpt from the UNCAC *Legislative Guide* summarizes and explains the various mandated and recommended actions that, pursuant to Article 14, State Parties are to follow:

BEGINNING OF EXCERPT

Summary of Main Requirements

138. Article 14 contains two mandatory requirements:

- (a) To establish a comprehensive domestic regulatory and supervisory regime to deter money-laundering (para. 1 (a));
- (b) To ensure that agencies involved in combating money-laundering have the ability to cooperate and exchange information at the national and international levels (para. 1 (b)).

139. In addition, pursuant to article 14 States must consider:

- (a) Establishing an FIU (para. 1 (b));
- (b) Implementing measures to monitor cash movements across their borders (para. 2);
- (c) Implementing measures to require financial institutions to collect information on originators of electronic fund transfers, maintain information on the entire payment chain and scrutinize fund transfers with incomplete information on the originator (para. 3);
- (d) Developing and promoting global, regional and bilateral cooperation among relevant agencies to combat money-laundering (para. 5).

Mandatory requirements: obligation to take legislative or other measures

(a) Regulatory and supervisory regime

⁵⁰ *Ibid* at 8.

⁵¹ *Ibid* at 8-9.

140. Article 14, paragraph 1 (a), requires that States parties establish a regulatory and supervisory regime within their competence in order to prevent and detect money-laundering activities. This regime must be comprehensive, but the precise nature and particular elements of the regime are left to States, provided that they require, at a minimum, banks and non-bank financial institutions to ensure:

- (a) Effective customer identification;
- (b) Accurate record-keeping;
- (c) A mechanism for the reporting of suspicious transactions.

141. The requirements extend to banks, non-bank financial institutions (e.g. insurance companies and securities firms) and, where appropriate, other bodies that are especially susceptible to money-laundering (art. 14, para. 1 (a)). The interpretative notes add that other bodies may be understood to include intermediaries, which in some jurisdictions may include stockbroking firms, other securities dealers, currency exchange bureaux or currency brokers (A/58/422/Add.1, para. 18). An addition to the equivalent provisions in the Organized Crime Convention is that financial institutions include “natural or legal persons that provide formal or informal services for the transmission of money or value” (art. 14, para. 1 (a)). This is a reference to concerns about both formal remitters and informal value-transfer systems, such as the *hawala* networks that originated in South Asia and have become global in recent decades. These channels offer valuable services to expatriates and their families, but are also vulnerable to abuse by criminals, including corrupt public officials.

142. Thus, this regime should apply not only to banking institutions, but also to areas of commerce where high turnover and large volumes make money-laundering likely. Previous experience shows that money-laundering activities have taken place in the real estate sector and in the trade of commodities, such as gold, precious stones and tobacco.

143. In many forums, the list of institutions is being expanded beyond financial institutions to include businesses and professions related to real estate and commodities. For example, recommendation 12 of the FATF Forty Recommendations extends, when certain conditions are met, the requirements of customer due diligence and record-keeping to casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals and accountants and trust and company service providers. Similar requirements are set forth in article 1 of Directive 2005/60/EC adopted by the European Parliament and the Council of the European Union on 26 October 2005.

144. More recently, increased attention has been focused on money service businesses and informal value-transfer systems, such as *hawala* and *hundi*. In a growing number of jurisdictions, these are also subject to a regulatory regime for the purposes of detecting money-laundering, terrorist financing or other offences.

145. Customer identification entails requirements that holders of accounts in financial institutions and all parties to financial transactions be identified and documented. Records should contain sufficient information to identify all parties and the nature of the

transaction, identify specific assets and the amounts or values involved, and permit the tracing of the source and destination of all funds or other assets.

146. The requirement for record-keeping means that client and transaction records should be kept for a specified minimum period of time. For example, under the FATF Forty Recommendations, at least five years is recommended, while for States parties to the International Convention for the Suppression of the Financing of Terrorism, retention of records for five years is mandatory.

147. Suspicious transactions are to be notified to the FIU or other designated agency. Criteria for identifying suspicious transactions should be developed and periodically reviewed in consultation with experts knowledgeable about new methods or networks used by money launderers.

148. The interpretative notes indicate that the words “suspicious transactions” may be understood to include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer’s business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general (A/58/422/Add.1, para. 19). The International Convention for the Suppression of the Financing of Terrorism defines suspicious transactions as all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose (General Assembly resolution 54/109, annex, art. 18, para. 1 (b) (iii)).

149. The powers to be granted to regulators and staff of the FIU to inspect records and to compel the assistance of record keepers in locating the records must also be defined. As some of these records may be covered by confidentiality requirements and banking secrecy laws that prohibit their disclosure, provisions freeing financial institutions from complying with such requirements and laws may be considered. Drafters should also ensure that the inspection and disclosure requirements are written in such a way as to protect financial institutions against civil and other claims for disclosing client records to regulators and FIUs.

150. The implementation of such measures is likely to require legislation. In particular, the requirement that financial institutions must disclose suspicious transactions and the protection of those who make disclosures in good faith will require legislation to override banking secrecy laws (see also paras. 1-3 of art. 52, on the prevention and detection of transfers of proceeds of crime).

(b) Domestic and international cooperation

151. Coordination of efforts and international cooperation is as central to the problem of money-laundering as it is to the other offences covered by the Convention against Corruption. Beyond the general measures and processes such as extradition, mutual legal assistance, joint investigations and asset recovery (which are covered in detail in the

sections on international cooperation in chapter IV and asset recovery in chapter V, below), the Convention seeks to strengthen such coordination and cooperation.

152. Article 14, paragraph 1 (b), requires that administrative, regulatory, law enforcement and other domestic authorities in charge of the efforts against money-laundering are able to cooperate at both the national and international level. This includes the exchange of information within the conditions prescribed by their domestic law. This must be done without limiting or detracting from (or in the words of the Convention, “without prejudice to”) the requirements generated by article 46 (Mutual legal assistance).

153. In order for cooperation to be possible, domestic capabilities must be developed for the identification, collection and interpretation of all relevant information. Essentially, three types of entity may be part of a strategy to combat money-laundering and could, thus, be considered by States:

- (a) Regulatory agencies responsible for the oversight of financial institutions, such as banks or insurance entities, with powers to inspect financial institutions and enforce regulatory requirements through the imposition of regulatory or administrative remedies or sanctions;
- (b) Law enforcement agencies responsible for conducting criminal investigations, with investigative powers and powers to arrest and detain suspected offenders and that are subject to judicial or other safeguards;
- (c) FIUs, which are not required under the Convention, whose powers are usually limited to receiving reports of suspicious transactions, analysing them and disseminating information to prosecution agencies, although some such units have wider powers (see more on FIUs in sect. V.E, below).

154. The authority of each entity to cooperate with national bodies and with other similar agencies in other States is usually specified in the relevant legislation. If States do have such entities, legislation may be needed to amend existing mandates and the division of labour among these entities, in accordance with each State’s constitutional or other principles and the specificities of its financial services sector.

155. Some of these measures may constitute a strong challenge for countries in which the financial sector is not heavily regulated and the necessary legislation and administrative infrastructure may have to be created. It is essential to note, however, that the relevance and utility of these arrangements are not limited to the control of money-laundering, but also to corruption. They also strengthen confidence in the financial infrastructure, which is instrumental to sustainable social and economic development.

156. The remaining provisions of this article are also closely connected to domestic and international cooperation, and are examined below, as they are not mandatory under the Convention.

Optional requirements: obligation to consider

(a) Financial intelligence units

157. Article 14, paragraph 1 (b), requires States parties to consider the establishment of FIUs to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. Since the 1990s, many States have established such units as part of their regulatory police or other authorities. There is a wide range of structure, responsibilities, functions and departmental affiliation or independence for such units. According to the interpretative notes, the call for the establishment of an FIU is intended for cases where such a mechanism does not yet exist (A/58/422/Add.1, para. 20).

158. The Egmont Group (an informal association of FIUs) has defined such units as a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information (a) concerning suspected proceeds of crime; or (b) required by national legislation or regulation; in order to counter money laundering.⁵²

159. The Convention does not require that an FIU be established by law, but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith (see also art. 58, on FIUs). In practice, the vast majority of FIUs are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:

- (a) Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;
- (b) Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;
- (c) Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution and authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;
- (d) Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;
- (e) Definition of the reporting arrangements for the unit and its relationship with other Government agencies, including law enforcement agencies and financial regulators. States may already have money-laundering controls in place that can be expanded or modified to conform to the requirements of article 14 relating to money-laundering and those of article 31 relating to freezing, confiscation,

⁵² [31] The website for the Egmont group is <<http://www.egmontgroup.org/>>, which, *inter alia*, provides links to FIUs on all continents.

seizure, disposal of proceeds, as well as provisions on asset recovery, as necessary.

160. It is worth noting that actions taken to conform to article 14 may also bring States into conformity with other conventions and initiatives, such as Security Council resolution 1373 (2001), the International Convention for the Suppression of the Financing of Terrorism, the Organized Crime Convention and the FATF Nine Special Recommendations on Terrorist Financing.

161. Further information about various options that can be included in laws, regulations and procedures to combat money-laundering can be obtained from the Anti-Money-Laundering Unit of the United Nations Office on Drugs and Crime.

(b) Other measures

162. As part of the effort to develop the capacity to provide effective international cooperation, States are required to consider the introduction of feasible measures aimed at monitoring the cross-border movement of cash and other monetary instruments (art. 14, para. 2). The goal of such measures would be to allow States to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash appropriate negotiable instruments. Generally, structures based on monitoring or surveillance will require legal powers giving inspectors or investigators access to information on cross-border transactions, in particular in cases where criminal behaviour is suspected.⁵³

163. Article 14, paragraph 3, contains provisions going beyond the Organized Crime Convention. It requires that States consider the implementation of measures obliging financial institutions, including money remitters:

- (a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;
- (b) To maintain such information throughout the payment chain; and
- (c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

164. The concern is essentially about the identification of remitters and beneficiaries on the one hand and the traceability of the transaction on the other. There are no exact estimates on the extent of funds transferred across national borders, especially with respect to informal remitters, who are popular in many countries. Given that they range in the tens of billions of United States dollars, however, it is an area of regulatory concern.

⁵³ [32] See the website of the Financial Action Task Force on Money Laundering at [updated link: <<http://www.fatf-gafi.org/>>].

165. As mentioned above, the Convention against Corruption builds on parallel international initiatives to combat money-laundering. In establishing a domestic regulatory and supervisory regime, States parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering (art. 14, para. 4). An interpretative note states that during the negotiations, the words “relevant initiatives of regional, interregional and multilateral organizations” were understood to refer in particular to the Forty Recommendations and the Eight⁵⁴ Special Recommendations of the FATF, as revised in 2003 and 2001, respectively, and, in addition, to other existing initiatives of regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union, the Financial Action Task Force of South America against Money Laundering and the Organization of American States” (A/58/422/Add.1, para. 21).

166. Ultimately, States are free to determine the best way to implement article 14. However, the development of a relationship with one of the organizations working to combat money-laundering would be important for effective implementation.

167. In implementing article 14, paragraph 4, States may wish to consider some specific elements relative to the measures that the comprehensive regulatory regime must include. The Forty Recommendations are useful in this regard, as are model regulations that have been prepared by the United Nations Office on Drugs and Crime and the Organization of American States (see sect. II.G (Information resources) at the end of this chapter of the guide).

168. Furthermore, paragraph 5 of article 14 requires that States endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.⁵⁵

END OF EXCERPT

4.2 OECD Convention

The OECD Convention does not deal extensively with money laundering, but it does touch on the issue in the two articles reproduced below:

Article 7: Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering

⁵⁴ [33] In October 2004, the FATF adopted a ninth Special Recommendation on Terrorist Financing.

⁵⁵ Legislative Guide (2012), *supra* note 48 at 46–53, paras 138–168. Reprinted with the permission of the United Nations. For more information on Article 14, see Rose, Kubiciel & Landwehr, *supra* note 46 at 150–164.

legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8: Accounting

In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

The OECD acknowledges that the FATF is the international standard setter in the development and promotion of policies to combat money laundering and terrorist financing, and that the OECD's work on tax crime and money laundering is designed to complement that of the FATF. The FATF recommendations covered in the following section, provide a more comprehensive treatment of money laundering and the measures that states can take to combat it.

4.3 FATF Recommendations

The latest version of the FATF Recommendations was released in 2012, and amended in 2021.⁵⁶ There are 40 recommendations in this new version, which merged the original 40 recommendations (issued in 1996) with nine additional 2003 recommendations (on countering terrorism financing).⁵⁷ The Recommendations also include interpretive notes. The following excerpt from Paul Allan Schott's *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*,⁵⁸ provides a general introduction to the FATF and the Recommendations. The following excerpt is based on the 2003 version of the Forty Recommendations, but it does not affect the validity of the general comments set out.

⁵⁶ "About Tax and Crime" (last visited 8 August 2021), online: *OECD* <<https://www.oecd.org/tax/crime/about-tax-and-crime.htm#:~:text=OECD%20work%20on%20tax%20crime,authorities%20to%20combat%20serious%20crimes>>.

⁵⁷ The recommendations can be found at: The Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, (Paris: FATF, 2012; revised 2021), online: (pdf): <<http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.html>>.

⁵⁸ 2nd ed (Washington, DC: World Bank, 2006).

BEGINNING OF EXCERPT

[Chapter III: International Standard Setters, pp. III-7 to III-12]

Formed in 1989 by the G-7 countries,⁵⁹ the Financial Action Task Force on Money Laundering (FATF) is an intergovernmental body whose purpose is to develop and promote an international response to combat money laundering.⁶⁰ In October of 2001, FATF expanded its mission to include combating the financing of terrorism.⁶¹

FATF is a policy-making body, which brings together legal, financial and law enforcement experts to achieve national legislation and regulatory AML and CFT reforms. Currently, its membership consists of 31 [now 37] countries and territories and two regional organizations.⁶² In addition, FATF works in collaboration with a number of international bodies⁶³ and organizations.⁶⁴ These entities have observer status with FATF, which does not entitle them to vote, but otherwise permits full participation in plenary sessions and working groups.

FATF's three primary functions with regard to money laundering are:

1. monitoring members' progress in implementing anti-money laundering measures;

⁵⁹ [30] *Id.* The G-7 countries are Canada, France, Germany, Italy, Japan, United Kingdom, and United States.

⁶⁰ [31] About FATF, and Terrorist Financing at <<http://www.fatf-gafi.org/>>.

⁶¹ [32] *Id.* at Terrorist Financing.

⁶² [33] The 31 member countries and territories are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong-China, Iceland, Ireland, Italy, Japan, Luxemburg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. The two regional organizations are the European Commission and the Gulf Co-operation Council.

⁶³ [34] The international bodies are regional FATF-style regional bodies (FSRBs) that have similar form and functions to those of FATF. Some FATF members also participate in the FSRBs. These bodies are: Asia/Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), Council of Europe MONEYVAL (previously PC-R-EV) Committee, Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and Financial Action Task Force on Money Laundering in South America (GAFISUD). For a discussion of these organizations, See Chapter IV, Regional Bodies and Relevant Groups, FATF- Style Regional Bodies. FATF also works with the Egmont Group.

⁶⁴ [35] Each of the international organizations, which have, among other functions, a specific anti-money laundering mission or function, are: African Development Bank, Asia Development Bank, The Commonwealth Secretariat, European Bank for Reconstruction and Development, European Central Bank (ECB), Europol, Inter-American Development Bank (IDB), Intergovernmental Action Group Against Money-Laundering in Africa (GIABA), International Association of Insurance Supervisors (IAIS), International Monetary Fund (IMF), Interpol, International Organization of Securities Commissions (IOSCO), Organization of American States/Inter-American Committee Against Terrorism (OAS/CICTE), Organization of American States/Inter-American Drug Abuse Control Commission (OAS/CICAD), Organization for Economic Co-operation and Development (OECD), Offshore Group of Banking Supervisors (OGBS), United Nations Office on Drugs and Crime (UNODC), World Bank and World Customs Organization (WCO).

2. reviewing and reporting on laundering trends, techniques and counter- measures; and
3. promoting the adoption and implementation of FATF anti-money laundering standards globally.

1. *The Forty Recommendations*

FATF has adopted a set of 40 recommendations, *The Forty Recommendations on Money Laundering (The Forty Recommendations)*, which constitute a comprehensive framework for AML and are designed for universal application by countries throughout the world.⁶⁵ *The Forty Recommendations* set out principles for action; they permit a country flexibility in implementing the principles according to the country's own particular circumstances and constitutional requirements. Although not binding as law upon a country, *The Forty Recommendations* have been widely endorsed by the international community and relevant organizations as the international standard for AML.

The Forty Recommendations are actually mandates for action by a country if that country wants to be viewed by the international community as meeting international standards. The individual recommendations are discussed in detail throughout this Reference Guide and, particularly in Chapters V, VI, VII, and VIII.

The Forty Recommendations were initially issued in 1990 and have been revised in 1996 and 2003 to take account of new developments in money laundering and to reflect developing best practices internationally. [The current version of the *Forty Recommendations* was revised in 2012.]

2. *Monitoring Members Progress*

Monitoring the progress of members to comply with the requirements of *The Forty Recommendations* is facilitated by a two-stage process: self assessments and mutual evaluations. In the self-assessment stage, each member responds to a standard questionnaire, on an annual basis, regarding its implementation of *The Forty Recommendations*. In the mutual evaluation stage, each member is examined and assessed by experts from other member countries.

In the event that a country is unwilling to take appropriate steps to achieve compliance with *The Forty Recommendations*, FATF recommends that all financial institutions give special attention to business relations and transactions with persons, including companies and financial institutions, from such non-compliant countries and, where appropriate, report questionable transactions, i.e., those that have no apparent economic or visible lawful purpose, to competent authorities.⁶⁶ Ultimately, if a member country does not take

⁶⁵ [36] *The Forty Recommendations*, [updated link: <<http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>>].

⁶⁶ [37] *Id.*, Rec. 21.

steps to achieve compliance, membership in the organization can be suspended. There is, however, the process of peer pressure before these sanctions are enforced.

3. Reporting on Money Laundering Trends and Techniques

One of FATF's functions is to review and report on money laundering trends, techniques and methods (also referred to as typologies). To accomplish this aspect of its mission, FATF issues annual reports on developments in money laundering through its Typologies Report.⁶⁷ These reports are very useful for all countries, not just FATF members, to keep current with new techniques or trends to launder money and for other developments in this area.

4. The NCCT List

One of FATF's objectives is to promote the adoption of international AML/CFT standards for all countries. Thus, its mission extends beyond its own membership, although FATF can only sanction its member countries and territories. Thus, in order to encourage all countries to adopt measures to prevent, detect and prosecute money launderers, i.e., to implement The Forty Recommendations, FATF has adopted a process of identifying those jurisdictions that serve as obstacles to international cooperation in this area. The process uses 25 criteria, which are consistent with *The Forty Recommendations*, to identify such non-cooperative countries and territories (NCCT's) and place them on a publicly available list.⁶⁸

...

[In response to criticisms levied against the use of the NCCT list, the last country on the NCCT list was removed in 2006, and no new states have been reviewed by the FATF under the NCCT criteria since 2001. Many felt that the NCCT focused attention unfairly on smaller, less powerful nations while ignoring the failings of more powerful countries such as the United States. Since it is no longer relevant, the remainder of the section on the NCCT list has not been included in this excerpt. However, the FATF has continued to issue public statements on high-risk and non-compliant countries. This list presently includes Iran, the Democratic People's Republic of Korea and Algeria. It is available at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/>]

5. Terrorist Financing

FATF also focuses its expertise on the world-wide effort to combat terrorist financing. To accomplish this expanded mission FATF has adopted nine *Special Recommendations on*

⁶⁷ [38] See FATF Documents, Money Laundering Trends and Techniques at <http://www.fatf-gafi.org/pdf/TY2004_en.PDF> [see updated link: <[http://www.fatf-gafi.org/publications/methodsandtrends/?hf=10&b=0&s=desc\(fatf_releasedate\)>](http://www.fatf-gafi.org/publications/methodsandtrends/?hf=10&b=0&s=desc(fatf_releasedate)>)].

⁶⁸ [39] NCCT Initiative, <http://www.fatf-gafi.org/NCCT_en.htm>. [see updated link: <[http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/aboutthenon-cooperativecountriesandterritoriesncctinitiative.html?hf=10&b=0&s=desc\(fatf_releasedate\)>](http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/aboutthenon-cooperativecountriesandterritoriesncctinitiative.html?hf=10&b=0&s=desc(fatf_releasedate)>)].

Terrorist Financing (Special Recommendations).⁶⁹ As part of this effort, FATF members use a self-assessment questionnaire of their country's actions to come into compliance with the *Special Recommendations*.⁷⁰ FATF is continuing to develop guidance on techniques and mechanisms used in the financing of terrorism.

END OF EXCERPT

The FATF prepares guidance and best practices documents to assist states in implementing the Recommendations.⁷¹

4.4 European Union Money Laundering Directives

In addition to the supra-national AML requirements of the UN, the FATF, and the OECD, which have evolved into international norms, there are also important regional AML regimes. The most influential is that of the European Union, which began issuing AML Directives to its member nations in 1990. As of January 10, 2020, each member state of the EU is required to implement the provisions of the Fifth Money Laundering Directive.⁷² A new, sixth directive is being drafted in 2021. Although only applicable within the EU, these directives have considerable influence elsewhere, both for nations that trade with EU countries and for their suasive impact.⁷³

5. STATE-LEVEL AML REGIMES: US, UK, AND CANADA

5.1 Essential Elements of AML Regimes

While the FATF Recommendations provide a global standard for AML measures, these recommendations must be put into place at the state level to be effective. The global effectiveness of the AML regime depends on a degree of standardization, but each state must also create a regime that fits within its domestic legal framework and policy goals. As a

⁶⁹ [42] See *Special Recommendations*. These Special Recommendations are set out in Annex V, <www.fatf-gafi.org/pdf/SRecTF_en.pdf>. [see updated link <<https://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html>>].

⁷⁰ [43] <http://www.fatf-gafi.org/SAQTF_en.htm>. [see updated link: <<https://www.fatf-gafi.org/media/fatf/documents/reports/Handbook%20for%20assessors.pdf>>].

⁷¹ They are available on the FATF website. For more information, see "Guidance" (last visited 24 August 2021), online: FATF <[http://www.fatf-gafi.org/documents/guidance/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/documents/guidance/?hf=10&b=0&s=desc(fatf_releasedate))>.

⁷² For an overview of the directives, see DynaFin Consulting, "The evolution of Anti-Money Laundering Directives" (28 January 2020), online (blog): *DynaFin Consulting* <<https://medium.com/@dynafinc/the-evolution-of-anti-money-laundering-directives-1fcade0921e0>>.

⁷³ For an update on the latest developments and reports regarding the EU directives, see "Anti-money laundering and counter terrorist financing" (last visited 10 August 2021), online: *European Commission* <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/anti-money-laundering-and-counter-terrorist-financing_en>.

result, despite many shared elements, there is significant variation between different state-level AML regimes.

The overall goal of state-level AML regimes is to allow centralized monitoring of the financial sector. The recommended set of laws and policies contained in the FATF Recommendations is intended to enable a calibrated degree of state surveillance and intelligence gathering across the financial sector. Data concerning suspicious transactions is transmitted to a central organization for analysis and selected information is then passed to law enforcement agencies for investigation. In general, the goal is to create a system in which suspicious transactions or patterns of transactions are promptly detected and thoroughly investigated, preventing the abuse of financial institutions by organized crime and corrupt officials.

There are three principal elements in a state-level AML regime, each of which is dealt with in a separate section below. The first element is a Financial Intelligence Unit (FIU). FIUs are central, national-level organizations that collect and analyze information concerning suspicious transactions reported by financial institutions. They pass selected information along to the appropriate law enforcement agencies for investigation.

The second element of a state-level AML regime is regulation of the financial sector, which requires financial institutions to report information to the FIU. There are three basic aspects of this regulatory framework. The first is customer due diligence measures (CDD), which require financial institutions to collect identifying information from each of their customers. The second is record keeping requirements, which require financial institutions to retain all information collected for at least five years. The final aspect is transaction reporting requirements, which require financial institutions to report certain transactions to their respective FIUs.

The third element of a state-level AML regime is the creation of tools that law enforcement agencies and prosecution authorities can use to effectively investigate and prosecute money launderers once their activities are detected. These include the creation of stand-alone criminal offences for money laundering to enable the prosecution of launderers. In theory, the three elements discussed should create a state-level regime in which money laundering can be effectively combated through cooperation between the financial sector, the FIU, and law enforcement agencies.

While the three elements described above are present in all state-level AML regimes that conform to the FATF recommendations, how each is put into place varies considerably from country to country. The following section surveys the state-level AML regimes in the US, Canada, and the UK, comparing and contrasting the different approaches taken in each jurisdiction. Each subsection begins by reproducing the appropriate FATF recommendation, and then briefly discusses how the recommendation has been enacted by each of the three governments.⁷⁴

⁷⁴ Only selected FATF recommendations are reproduced here. The full text can be found online: "The FATF Recommendations" (as amended June 2021), online: *FATF* <<http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.html>>.

5.2 Financial Intelligence Units

5.2.1 FATF Recommendations

Recommendation 29 of the FATF suggests that each member state create a financial intelligence unit (FIU) as part of its AML regime. These FIUs cooperate internationally through their membership in the Egmont Group, an informal network whose membership currently exceeds 160 state-level FIUs. The Egmont Group's website⁷⁵ provides a library of research reports produced by the organization as well as sanitized cases from member FIUs.

The full text of Recommendation 29 is reproduced below:

29. Financial intelligence units

Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly.

There is considerable scope available to states in implementing Recommendation 29. It simply recommends the creation of a central organization that collects and analyzes reports of suspicious transactions and "other information." Some states have chosen to create FIUs with a broad range of powers, while others have taken a minimalist approach. Furthermore, there is nothing in the recommendation to indicate how the FIU should relate to other government agencies, or who it should report to. States have made different choices in this regard as well. The following section briefly discusses and compares the FIUs created by the UK, the US, and Canada respectively.

The US FIU is known as the Financial Crimes Enforcement Network (FinCEN).⁷⁶ Canada, displaying US influence, chose the name Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).⁷⁷ The UK, taking a more prosaic approach, named its FIU the UK Financial Intelligence Unit (UKFIU).⁷⁸ FinCEN and FINTRAC are standalone agencies that report through the financial arms of their respective states. FinCEN reports to the Secretary

⁷⁵ "About the Egmont Group" (last visited 24 August 2021), online: *Egmont Group* <<http://www.egmontgroup.org/>>.

⁷⁶ For more information, see: "Financial Crimes Enforcement Network" (last visited 8 August 2021), online: *FinCEN* <<http://www.fincen.gov/>>.

⁷⁷ For more information, see: "Financial Transactions and Reports Analysis Centre of Canada" (last visited 8 August 2021), online: *FINTRAC* <<http://www.fintrac-canafe.gc.ca/intro-eng.asp>>.

⁷⁸ For more information, see: "What we do" (last visited 8 August 2021), online: *NCA* <<https://www.nationalcrimeagency.gov.uk/what-we-do>>.

of the Treasury⁷⁹ and FINTRAC to the Minister of Finance.⁸⁰ In contrast, UKFIU is situated within the law enforcement apparatus of the UK (in an indication of this embedded role, the organization does not have its own website). It forms part of the National Crime Agency (NCA). The NCA website describes its function as follows:

The NCA has a wide remit. We tackle serious and organised crime, strengthen our borders, fight fraud and cyber crime, and protect children and young people from sexual abuse and exploitation. We provide leadership in these areas through our organised crime, border policing, economic crime and CEOP commands, the National Cyber Crime Unit and specialist capability teams. The NCA works closely with partners to deliver operational results. We have an international role to cut serious and organised crime impacting on the UK through our network of international liaison officers.⁸¹

Had the US and Canada taken a similar approach, their FIUs would have been created as specialist bodies within federal law enforcement. Instead, FINCEN and FINTRAC have considerably more autonomy from law enforcement than UKFIU, as well as broader powers.

5.2.2 US

Established under the *Bank Secrecy Act*, FINCEN performs a variety of functions, covering data gathering, regulation, research, and analysis. Its website describes the organization's powers as follows:

Congress has given FinCEN certain duties and responsibilities for the central collection, analysis, and dissemination of data reported under FinCEN's regulations and other related data in support of government and financial industry partners at the Federal, State, local, and international levels. To fulfill its responsibilities toward the detection and deterrence of financial crime, FinCEN:

- Issues and interprets regulations authorized by statute;
- Supports and enforces compliance with those regulations;
- Supports, coordinates, and analyzes data regarding compliance examination functions delegated to other Federal regulators;
- Manages the collection, processing, storage, dissemination, and protection of data filed under FinCEN's reporting requirements;
- Maintains a government-wide access service to FinCEN's data, and networks users with overlapping interests;

⁷⁹ "What We Do" (last visited 8 August 2021), online: *FinCEN* <<https://www.fincen.gov/what-we-do>>.

⁸⁰ "Who We Are" (last visited 8 August 2021), online: *FINTRAC* <<http://www.fintrac-canafe.gc.ca/fintrac-canafe/1-eng.asp>>.

⁸¹ "What We Do" (last visited 8 August 2021), online: *NCA* <<https://www.nationalcrimeagency.gov.uk/what-we-do>>.

- Supports law enforcement investigations and prosecutions;
- Synthesizes data to recommend internal and external allocation of resources to areas of greatest financial crime risk;
- Shares information and coordinates with foreign financial intelligence unit (FIU) counterparts on AML/CFT efforts; and
- Conducts analysis to support policymakers; law enforcement, regulatory, and intelligence agencies; FIUs; and the financial industry.⁸²

Under the *Bank Secrecy Act (BSA)*, FinCEN can bring enforcement actions for BSA violations.⁸³ For example, in May 2015, a FinCEN enforcement action led to the imposition of a \$700,000 fine on a virtual currency exchange company that lacked an AML program.⁸⁴ In June 2015, FinCEN fined a casino in the Northern Mariana Islands \$75 million for its failure to institute an AML program, hire compliance staff, and create procedures for detecting suspicious transactions.⁸⁵ In July 2015, FinCEN imposed “special measure five” on Tanzania-based FBME Bank Ltd, meaning US financial institutions are barred from “opening or maintaining correspondent accounts or payable through accounts for or on behalf of FBME.”⁸⁶ FinCEN alleges that FBME is being used to facilitate money laundering and that high-risk shell companies are among its customers.⁸⁷ The bank expressed outrage at the ban and claimed it did not receive adequate notice, although FinCEN issued a notice in July 2014 warning that FBME was a primary money laundering concern and could be subject to a final ban.⁸⁸ See the FinCEN website for a full list of enforcement actions.⁸⁹

5.2.3 UK

The UK’s FIU responsibilities were transferred from the Serious Organized Crime Agency to the National Crime Agency (NCA) in 2013 with the passing of the *Crime and Courts Act*. In contrast to FinCEN, the NCA website simply states: “The UK Financial Intelligence Unit (UKFIU) has national responsibility for receiving, analysing and disseminating financial

⁸² “What We Do” (last visited 8 August 2021), online: *FinCEN* <<https://www.fincen.gov/what-we-do>>.

⁸³ For a list of FinCEN enforcement actions, see: “Enforcement Actions” (last visited 8 August 2021) [FinCEN Enforcement Actions], online: *FinCEN* <<https://www.fincen.gov/news-room/enforcement-actions>>.

⁸⁴ Richard L Cassin, “Ripple Labs Becomes First Virtual Money Exchange Fined by FinCEN” (7 May 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/5/7/ripple-labs-becomes-first-virtual-money-exchange-fined-by-fi.html>>.

⁸⁵ Richard L Cassin, “FinCEN Fines Pacific Island Casino \$75 Million for ‘Egregious’ Anti-Money Laundering Offenses” (4 June 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/6/4/fincen-fines-pacific-island-casino-75-million-for-egregious.html>>.

⁸⁶ Richard L Cassin, “Tanzania Bank is ‘Shocked’ after ‘Unexplained’ FinCEN Ban” (27 July 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/7/27/tanzania-bank-is-shocked-after-unexplained-fincen-ban.html>>.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ FinCEN Enforcement Actions, *supra* note 83.

intelligence gathered from Suspicious Activity Reports.”⁹⁰ While FinCEN and FINTRAC also handle suspicious activity (US) or suspicious transaction (Canada) reports, which will be discussed in more detail in the following section, they also do a great deal more. UKFIU’s mandate is narrower, likely due to its integration within the state’s law enforcement apparatus. FinCEN and FINTRAC have broader mandates and greater organizational independence.

5.2.4 Canada

FINTRAC was created by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)* of 2000.⁹¹ This enabling legislation has been amended numerous times however it has also spawned a number of regulations which provide greater detail of reporting requirements and related matters.⁹² Important amendments were made to the regulations in 2019.⁹³ In addition to the statute and regulations, FINTRAC issues numerous rules and policy statements, which reporting entities must track to ensure continued compliance. A good source of those changes is FINTRAC’s own news releases.⁹⁴

Similarly to its US counterpart, FINTRAC’s description of its function is comprehensive, covering data gathering, analysis, and research. The organization’s website states:

Our mandate is to facilitate the detection, prevention and deterrence of money laundering and the financing of terrorist activities, while ensuring the protection of personal information under our control. We fulfill our mandate through the following activities:

- Receiving financial transaction reports and voluntary information on money laundering and terrorist financing in accordance with the legislation and regulations and safeguarding personal information under our control;

⁹⁰ “Money laundering and illicit finance” (last visited 8 August 2021), online: NCA <<https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-illicit-finance>>.

⁹¹ SC 2000, c 17, Royal Assent 29 June 2000 [PCMLTFA].

⁹² “Regulations” (last modified 15 June 2020), online: FINTRAC <<https://www.fintrac-canafe.gc.ca/reg/1-eng>>.

⁹³ The following summaries of the 2019 changes by Daniel Leslie are valuable: “Canada: New Anti-money Laundering Rules In Canada- Further Updates Released”, *Mondaq* (14 July 2020), online: <<https://www.mondaq.com/canada/money-laundering/964846/new-anti-money-laundering-rules-in-canada-further-updates-released>>; “Canada: Developments in Canada’s AML Regime - Brief Highlights of 2019 and What 2020 Holds”, *Mondaq* (21 January 2020), online: <<https://www.mondaq.com/canada/money-laundering/885540/developments-in-canada39s-aml-regime-brief-highlights-of-2019-and-what-2020-holds>>; and “New anti-money laundering rules in Canada: a brief impact analysis” (25 July 2019), online: *Norton Rose Fulbright* <<https://www.regulationtomorrow.com/ca/new-anti-money-laundering-rules-in-canada-a-brief-impact-analysis/>>.

⁹⁴ “News” (last visited 10 August 2021), online: *Government of Canada - FINTRAC* <<https://www.fintrac-canafe.gc.ca/new-neuf/1-eng>>.

- Ensuring compliance of reporting entities with the legislation and regulations;
- Producing financial intelligence relevant to money laundering, terrorist activity financing and threats to the security of Canada investigations;
- Researching and analyzing data from a variety of information sources that shed light on trends and patterns in money laundering and terrorist financing;
- Maintaining a registry of money services businesses in Canada;
- Enhancing public awareness and understanding of money laundering and terrorist activity financing.⁹⁵

FINTRAC is authorized by legislation to provide information to foreign FIUs, and also receives information from FIUs and law enforcement agencies in other jurisdictions.⁹⁶

FINTRAC has broad powers to search premises, other than a dwelling-house, without warrant, investigate and report to police authorities.⁹⁷ Terence D. Hall notes that “[t]here is a tension between the values placed on privacy and the protection of personal information and the public policy goals of deterring criminal activity and the financing of terrorism by requiring the collection and disclosure of personal and proprietary information.”⁹⁸ During its 2017 audit, Canada’s Privacy Commissioner, reported that FINTRAC “continues to receive and retain personal information outside of the legislated thresholds for reporting.”⁹⁹

5.3 Regulation of Financial Institutions and Professionals

5.3.1 Customer Due Diligence

FATF Recommendation 10 deals with customer due diligence (CDD) measures. The essence of CDD is requiring financial institutions to ascertain whom they are dealing with for each major transaction. The full text of the recommendation is reproduced below:

BEGINNING OF EXCERPT

10. Customer due diligence

Financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names.

⁹⁵ FINTRAC, “Who We Are”, *supra* note 80. FINTRAC has reorganized all its very detailed guidelines in respect to the *PCMLTFA*, *supra* note 91, and these can be found on FINTRAC’s website at: “Guidance” (last modified 1 June 2021), online: FINTRAC <<https://www.fintrac-canafe.gc.ca/guidance-directives/1-eng>>.

⁹⁶ Terence D Hall, *A Guide to Canadian Money Laundering Legislation*, 6th ed (LexisNexis, 2020) at 31.

⁹⁷ *Ibid* at 169.

⁹⁸ *Ibid* at 26.

⁹⁹ *Ibid* at 27.

Financial institutions should be required to undertake customer due diligence (CDD) measures when:

- (i) establishing business relations;
- (ii) carrying out occasional transactions: (i) above the applicable designated threshold (USD/EUR 15,000); or (ii) that are wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16;
- (iii) there is a suspicion of money laundering or terrorist financing; or
- (iv) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The principle that financial institutions should conduct CDD should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means.

The CDD measures to be taken are as follows:

- (a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.
- (b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.
- (c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
- (d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Financial institutions should be required to apply each of the CDD measures under (a) to (d) above, but should determine the extent of such measures using a risk-based approach (RBA) in accordance with the Interpretive Notes to this Recommendation and to Recommendation 1.

Financial institutions should be required to verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business.

Where the financial institution is unable to comply with the applicable requirements under paragraphs (a) to (d) above (subject to appropriate modification of the extent of the measures on a risk-based approach), it should be required not to open the account, commence business relations or perform the transaction; or should be required to terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

These requirements should apply to all new customers, although financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times.

END OF EXCERPT

As discussed in the first section of this chapter, PEPs launder large amounts of misappropriated government funds and bribes every year. Because of the particular risks associated with PEPs, FATF Recommendation 12, set out below, requires enhanced due diligence when dealing with them as customers:

BEGINNING OF EXCERPT

12. Politically exposed persons

Financial institutions should be required, in relation to foreign politically exposed persons (PEPs) (whether as customer or beneficial owner), in addition to performing normal customer due diligence measures, to:

- (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;
- (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
- (c) take reasonable measures to establish the source of wealth and source of funds; and
- (d) conduct enhanced ongoing monitoring of the business relationship.

Financial institutions should be required to take reasonable measures to determine whether a customer or beneficial owner is a domestic PEP or a person who is or has been entrusted with a prominent function by an international organisation. In cases of a higher risk business relationship with such persons, financial institutions should be required to apply the measures referred to in paragraphs (b), (c) and (d).

END OF EXCERPT

Both the UK and Canada have created comprehensive regulatory frameworks to implement the above recommendations.¹⁰⁰ They require financial institutions to collect and record personal information about their customers. As suggested by the FATF, both also require banks to conduct ongoing monitoring of the customer relationship and to take steps to identify the beneficial owners of customers that are organizations. Finally, both Canada and the UK require financial institutions to take steps to determine if their customers are PEPs and require enhanced due diligence in such cases.¹⁰¹ The PEP concept has been criticized by some for its vagueness. Different definitions are used internationally, and challenges arise in determining who fits each definition. Financial institutions must choose where to draw the line, which is often far from clear cut.¹⁰²

US regulations require financial institutions to set up a Customer Identification Program (CIP) to determine the identity of each customer.¹⁰³ In 2016, FINCEN issued final rules under the *Bank Secrecy Act* to clarify and strengthen CDD requirements. The rules, which came into effect in 2018, included a new requirement to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and exemptions. Furthermore, the US requires enhanced CDD in the case of correspondent accounts created by US banks for non-US persons. These measures include a requirement to determine beneficial ownership of any organizations involved and to determine whether the account holder is a Senior Foreign Political Figure (the US statutory language, roughly equivalent to PEP).¹⁰⁴

5.3.2 Transaction Reporting

FATF Recommendation 20 expects states to create legal requirements for financial institutions to report any suspicious transactions to their respective FIUs:

¹⁰⁰ In the UK, see the *Proceeds of Crime Act 2002, c 22 [POCA]*, and the *Money Laundering Regulations 2007, SI 2007/2157 [UK ML Regulations]*. The Financial Conduct Authority (FCA) is the authority responsible for supervising compliance with the *Money Laundering Regulations* by most financial firms and organisations. For more detail, see the resources available at the FCA website: “Financial Conduct Authority” (last visited 8 August 2021), online: FCA <<http://www.fca.org.uk/>>. See also Edward Rees, QC, Richard Fisher & Richard Thomas, *Blackstone’s Guide to the Proceeds of Crime Act*, 5th ed (Oxford University Press, 2015). In Canada, see the *PCMLTFA*, *supra* note 91, and *The Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184 [PCMLTF Regulations]*, and four subsequent Regulations. See the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) website for detailed information on the various regulations related to the enforcement of *PCMLTFA*: “Financial Transactions and Reports Analysis Centre of Canada” (last visited 8 August 2021), online: *Government of Canada* <<http://www.fintrac-canafe.gc.ca/>>. See also Hall, *supra* note 96, and Peter M German, *Proceeds of Crime and Money Laundering: Includes Analysis of Civil Forfeiture and Terrorist Financing Legislation* (Thomson Reuters, 1998) (loose-leaf, updated bimonthly), c 3, 16.

¹⁰¹ UK: *UK ML Regulations*, *supra* note 100, ss 7, 14(4); Canada: *PCMLTF Regulations*, *supra* note 100, ss 53-67.2.

¹⁰² Louis de Koker, “Applying Anti-Money Laundering Laws to Fight Corruption” in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Cheltenham: Edward Elgar, 2011) 340 at 344-47.

¹⁰³ 31 CFR § 103.121.

¹⁰⁴ Fed Reg, Vol 72 No 153 (9 August 2007).

20. Reporting of suspicious transactions

If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU).

Following this recommendation, Canada, the US, and the UK require financial institutions to report all suspicious transactions to their FIUs. However, there are some significant variations between the different reporting regimes. The UK only requires that all *suspicious* transactions be reported to UKFIU.¹⁰⁵ The US and Canada have similar requirements,¹⁰⁶ but both countries also require that large transactions over \$10,000 be reported to their respective FIUs.¹⁰⁷ All three countries have threshold-based reporting of cash or monetary instruments crossing the border that exceeds 10,000 dollars (US, Canada) or pounds (UK). Other than at the border, the UK has taken a strict risk-based approach to transaction reporting, while Canada and the US have supplemented this with threshold-based reporting requirements. However, this should not be taken to mean that the UK's regime is weaker. Their reporting requirements are backed up with harsh sanctions for failure to report suspicious transactions.¹⁰⁸ Failure to disclose can result in up to five years imprisonment or a fine, or both. While the UK has taken a slightly different approach, it is not a more lenient one, and this "fear factor" has led to a dramatic increase in SAR submissions. However, critics claim that the high cost of compliance with the UK's SAR regime is disproportionate to its effectiveness.¹⁰⁹

5.3.3 Record-Keeping

The final piece of the regulatory regime proposed by the FATF Recommendations is the requirement for financial institutions to retain transaction records and customer information for at least five years. This requirement is set out in Recommendation 11:

11. Record-keeping

Financial institutions should be required to maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved, if any) so as to provide, if necessary, evidence for prosecution of criminal activity.

Financial institutions should be required to keep all records obtained through CDD measures (e.g. copies or records of official identification

¹⁰⁵ *PCMLTFA*, *supra* note 91, ss 330-331.

¹⁰⁶ US: 12 CFR §§ 21.11; Canada: *PCMLTFA*, *supra* note 91, s 7.

¹⁰⁷ US: 31 CFR Ch X § 1010.311; Canada: *PCMLTF Regulations*, *supra* note 100, s 12(1).

¹⁰⁸ *PCMLTFA*, *supra* note 91, ss 330-332.

¹⁰⁹ Karen Harrison & Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom*, 2nd ed (New York: Routledge, 2017) at 36.

documents like passports, identity cards, driving licences or similar documents), account files and business correspondence, including the results of any analysis undertaken (e.g. inquiries to establish the background and purpose of complex, unusual large transactions), for at least five years after the business relationship is ended, or after the date of the occasional transaction.

Financial institutions should be required by law to maintain records on transactions and information obtained through the CDD measures.

The CDD information and the transaction records should be available to domestic competent authorities upon appropriate authority.

The US, UK, and Canada all require financial institutions to store records for five years in accordance with Recommendation 11.¹¹⁰ While the information stored in these records will vary slightly based on differences in their respective CDD regimes, there are no significant variations with regard to the record-keeping requirements themselves.

5.4 Offences

5.4.1 FATF Recommendations and UNCAC

FATF Recommendation 3 expects states to create offences to directly criminalize money laundering. The recommendation is reproduced below, along with an interpretive note. FATF Recommendation 3 on money laundering was produced in the original 2003 FATF Forty Recommendations. It was drafted on the basis of two existing UN Conventions: the 1998 Narcotic Drugs and Psychotropic Substances Convention and the 2000 Transnational Organized Crime Convention. The money laundering provisions in those two conventions are now consolidated in the money laundering provisions in UNCAC. FATF Recommendation 3 provides:

3. Money laundering offence

Countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.

Interpretive Note to Recommendation 3 (Money Laundering Offence)

1. Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention) [and now in

¹¹⁰ Canada: *PCMLTF Regulations*, *supra* note 100, s 69; UK: *UK ML Regulations*, *supra* note 100, s 19; US: 31 CFR § 103.121(3).

accordance with Articles 14 and 23 of UNCAC (2005), which are discussed in detail in Sections 4.1.1 and 4.1.2].

2. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches.
- ...
5. Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence, had it occurred domestically.
6. Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

The US, the UK, and Canada all have money laundering offences that generally comply with FATF and UNCAC requirements. However, there are significant differences between the three countries' provisions. Canada and the US define money laundering as the use of the proceeds of a list of specified offences ("predicate offences"). The UK takes a more inclusive approach. Under its regime, virtually all profit-driven crime can lead to money laundering charges.

5.4.2 US

In the United States, money laundering is an offence under both federal criminal law and in the majority of state criminal codes. Where money laundering is criminalized at the state level, federal and state authorities work closely together. Approximately 2,500 natural and legal persons are charged with federal money laundering offences each year, resulting in over 1,200 convictions. In 2014, a total of 3,369 money laundering charges were laid and 1,967 convictions registered (the greater number of charges accounted for by the fact that a person may be charged with multiple counts of various money laundering offences).¹¹¹

The two primary money laundering offences are 18 USC 1956: Money Laundering (proceeds laundering) and 18 USC 1957: Money Laundering (transactional). In 2014, charges for the first offence were laid 1,895 times and 517 times for the second offence, together accounting for 72% of all money laundering charges in the United States. Other money laundering related

¹¹¹ Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures - United States Mutual Evaluation Report*, (Paris: FATF, 2016) [US Mutual Evaluation Report (2016)] at 64-65, online (pdf): <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>>.

charges are USC 1952: Interstate & foreign travel/transportation, including proceeds, in aid of racketeering enterprises, 18 USC 1962: Receiving or deriving income from racketeering activities (RICO), and 31 USC 5332: Bulk cash smuggling.¹¹²

The relevant US provisions are reproduced below:

18 US Code § 1956 – Laundering of monetary instruments

(a) (1) *Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—*

- (A) (i) *with the intent to promote the carrying on of specified unlawful activity; or*
- (ii) *with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or*
- (B) *knowing that the transaction is designed in whole or in part—*
 - (i) *to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or*
 - (ii) *to avoid a transaction reporting requirement under State or Federal law,*

shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) *Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—*

- (A) *with the intent to promote the carrying on of specified unlawful activity; or*
- (B) *knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent*

¹¹² *Ibid* at 64-65.

the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

- (i) *to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or*
- (ii) *to avoid a transaction reporting requirement under State or Federal law,*

shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

- (A) *to promote the carrying on of specified unlawful activity;*
- (B) *to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or*
- (C) *to avoid a transaction reporting requirement under State or Federal law,*

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section. [emphasis added]

...

18 US Code § 1957 – Engaging in monetary transactions in property derived from specified unlawful activity

- (a) Whoever, in any of the circumstances set forth in subsection (d), *knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is*

derived from specified unlawful activity, shall be punished as provided in subsection (b).

- (b)
 - (1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this subsection is greater.
 - (2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.
- (c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.
- (d) The circumstances referred to in subsection (a) are—
 - (1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or
 - (2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).
- (e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the

Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

- (f) As used in this section —
- (1) the term “monetary transaction” means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956 of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956 of this title, but such term does not include any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution;
 - (2) the term “criminally derived property” means any property constituting, or derived from, proceeds obtained from a criminal offense; and
 - (3) the terms “specified unlawful activity” and “proceeds” shall have the meaning given those terms in section 1956 of this title. [emphasis added]

While the US statutory provisions are longer and more complex than their Canadian equivalents (discussed below), their overall effect is similar. Only the proceeds of certain crimes (“specified unlawful activity”) can give rise to a money laundering charge. The term “specified unlawful activity” is defined in 18 USC 1956(c)(7), and provides a long list of offenses that encompasses most serious crimes and includes violations of the *Foreign Corrupt Practices Act*. To be convicted, the accused must have known that the property in question was derived from unlawful activity of some kind. The two US provisions excerpted above include a variety of different uses that can give rise to a money laundering conviction, including attempting to avoid transaction reporting requirements and promoting the carrying on of a specified unlawful activity (i.e., funding further crimes). However, the overall effect is that money laundering consists of using the proceeds of certain defined crimes in certain defined ways.¹¹³

Sentences for money laundering offenses are often lengthy and can reach a life term. From 2010-2015, prison sentences greater than 61 months (5 years) were imposed in 40% of convictions, while non-custodial sentences were used in only 15% of convictions. Table 4.1 outlines the sentences given in US federal money laundering cases from 2010-2014.

¹¹³ For lawyers prosecuting or defending money laundering charges, these provisions raise a host of issues. For a detailed analysis of the US money laundering provisions, including elements of the offences, possible defenses and sanctions, see Carolyn Hart, “Money Laundering” (2014) 51 Am Crim L Rev 1449. Charles Doyle, “Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law” (Congressional Research Service, 2012), online: <www.crs.gov>; United States Code Annotated, Title 18, ss 1956, 1957.

Table 4.1 *Sentencing for Money Laundering Convictions (FY2010-FY2014)*¹¹⁴

Offense	# of Defendants	Not imprisoned	1-12 Months	13-14 Months	25-36 Months	37-60 Months	61+ Months	Life
18 USC 1956	5076	784	341	520	456	823	2106	46
18 USC 1957	1253	174	81	145	112	249	486	6

5.4.3 UK

In the UK, money laundering is criminalized by sections 327-329 of the *Proceeds of Crime Act, 2002 (POCA)*. Those provisions provide as follows:

327 Concealing etc

- 1) A person commits an offence if he —
 - (a) conceals criminal property;
 - (b) disguises criminal property;
 - (c) converts criminal property;
 - (d) transfers criminal property;
 - (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.
- 2) But a person does not commit such an offence if —
 - (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
 - (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
 - (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.¹¹⁵
- 3) Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.

328 Arrangements

- 1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects

¹¹⁴ US Mutual Evaluation Report (2016), *supra* note 111 at 74.

¹¹⁵ 2) A, B, C found here: F1S 327(2A)(2B) inserted (15 May 2006) by *Serious Organised Crime and Police Act 2005*, c 15 [SOCPA], ss 102(2), 178(8); SI 2006/1085, art 3; and F2S 327(2C) inserted (1 July 2005) by SOCPA, ss 103(2), 178(8); SI 2005/1521, art 3(1)(c).

facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

- 2) But a person does not commit such an offence if—
 - (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
 - (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
 - (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

[The meaning of “suspicion” in section 328 has been the subject of some debate due to its subjectivity. The case law has indicated a preference for the “more than fanciful possibility” test. It should also be noted that “arrangement” does not include legal proceedings.¹¹⁶]

329 Acquisition, use and possession

- 1) A person commits an offence if he—
 - (a) acquires criminal property;
 - (b) uses criminal property;
 - (c) has possession of criminal property.
- 2) But a person does not commit such an offence if—
 - (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
 - (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
 - (c) he acquired or used or had possession of the property for adequate consideration;
 - (d) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.¹¹⁷
- 3) For the purposes of this section—
 - (a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;

¹¹⁶ Harrison & Ryder, *supra* note 109 at 17.

¹¹⁷ (2A), (2B), (2C), found here: Textual Amendments F1S 329(2A)(2B) inserted (15 May 2006) by SOCPA, *supra* note 115, ss 102(4), 178(8); SI 2006/1085, art 3; and F2S 329(2C) inserted (1 July 2005) by SOCPA, *supra* note 115, ss 103(4), 178(8); SI 2005/1521, art 3(1)(c).

- (b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;
- (c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

Section 340(3) of the *POCA* defines criminal property broadly. Property is criminal property if:

- (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
- (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

The person benefitting from criminal conduct need not commit the criminal act. The definition also includes property from anywhere in the world.

In the UK, unlike Canada and the US, there is no defined set of predicate offences for money laundering. There is also no need, under some of the provisions above, for any intent to conceal the source of the funds. The use or possession of the proceeds of any crime whatsoever can be prosecuted as money laundering. Under this regime, stealing and selling bicycles can give rise to money laundering charges. There is a requirement that the accused know that the proceeds in question were derived from criminal activity and a statutory defence if the accused reported the act as a suspicious transaction. Nonetheless, far more criminal activity is captured by this regime than in either the US or Canada.

Section 333 of the *POCA* also creates an offence of "tipping off." The offence is committed where a person in the regulated sector tells a customer or third person that a money laundering investigation is underway or under consideration and where this disclosure is likely to be prejudicial.¹¹⁸

Sentencing guidelines for money laundering offences came into force October 1, 2014. For more information see Chapter 7, Section 5.¹¹⁹

¹¹⁸ Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (New York: Oxford University Press, 2014) at 166.

¹¹⁹ For a detailed analysis of the provisions of the *Proceeds of Crime Act 2002*, see Rees, Fisher & Thomas, *supra* note 100. For a critical look at the success of the UK's money laundering laws, see Peter Allan Sproat, "An Evaluation of the UK's Money Laundering and Asset Recovery Regime" (2007) 47:3 *Crime L & Soc Change* 169. For more on the UK's anti-money laundering regime and its weaknesses, see Harrison & Ryder, *supra* note 109 at 11-48.

5.4.4 Canada

Money laundering laws in Canada were first enacted in 1989 and amended numerous times

¹²⁰ The current money laundering offences are set out in sections 462.31(1) and 354(1) of the *Criminal Code*, which state:

Laundering proceeds of crime

462.31 (1) Every one commits an offence who *uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal* or convert that property or those proceeds, *knowing or believing* that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a *designated offence*; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

Possession of property obtained by crime

354. (1) Every one commits an offence who has in his *possession* any property or thing or any proceeds of any property or thing *knowing* that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

- (a) the commission in Canada of an *offence punishable by indictment*; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.
[emphasis added]

There are three important aspects to section 462.31. First, it applies only to the proceeds of “designated offences.” The term “designated offence” is defined in section 462.3 of the *Criminal Code* as an offence that may be prosecuted as an indictable offence under Canadian legislation, unless it is expressly excluded by regulation. This means violations of the *Corruption of Foreign Public Officials Act* and bribery offences, as well as most other criminal offences, are included as designated offences. Second, while the range of actions that can constitute the *actus reus* of the offence is broad, there must be intent to conceal or convert on the part of the accused. Finally, the accused must know or believe, or be reckless as to whether the property or proceeds were derived from the commission of an indictable offence. An offence under section 462.31 is punishable by up to ten years imprisonment. Section 354(1) does not require any intent to conceal the source of the property or proceeds, but it requires specific knowledge that the property was derived from a criminal offence.

¹²⁰ For a history of the development of money laundering laws in Canada, see German, *supra* note 100, c 3.

This knowledge requirement often leads to difficulty when attempting to draw a nexus between a predicate offence and the property or proceeds.

Money laundering charges are typically laid along with a predicate offence such as bribery or drug trafficking. From 2010 to 2014, 1,800 money laundering charges were laid in 1,027 cases involving one or more counts of money laundering along with other offences. Prosecuting the money laundering is typically not prioritized in these circumstances. The tables below, reproduced from FATF's 2016 mutual evaluation of Canada, show that while the conviction rate for these cases was 59.6%, the money laundering charge led to a conviction only 9.4% of the time.¹²¹ Conversely, the money laundering charge was stayed 14.6% of the time and withdrawn 72.7% of the time. In FATF's mutual evaluation of Canada, discussed in greater detail in Section 6.2.3, it is explained that insufficient evidence, avoidance of over-charging, plea bargaining, and length of proceedings in money laundering cases were some of the reasons why this is done.¹²² Given the principle of totality in sentencing, pursuing a money laundering charge when there is already a conviction for the predicate offence may not greatly increase the sentence, and therefore prosecutors may believe their resources are better directed at crafting a plea bargain or focusing on the predicate offence.

Table 4.2 *Results of Money Laundering-Related Cases*¹²³

	2010	2011	2012	2013	2014	Total	%
Guilty	82	108	140	136	146	612	59.6%
Acquitted	2	0	0	4	7	13	1.3%
Stayed	8	12	15	26	18	79	7.7%
Withdrawn	49	63	74	64	53	303	29.5%
Other Decisions	0	0	12	4	4	20	1.9%
Total	141	183	241	234	228	1027	100%

¹²¹ Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures - Canada Mutual Evaluation Report*, (FATF, 2016) [Canada Mutual Evaluation Report (2016)] at 54, online: <<http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-canada-2016.html>>.

¹²² *Ibid.*

¹²³ Statistics Canada's Integrated Criminal Court Survey (ICCS) as cited in *ibid* at 52. In 2019, the Toronto Star reported that between 2012 and 2017, 86% of money laundering charges were withdrawn or stayed and only nine percent of charges lead to a guilty plea or conviction: Marco Chown Oved, "In Canada, Nearly All Accused Money Launderers Get their Charges Dropped", *The Toronto Star* (26 December 2019), online: <<https://www.thestar.com/news/investigations/2019/12/26/in-canada-nearly-all-accused-money-launderers-get-their-charges-dropped.html>>.

Table 4.3 *Results of Money Laundering-Charges*¹²⁴

	2010	2011	2012	2013	2014	Total	%
Guilty	38	21	35	31	44	169	9.4%
Acquitted	5	1	8	6	9	29	1.6%
Stayed	17	26	144	45	31	263	14.6%
Withdrawn	132	190	366	327	294	1309	72.7%
Other Decisions	2	2	14	7	5	30	1.7%
Total	194	240	567	416	383	1800	100%

Conviction rates for money laundering were higher in cases where that is the only charge laid. In a limited sample size of 35 single-charge money laundering cases from 2010 to 2014, 12 resulted in convictions, a 34.3% rate. Stays were imposed 14.3% of the time; a comparable proportion as when money laundering is charged with other offences, while withdrawals were far less frequent, occurring 40% of the time, compared to 72.7% when money laundering is charged alongside other offences.

Sentencing for money laundering ranges from non-custodial sentences to penitentiary terms. FATF suggests sanctions imposed in Canada for money launderers are low and not dissuasive enough. In 145 sentencing cases where money laundering was the most serious offence, nearly half received no prison time, and only 11% received over two years' incarceration.¹²⁵

Table 4.4 *Sanctions in Money Laundering Cases where Money Laundering was the Most Serious Offence, 2010 to 2014*¹²⁶

	Number	Percentage
Custodial Sentence	80	55.2%
• Less than 12 months	47	32.4%
• 12 to 24 months	17	11.7%
• More than 24 months	16	11.0%
Conditional sentence, probation, fine, restitution	65	44.8%
Total	145	100.0%

Note. There are other undisclosed cases where the money laundering offence runs concurrently with another "Most Serious Offence."

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at 54. For a detailed legal analysis of Canada's money laundering offences see Hall, *supra* note 96; German, *supra* note 100, c 5, 6; *Anti-Money Laundering Law*, BC CLE Course Materials (BC CLE, May 2011); and Margaret Beare, *supra* note 3, c 6. For a good critical analysis of money laundering in Canada and a claim as to its dubious benefits, see Margaret E Beare & Stephen Schneider, *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars* (Toronto: University of Toronto Press, 2007).

¹²⁶ Statistics Canada's Integrated Criminal Court Survey (ICCS) as cited in *Canada Mutual Evaluation Report* (2016), *supra* note 121 at 54.

5.5 Role of Legal Professionals

5.5.1 FATF Recommendations

FATF Recommendations 22 and 23 state that lawyers should be required to engage in CDD measures when performing transactions for clients and to report suspicious transactions. Many members of the legal profession and legal organizations such as the Canadian Bar Association have strongly opposed the inclusion of lawyers in these reporting regulations.¹²⁷ The interpretive note to Recommendation 23, reproduced below, modifies FATF's position somewhat:

Interpretive Note to Recommendation 23 (DNFBPS [designated non-financial businesses and professions] – Other Measures)

1. Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.
2. It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.
3. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR [suspicious transaction report] to their appropriate self-regulatory organisations, provided that there are appropriate forms of cooperation between these organisations and the FIU.
4. Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping-off.

¹²⁷ John A Kelley, "International Anti-Money Laundering and Professional Ethics" (2006) 40:2 Intl Lawy 433. For an explanation of lawyer opposition to reporting requirements, see Kent Roach et al, "Sentries or Facilitators?: Law and Ethics in Trusting Lawyers with Money Laundering Prevention" (2004) 49 Crim LQ 34. For a comparative analysis of responses to the FATF recommendations in various jurisdictions (EU, UK, US, Canada, Australia, and New Zealand) and an examination of the effects of gatekeeper obligations on the solicitor-client relationship, see Maria Italia, "Lawyers and Accountants as 'Gatekeepers' to Combat Money Laundering: An International Comparison" (2013) 42:2 Austl Tax L Rev 116.

In this interpretive note, the FATF clarifies that its recommendations are tempered by the requirements of legal privilege and confidentiality, and leaves it in the hands of member states to decide how to implement an AML regime that respects those duties. Lawyers in the US, the UK and Canada are subject to different degrees of regulation. This variation is a function of a number of factors, principally legislative policy, the power of the bar and the constitutional structure of the country in question. For instance, after Canada's Parliament included the legal profession among those entities required to report to its FIU, the Federation of Law Societies successfully challenged these measures on constitutional grounds (further discussed in Section 5.5.4). In the UK, on the other hand, lawyers have been less successful in preventing mandatory reporting.

There are two principal ways that lawyers must deal with state-level AML regimes. The first is regulation. Similarly to financial institutions, lawyers in some countries are subject to reporting, record-keeping and CDD requirements. The second is direct criminal liability. In some countries, AML laws are drafted in such a way that lawyers must be extremely careful to avoid prosecution for careless handling of funds or lack of due diligence in the ordinary course of their practice.

5.5.2 US

To date, the US has not taken serious steps to regulate lawyers as part of their AML regime. According to an article on the International Bar Association's Anti-Money-Laundering Forum:

[T]he American legal system regards legal professional privilege as fundamental to the lawyer-client relationship. Therefore, it is disinclined towards modifying its current anti-money laundering legislation to include professionals such as lawyers. Trust and confidence are considered as keystone principles to the legal professional relationship. They would be eroded indefinitely, if lawyers were required to reveal information relating to the client to third parties, based upon mere suspicions. A client must feel free to seek legal assistance and be able to communicate with his legal representative fully and frankly.¹²⁸

US lawyers are not subject to any mandatory reporting requirements, with one exception. They are required to report any cash transaction greater than \$10,000 to the IRS.¹²⁹ Other than that, their work is outside the US AML regime.

US lawyers are also not likely to be caught by the country's anti-money laundering offenses in the ordinary course of their work. As discussed in Section 5.4.2, US money-laundering offenses require that the accused have actual knowledge that the funds in question were derived from criminal activity. While some courts have held that willful blindness is

¹²⁸ "Lawyers and Money Laundering" (last visited 8 August 2021), online: *International Bar Association - Anti-Money Laundering Forum* <http://www.anti-moneylaundering.org/Lawyers_and_Money_Laundering.aspx>.

¹²⁹ 26 USC § 6050I. This provision was unsuccessfully challenged in *United States v W Ritchie & Pc*, 15 F (3d) 592 (1994), 73 AFTR 2d 94-994, online: <<http://openjurist.org/15/f3d/592>>.

sufficient to make out this element of the offence, it is still unlikely that a lawyer who was not knowingly complicit in a money laundering scheme could be successfully prosecuted.¹³⁰

5.5.3 UK

Lawyers in the UK are in an unenviable position relative to their North American colleagues. They face significant potential criminal liability under section 328 of the *POCA*, even in the ordinary course of their practice. Section 328 targets those who assist in the layering and integration stages of the money laundering process. The Crown is required to establish that the accused entered into or became concerned in an arrangement that they knew or suspected “facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.” This provision is intended to catch financial advisors, accountants, lawyers and other professionals who assist in a money laundering scheme.

Section 328 is broad enough that even careless lawyers can be prosecuted. For example, in *R v Duff*, a solicitor was sentenced to six months imprisonment because he suspected that his client’s funds had been criminally derived, but did not report his suspicions.¹³¹ This came to light some years later when his client was arrested for cocaine smuggling.¹³² There are statutory defences to a section 328 charge, but they require the accused either to have reported their suspicions or to have a reasonable excuse for their failure to do so. This regime forces lawyers to report any suspicions or face criminal charges.

The UK courts have limited the scope of section 328 somewhat. In the 2005 *Bowman v Fels* case, the English Court of Appeal held that section 328 does not apply to lawyers involved in ordinary litigation or other dispute resolution processes who, as a result of the privileged information they receive, come to suspect that the property at issue is criminal property.¹³³ The case involved a family law dispute. The claimant, Ms. Bowman, sought recognition of a proprietary interest in the defendant’s home based on the doctrine of constructive trust. The claimant and the defendant had previously lived in the house together in a common-law relationship. During the course of preparing for litigation, the claimant’s solicitors began to suspect that the house may have been criminal property and became concerned that if they did not disclose their suspicions to the authorities they would be held liable under section 328 for participating in an arrangement to aid their client in acquiring an interest in criminal property. The Court in *Bowman* clarified that the solicitors were in no such danger. Section 328 does not override the concept of legal privilege and therefore would not have applied to the acts of the solicitors of the claimant or the defendant.

¹³⁰ Carolyn Hart, “Money Laundering” (2014) *Am Crim L Rev* 1449 at 1460.

¹³¹ *R v Duff*, [2003] 1 Cr App R (S) 466.

¹³² Edward Rees, QC, Richard Fisher & Richard Thomas, *Blackstone’s Guide to the Proceeds of Crime Act 2002*, 4th ed (Oxford University Press, 2011) at 130. (*please note: there is a 5th edition of this book that the author did not have access to at the time of writing*).

¹³³ *Bowman v Fels*, [2005] EWCA Civ 226.

However, the Court in *Bowman* did not address the position of lawyers who assist clients in matters not involving litigation. Therefore, the potential liability of lawyers acting in a transactional context remains uncertain.¹³⁴

5.5.4 Canada

The Canadian government has tried unsuccessfully to subject lawyers to reporting and CDD requirements much like those imposed on financial institutions. When they were promulgated, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)* and *Regulations* applied to lawyers. They imposed reporting and CDD requirements and allowed searches of law offices and seizure of evidence. The application of the *PCMLTFA* and *Regulations* to lawyers was challenged by the Federation of Law Societies on constitutional grounds. In a 2015 ruling, the Supreme Court upheld the Federation's position and read down the relevant provisions to effectively exclude lawyers from the *PCMLTFA* and *Regulations*.¹³⁵ The Federation has created model rules to deal with money laundering, which have been adopted by the provincial law societies.¹³⁶ The Federation's model rule on cash transactions states that "[a] lawyer shall not receive or accept from a person, cash in an aggregate amount of \$7,500 or more Canadian dollars in

¹³⁴ Edward Powles, "All that Glitters Is Not Gold: Laundering the UK Money Laundering Regime" (2006) 42 Cambridge LJ 40 at 42. For further information on legal privilege in the context of UK anti-money laundering law see: The Law Society, "Chapter 13: Legal Professional Privilege" in *Anti-Money Laundering Guidance for the Legal Sector*, online:

<<https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>>.

¹³⁵ *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7. The SCC articulated a new principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*. The SCC held that it is a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. The SCC stated that this duty is a basic tenet of the Canadian legal system, a distinct element of a lawyer's broad common law duty of loyalty and a fundamental part of the solicitor-client relationship. The Court noted that the lawyer's duty of commitment to the client's cause is essential to maintain confidence in the integrity of the administration of justice. Under the impugned regulations, lawyers must create and preserve records not required for client representation and the solicitor-client confidences contained in these records are not adequately protected against the sweeping warrantless searches authorized by sections 62-64 of the *PCMLTFA*, *supra* note 91, which violate section 8 *Charter* rights against search and seizure in law offices as set out in *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61.

¹³⁶ The FLSC Model Code is available online:

"Federation Model Code of Professional Conduct" (last visited 8 August 2021), online: FLSC <<http://www.flsc.ca/en/federation-model-code-of-professional-conduct/>>. Rule 3.2-7 prohibits lawyers from "knowingly assist[ing] in or encourage[ing] any dishonesty, fraud, crime or illegal conduct, or instruct[ing] the client on how to violate the law and avoid punishment," including money laundering. The same prohibition is also found in Rule 3.2-7 of the BC Law Society *Code of Professional Conduct* for BC, online: <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/>>. For a useful description of the Law Society of BC rules, see Barbara Buchanan, "BC Lawyers and Professional Responsibility" in *Anti-Money Laundering Law* (Materials for CLE-BC Seminar on *Anti-Money Laundering Law*, May 27, 2011), online: <<http://www.cle.bc.ca/>>.

respect of any one client matter or transaction.”¹³⁷ The BC Law Society Rule 3-59 also adopts the \$7,500 cash rule.¹³⁸ However, these rules are less comprehensive, contain exemptions, and generally impose less stringent requirements than the government’s *Regulations*. The federal legislation and regulations require that financial institutions and other professionals, such as accountants or investment brokers, report all transactions of \$10,000 or more to FINTRAC. On the other hand, lawyers need not report cash transactions to anyone. The law societies take the position that when a cheque or electronic bank transfer of \$10,000 or more is received by a law firm, that money has already been subjected to the automatic FINTRAC reporting requirement (for \$10,000 or more) at the point of deposit of that money with a financial institution. This fails, of course, to allow the lawyer to ascertain and account for the source of funds or wealth, instead relying upon the financial institution.

As in the US, Canadian lawyers are unlikely to be prosecuted for money laundering offences unless they deliberately facilitate a money laundering scheme. As discussed in Section 5.4.4, the Canadian offences require that the accused have actual knowledge that the funds in question were obtained through the commission of an indictable offence. Wilful blindness and recklessness can, however, equate with actual knowledge.¹³⁹ Section 462.31(1) of the *Criminal Code* also requires intent to conceal or convert the property. Mere careless conduct on the part of a lawyer is unlikely to make out the offence.¹⁴⁰

6. EVALUATING THE EFFECTIVENESS OF AML REGIMES

This section discusses tools for evaluating the success or failure of state-level AML regimes and introduces the two most common international evaluators, the Basel Institute on Governance and the FATF. It describes both the Basel AML Index and the FATF mutual evaluation process and briefly summarizes how the US, UK, and Canada performed on each

¹³⁷ Federation of Law Societies of Canada, *Model Rule on Cash Transactions* (adopted by Council of the Federation of Law Societies of Canada as of July 2004), online (pdf): <<http://flsc.ca/wp-content/uploads/2014/10/terror1.pdf>>.

¹³⁸ Law Society of BC, *Law Society Rules 2015*, Rule 3-59, online: <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/part-3-%E2%80%93-protection-of-the-public/#59>>.

¹³⁹ See G Ferguson et al, *Canadian Criminal Jury Instructions* (Vancouver: CLE-BC, 2020) at 6.60, user note before para 13.

¹⁴⁰ For a practical guide to lawyers’ legal and ethical obligations regarding money laundering, see International Bar Association, American Bar Association & Council of Bars and Law Societies of Europe, *A Lawyer’s Guide to Detecting and Preventing Money Laundering*, (October 2014), online: <<http://www.lawsociety.org.uk/support-services/advice/articles/new-global-aml-guidance/>>. For a comparative review of money laundering regimes in Canada and the US, see Ronan Reinart, “Laundering Around the World: Legislative Responses to Money Laundering in Canada, the US and Bermuda” (2004) 4 *Asper Rev Intl Bus & Trade L* 131 and Nicholas Ryder, *Money Laundering: An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States, the United Kingdom, Australia and Canada* (London; New York: Routledge, 2012). For a summary of various US and international AML developments, see Mikhail Reider-Gordon, “US and International Anti-Money Laundering Developments” (2011) 45 *Intl Law* 365.

of these evaluations. It then excerpts a critical evaluation from the Canadian Senate and discusses some of the systemic barriers to creating effective state-level AML regimes.

6.1 Basel AML Index

Since 2012, the Basel Institute on Governance has produced an annual index on anti-money laundering.¹⁴¹ The Basel AML Index (Index) provides a useful tool for assessing and comparing *the risk* of money laundering in different countries worldwide and for observing over time changes to that risk within a given country.

The Index is a composite weighting of the average of 16 indicators, relying on data provided by groups such as FATF, Transparency International, the World Economic Forum, and the World Bank.¹⁴² For the 2020 report, data was available for 141 countries who were given a score from 0 (lowest risk) to 10 (highest risk).

Factors weighed in the total score are:

- Quality of AML/CFT Framework
- Bribery and Corruption
- Financial Transparency and Standards
- Public Transparency and Accountability
- Legal and Political Risks¹⁴³

The highest (worst) score in the 2020 Basel Index was Afghanistan at 8.16. The lowest (best) score was Estonia at 2.36. Canada placed 94th (4.68), the US placed 100th (4.57) and the UK placed 116th (4.02).

It is important to note that the Index measures *risk* of money laundering and terrorist financing. In practice, factors relating to a country's financial sector and economy are important considerations for money launderers and can contribute significantly to the volume of laundering in any given country. For example, the US ranks 97th of 149 countries, meaning there are approximately 50 countries which have a lower risk for money laundering. However, that US ranking does not mean that all the countries which were ranked as lower money laundering risks are doing more, or are more effective, in trying to control and prevent money laundering. In practice, the majority of international money launderers choose not to operate in small, isolated economies. One study found that nearly

¹⁴¹ As it describes itself, the Basel Institute is an "independent non-for-profit competence centre working around the world to strengthen governance and counter corruption and other financial crimes.": "Basel Institute on Governance" (last visited 8 August 2021), online: <<https://baselgovernance.org/>>.

¹⁴² Basel Institute on Governance, *Basel AML Index 2016*, (2020) at 12, online: <<https://baselgovernance.org/basel-aml-index/public-ranking>>.

¹⁴³ These factors are determined by a number of sub-factors.

half of the world's money laundering originates in the US, due in part to the dominance of US dollars in global markets and transactions.¹⁴⁴

6.2 FATF Mutual Evaluations

The FATF assesses compliance with its AML recommendations through a process of mutual evaluation. For the first three rounds of evaluation, countries were assessed on their technical compliance with the FATF recommendations. However, a new methodology was developed in 2013 to evaluate the *effectiveness* of AML regimes. This methodology is used in the ongoing fourth round of FATF evaluations, which began in mid-2014. Evaluations are carried out by teams of experts, described by FATF as follows:

An assessment team will usually consist of five to six expert assessors (comprising at least one legal, financial and law enforcement expert), principally drawn from FATF members, and will be supported by members of the FATF Secretariat. Depending on the country and the ML/TF risks, additional assessors or assessors with specific expertise may also be required.¹⁴⁵

Prior to 2014, countries were assigned a rating for compliance with each FATF recommendation. Possible ratings were C (compliant), LC (largely compliant), PC (partially compliant) or NC (non-compliant). After an evaluation, a country may be required to report back to the FATF at intervals to describe its progress in addressing any shortcomings identified by the evaluation team.

Care must be exercised in using the FATF evaluations as a basis for comparing AML regimes in the US, UK, Canada, and elsewhere. Also, the process for conducting mutual evaluations and the FATF Recommendations themselves have changed significantly over time. The mutual evaluations and follow-up reports on each member state were prepared at different times, and may not be directly comparable. The mutual evaluations are intended as a tool to assist countries to improve their AML regimes and to allow the FATF to exert peer pressure on reluctant countries. The evaluations are not a global comparative survey for scholarly analysis.

Nonetheless, the FATF mutual evaluation process provides the best primary data on global AML efforts and is an important source for surveys by other organisations, including the Basel Institute. The following sections summarize the most recent evaluations of the AML regimes in the US, UK, and Canada, focusing on any key weaknesses identified.

¹⁴⁴ McCarthy, *supra* note 4 at 138.

¹⁴⁵ Financial Action Task Force, *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations*, (Paris: FATF, updated January 2021) at 6, online (pdf): <<http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf>>. The calendar of fourth round evaluations can be seen at: FATF, *Global Assessments Calendar*, (July 2015), online (pdf): <<http://www.fatf-gafi.org/media/fatf/documents/assessments/Global-assessment-calendar.pdf>>.

6.2.1 US

The United States had a FATF mutual evaluation in 2016, which like the previous evaluation in 2006 was generally positive. The United States has significant exposure to potential money laundering due to the global dominance of the US dollar. The US was one of the first countries to place significant focus on money laundering and has a developed anti-money laundering system.¹⁴⁶

Of FATF's 40 recommendations, the US was found compliant with 11, largely compliant with 20, partially compliant with 6 and non-compliant with 3. The non-compliances related to the lack of transparency of beneficial ownership and the regulation of designated non-financial businesses and professions including lawyers, accountants and real estate agents.¹⁴⁷

Mutual legal assistance from the US was positive. From 2009 to 2014, the US received 1,541 requests from MLA relating to money laundering, terrorist financing or asset forfeiture and recovery and granted the request in 1,062 of those cases.

Table 4.5 *Response to Incoming MLA Requests*¹⁴⁸

Response to incoming MLA requests	ML	TF	Asset Forfeiture
Granted	568	53	501
Denied (grounds include lack of evidence, assistance not legally available, and other process reasons)	64	3	72
ML and asset forfeiture cases: Other reasons for not executing request (includes unable to locate evidence, withdrawn, and other non-process reasons)	150	N/A	102
TF cases: Other reasons for not executing request (includes no response from requestor, unable to locate evidence, and withdrawn)	N/A	14	N/A
Inexecutable under U.S. law	4	0	10
Total number of MLA requests related to ML, TF & asset forfeiture	786	70	685

In the same years, 21 requests to extradite a money laundering suspect were made, resulting in ten extraditions. Contested extraditions took an average of one year to resolve.

¹⁴⁶ US Mutual Evaluation Report (2016), *supra* note 111 at 5, 23.

¹⁴⁷ *Ibid* at 255-259.

¹⁴⁸ US Mutual Evaluation Report (2016), *supra* note 111 at 164.

Table 4.6 *Response to Incoming Extradition Requests*¹⁴⁹

Response to incoming extradition requests	ML	TF
Granted	10	0
Denied	3	0
Other (Includes cases withdrawn, fugitive not located, fugitive located in another country or fugitive arrested in requesting country)	6	0
Inexecutable under U.S. law	2	0
Total number of extradition requests related to ML & TF	21	0

One beneficial aspect of the US system is the assigning of an attorney to US embassies in specific countries to assist in mutual legal assistance and extradition requests.¹⁵⁰

Recommendations made in the FATF mutual evaluation include ensuring the requirement of beneficial ownership information at the federal level,¹⁵¹ as well as assessing and addressing exposure to the risk of money laundering by non-financial businesses and professions, such as lawyers, accountants and real estate agents.¹⁵²

6.2.2 UK

The last mutual evaluation of the UK was completed in 2018. The evaluation was very positive, rating the UK as compliant or largely compliant with all but two FATF Recommendations. The key findings were as follows:

- a) The UK has a robust understanding of its ML/TF risks which is reflected in its public national risk assessments (NRAs). National AML/CFT policies, strategies and activities seek to address the risks identified in the NRAs. National co-ordination and co-operation on AML/CFT issues at both the policy and operational levels has improved significantly since the last evaluation.
- b) The UK proactively investigates, prosecutes and convicts a range of TF activity, in line with its identified risks in this area. A particularly positive feature of the system is the strong public/private partnership on TF matters. This is facilitated by the Joint Money Laundering Intelligence Task Force (JMLIT) which facilitates public/private information sharing including on TF and ML investigations.
- c) The UK routinely and aggressively identifies, pursues and prioritises ML investigations and prosecutions. It achieves around 7,900 investigations, 2,000 prosecutions and 1,400 convictions annually for standalone ML or where ML is the principal offence. The UK investigates and prosecutes a

¹⁴⁹ US Mutual Evaluation Report (2016), *supra* note 111 at 165.

¹⁵⁰ *Ibid* at 167.

¹⁵¹ *Ibid* at 38, 118, 154.

¹⁵² *Ibid* at 135.

wide range of ML activity. Investigations of high-end ML (a long-standing risk area for the UK) have increased since being prioritised in 2014. These cases generally take years to progress to prosecution and conviction and limited statistics are available on high-end ML investigations, prosecutions, and convictions prior to its prioritisation in 2014. As a result, it is not yet clear whether the level of prosecutions and convictions of high-end ML is fully consistent with the UK's threats, risk profile, and national AML/CFT policies.

d) Another strong point of the system is that all entities within the FATF definition of financial institutions and all DNFBPs are subject to comprehensive AML/CFT requirements and subject to supervision. Supervisors' outreach activities, and fitness and proprietary controls are generally strong. Each supervisor takes a slightly different approach to risk-based supervision. However, while positive steps have been taken, there are weaknesses in the risk-based approach to supervision even among the statutory supervisors.

e) The UK has been a leader in designating terrorists at the UN and EU level, and takes a leading role promoting effective global implementation of proliferation-related TFS. The UK has frozen assets and other funds pursuant to its proliferation financing sanctions program and taken steps to increase the overall effectiveness of its targeted financial sanctions (TFS) regime, including through the creation of the Office of Financial Sanctions Implementation and the strengthening of penalties for breaching TFS. However, minor improvements are required in relation to applying penalties for sanctions breaches, ensuring consistent application of TFS and communicating designations immediately. The UK has a good understanding of the TF risks associated with NPOs and has been effective in taking action to protect the sector from abuse. The UK also has a robust confiscation regime through which it can and does deprive terrorists of assets.

f) Available financial intelligence and analysis is regularly used by a wide range of competent authorities to support investigations of ML/TF and related predicate offences, to trace assets, enforce confiscation orders, and identify risks. However, the UK has made a deliberate policy decision to limit the role of the UK Financial Intelligence Unit (UKFIU) in undertaking operational and strategic analysis which calls into question whether suspicious activity report (SAR) data is being fully exploited in a systematic and holistic way and providing adequate support to investigators. Additionally, while reports of a high quality are being received, the SAR regime requires a significant overhaul to improve the quality of financial intelligence available to the competent authorities.

g) The UK is a global leader in promoting corporate transparency and has a good understanding of the ML/TF risks posed by legal persons and arrangements. The UK has a comprehensive legal framework requiring all financial institutions and all DNFBPs to conduct customer due diligence

and obtain and maintain beneficial ownership information in a manner that is generally in line with the FATF requirements. Beneficial information on trusts is available to the competent authorities through a registry of trusts with tax consequences in the UK. The information in the trust register is verified for accuracy, but the register itself is not yet fully populated. For legal persons, basic and beneficial ownership information is freely and immediately available to the public and all competent authorities through a central public register. This information is not verified for accuracy which limits its reliability. Authorities confirmed that beneficial ownership information, where held in the UK, was obtainable for investigative purposes in a timely manner via available informal and formal investigative tools, including JMLIT and the NCA s.7 gateway.¹⁵³

The report noted two key weaknesses in the UK regime, one being the ambit of its correspondent back rules (Recommendation 13) and the other being its FIU, which includes a lack of independence (Recommendation 29).

In 2016, the UK created a publicly accessible registry of the beneficial ownership of companies. That law will greatly aid in the identification of money launderers. Mandatory disclosure of beneficial ownership is discussed fully in Chapter 5, Section 6.1.2.

6.2.3 Canada

Canada had a FATF mutual evaluation in 2016, and that evaluation noted significant progress since the previous evaluation in 2007. The FATF report noted overall that “Canada has a strong framework to fight ML and TF, which relies on a comprehensive set of laws and regulations, as well as a range of competent authorities.”¹⁵⁴ Of the 40 FATF recommendations, Canada was found compliant with 11, largely compliant with 18, partially compliant with six and non-compliant with five.¹⁵⁵ The non-compliant ratings resulted from the anti-money laundering legal obligations being inoperative with respect to lawyers, inadequate beneficial ownership laws (discussed in Chapter 5, Section 6.1.2), and failing to meet the standards for foreign politically exposed persons.¹⁵⁶ The latter concern was addressed through amended regulations to the *PCMLTFA* in July 2016.

The evaluation states that most high-risk areas are governed by Canada’s AML/CTF framework, but finds that the exemption of legal counsel, law firms, and Quebec notaries is a “significant loophole”¹⁵⁷ in Canada’s framework. This has a trickle-down effect throughout the AML/CTF regime. As the evaluation notes, “[i]n light of these professionals’ key gatekeeper role, in particular in high-risk sectors and activities such as real-estate

¹⁵³ Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures - United Kingdom Mutual Evaluation Report*, (Paris: FATF, 2018) at 3-4, online (pdf): <<https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf>>.

¹⁵⁴ Canada Mutual Evaluation Report (2016), *supra* note 121 at para 12.

¹⁵⁵ *Ibid* at 205-209.

¹⁵⁶ *Ibid* at 205-209.

¹⁵⁷ *Ibid* at 31.

transactions, and the formation of corporations and trusts, this constitutes a serious impediment to Canada's efforts to fight ML."¹⁵⁸

The evaluation suggests that law enforcement results are not commensurate with Canada's money laundering risk and that asset recovery appears low. The report notes that some provinces appear more effective in asset recovery, citing Quebec as an example.¹⁵⁹ As discussed in Chapter 6, Section 3.1.2, Quebec is the only province to have a dedicated, multi-governmental anti-corruption agency.

As discussed in Section 5.4.4, the evaluation is also critical of the prosecution of money laundering cases, finding that there is a high percentage of withdrawals and stays of proceedings, and that sanctions in money laundering cases are not sufficiently dissuasive.¹⁶⁰

The evaluation commended Canada's mutual legal assistance system. From 2008 to 2015, Canada received 383 mutual legal assistance requests for money laundering offences. Canada provided assistance in 253 of these requests, while 17 were withdrawn, 36 abandoned and 7 refused. Feedback from 46 countries found that assistance provided by Canada is of good quality.¹⁶¹

Canada is also cooperative with extradition requests, although the process can be lengthy. From 2008 to 2015, Canada received 92 requests for extradition in money laundering cases, 77 of which came from the US. These resulted in 48 persons being extradited and 13 subject to other measures such as deportation or voluntary return.¹⁶² As noted in Section 6.2.1, contested extradition from the US in money laundering cases is resolved within a year on average. The extradition process from Canada is lengthier, with 53% of cases taking 18 months to five years to complete, 28% from three to five years and 4% over five years.¹⁶³

Recommendations stemming from the mutual evaluation included mitigating the risks posed by the exclusion of lawyers, law firms and Quebec notaries from the *PCMLTFA*, engaging prosecutors at earlier stages in money laundering cases, and ensuring asset recovery is pursued as a policy objective.¹⁶⁴

6.3 Other Evaluations

As the previous two sections demonstrate, both the FATF and the Basel Institute are relatively positive about the performance of the US, UK, and Canada. However, in the case of the Basel Index this is a relative measure—it simply shows that many other countries in the world are doing worse in reducing or controlling their risk of money laundering. In the case of the FATF mutual evaluations, most of the focus is on implementation of the Recommendations. However, in some cases, even complete compliance with the FATF

¹⁵⁸ *Ibid* at 7.

¹⁵⁹ *Ibid* at 6.

¹⁶⁰ *Ibid* at 36.

¹⁶¹ *Ibid* at 108-09.

¹⁶² *Ibid* at 110.

¹⁶³ *Ibid* at 110.

¹⁶⁴ *Ibid* at 31, 37, 77, 87, 101.

Recommendations may not produce an effective AML regime in practice. Some commentators have produced more critical reviews of the AML regimes discussed above.¹⁶⁵

The following excerpt is from a 2013 Canadian Senate report entitled *Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really*.¹⁶⁶ This report was completed pursuant to section 72 of the *PCMLTFA*, which mandates that a Parliamentary Committee review the act every five years. As the title of the report suggests, the Senate committee found that there is little evidence that the *PCMLTFA*, FINTRAC, and the rest of Canada's anti-money laundering regime is effective at reducing or prosecuting money laundering. The report goes on to suggest eighteen recommendations for reform. The following excerpt (pages 5-7) provides an overview of the Committee's findings and recommendations:

BEGINNING OF EXCERPT

B. The Impact

Recognizing that Canada's anti-money laundering and anti-terrorist financing legislation has had incremental changes over the past 11 years, the Committee believes that it is appropriate to examine the extent to which Canada's Regime is effective in detecting and deterring the laundering of money and the financing of terrorist activities, and contributes to the successful investigation and prosecution of those who are involved in these criminal activities. The Committee is interested in the responses to several questions:

- Have the scope and magnitude of money laundering and terrorist financing in Canada diminished over time?
- Are the time, money and other resources dedicated to addressing these activities having sufficient "results?" and
- What changes are needed to bring about better "results?"

Throughout the hearings, the Committee questioned witnesses about the scope and magnitude of money laundering and terrorist financing in Canada. While the Committee learned that FINTRAC has a solid reputation internationally, witnesses shared only limited and imprecise information about the extent to which the Regime meets its objective of detecting and deterring money laundering and terrorist financing. The Committee believes that there continues to be a clear need for legislation to combat money laundering and terrorist financing in Canada.

The Committee feels that there is a lack of clear and compelling evidence that Canada's Regime is leading to the detection and deterrence of money laundering and terrorist financing, as well as contributing to law enforcement investigations and a significant rate

¹⁶⁵ For example, Louis de Koker calls for an evaluation of FATF itself due to its power and lack of transparency in decision-making: de Koker, *supra* note 102 at 356.

¹⁶⁶ Senate, Standing Senate Committee on Banking Trade and Commerce, *Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really*, 41-1 (March 2013) (Chair: Irving R Gerstein & Céline Hervieux-Payette), online (pdf): <<http://www.parl.gc.ca/Content/SEN/Committee/411/BANC/rep/rep10mar13-e.pdf>>.

of successful prosecutions. It is possible that some witnesses were unable to share confidential information in a public meeting. It is also possible that information about the success or failure of the Regime is not being collected. In any event, the Committee feels that the current Regime is not working as effectively as it should, given the time, money and other resources that are being committed by reporting entities, a variety of federal departments and agencies, other partners and taxpayers.

Given that multinational financial institutions have recently been implicated in money laundering and terrorist financing, the Committee is concerned about non-compliance with the Act by reporting entities. While the majority of non-compliance charges laid in Canada are in relation to cross-border reporting offences, the Committee is aware of the July 2012 report by the United States (U.S.) Senate Permanent Subcommittee on Investigations of the U.S. Senate Committee on Homeland Security and Governmental Affairs, entitled *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History*, in relation to HSBC and money laundering using international wire transfers. [In 2013, HSBC paid \$1.9 billion to settle money laundering charges filed by the US Department of Justice.¹⁶⁷] The U.S. Senate Committee made several recommendations designed to strengthen anti-money laundering and anti-terrorist financing controls, particularly in relation to large, multinational financial institutions with affiliates in jurisdictions that are considered to be at high risk of being targeted by money launderers and those who finance terrorism. As financial institutions play a critical role in preventing illicit money from entering the financial system, the Committee feels that FINTRAC must be vigilant in ensuring that Canada's reporting entities comply with their obligations under the Act.

The Committee believes that an approach involving incremental legislative and regulatory changes must end. Consequently, ongoing efforts are needed to ensure that the resources committed to detecting, deterring, investigating and prosecuting money laundering and terrorist financing offences have the best "results" in the least costly, burdensome and intrusive manner. While it is virtually impossible to eliminate the illegal activities that lead to the need to launder money, a continuation of the current incremental approach – which appears to involve changes to fill gaps by adding reporting entities and to meet evolving FATF recommendations that may or may not have relevance for Canada – is not the solution that Canada needs at this time.

Having conducted a comprehensive study, the Committee's view is that the Act should be amended to address three issues:

- the existence of a structure for Canada's Regime that leads to increased performance in relation to the detection, deterrence, investigation and prosecution of money laundering and terrorist financing;

¹⁶⁷ "HSBC's \$1.9B Money Laundering Settlement Approved by Judge", *CBC News* (3 July 2013), online: <<http://www.cbc.ca/news/business/hsbc-s-1-9b-money-laundering-settlement-approved-by-judge-1.137727>>.

- the existence of information-sharing arrangements that ensure that suitable information is being collected and shared with the right people at the appropriate time, bearing in mind the need to protect the personal information of Canadians; and
- the existence of a scope and focus for the Regime that is properly directed to ensuring that individuals and businesses report the required information to the appropriate entity in an expedient manner.

The time for incremental change to the Regime has ended. The time for examination of fundamental issues has arrived.

END OF EXCERPT

Some commentators criticize the high costs of AML measures for businesses and society and question whether these costs are worth the arguable benefits of AML regimes.¹⁶⁸

6.4 Barriers to Creating Effective AML Measures

There are a variety of reasons why it is difficult to create effective AML measures. First, there are the difficulties posed by the lack of information available to legislators at the national and international level. There is no accurate estimate of the global scope of money laundering or its extent in any particular country. This makes it difficult to evaluate the success of any particular AML measure, since we cannot accurately measure the impact of any such measure. The secrecy surrounding government and FIU information also poses a challenge to those researching the effectiveness of AML measures.¹⁶⁹

Investigation of money laundering also presents many problems, such as the volume of data and documents, and the length of time between a corrupt act and its discovery.¹⁷⁰ A further difficulty is that a successful AML regime relies heavily on the cooperation of the financial sector, which may see little financial benefit in assisting the authorities. As Margeret Beare and Stephen Schneider note in their 2007 book *Money Laundering in Canada*:

¹⁶⁸ See, for example, Michael Levi & Peter Reuter, “Money Laundering” (2006) 32:1 Crime Justice 289. The UK has embarked on a review of the country’s AML regime with the goal of making the system more efficient and less costly for businesses. See: Department of Business, Innovation and Skills, Press Release, “Financial Red Tape Targeted in New Review” (28 August 2015), online: <<https://www.gov.uk/government/news/financial-red-tape-targeted-in-new-review>>. For a detailed cost-benefit analysis of AML laws in a hypothetical EU country, see Joras Ferwerda, “Cost-benefit analysis” in Brigitte Unger et al, eds, *The Economic and Legal Effectiveness of the European Union’s Anti-Money Laundering Policy* (Edward Elgar Publishing, 2014) 205. For a detailed analysis of money laundering regulation in 80 countries with the aim of determining which regulations are most effective in curtailing money laundering and predicate offences, see Alberto Chong & Fernando Lopez-de-Silanes, “Money Laundering and its Regulation” (March 2015) 27:1 Econ Politics 78.

¹⁶⁹ de Koker, *supra* note 102 at 354.

¹⁷⁰ Charles Monteith, “Case and Investigation Strategy” in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publishers, 2013) 183.

The rhetoric of financial institutions come across as if all of the objectives of the banks are equal: profit, risk management, customer satisfaction, *and* a sense of societal/corporate responsibility towards the reduction of money laundering. In reality, these goals are often seen to be contradictory and are not given equal attention. As we have noted, a focus on profitability runs throughout the banking sector. Picking up on the ‘what gets measured and gets rewarded, gets done’ line of reasoning (Bogach and Gordon, 2000), it is important to consider the reward system within those institutions that have claimed to implement sound voluntary codes, especially where those codes might work against other rewarded objectives. During the US Senate’s 1999 review of the operations of private banking, one bank official stated that ‘no-one took the “know-your-customer” policies seriously until bonuses were threatened.’ The internal study of bank defalcations [failure to repay loans] within Canadian financial institutions revealed a maze of individual, departmental, and branch incentives that were offered based on performance. These individual and group rewards were so coveted that they were seen to be partially responsible for overzealous banking decisions (e.g., unwise loans and credit lines). Peer pressure from group incentives was particularly powerful. Hence any policy that resulted in the loss of customers – especially customers with large amounts of money – operated against the current reward structure. Banks are organized around the concept of attracting funds, and few banks reward those who turn money away.¹⁷¹

Richard Gordon further criticizes this reliance on the private sector to report transactions and keep records. Gordon calls for a greater role for the public sector and FIUs in AML efforts.¹⁷² The recent movement to require public disclosure of the beneficial owners of shell companies and trusts is discussed in Chapter 5, Section 6.1.2.

Clare Fletcher and Daniela Hermann outline several other challenges for AML regimes.¹⁷³ Legal or political immunity of high-level politicians may block prosecution of money laundering offences. Corrupt officials may also use AML measures to freeze funds of their opponents and can frustrate the efforts of law enforcement in other countries to gather evidence against themselves or their government. Bank secrecy laws continue to pose a challenge to AML efforts, although strict secrecy has been relaxed due to FATF blacklisting and increased international pressure since September 11, 2001. Finally, Fletcher and Hermann note that the creation of FIUs is expensive for developing countries, and the effectiveness of FIUs has been questioned in less advanced, cash-oriented economies.

¹⁷¹ Beare & Schneider, *supra* note 125 at 214–216.

¹⁷² Richard K Gordon, “Losing the War against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing” (2011) 21:3 Duke J Comp & Intl L 503.

¹⁷³ Clare Fletcher & Daniela Herrmann, *The Internationalisation of Corruption* (Burlington, VI: Ashgate, 2012) at 177-179.

CHAPTER 5

ASSET RECOVERY AND MUTUAL LEGAL ASSISTANCE

GERRY FERGUSON* AND PETER GERMAN

* Gerry Ferguson would like to thank Rachael Carlson and Chloe Ducluzeau for their excellent research on this updated and revised chapter.

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The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

The World Bank estimates that \$20 to \$40 billion (equivalent to 20-40% of official development assistance) is stolen from developing countries and hidden overseas every year through high-level corruption practices.¹ The Stolen Asset Recovery Initiative (StAR) estimates that over a 15-year period, only \$5 billion was recovered (between 0.8% and 1.6% of stolen assets).² In 2011, StAR estimated that \$1 to \$1.6 trillion in global proceeds from criminal activities, corruption, and tax evasion crosses borders every year.³

Asset recovery in corruption cases includes the uncovering of corruption and the tracing, freezing, confiscating, and returning of funds obtained through corrupt activities. It is a particularly vital tool for developing countries that see their national wealth corruptly exported. There are several barriers to asset recovery. Once stolen assets are transferred abroad, recovery is extremely difficult. In developing countries, this difficulty results from limited legal, investigative and judicial capacity, as well as inadequate resources. Further, the lack of resources affects the ability of a state to make requests to countries holding the stolen assets. The problem is exacerbated in developed countries where assets are hidden or where necessary laws may be lacking to respond to requests for legal assistance.⁴ Moreover, the lack of non-conviction based (NCB) asset forfeiture laws in some countries makes recovering assets difficult when the officials engaged in stealing assets have died, fled or have immunity.

Confiscating assets is an important tool in the fight against corruption. It serves as both a sanction for improper, dishonest and corrupt behaviours, and a deterrent as the incentive to commit corruption is removed. Further, it incapacitates the offenders by depriving them of their assets and instruments of misconduct. It also repairs the damage done to victim populations when financial resources are confiscated from the offenders and are directed toward economic development and growth in that country. Finally, asset recovery promotes accountability and positively affects the rule of law. The asset recovery process involves four

¹ World Bank & United Nations Office on Drugs and Crime (UNODC), *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*, (Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2007) at 9, online (pdf): <<http://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>>. For a critical discussion of these figures, see “Are Quantitative Estimates of the Amount of Global Corruption Reliable?” in Chapter 1, Section 4.3.

² StAR Initiative, Kevin M Stephenson et al, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, (Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2011) at 1, online (pdf): <<https://issuu.com/world.bank.publications/docs/9780821386606/1?e=1107022/2691008>>.

³ *Ibid.*

⁴ *Ibid.* Note that some states resort to illicit means in order to recover assets. For example, the Chinese government seems to rely on its secret agents to find fugitive suspects abroad and pressure them to return home. In particular, Operation Fox Hunt, commenced by China in 2014, resulted in the repatriation of some 700 suspected economic fugitives globally, and Operation Skynet saw the return of another 857 persons in 2015: Affan Chowdhry, “China’s Corruption Crackdown Ruffles International Feathers”, *The Globe and Mail* (20 September 2016), online: <<http://www.theglobeandmail.com/news/world/chinas-corruption-crackdown-ruffles-international-feathers/article31979594/>>.

steps: (1) identification (2) investigation, tracing, freezing and seizing (3) confiscation or forfeiture, and (4) return of the stolen assets to the owner. For these reasons, The United Nations and other relevant organizations attach a high priority to the problem of cross-border transfers of illicitly obtained funds and the return of such funds.

In this chapter we discuss the international and domestic obligations that facilitate the recovery of stolen assets through the United Nations Convention Against Corruption (UNCAC),⁵ the OECD Convention on Combating Bribery of Foreign Public Officials (OECD Convention),⁶ and other multilateral agreements. Then the discussion covers StAR and the role Financial Intelligence Units (FIUs) have in facilitating the recovery of stolen and corrupt assets before moving on to the various legal approaches for freezing, confiscation, and the ultimate return of assets obtained by corruption.

2. ASSET RECOVERY CONCEPTS AND TOOLS

The following sections summarize the asset recovery process, identify relevant enforcement, policy development and investigatory agencies, and describe the legal tools used for asset recovery. An important resource for these sections, and the chapter as a whole, is the 2011 StAR/World Bank publication *Asset Recovery Handbook: A Guide for Practitioners*.⁷ This guide provides a detailed description of the entire asset recovery process. However, it is worth noting at this stage, as discussed in Section 6.1, that some commentators are not enamoured with the policies and practices of the World Bank and StAR.

2.1 Asset Recovery Steps

2.1.1 General Process

The following excerpt is from the *Asset Recovery Handbook: A Guide for Practitioners*:

BEGINNING OF EXCERPT

1.1.1 Collection of Intelligence and Evidence and Tracing Assets

Evidence is gathered and assets are traced by law enforcement officers under the supervision of or in close cooperation with prosecutors or investigating magistrates, or by

⁵ *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, art 42 (entered into force 14 December 2005) [UNCAC], online (pdf):

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

⁶ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, S Treaty Doc No 105-43 (entered into force 15 February 1999) [OECD Convention], online: <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

⁷ StAR Initiative, Jean-Pierre Brun et al, *Asset Recovery Handbook: A Guide for Practitioners*, (Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2011) [StAR Asset Recovery Handbook], online (pdf): <https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf>.

private investigators or other interested parties in private civil actions. In addition to gathering publicly available information and intelligence from law enforcement or other government agency databases, law enforcement can employ special investigative techniques.... Private investigators do not have the powers granted to law enforcement; however, they will be able to use publicly available sources and apply to the court for some civil orders ...

...

1.1.2 Securing the Assets

During the investigation process, proceeds and instrumentalities subject to confiscation must be secured to avoid dissipation, movement, or destruction ...

1.1.3 International Cooperation

International cooperation is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. It will be required for the gathering of evidence, the implementation of provisional measures, and the eventual confiscation of the proceeds and instrumentalities of corruption. And when the assets are confiscated, cooperation is critical for their return. International cooperation includes “informal assistance,” mutual legal assistance (MLA) requests, and extradition⁸ ...

1.1.4 Court Proceedings

Court proceedings may involve criminal or NCB [non-conviction based] confiscation or private civil actions (each described below and in subsequent chapters); and will achieve the recovery of assets through orders of confiscation, compensation, damages, or fines. Confiscation may be property based or value based [discussed later in this chapter] ...

1.1.5 Enforcement of Orders

When a court has ordered the restraint, seizure, or confiscation of assets, steps must be taken to enforce the order. If assets are located in a foreign jurisdiction, an MLA request must be submitted. The order may then be enforced by authorities in the foreign jurisdiction through either (1) directly registering and enforcing the order of the requesting jurisdiction in a domestic court (direct enforcement) or (2) obtaining a domestic

⁸ [13] For the purposes of this handbook, “informal assistance” is used to include any type of assistance that does not require a *formal* MLA request. Legislation permitting this informal, practitioner-to-practitioner assistance may be outlined in MLA legislation and may involve “formal” authorities, agencies, or administrations. For a description of this type of assistance and comparison with the MLA request process, see section 7.2 of chapter 7.

order based on the facts (or order) provided by the requesting jurisdiction (indirect enforcement)⁹ ...

1.1.6 Asset Return

The enforcement of the confiscation order in the requested jurisdiction often results in the confiscated assets being transferred to the general treasury or confiscation fund of the requested jurisdiction (not directly returned to the requesting jurisdiction).¹⁰ As a result, another mechanism will be needed to arrange for the return of the assets [these mechanisms are discussed later in this chapter].

...

A number of policy issues are likely to arise during any efforts to recover assets in corruption cases. Requested jurisdictions may be concerned that the funds will be siphoned off again through continued or renewed corruption in the requesting jurisdictions, especially if the corrupt official is still in power or holds significant influence. Moreover, requesting jurisdictions may object to a requested country's attempts to impose conditions and other views on how the confiscated assets should be used. In some cases, international organizations such as the World Bank and civil society organizations have been used to facilitate the return and monitoring of recovered funds.^{11 12}

END OF EXCERPT

Judges in the United States and the United Kingdom have, in a number of cases, made orders directing corrupt public officials and money launderers, as well as corporations and their agents involved in bribery of public officials, to pay compensation or damages to a state that has been harmed by corruption offences.¹³ For instance, when the British construction and

⁹ [14] See United Nations Convention against Corruption (UNCAC), art. 54 and 55; United Nations Convention against Transnational Organized Crime (UNTOC), art. 13; United Nations Convention against Narcotic Drugs and Psychotropic Substances, art. 5; and the Terrorist Financing Convention, art. 8. For restraint or seizure, see UNCAC, art. 54(2).

¹⁰ [15] Stolen Asset Recovery (StAR) Initiative Secretariat, "Management of Confiscated Assets" (StAR, 2009), [updated link: <https://star.worldbank.org/sites/star/files/asset_recovery_handbook_0.pdf>].

¹¹ [17] In 2007, the U.S. Department of Justice filed a civil confiscation action against a U.S. citizen indicted in 2003 for allegedly paying bribes to Kazakh officials for oil and gas deals. The action was for approximately \$84 million in proceeds. The American citizen agreed to transfer those proceeds to a World Bank trust fund for use on projects in Kazakhstan. See "U.S. Attorney for S.D.N.Y. Government Files Civil Forfeiture Action Against \$84 Million Allegedly Traceable to Illegal Payments and Agrees to Conditional Release of Funds to Foundation to Benefit Poor Children in Kazakhstan," news release no. 07-108, May 30, 2007; World Bank, "Kazakhstan BOTA Foundation Established," news release no. 2008/07/KZ, June 4, 2008, [updated link: <https://www.irex.org/sites/default/files/node/resource/bota-case-study_0.pdf>].

¹² StAR Asset Recovery Handbook, *supra* note 7 at 5-8.

¹³ UNODC, Corruption and Economic Crime Branch, *Digest of Asset Recovery Cases*, (Vienna: United Nations (UN), 2015) [UN Digest] at 63-66, online (pdf): <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf>.

engineering firm, Mabey & Johnson disclosed to the UK Serious Fraud Office (SFO) that it had paid bribes in several jurisdictions, it was ordered to make reparations of about £658,000 to Ghana, £618,000 to Iraq, and £139,000 to Jamaica.¹⁴ In the US, Robert Antoine, Director of Operations for Haiti's state-owned telecommunications entity, and the executives of the telecommunications companies who bribed him were jointly ordered to pay \$2.2 million in restitution to the government of Haiti. Similarly, the US court ordered the three co-defendants of Steve Ferguson, head of the National Gas Company of Trinidad and Tobago, to make restitution to the government of Trinidad and Tobago in the amounts of \$4 million, \$2 million, and \$100,000 respectively.¹⁵

2.1.2 Management of Seized Assets

Below is an excerpt from the International Centre for Asset Recovery/Basel Institute on Governance publication entitled, *Development Assistance, Asset Recovery and Money Laundering: Making the Connection*.

BEGINNING OF EXCERPT

Asset Recovery, Management of Seized Assets and the Monitoring the Use of Returned Assets

Two additional elements should be considered in the asset recovery process: the management of assets that have been seized and that are pending confiscation, and the monitoring of assets that are repatriated by the recipient country to the victim country.¹⁶

Both national and international authorities often overlook the management of seized assets that are pending a confiscation order. Some of the problems include the cost of maintenance of the property – whether the taxes that are due during the seizure or the cost of up-keeping it in storage – while the seizure is pending a confiscation order, and the depreciation that the asset may have during its storage. To overcome such a situation, it is useful to analyse how some jurisdictions deal with the challenges, varying from the anticipated sale of the seized assets, such as in the United States and several Eastern European countries, or the promise from the person that committed the corrupt or other criminal act before a court that he/she will not sell the asset and will maintain it in good condition, such as in the United Kingdom.

¹⁴ *Ibid* at 63.

¹⁵ *Ibid* at 64. For more on the use of anti-money laundering (AML) framework in asset tracing, see Elena Hounta & Selvan Lehmann, "Using the Anti-Money Laundering Framework in Asset Tracing" in *Tracing Illegal Assets: A Practitioner's Guide*, (Basel: Basel Institute on Governance, International Centre for Asset Recovery, 2015) [Tracing Illegal Assets Guide] at 69-91, online (pdf): <https://baselgovernance.org/sites/default/files/2019-01/tracing_illegal_assets_EN.pdf>.

¹⁶ [7] For more on the management and use of recovered assets, see [Ignasio] Jimu. Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan. (2009), available at [updated link: <https://baselgovernance.org/sites/default/files/2019-06/biog_working_paper_06.pdf>].

Whatever the option chosen, if at all since many countries do not yet have regulations in place to adequately address the management of seized assets, countries must bear in mind the fact that the anticipated sale of assets must be properly introduced into a legal system, so as to avoid any conflicts with the right to property of persons who may have a legitimate claim to the assets. Furthermore, an adequate database of seized assets must be put in place so as to ensure transparency and security in the management of such assets.

On the other hand, the monitoring of returned assets is a much debated topic in the asset recovery field. Some countries returning assets have in the past requested or conditioned the return of proceeds of corruption and other criminal acts to spending on specific projects or areas mutually determined by both countries. The argument used by returning countries is that this is an attempt to avoid the returned assets being recycled out of the country again through further corruption or other criminal acts. Many victim countries, in turn, argue that such imposition and conditioning of the returned assets is a violation of their sovereign right to decide how to spend or invest returned money.

The monitoring of returned assets must be mutually decided upon [by] both the recipient and victim countries in a case-by-case scenario, ensuring transparency and dialogue in the process. In past cases, there have been examples [of] countries using independent third parties, such as civil-society organisations from both countries to monitor the process.¹⁷

END OF EXCERPT

In regard to the somewhat controversial issue of monitoring returned assets, Article 57(5) of UNCAC stipulates that State Parties may “give special consideration to concluding agreements or mutually acceptable arrangements on a case-by-case basis, for the final disposal of confiscated property.” This vague provision attempts to ensure that the return of property to fragile, corrupt recipient states can have anti-corruption safeguards attached to the agreement to return. Aside from objections relating to the erosion of the recipient’s sovereignty, monitoring may pose its own challenges, such as expense and technical difficulties.¹⁸

¹⁷ International Centre for Asset Recovery, *Development Assistance, Asset Recovery and Money Laundering: Making the Connection*, (Basel: Basel Institute on Governance, International Centre for Asset Recovery, 2011) at 18, online (pdf): <https://baselgovernance.org/sites/default/files/2019-02/dfid_brochure_final_version_for_print.pdf>.

For example, in Kazakhstan, criminal proceedings in Switzerland led to the restitution of assets derived from bribery. In a relatively successful monitoring arrangement, a non-profit, independent foundation was set up in Kazakhstan to monitor the use of returned assets. The foundation is supervised by IREX Washington and Save the Children: Gretta Fenner Zinkernagel & Kodjo Attisso, “Past Experience with Agreements for the Disposal of Confiscated Assets” in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (Bern: Peter Lang AG, International Academic Publishers, 2013) 340.

¹⁸ *Ibid* at 329.

While there are some examples of successful agreements to facilitate the return of assets,¹⁹ recovering the proceeds of corruption is often impossible. Civil society organizations and transparency advocates argue that money from the *Foreign Corrupt Practices Act (FCPA)*²⁰ settlements should also be used to compensate victims, just as settlements in environmental cases often go towards affected communities.²¹ StAR echoes this argument, encouraging countries to consider legislation allowing third parties to be included in settlement agreements for foreign bribery cases.²²

2.2 International Asset Recovery Agencies

The World Bank in partnership with the United Nations Office on Drugs and Crime (UNODC) launched StAR in 2007 for the international support of asset recovery. The StAR Initiative was designed to:

- (1) urge countries to ratify UNCAC and apply the framework;
- (2) lower the barriers to asset recovery;
- (3) build technical capacity to facilitate asset recovery;
- (4) help to deter such flows and eliminate safe havens for corruption;
- (5) generate and disseminate knowledge on asset recovery;
- (6) advocate for implementation of measures that reduce barriers to asset recovery;
- (7) support national efforts to build institutional capacity for asset recovery; and
- (8) monitor recovered funds if requested.

Each country maintains its own asset recovery system. In 2010, the UK created the National Crime Agency (NCA)²³ to fight serious and organized crime. Originally, this agency was organized into a number of “command” groups, including the Economic Crime Command (which dealt with economic crime) and the Organized Crime Command (which dealt with serious and organized crime).²⁴ In 2017, this organizational structure was revisited and new

¹⁹ The BOTA Foundation in Kazakhstan provides an example of a successful agreement to facilitate the return of assets. For more information see, Aaron Bornstein, “The BOTA Foundation Explained (Part Nine): How Effective was BOTA?” (22 April 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/4/22/the-bota-foundation-explained-part-nine-how-effective-was-bo.html>>; and Andy Spalding, “The BOTA Foundation explained (Part Twelve): Future BOTAs and the FCPA” (29 April 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/4/29/the-bota-foundation-explained-part-twelve-conclusion-future.html>>.

²⁰ 15 USC §§ 78dd-1, et seq.

²¹ Spalding, *supra* note 19.

²² Larissa Gray et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (Washington, DC: World Bank/ OECD, 2014) at 45, online (pdf): <<https://openknowledge.worldbank.org/handle/10986/20002>>.

²³ “National Crime Agency” (last visited 6 September 2021), online: NCA <<https://www.nationalcrimeagency.gov.uk/>>.

²⁴ UK, National Crime Agency, *A Plan for the Creation of a National Crime-Fighting Capability* (London: The Stationery Office, 2011), online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97826/nca-creation-plan.pdf>.

bodies, such as the National Economic Crime Centre (NECC),²⁵ were established.²⁶ The Asset and Forfeiture and Money Laundering Section of the Department of Justice is the US government body dealing with asset forfeiture and anti-money laundering (AML) enforcement efforts.²⁷ An international unit assists prosecutors in the restraint and forfeiture of assets located abroad and assists foreign governments seeking restraint and forfeiture of assets held in the United States. The Kleptocracy Team²⁸ investigates and litigates to recover proceeds of foreign official corruption. The US manages the Consolidated Assets Tracking System²⁹—a database for managing the approximately \$2 billion in assets seized.

Many jurisdictions, such as Canada, Australia, Italy, the US, and South Africa maintain asset forfeiture funds to ensure adequate funding for asset recovery. Confiscation laws may require confiscated assets be liquidated and the proceeds paid into these accounts. Canada identifies its fund as the Seized Property Proceeds Account,³⁰ South Africa has the Criminal Assets Recovery Account (CARA),³¹ while the US has the Assets Forfeiture Fund.³²

2.3 State-Level Financial Intelligence Units

Financial Intelligence Units (FIUs) are responsible for collecting suspicious transaction reports (STRs) from financial and some non-financial organizations in order to combat money laundering. An FIU is defined as a national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating disclosures of financial information involving the proceeds of crime to the authorities as required by national legislation or regulation. FIUs may conduct investigations based on the reports received and disseminate results to local law enforcement.

²⁵ “National Economic Crime Centre” (last visited 6 September 2021), online: NCA <<https://www.nationalcrimeagency.gov.uk/what-we-do/national-economic-crime-centre>>.

²⁶ *Commission of Inquiry into Money Laundering in British Columbia: Public Hearing*, (Vancouver: 2020) at 21, online (pdf):

<<https://cullencommission.ca/data/transcripts/Transcript%20May%2028,%202020.pdf>>; see also 21-25 for an overview of the UK’s AML approach. See “Economic Crime Plan, 2019-2022,” Policy Paper (updated 4 May 2021), online: UK Government

<<https://www.gov.uk/government/publications/economic-crime-plan-2019-to-2022/economic-crime-plan-2019-to-2022-accessible-version>> for the UK’s recent strategies in combatting economic crime.

²⁷ “Money Laundering and Asset Recovery Section (MLARS)” (last visited 13 August 2021) [MLARS], online: *The United States Department of Justice* <<http://www.justice.gov/criminal/afmls/>>.

²⁸ See the subheading “International Unit” in MLARS, *ibid*.

²⁹ “Major Information Systems: Consolidated Asset Tracking System” (last updated 7 May 2021), online: *Department of Justice* <<https://www.justice.gov/jmd/major-information-systems-consolidated-asset-tracking-system>>.

³⁰ This account is established by the *Seized Property Management Act*, SC 1993, c 37, s 13(1).

³¹ The CARA is established by the *Prevention of Organized Crime Act* (S Afr), No 121 of 1998, s 63. For a recent example of the South African High Court ordering that assets be forfeited to the CARA, see “Millions Stolen by Bobroffs should be Forfeited to State, Court Rules,” *South African Government News Agency* (5 May 2021), online: <<https://www.sanews.gov.za/south-africa/millions-stolen-bobroffs-should-be-forfeited-state-court-rules>>.

³² MLARS, *supra* note 27.

FIUs are essential in the fight to prevent or reduce the laundering of proceeds of corruption and other related crimes. AML legislation requires many financial and non-financial organizations to file activity reports or STRs with FIUs. Some FIUs also collect currency transaction reports (CTRs). Organizations include financial institutions, regulatory authorities and professions such as lawyers, accountants, and trust company providers. The local FIU may also give information to the Egmont Group, the informal association of FIUs, which can then forward information to foreign FIUs.³³

The US FIU is known as the Financial Crimes Enforcement Network (FinCEN),³⁴ while the UK created the UKFIU.³⁵ FinCEN's approach to its reporting entities has evolved into a model, which it states provides "clarity and transparency."³⁶ Part of that transparency is to clearly delineate potential enforcement actions. Canada created the Financial Transactions and Reports Analysis Centre (FINTRAC)³⁷ in 2000.

UNCAC does not require an FIU be established, but Article 58 requires that State Parties cooperate to prevent the transfer of the proceeds of Convention offences and to promote recovery of such proceeds. To that end, Article 58 requires State Parties to consider establishing an FIU.³⁸

³³ The following description is taken from StAR Initiative, *Towards a Global Architecture for Asset Recovery*, (Washington, DC: World Bank/UNODC, 2010) [Towards a Global Architecture for Asset Recovery] at 38, online: <<https://star.worldbank.org/resources/towards-global-architecture-asset-recovery>>:

The Egmont Group is a network of 116 Financial Intelligence Units established to improve cooperation in the fight against money laundering and financing of terrorism and promote programs in this field at the national level. The Egmont Group manages a secure information network, which allows members to exchange information freely that would facilitate analysis or investigation of financial transactions. This information originates from suspicious activity reports or other disclosures from the financial sector, as well as government administrative data and public record information. Members agreed that information exchanged between FIUs be used only for the specific purpose for which the information was sought or provided. Rarely is information used as evidence and then only where authorized by the requested FIU. Nonetheless, the Egmont network serves as an important support to international asset recovery both in terms of detecting illicit flows, identifying possible leads, and facilitating tracing and the collection of evidence to support asset recovery cases.

³⁴ "Financial Crimes Enforcement Network" (last visited 6 September 2021), online: *US Government* <<https://www.fincen.gov/>>.

³⁵ "Financial Intelligence" (last visited 6 September 2021), online: *NCA* <[https://www.ukciu.gov.uk/\(4ekcnwuai11fpift3f2dnnmf\)/Information/Info.aspx](https://www.ukciu.gov.uk/(4ekcnwuai11fpift3f2dnnmf)/Information/Info.aspx)>.

³⁶ See Richard L Cassin, "FinCEN Issues New AML Enforcement Guidance" (28 August 2020), online (blog): *The FCPA Blog* <<https://fcpublog.com/2020/08/28/fincen-director-says-aml-enforcement-isnt-a-gotcha-game/>>.

³⁷ "About FINTRAC" (last modified 20 August 2021), online: *Government of Canada* <<https://www.fintrac-canafe.gc.ca/intro-eng>>.

³⁸ For more information on FIUs and SARs and their importance for asset recovery, see *Towards a Global Architecture for Asset Recovery*, *supra* note 33; International Centre for Asset Recovery, *Tracing*

2.4 Tools for Asset Recovery

The following sections briefly describe the statutory and private law remedies that can be used for asset recovery, as well as the ways in which they interact and their limitations.

2.4.1 Criminal Forfeiture

Confiscation (or forfeiture) provides a means of redress for authorities seeking to recover stolen assets. Confiscation is an order by which a person is permanently deprived of assets without compensation. As a result, title is acquired by the state. The rationale for confiscating proceeds of corruption is both to compensate victims and to provide deterrence by removing the enjoyment of illegal gains. Criminal confiscation takes place after a criminal conviction (at trial or by a guilty plea). The forfeiture order follows as part of the sentencing process. Guilt must be proven at trial “beyond a reasonable doubt” in common law regimes, or the judge must be “intimately convinced” in civil law regimes. Once a conviction is obtained, the court can order confiscation. In most jurisdictions, the standard of proof for establishing that certain assets were derived from criminal activities is lowered to a “balance of probabilities.”

2.4.2 Civil (Non-Criminal Based) Forfeiture

Civil or Non-Criminal Based (NCB) is another form of forfeiture. Criminal forfeiture and NCB forfeiture share the same objective, but their procedures are different. For example, criminal confiscation can only occur after a criminal conviction. NCB forfeiture, on the other hand, can operate separately from the criminal justice system or alongside it, and it allows for the restraint, seizure, and forfeiture of stolen assets without a finding of guilt in the criminal context. NCB forfeiture only requires a finding that the property is tainted, either as the proceeds of a crime or as an instrument of criminal activity.

NCB forfeiture is an action against the asset itself (e.g., money, property, etc.), not the person. After an NCB forfeiture order, the defendant forfeits the thing itself subject to any innocent owners. There are generally three ways NCB forfeiture is available. First, it can form part of criminal proceedings without requiring a final conviction or finding of guilt. In this regard, NCB confiscation tools are incorporated into criminal legislation. The second method is through a separate proceeding, normally governed by the rules of civil procedure and can occur independently or parallel to criminal proceedings. The final method is administrative confiscation, which can occur in some jurisdictions and does not require a judicial determination.

Stolen Assets: A Practitioner's Handbook, (Basel: Basel Institute on Governance, International Centre for Asset Recovery, 2009) [Tracing Stolen Assets] at 65–66, online: <<https://baselgovernance.org/publications/tracing-stolen-assets-practitioners-handbook>>; and Daniel Thelesklaf & Amar Salihodzic, “The Role of Financial Intelligence Units in Fighting Corruption and Asset Recovery” in Zinkernagel, Monteith & Pereira, *supra* note 17, 207.

An acquittal from criminal charges does not bar NCB forfeiture proceedings.³⁹ Article 54 of UNCAC requires all State Parties to consider NCB forfeiture. It also obliges State Parties to enable domestic authorities to recognize and act on an order of confiscation issued by a court of another State Party, and to permit competent authorities to order the confiscation of property of foreign origin acquired through Convention offences. These obligations are broadly worded and could include NCB forfeiture orders. However, many jurisdictions have yet to put in place procedures allowing NCB forfeiture.

NCB forfeiture is particularly important for asset recovery in circumstances when there is a lack of evidence to support a criminal conviction (beyond a reasonable doubt), such as when the offender is dead (bringing to an end criminal proceedings), has fled the jurisdiction, is immune from prosecution, is unknown, or the property is held by a third party who is aware (or wilfully blind) that the property is tainted. For these reasons, StAR views NCB forfeiture as a “critical tool for recovering the proceeds and instrumentalities of corruption.”⁴⁰

Confiscation can be either property-based or value-based. In a property-based order, assets linked to illicit activities are specifically targeted for confiscation. In a value-based order, a monetary amount is calculated based on the value of the benefit, advantages, and profits a person gained from illicit activities.

Criminal proceedings and NCB forfeiture operate together to achieve the best results. Both procedures can occur without violating double jeopardy because NCB forfeiture is not considered a punishment or a criminal proceeding.⁴¹ In both methods, it must be established that the targeted assets were derived directly or indirectly from the commission of the crime. Tracing assets can be extremely difficult as they can quickly change form, location and ownership, and complicated legal vehicles are used to hide assets abroad. Fortunately, “know-your-customer” policies and procedures imposed by international treaties can assist in the asset tracing process. Further, FIUs can also provide helpful information in an asset tracing investigation.

For both criminal and NCB forfeiture, confiscated proceeds go to the prosecuting state treasury, unless compensation for victims is also ordered.⁴²

³⁹ See, for example *Director of the Assets Recovery Agency v T and Others*, [2004] EWHC 3340 (Admin); *Prophet v National Director of Public Prosecutions*, [2006] ZACC 17 (S Afri Const Ct); *United States v One Assortment of 89 Firearms*, 465 US 354 (1984); *Proceeds of Crime Act 2002* (Cth), s 51 (Australia).

⁴⁰ StAR Initiative, Theodore S Greenberg et al, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (The International Bank for Reconstruction and Development/The World Bank, 2009) at 1, online: <<https://star.worldbank.org/resources/good-practice-guide-non-conviction-based-asset-forfeiture>>.

⁴¹ See, for example, *United States v Ursery*, 518 US 267 (1996); *The Scottish Ministers v Doig*, [2006] CSOH 176 (Scot); *Walsh v Director of the Assets Recovery Agency*, [2005] NICA 6; and *Ontario v Chatterjee*, 2009 SCC 19. For further reading on the double jeopardy clause and NCB forfeiture in the US, see Javier Escobar Veas, “The Constitutionality of Parallel Civil Forfeiture Proceedings and Criminal Prosecutions under the Double Jeopardy Clause in the United States” (2020) 6:2 Rev Brasileira de Direito Processual Penal 701.

⁴² StAR Initiative, Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington, DC: International Bank for Reconstruction and

For non-conviction based forfeiture statutes in Canada, see provincial statutes such as the *Civil Forfeiture Act*⁴³ and *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*.⁴⁴

2.4.3 Administrative Freezing and Confiscation Measures

Administrative orders to freeze or confiscate assets are issued by a government rather than the judiciary and can bypass mutual legal assistance requests from foreign countries in cases of urgency. For example, after the Arab Spring, administrative measures were implemented to facilitate the rapid freezing of assets of corrupt former leaders in the Arab world. Canada, the US, Switzerland, and the EU introduced legislation allowing their governments to order financial institutions to freeze assets without a judicial order or mutual legal assistance request from the corrupt officials' countries.⁴⁵

2.4.4 Fines Corresponding to the Value of the Benefit

Fines can also be imposed on individuals or corporations that are equal to or greater than the value of benefits derived from the inappropriate conduct. The judgment may be enforceable as a fine or a debt. Derived benefits include all assets and profits that can be reasonably linked to the offences forming the offender's criminal conviction. This is referred to as "value-based confiscation," as the person is ordered to pay an amount of money equivalent to or greater than their criminal benefit. Fines are generally paid into the treasury of the prosecuting jurisdiction.⁴⁶

The OECD/World Bank publication entitled, *Identification and Quantification of the Proceeds of Bribery* gives examples of how various countries use fines and value-based forfeiture orders to remove any "criminal benefits."⁴⁷

2.4.5 Civil Actions and Remedies

Civil remedies provide another tool for recovering the proceeds of corruption and can complement criminal proceedings. Civil actions are not limited to asset recovery purposes, but also achieve anti-corruption goals more generally by sanctioning wrongdoing and allowing injured parties to bring suits. These actions will be discussed in this section, including those not specifically related to asset recovery.

Article 35 of UNCAC creates an international obligation to provide private actors with the right to initiate civil proceedings:

Development/The World Bank, 2014) at 141.

⁴³ SBC 2005, c 29.

⁴⁴ SO 2001, c 28.

⁴⁵ Gray et al, *supra* note 22 at 41. See also UN Digest, *supra* note 13 at 26-27, 40, 49-52. In respect to Canada, see Sections 5.3(1) and (2).

⁴⁶ Oduor et al, *supra* note 42 at 143.

⁴⁷ OECD & The World Bank, *Identification and Quantification of the Proceeds of Bribery: Revised Edition*, (Paris: OECD Publishing, 2012) [Identification & Quantification] at 19-20, online (pdf): <<http://dx.doi.org/10.1787/9789264174801-en>>.

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

However, Article 35 does not provide special standing or a special right of action for private litigants and is subject to sovereignty and domestic law. As pointed out by Abiola Makinwa in *Private Remedies for Corruption*, this means that private rights of action “exist only to the extent provided under domestic laws and processes.”⁴⁸ Makinwa also points out that Article 35 applies only where a causal link exists between the claimant and the wrongdoing.⁴⁹ As a result, Article 35 on its own “gives a very limited right of redress to only a very particular group of people.”⁵⁰

A foreign court is competent to hear a civil suit if the defendant lives in or is incorporated in the court’s jurisdiction, or if assets are located in or have passed through the jurisdiction, or if an act of corruption or money laundering was committed in the jurisdiction.⁵¹ In some countries, civil and criminal proceedings can run simultaneously.⁵²

State Parties, and local public entities like municipalities and state-owned companies, can initiate civil proceedings in foreign or domestic courts in the same manner as private citizens, although legal standing may be denied if the public entity has no direct and personal interest in the case.⁵³ Article 43 of UNCAC requires that all State Parties *consider* assisting each other in investigations and proceedings in civil and administrative matters relating to corruption. Article 53 requires that each State Party take necessary measures to:

- (i) ensure that other States may make civil claims in its courts to establish ownership of property acquired through a Convention offence;
- (ii) ensure that courts have the power to order the payment of damages to another State Party; and
- (iii) ensure that courts considering criminal confiscation also take into consideration the civil claims of other countries.

Domestic statutes, such as the US *Racketeering Influenced and Corrupt Organizations Act (RICO)*,⁵⁴ sometimes recognize the right of foreign states to sue. Another option for victims

⁴⁸ Abiola O Makinwa, *Private Remedies for Corruption* (The Hague: Eleven International, 2013) at 377.

⁴⁹ *Ibid* at 428.

⁵⁰ *Ibid*.

⁵¹ Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (Washington, DC: World Bank, 2015) at 4.

⁵² *Attorney General of Zambia v Meer, Care & Desai and Others* [2007] EWHC 952 (Ch) (UK) [*Attorney General of Zambia*]. See also John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham, UK: Edward Elgar, 2014) at 326.

⁵³ Brun et al, *supra* note 51 at 14.

⁵⁴ 18 USC §§1961-1968.

of corruption is to bring an action domestically and seek to enforce the judgment in the foreign jurisdiction in which assets are located.⁵⁵

In general, to be enforceable in Canada, a judgment “must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce.”⁵⁶ The defences to enforcement of a foreign judgment include fraud, public policy, and lack of natural justice.⁵⁷ Overall, Canadian courts have adopted a “generous and liberal” approach to the enforcement of foreign judgments, but a case involving Chevron demonstrates that enforcement of foreign judgments in complex disputes involving years of litigation in multiple jurisdictions may be ultimately unsuccessful.⁵⁸ That saga is set out in the example below.

Example of a Complex Enforcement of a Foreign Judgement Case

In the *Chevron* case, in 2011, after a seven-year-long trial process, a provincial court in Ecuador issued a judgment ordering the California-based oil company Chevron to pay \$8.6 billion in environmental damages and \$8.6 billion in punitive damages to the plaintiffs representing around 30,000 Ecuadorian indigenous villagers. In November 2013, Ecuador’s Court of Cassation reduced the total amount to \$9.5 billion. In May 2012, the plaintiffs sought recognition and enforcement of the Ecuadorian judgment against Chevron and its Canadian subsidiary in the Ontario Superior Court of Justice. The dispute ultimately reached the Supreme Court of Canada, which held that the only prerequisite to recognize and enforce a foreign judgment is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction (the defendant’s presence in the jurisdiction or consent to submit to the court’s jurisdiction) were satisfied.⁵⁹ There is no need to prove that a “real and substantial connection” exists between the enforcing forum and the judgment debtor or the dispute, or that the foreign debtor has assets in the enforcing forum.⁶⁰ However, the fact that a court in Canada has jurisdiction in an enforcement proceeding does not mean that the judgment will be enforced because the debtor may still raise any of the available defences (i.e., fraud, denial of natural justice or public policy).⁶¹ Here Chevron instituted legal proceedings in the United States alleging that the plaintiffs’ American lawyer Steven Donziger and his team corrupted the Ecuadorian proceedings by offering a bribe of \$500,000 to the trial judge and “ghost-writing” the judgment. In 2011, Judge Kaplan of the US District Court for the Southern District of New York granted Chevron a global anti-enforcement injunction with respect to the Ecuadorian judgment.⁶² In 2014, Judge Kaplan held that the Ecuadorian judgment had been

⁵⁵ Brun et al, *supra* note 51 at 14.

⁵⁶ *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 31, [2006] 2 SCR 612.

⁵⁷ *Beals v Saldanha*, 2003 SCC 72 at paras 39-77, [2003] 3 SCR 416. See also *British Columbia Court Order Enforcement Act*, RSBC 1996, c 78, s 29(6); *Ontario Reciprocal Enforcement of Judgments Act*, RSO 1990, c R5, s 3; *Civil Code of Québec*, CQLR, c CCQ-1991, s 3155.

⁵⁸ *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 27, [2015] 3 SCR 69.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at para 3.

⁶¹ *Ibid* at paras 34, 77.

⁶² *Chevron Corp v Donziger*, 768 F Supp (2d) 581 (SDNY 2011). The United States Court of Appeals for the Second Circuit overturned the injunction in 2012: see *Chevron Corp v Naranjo*, 667 F (3d) 232 (2d Cir 2012).

procured by fraud.⁶³ In Canada, the Ontario Superior Court of Justice ruled against the plaintiffs, holding that Chevron Canada's shares and assets were not exigible and that there was no legal basis for piercing Chevron Canada's corporate veil.⁶⁴ The Ontario Court of Appeal dismissed the plaintiffs' appeal.⁶⁵ In 2019, the Supreme Court of Canada dismissed the plaintiffs' application for leave to appeal.⁶⁶

Civil actions in corruption cases may benefit private interests or public interests. In this respect, Makinwa divides claims for damage into two categories. The first involves claims for damage to private interests. Claimants in this category are direct parties to a corruption-tainted transaction, such as shareholders or losing competitors in a bidding process. States or public entities can be included in this category if they are party to a tainted contract. Remedies for damaged private interests are found in tort law, in the principles of fiduciary duty, and in securities and antitrust litigation. The second category of claims is for damage to public interests. Claimants in this category are indirect victims of corruption or states and civil society groups claiming on behalf of indirect victims. Because obtaining legal standing and establishing a cause of action is challenging for indirect victims, they "do not have as clear a path to redress as compared with the methods available to direct victims such as principals, shareholders, and third parties affected by noncompetitive behavior."⁶⁷ Makinwa, however, lists some strategies used in past cases involving damage to the public interest:

[Examples include] a state government using private law processes to protect the *interest of the state and people*; a state company seeking redress for international corrupt activity affecting its officials; and a succeeding government using the processes of private law to seek remedies for corrupt actions. Other examples show attempts by NGOs and private citizens to seek redress on behalf of the general citizenry for damage caused by a corrupt activity.⁶⁸

Recovery in civil proceedings can take the form of compensation for damages, return of property acquired through corruption to the legitimate owner or restitution of the rewards of unjust enrichment. As mentioned, civil remedies in corruption cases do not always further the goals of asset recovery and instead might be related to sanctioning wrongdoing and compensating individuals for harm arising from corrupt conduct. The following sections will explore various claims and remedies related to anti-corruption and asset recovery goals.

⁶³ *Chevron Corp v Donziger*, 974 F Supp (2d) 362 (SDNY 2014), affirmed, 833 F (3d) 74 (2nd Cir 2016).

⁶⁴ *Yaiguaje v Chevron Corporation*, 2017 ONSC 135 (CanLII) at paras 49, 68, 136 OR (3d) 261.

⁶⁵ *Yaiguaje v Chevron Corporation*, 2018 ONCA 472 (CanLII), 141 OR (3d) 1.

⁶⁶ *Daniel Carlos Lusitande Yaiguaje, et al v Chevron Corporation, et al*, 2019 CanLII 25908, 2019 CarswellOnt 5162 (SCC).

⁶⁷ Makinwa, *supra* note 48 at 432.

⁶⁸ *Ibid* at 407.

2.4.5.1 Personal Claims and Remedies

Victims of corruption can bring claims against other persons to seek redress for damage caused by corruption. For example, a victim might bring an action in tort for monetary damages to compensate for economic losses caused by corruption. Possible plaintiffs include governments that pay excessive amounts for goods or services due to bribes paid to their officials or harmed individuals like consumers and unsuccessful bidders.

a) Actions for compensation for damages in tort

In tort-based actions, the plaintiff is compensated for losses caused by a defendant's breach of duty. In the case of bribery, the giver and the receiver of the bribe will likely be joint tortfeasors, since both act wrongfully towards the plaintiff.⁶⁹ Causes of action useful to asset recovery and corruption include civil fraud, tortious interference, conspiracy and misfeasance in public office.⁷⁰ Tort claims are sometimes hindered by the need to establish intent on the part of the defendant and causation between the corrupt act and the loss.

Tortious interference is relevant when the private interests of parties to a transaction are damaged, such as when bribery taints a bidding process. The interfering conduct must be unlawful, like bribery, in order to provide a foundation for the tort. In *Korea Supply Co (KSC) v Lockheed Martin Corp* (2003),⁷¹ KSC succeeded in recovering damages based on the tort of interference with prospective economic advantage. KSC stood to gain a hefty commission if it secured a contract for another company. The defendant, another bidder, bribed a public official and was awarded the contract instead.

The tort of misfeasance in public office holds potential to assist in asset recovery, as demonstrated by the successful claim for compensation in *Marin and Coye v Attorney General of Belize*.⁷² The state was allowed to bring an action for misfeasance against its own officials, who sold state land to a company beneficially owned by themselves.⁷³ However, Makinwa warns that claims of misfeasance in public office are often not feasible due to the requirement of establishing intent to cause loss.⁷⁴

The case against SNC-Lavalin Group Inc. provides another example of a civil action for damages in the context of corruption. SNC-Lavalin was charged with corruption and fraud in relation to alleged bribery in Libya and subsequently sued two former executives for financial losses and reputational damage. SNC-Lavalin claimed it was unaware that one of

⁶⁹ Emile van der Does de Willebois & Jean-Pierre Brun, "Using Civil Remedies in Corruption and Asset Recovery Cases" (2013) 45:3 Case W Res J Intl L 615 at 637–639.

⁷⁰ *Ibid.*

⁷¹ *Korea Supply Co v Lockheed Martin Corporation*, 63 P (3d) 937, 941 (Cal 2003).

⁷² *Marin and Coye v Attorney General of Belize*, [2011] CCJ 9 (AJ).

⁷³ Hatchard, *supra* note 52 at 96.

⁷⁴ Makinwa, *supra* note 48 at 243. See also *Attorney General of Zambia*, *supra* note 52.

the executives was allegedly the beneficial owner of a shell consultancy company, which was used to divert funds.⁷⁵

b) Actions for contractual invalidity, contractual damages, and contractual restitution

Makinwa outlines two different contracts involved in cases of bribery: the primary contract, which consists of offer and acceptance of the bribe, and the secondary contract, which comes into being because of the bribe.⁷⁶ Makinwa notes that international consensus exists as to the unenforceability of the primary contract, since it evidences criminally prohibited behaviour. Therefore, a court will not interfere with disputes over the primary contract.

The secondary contract will generally be void or, particularly in common law jurisdictions, voidable at the instance of the betrayed principal. This unenforceability is based on public policy. These secondary contracts will therefore be subject to general contract law principles applicable to voidable contracts (i.e., orders of restitution may apply to an invalid secondary contract; damages are available for breaches of contract causing loss or a breach of duty of loyalty or good faith; principals may rescind contracts in the absence of wrongdoing, etc.).

If the principal decides not to rescind, the court may award compensation for damages resulting from entering a contract with unfavourable terms. For example, if a government buys goods from a company that has bribed a public official, a court might find that the true price of the goods has been inflated by the amount of the bribe. This allows the government to recover the amount of the bribe as well as any other losses it can show.⁷⁷

Further, while damages are usually calculated based on the plaintiff's loss, in some jurisdictions the defendant in a suit for contractual breach might be obliged to disgorge the profits of corruption instead of, or even in addition to, compensating the plaintiff for losses.

⁷⁵ Nicholas van Praet, "SNC-Lavalin Sues Former Executives over Alleged Bribery and Embezzlement", *The Globe and Mail* (April 9, 2015), online at: <<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/snc-lavalin-sues-former-executives-over-alleged-bribery-embezzlement/article23870439/>>. In his statement of defence, SNC's former executive vice-president of construction Riadh Ben Aissa alleged that specific SNC executives organized and approved purchases of a number of lavish gifts for Saadi Gaddafi, including a \$38 million yacht. He further claimed that "most of SNC's senior executives knew that the so-called agency contracts were in reality bribes paid to Libyan foreign officials in exchange for the award of the sole-source contract" (see Dave Seglins, "SNC-Lavalin Replaces CEO Amid More Allegations", *CBC News* (14 September 2015), online: <<http://www.cbc.ca/news/business/snc-lavalin-card-bruce-1.3226097>>). Also, in December 2014, SNC-Lavalin recovered \$13 million from Ben Aissa's frozen assets in Switzerland after Ben Aissa was found guilty for bribery in Swiss proceedings. The recovered money was part of the \$47 million surrendered by Aissa and was awarded to SNC-Lavalin on the basis that the company was an "injured party." Recovery by corporate "victims" in bribery cases is very rare and has only occurred in two cases. See Richard L Cassin, "'Victim' SNC-Lavalin Collects \$13 Million in Recovered Funds" (15 December 2014), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2014/12/15/victim-snc-lavalin-collects-13-million-in-recovered-funds.html>>. For a more recent update on the ongoing civil action, see *SNC-Lavalin Group inc v Ben Aissa*, 2019 QCCS 465 (CanLII), <<https://canlii.ca/t/hxm23>> and *Groupe SNC-Lavalin inc v Siegrist*, 2020 QCCA 1004 (CanLII), <<https://canlii.ca/t/j8zdj>>.

⁷⁶ Makinwa, *supra* note 48 at 471.

⁷⁷ StAR Asset Recovery Handbook, *supra* note 7 at 164-165.

The rationale behind this alternative measure of damages is that bribery is not only a breach of contract, but also a wrongful act.⁷⁸

c) Unjust enrichment and disgorgement of profits

Unjust enrichment is available as a non-tortious, non-contractual cause of action. An action for unjust enrichment generally requires that one party acquire and retain a benefit at the expense of another. However, in the context of agents, such as public officials, who retain secret profits through corruption, retention of the benefit need not be at the principal's expense. The principal is not obliged to establish loss in order to seek restitution of secret profits because harm is considered to flow from the breach of fiduciary duty alone.⁷⁹

Disgorgement of profits is an equitable remedy in common law systems based on unjust enrichment. In the enforcement of the US FCPA, the Securities and Exchange Commission (SEC) considers disgorgement to be an essential element of any SEC settlement for bribery offenses. Foreign companies that trade on the US Stock Exchanges are subject to SEC penalties and disgorgement actions.⁸⁰

In the StAR/World Bank report entitled *Asset Recovery Handbook: A Guide for Practitioners*, the authors state:

In the United States, disgorgement of profits is frequently sought by the Securities and Exchange Commission and the Department of Justice in civil or criminal actions to enforce the FCPA. Settlements often include recovery of the benefits of wrongful acts or illicit enrichment. In cases where a government contract was awarded as a result of bribery, the illicit enrichment is normally calculated by deducting direct and legitimate expenses linked to the contract from the gross revenue. The amount of the bribe and the taxes are generally not considered deductible expenses. In other civil actions brought by parties as private plaintiffs, U.S. courts have ruled that an employer or buyer is entitled to recover the amount of the bribe received by an employee even if the goods or services were exactly what the employer was seeking and even if the price was reasonable (*Sears, Roebuck & Co. v. American Plumbing & Supply Co.*, 19 F.R.D. 334, 339 (E.D.Wis., 1956) (U.S.)).⁸¹

⁷⁸ van der Does de Willebois & Brun, *supra* note 69 at 634.

⁷⁹ *Ibid* at 637.

⁸⁰ Robert Tarun & Peter Tomzack, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 5th ed (Chicago: ABA Publishing, 2018) at 74-75. "There are currently 543 global, non-US companies that cross-list their shares on U.S. stock exchanges": "Global Companies Cross-Listed on US Stock Exchanges" (last visited 11 September 2021), online: *Stock Market MBA* <<https://stockmarketmba.com/globalcompaniescrosslistonusexchanges.php>>.

⁸¹ StAR Asset Recovery Handbook, *supra* note 7 at 168.

2.4.5.2 Proprietary Claims and Remedies

Proprietary claims are for specific assets, as opposed to personal claims against another party for damages. In a property-based action, the state or another party claims to be the rightful owner of assets, or the state claims on behalf of the rightful owners that assets have been taken by theft, fraud, embezzlement or other wrongdoing. For example, in *Federal Republic of Nigeria v Santolina Investment Corp*, the London High Court of Justice found Nigeria to be the true owner of several bank accounts and properties in London, which were the proceeds of bribery accepted by a corrupt Nigerian official.⁸² Over \$17.7 million was recovered and repatriated.

Article 53 of UNCAC requires states to permit the initiation of civil actions by other State Parties to establish ownership of property acquired through corruption and to recognize another state's claim as the true owner. Unlike personal claims in tort and contract, a successful claimant in a property-based action will have priority over the defendant's other creditors.⁸³

In common law jurisdictions, claimants can use constructive trusts to recover assets acquired through a breach of trust or of a fiduciary duty. When public funds or property are embezzled or misappropriated, the state will be the beneficial owner of the stolen property, any profits derived from it or any property into which the stolen property is converted. The state's beneficial ownership will affix to the asset as it goes through successive transactions, unless there is a bona fide purchaser for value without notice of the breach of trust. For example, Saadi Gaddafi used funds belonging to the State of Libya to purchase a \$10 million house in London. Ownership of the house was easily traceable to Gaddafi, since it was owned by a shell company of which he was the beneficial owner. The Court found that Gaddafi held beneficial ownership of the house in constructive trust for Libya, allowing the transfer of the house to the State of Libya.⁸⁴

The same logic of constructive trust has been extended to situations where a state or other principal claims a proprietary interest in a bribe accepted by an agent. A successful proprietary claim allows the principal to recover the bribe and any increases in its value.⁸⁵ As the Privy Council of the UK House of Lords stated in an earlier case:

When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the

⁸² *Federal Republic of Nigeria v Santolina Investment Corp*, *Solomon & Peters and Diepreye Alamiyeseigha*, [2007] EWHC 437 (Ch).

⁸³ van der Does de Willebois & Brun, *supra* note 69 at 620.

⁸⁴ Brun et al, *supra* note 51 at 49–52.

⁸⁵ See for example, *Kartika Ratna Thahir v PT Pertamina Minyak dan Gas Bumi Negara (Pertamina)*, [1994] 3 SGCA 105 (Singapore), where a state-owned oil and gas company discovered that one of its executives had accepted bribes from contractors seeking preferential treatment and, therefore, breached his fiduciary duty, leading the Court to hold that the bribe was held in trust for Pertamina.

property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.⁸⁶

However, the law is currently unclear as to whether principals can still claim a proprietary interest in bribes accepted by their agents. While one line of authority supports the idea that all traceable proceeds of a fiduciary's corruption belong to the victim in equity, the Court in *Sinclair Investments (UK) v Versailles Trade Finance Ltd*⁸⁷ held that claimants can only acquire a proprietary interest in a fiduciary's wrongfully acquired property if the property belongs or belonged to the claimant or if the fiduciary took advantage of a right belonging to the claimant.⁸⁸ This suggests that betrayed principals cannot claim a proprietary interest in a bribe.⁸⁹

2.4.5.3 Other Civil Claims, Remedies, and Tools

a) Actions based on FCPA violations

In the United States, FCPA violations can provide the basis for civil actions under other statutes including securities laws, antitrust laws, or RICO.⁹⁰ For instance, if a violation adversely affects competition between companies, a civil action can be brought under state or federal antitrust laws.⁹¹ Shareholders can also bring claims based on FCPA violations to obtain compensation for damages. For example, shareholders might bring a class action for damage caused by false and misleading information about a company's bribery activities that led to a fall in share prices.⁹² Avon Products Inc. (Avon) was sued by a group of shareholders in a derivative class action lawsuit alleging securities fraud. After conceding that it had bribed Chinese government officials to boost sales revenues and paying \$135 million in fines for SEC and FCPA offenses as part of a DPA, Avon settled the shareholder class action with a \$62 million settlement.⁹³ Similar securities class actions were settled

⁸⁶ *The Attorney General for Hong Kong v (1) Charles Warwick Reid and Judith Margaret Reid and (2) Marc Molloy*, [1993] UKPC 2, [1994] 1 All ER 1.

⁸⁷ *Sinclair Investments (UK) v Versailles Trade Finance Ltd*, [2011] EWCA Civ 347.

⁸⁸ van der Does de Willebois & Brun, *supra* note 69 at 621-625.

⁸⁹ Brun et al, *supra* note 51 at 52.

⁹⁰ Padideh Ala'i, "Civil Consequences of Corruption in International Commercial Contracts" (2014) 62 Am J Comp L 185 at 208-211.

⁹¹ Brun et al, *supra* note 51 at 67.

⁹² Makinwa, *supra* note 48 at 390.

⁹³ The securities fraud lawsuit was brought on behalf of Avon's shareholders from 2006 to 2011 and led by two German investment funds. The plaintiffs alleged that the cosmetics company developed a corporate culture that was hostile to effective oversight and concealed the company's dependence on corrupt activities to boost sales in China. See Jonathan Stempel, "Avon Seeks Approval in US of \$62 Mln Accord over China Bribery", *Reuters* (18 August 2015), online: <<http://www.reuters.com/article/avon-corruption-settlement-idUSL1N10T14B20150818>>.

against Petrobras⁹⁴ and Wal-Mart.⁹⁵ Corporations may face foreign corrupt practices-related class actions in Canada as well. For example, SNC-Lavalin faced securities class proceedings in Ontario and Quebec based on alleged material misrepresentations in its disclosure of internal investigations of bribery in Bangladesh and elsewhere.⁹⁶ In 2018, SNC-Lavalin reached a CDN\$110 million settlement.⁹⁷

b) Social damages

The concept of social damage is an emerging tool in obtaining compensation for damages to the public interest. Costa Rican law, for example, allows the Attorney General to bring a civil action for compensation when conduct causes damage to society. Costa Rica successfully used this tool to obtain compensation in a 2010 settlement after corruption was uncovered in a bidding process for telephone service providers in Costa Rica. As explained by Makinwa, “[t]he action filed by the government of Costa Rica under the Criminal Procedural Rules in Costa Rica, to seek pecuniary compensation for damage suffered by the collective interests of the state and peoples of Costa Rica, illustrates a resort to private law notions of compensation for damage suffered as a result of corrupt activity.”⁹⁸

⁹⁴ In February 2016, the US District Judge Jed Rakoff in the Southern District of New York certified a class action brought against the Brazilian oil company Petrobras. The plaintiffs, who held Petrobras securities from 2010 to 2015, sought to recover their losses following a bribery and political kickbacks scandal involving dozens of public officials in Brazil. The scandal has contributed to a drop in Petrobras' market value to below \$20 billion from almost \$300 billion less than eight years ago. See Jonathan Stempel & Nate Raymond, “Brazil’s Petrobras Must Face US Group Lawsuits over Corruption: Judge”, *Reuters* (2 February 2016), online: <<http://www.reuters.com/article/us-brazil-petrobras-lawsuit-idUSKCN0VB2OQ>>. In January 2018, Petrobras agreed to a \$2.95 billion settlement: Brendan Pierson, “Petrobras to Pay \$2.95 Billion to Settle US Corruption Lawsuit”, *Reuters* (3 January 2018), online: <<https://www.reuters.com/article/us-petrobras-classaction-idUSKBN1ES0L2>>.

⁹⁵ In September 2016, the US District Judge Susan Hickey in Fayetteville, Arkansas certified a class action led by a Michigan retirement fund. The investors alleged that Wal-Mart concealed a corruption scheme in Mexico, where millions of dollars were paid in bribes to speed building permits and gain other benefits. See Anne D’Innocenzio, “Wal-Mart to Face Class-Action Over Alleged Bribery in Mexico”, *CTV News* (22 September 2016), online: <<http://www.ctvnews.ca/business/wal-mart-to-face-class-action-over-alleged-bribery-in-mexico-1.3083753>>. In April 2019, the court approved a \$160 million settlement. See Bill Laitner, “How Pontiac Pensioners Took on Walmart for All Stock Investors”, *Detroit Free Press* (last updated 16 April 2019), online: <<https://www.freep.com/story/news/local/michigan/oakland/2019/04/15/walmart-lawsuit-stockholders-pontiac-pension-fund-bribery-mexico/3444790002/>>.

⁹⁶ “Judge Certifies \$1 Billion Class Action Lawsuit Against SNC-Lavalin”, *CBC News* (20 September 2012), *CBC News*, online: <<http://www.cbc.ca/news/canada/montreal/judge-certifies-1-billion-class-action-lawsuit-against-snc-lavalin-1.1169847>>. See also SNC-Lavalin, *Annual Information Form (Year Ended December 31, 2015)* at 22-23, online (pdf): <<http://www.snclavalin.com/en/investors/financial-information/annual-reports/2015>>.

⁹⁷ Ross Marowitz, “SNC-Lavalin Settles Shareholder Class Actions in Ontario and Quebec for \$110 Million”, *The Toronto Star* (22 May 2018), online: <<https://www.thestar.com/business/2018/05/22/snc-lavalin-settles-shareholder-class-actions-in-ontario-and-quebec-for-110-million.html>>.

⁹⁸ Makinwa, *supra* note 48 at 408.

c) Insolvency proceedings

Jean-Pierre Brun et al. note that insolvency and receivership proceedings provided another tool in tracing and recovering assets. They summarized the advantages and disadvantages of using insolvency proceedings in asset recovery:

Insolvency or receivership may present opportunities because the receiver (or other insolvency office holder) enjoys increased powers over assets. In such proceedings, the state claimant may be able to recover property simply by showing that it owns it. It is also easier to reclaim assets that have been transferred away, for example, by fraud. The insolvency office holder has the power to access information and demand testimony and has proved powerful and pivotal in large asset recovery cases. Within an insolvency proceeding, an insolvency office holder can compel the testimony of witnesses, including the directors or managers who may have been culpable in hiding assets. Refusal to cooperate can lead to imprisonment, which may motivate testimony that helps the office holder to locate and subsequently recover substantial assets.

Formal insolvency processes are complex to implement internationally. Generally, in pursuing assets across borders, a plaintiff or creditor will need to pursue the assets under the insolvency laws of that country. Moreover, insolvency judgements are not easily recognized in foreign courts, unless certain regulations, conventions, or model laws apply. Therefore, the insolvency laws of the country where the assets are located will influence the effectiveness of approaching asset recovery through insolvency. [footnotes omitted]⁹⁹

Partie civile

Victims of corruption can participate in criminal proceedings for corruption-related offences as a *partie civile* in civil law jurisdictions. The victim must establish that they suffered direct and personal harm as a result of the criminal offence. This allows claims for damages to be assessed within a criminal trial and awarded if there is a conviction. For example, in 2007, Nigeria was awarded €150,000 for non-pecuniary damages after a French court convicted a former Nigerian energy minister for money laundering.¹⁰⁰ Disadvantages of the *partie civile* approach include the victim state's lack of control over criminal proceedings and the fact that prosecutors may engage in plea bargaining without consideration of the *partie civile*.¹⁰¹

⁹⁹ Brun et al, *supra* note 51 at 113.

¹⁰⁰ Gillian Dell et al, *Exporting Corruption - Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention*, (Berlin: Transparency International (TI), 2020) at 22, online (pdf): <https://us.transparency.org/wp-content/uploads/2020/10/2020_Report_ExportingCorruption_English-2.pdf>.

¹⁰¹ Brun et al, *supra* note 51 at 68–69.

2.4.6 Limitations and Advantages of Criminal and Civil Proceedings

Both criminal and civil proceedings have their advantages and limitations. Civil actions are limited in terms of access to information and investigative powers. Criminal proceedings provide investigators with access to information at the national and international level and allow them to overcome bank secrecy. Further, the assistance and cooperation between states provided by mutual legal assistance (MLA) in criminal proceedings is not mandatory in civil cases.¹⁰² For example, in *Attorney General of Zambia v Meer, Care & Desai and Others*,¹⁰³ the Zambian government was obliged to hire a private firm specializing in the tracing of assets due to the absence of any MLA in civil actions.¹⁰⁴

Benefits of civil litigation, aside from the lower burden of proof, include the possibility of action against third parties, such as facilitators (parties who knowingly facilitated the transfer of proceeds or received illicit assets). For example, a whole range of defendants were included in *Attorney General of Zambia*, including lawyers and other third parties.¹⁰⁵ However, plaintiffs might be required to establish dishonesty on the part of third parties, since incompetence is not always sufficient to ground liability.

Another advantage of civil actions is the possibility of the inclusion of moral and punitive damages in compensation. Further, plaintiffs can choose the jurisdiction in which recovery is pursued, and civil recovery can be pursued in several jurisdictions at once. Criminal proceedings, on the other hand, are much more structured and provide limited opportunities for intervention by an aggrieved party.

As pointed out by Makinwa, civil actions can be pursued independently of the state, which is an advantage when states are unwilling to pursue criminal proceedings. Makinwa also points out that private suits deter corrupt transactions through the introduction of “an element of uncertainty in terms of the number, duration, and costs (both financial and reputational) of potential private suits that may be filed by a variety of claimants. The criminal process is much more predictable as fines and punishment are pre-determined and can be more easily factored into the decision whether or not to give a bribe.”¹⁰⁶

2.4.7 Interaction between Remedies

The following is an excerpt from an OECD/World Bank report entitled *Identification and Quantification of the Proceeds of Bribery*:

¹⁰² See UNCAC, *supra* note 5, art 43.

¹⁰³ *Attorney General of Zambia*, *supra* note 52.

¹⁰⁴ Hatchard, *supra* note 52 at 327.

¹⁰⁵ *Ibid* at 326. Additionally, for a discussion of the value of certain disclosure orders in civil actions and insolvency proceedings, see Martin Kenney, “Guest Post: The UK Order on UBO Registries in Overseas Territories—A Reply” (22 May 2018), online (blog): *The Global Anti-Corruption Blog* <<https://globalanticorruptionblog.com/2018/05/22/guest-post-the-uk-order-on-ubo-registries-in-overseas-territories-a-reply/>>.

¹⁰⁶ Makinwa, *supra* note 48 at 365.

BEGINNING OF EXCERPT

1. Interaction between confiscation, disgorgement, and fines

Disgorgement and confiscation serve similar purposes, as noted above. Both seek to remove ill-gotten gains. However, disgorgement and confiscation can be computed based on different factors depending on the specific facts and circumstances of the bribery scheme and the relevant jurisdiction. Thus, it is possible to have both disgorgement and confiscation used in the same case. In the United States, disgorgement and restitution are quite similar and are unlikely to be used simultaneously. In the United States, if the SEC has already sought civil disgorgement of profits, generally the DOJ would exercise its discretion not to seek the same funds as a criminal restitution or forfeiture order. Unlike confiscation and disgorgement, the purpose of fines is to punish the offender, and not to remove the benefits of crime per se. In the U.S., the authorities frequently seek a criminal fine and/or a civil penalty in addition to disgorgement and forfeiture. In the United Kingdom, case law makes clear that a fine is to serve as a deterrent and that “offending itself must be severely punished quite irrespective of whether it has produced a benefit.” If a defendant is in a position to pay both a fine and have the benefits confiscated, both may be ordered. In other cases, if the defendant does not have sufficient resources to pay both, confiscation will take primacy over a fine.

...

2. Interaction between confiscation and compensation for damages

Compensation is based on the existence of damages suffered by the victim and may be awarded even in cases where bribery did not generate any profit or benefit for the briber. However, bribes are generally intended to, and often do, ensure that the briber makes a profit. In certain instances, the profit may be greater than the damage suffered by the victim. There are various remedies that can be sought in this instance – the government enforcing anti-bribery laws can seek confiscation and the victim of the bribery can seek compensation for damages.

...

3. Interaction between confiscation and contractual restitutions

In some jurisdictions government agencies have the authority to declare void or invalidate contracts awarded by or through bribed officials. In such instances, the government harmed by the bribery may seek recovery of all the amounts expended and the property transferred under the terms of the tainted contracts. In this situation, contractual restitutions could be as high as the proceeds of crime confiscated by the government enforcing the antibribery laws.

...

4. Interaction between remedies applied in foreign or multiple jurisdictions

Courts may take into account confiscation decisions or settlements with the same effect in foreign jurisdictions to avoid unfair duplication ...

Similarly, in the resolution of the Johnson & Johnson (J&J)/DePuy case, the United States and the United Kingdom simultaneously resolved investigations into some of the same misconduct. In the U.S., J&J's criminal fine was reduced by 25%, in part in light of anticipated fines in the U.K. and Greece, noting in the deferred prosecution agreement, "J&J and the Department agree that this fine is appropriate given [...] penalties related to the same conduct in the United Kingdom and Greece [...]" J&J was also required to disgorge profits from the conduct in a settlement with the SEC. DePuy settled the U.K. charges by agreeing to financial penalties under a civil recovery order. In reaching the settlement, the U.K. Serious Fraud Office also took the multijurisdictional nature of the settlement into account, stating that it had "taken particular note of the fact of disgorgement and recovery in more than one jurisdiction for the same underlying unlawful conduct. [...] The Serious Fraud Office has considered the matter from a global perspective. It has worked to achieve a sanction in this jurisdiction which will form part of a global settlement that removes all of the traceable unlawful property and at the same time imposes a penalty."¹⁰⁷

END OF EXCERPT

3. INTERNATIONAL CONVENTION OBLIGATIONS

3.1 UNCAC

International cooperation is extremely important for successful foreign recovery of corrupt assets. Most corruption cases require asset recovery efforts beyond domestic borders. For instance, the assets may be held in one jurisdiction and then laundered to another jurisdiction, with the offence committed in a third jurisdiction and the company responsible for paying bribes headquartered in a fourth jurisdiction. Further, money can be moved very quickly through computers, mobile devices, and wire transfers.

As corrupt activities often involve several countries, international cooperation is emphasised in UNCAC. Chapter V provides a framework to facilitate the recovery of stolen assets. The first provision, Article 51, declares that asset recovery is a "fundamental principle" of the convention.¹⁰⁸

¹⁰⁷ Identification & Quantification, *supra* note 47 at 22-25. For a detailed discussion of civil actions and remedies available in asset recovery proceedings in both common law and civil law jurisdictions, see van der Does de Willebois & Brun, *supra* note 69. For a recent guide to navigating civil actions in asset recovery, see the StAR publication: Brun et al, *supra* note 51.

¹⁰⁸ UNCAC, *supra* note 5, art 51.

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

Article 51 makes cooperation and assistance mandatory. Procedures and conditions for asset recovery include facilitating civil and administrative actions (Article 53), recognizing and taking action on the basis of foreign confiscation orders (Articles 54 and 55), returning property to requesting states in cases of embezzled public funds or other corruption offences, and returning property to its legitimate owners (Article 57). UNCAC provides a direct method of recovery by requiring State Parties to permit civil suits by other State Parties in their courts and requires that State Parties recognize the judgments of other State Party courts.

Article 52 calls for “know your customer” policies in financial institutions. It requires that each State Party take measures requiring financial institutions to verify the identity of customers and beneficial owners of funds and conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are or have been entrusted with prominent public functions, along with their family members and close associates. This applies to public officials not just of the government of the jurisdiction where the surveillance takes place but other countries. State Parties must require their financial institutions report suspicious transactions, issue advisories, and maintain adequate records. State Parties must also prevent the establishment of banks known as “shell banks,” which have no physical presence and are not affiliated with a regulated financial group.¹⁰⁹

Article 53 requires each State Party to have a legal regime allowing another State Party to initiate civil litigation for asset recovery in its jurisdiction or to intervene or appear in proceedings to enforce their claim for compensation. State Parties are required to take measures to (i) permit another State Party to initiate a civil action in its courts to establish title to or ownership of property acquired through the commission of a Convention offence; (ii) permit its courts to order those who have committed offences to pay compensation or damages to another State Party that has been harmed; and (iii) allow its courts or authorities to recognize another State Party’s claims as legitimate owner of property acquired through the commission of an offence.

UNCAC sets forth procedures for international cooperation in confiscation matters in Articles 54 and 55. These Articles create a basic regime for domestic freezing, seizure and confiscation. Article 54 provides that each State Party must take measures to “adopt laws that facilitate cooperative asset restraint and confiscation,”¹¹⁰ including duties to enable

¹⁰⁹ For a brief explanation of “shell banks” and “booking offices,” see Working Group on Cross-Border Banking, *Shell Banks and Booking Offices*, (Basel Committee on Banking Supervision, 2003), online (pdf): <<https://www.bis.org/publ/bcbs95.pdf>>. For an interesting account of a “disappearing bank” (i.e., bank fraud), see Sam Sheen, “The Case of the Disappearing Bank” (12 July 2019), online(blog): *International Banker* <<https://internationalbanker.com/banking/the-case-of-the-disappearing-bank/>>.

¹¹⁰ See Cecily Rose, Michael Kubiciel & Oliver Landwehr, eds, *The United Nations Convention Against Corruption: A Commentary* (New York: Oxford University Press, 2019) at 550-557.

cooperative confiscation, the duty to give effect to foreign confiscation orders, duties to enable cooperative freezing and seizure, and duties to act upon foreign orders or requests.

Article 55 implements mutual legal assistance between each State Party by providing a mechanism for responding to orders and requests from State Parties. It requires each State Party to:

- (i) submit the request for confiscation over corruption offences to its authorities;
- (ii) submit the order of confiscation issued by a court of the requesting State Party; and
- (iii) take measures to identify, trace and freeze or seize proceeds of crime, property, etc., for confiscation by the requesting state or by themselves.¹¹¹

Article 55 also sets out the requirements for making a request for assistance.

The assistance sought by the requesting State Party may be refused if the requested State Party did not receive sufficient and timely evidence or if the property was of *de minimis* value.

The United Nations Convention against Transnational Organized Crime (UNTOC)¹¹² also imposes international obligations on the signatories. Article 13(1) requires a state to act in response to requests for confiscation from other states to the “greatest extent possible within its domestic legal system.” Note that the obligations under this convention apply only if the criminal act is carried out by an organized criminal group within the definition under Article 2(1). Article 14(2) requires the return of assets in order to “give compensation to the victims of crime or return such proceeds of crime to their legitimate owners.”

Tim Daniel and James Maton pointed out that UNCAC’s asset recovery provisions are based on the assumption that victim states will attempt to recover assets, which they see as a fundamental flaw.¹¹³ Fear, lack of political will, breakdown of political systems or the corruption of current leaders in victim countries can easily frustrate UNCAC’s asset recovery goals by preventing requests from victim countries. For example, after the death of Zaire’s kleptocratic President, Mobutu Sese Seko, the Swiss authorities froze Mobutu’s Swiss bank accounts. However, Zaire, by now the Democratic Republic of Congo, failed to request repatriation of the stolen funds, which allowed the money to be recovered by Mobutu’s family.¹¹⁴ Similarly, Haiti failed to claim funds from a member of Haiti’s kleptocratic Duvalier family during litigation in Switzerland. However, the day after a Swiss court ruled that the money would be remitted to “Baby Doc” Duvalier, Haiti experienced its 2010

¹¹¹ *Ibid* at 559-564.

¹¹² *United Nations Convention against Transnational Organized Crime*, 12 December 2000, 2225 UNTS 209, 40 ILM 335 (2001) (entered into force 29 September 2003).

¹¹³ Tim Daniel & James Maton, “Is the UNCAC an Effective Deterrent to Grand Corruption?” in Jeremy Horder & Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2013) 293 at 293.

¹¹⁴ *Ibid* at 322.

earthquake. The Swiss government prevented the return of the money to Duvalier by passing a law that allows Switzerland to freeze assets if the rule of law has broken down in a victim country, incapacitating the victim state's ability to make requests (known as the "Duvalier law"). Because of UNCAC's reliance on action by victim states, Switzerland was obliged to pass a new domestic law to circumvent the retention of stolen funds by the Duvalier family.¹¹⁵

3.2 OECD Convention

Parties to the OECD Convention are required to provide mutual legal assistance to other jurisdictions investigating offences involving the bribery of public officials. Article 3 states that each State Party "shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to the proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable."¹¹⁶ Proceeds are defined as the "profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery."

The implementation of the OECD Convention is monitored by the OECD Working Group on Bribery (WGB), composed of all State Parties. The WGB compiled recommendations for State Parties in the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*.¹¹⁷ Recommendation XIII asks State Parties to "consult ... and cooperate with ... authorities in other countries ... in investigations and other legal proceedings concerning specific cases of bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition and the identification, freezing, seizure, confiscation, and recovery of the proceeds of bribery of foreign public officials."¹¹⁸

3.3 Other Instruments

There are several other conventions and agencies that place asset recovery obligations on convention signatories and agency members. For example:

1. The Arab Forum on Asset Recovery (AFAR), established in 2012, is an initiative supporting asset recovery efforts of Arab countries.

¹¹⁵ *Ibid* at 316–22. For an analysis of obstacles surrounding UNCAC's asset recovery provisions, as well as the potential of the provisions if used well, see Vlassis, Gottwald & Ji Won Park, "Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery" in Zinkernagel, Monteith & Pereira, *supra* note 17, 161–172.

¹¹⁶ OECD Convention, *supra* note 6, Art 3.

¹¹⁷ OECD, Working Group on Bribery in International Business Transactions (WGB), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, (November 2009), online (pdf): <<https://www.oecd.org/daf/anti-bribery/44176910.pdf>>.

¹¹⁸ *Ibid* at XIII.

2. The Busan Partnership for Effective Development Cooperation, created in 2011 under the auspices of the OECD, committed signatories to strengthening processes for the tracing, freezing and recovery of illegal assets.¹¹⁹
3. The Financial Action Task Force (FATF) is a policy-making body established to “set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.”¹²⁰ The FATF develops recommendations and monitors the progress of its 36 members.
4. The Council of European Union (EC) *Decision Concerning Cooperation Between Asset Recovery Offices of the Member States in the Field of Tracing and Identification of Proceeds from, or Other Property Related to, Crime* requires that member states set up a National Asset Recovery Office and cooperate with the recovery offices of member states.¹²¹
5. The EC Framework *Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders* purports to enable judicial decisions of European Union countries to be recognized and executed within deadlines.¹²²
6. The Council of Europe (CoE) *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism* requires parties to enable themselves to freeze, seize and confiscate proceeds of crime.¹²³
7. The *Regulation of the European Parliament and of the Council on the Mutual Recognition of Freezing Orders and Confiscation Orders* establishes rules under which a Member State is to recognize and execute in its territory a freezing order issued by another Member State in the framework of criminal proceedings.¹²⁴
8. The CoE *Criminal Convention* provides some support mechanisms for tracing, seizing and freezing assets.¹²⁵

¹¹⁹ “The Busan Partnership for Effective Development Co-operation” (last visited 7 September 2021), online: OECD <<https://www.oecd.org/development/effectiveness/busanpartnership.htm>>.

¹²⁰ “What do we do” (last visited 7 September 2021), online: FATF <<http://www.fatf-gafi.org/about/whatwedo/>>.

¹²¹ EC, *Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime*, [2007] OJ L 332/103, art 1, online: <<https://eur-lex.europa.eu/eli/dec/2007/845/oj>>.

¹²² EC, *Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders*, [2006] OJ L 328/59, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006F0783&from=EN>>.

¹²³ *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism*, Council of Europe, 16 May 2005, CETS 198 (entered into force 1 May 2008), online: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198?module=treaty-detail&treaty-num=198>>.

¹²⁴ EC, *Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders*, [2018] OJ L 303/1, online: <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1805>>.

¹²⁵ *Criminal Law Convention on Corruption*, Council of Europe, 27 January 1999, ETS 173 (entered into force 1 July 2002), online: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/17?module=treaty-detail&treaty-num=173>>.

9. The CoE Civil Convention allows the payment of damages for bribery and similar offences recovered against anyone who has committed or authorized an act of corruption or failed to take reasonable steps to prevent such an act.¹²⁶
10. The European Convention on Mutual Assistance in Criminal Matters contains a framework for mutual legal assistance in European Union countries.¹²⁷
11. Commonwealth states have signed the Commonwealth of Independent States Conventions on Legal Aid and Legal Relations in Civil, Family and Criminal Matters. These two multilateral conventions regulate criminal prosecution, extradition and mutual legal assistance.¹²⁸
12. The Southeast Asian Nations Mutual Legal Assistance in Criminal Matters Treaty (ASEAN MLA Treaty) signed in 2004 is “aimed at improving the effectiveness of the law enforcement authorities of the Parties to the MLA Treaty in the prevention, investigation and prosecution of offences through cooperation and mutual legal assistance in criminal matters.” This treaty is a multilateral instrument and provides for many forms of mutual legal assistance.¹²⁹
13. The African Union Convention on Preventing and Combating Corruption and Related Offences contains measures for mutual legal assistance and recovery of assets.¹³⁰
14. The Southern African Development Community *Protocol Against Corruption* requires State Parties to seize and confiscate assets, and provide mutual legal assistance and judicial cooperation.¹³¹

¹²⁶ *Civil Law Convention on Corruption*, Council of Europe, 4 November 1999, ETS 174 (entered into force 1 November 2003), online: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174?module=treaty-detail&treatynum=174>>.

¹²⁷ *European Convention on Mutual Assistance in Criminal Matters*, Council of Europe, 20 April 1959, ETS 30, (entered into force 12 June 1962), online: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174?module=treaty-detail&treatynum=030>>.

¹²⁸ *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*, Commonwealth of Independent States, 22 January 1993 (entered into force 19 May 1994, amended 28 March 1997) [the Minsk Convention]; and *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*, Commonwealth of Independent States, 7 October 2002 (entered into force 27 April 2004) [Chisinau Convention].

¹²⁹ *Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries*, Association of Southeast Asian Nations, 29 November 2004 (entered into force 28 April 2005), online (pdf): <<http://agreement.asean.org/media/download/20160901074559.pdf>>.

¹³⁰ *African Union Convention on Preventing and Combating Corruption and Related Offences*, 1 July 2003, 43 ILM 5 (entered into force 5 August 2006), online: <<https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>>.

¹³¹ *Protocol Against Corruption*, South African Development Community, 14 August 2001 (entered into force 6 August 2003), online: <<http://www.sadc.int/documents-publications/show/>>.

4. INTERNATIONAL MUTUAL LEGAL ASSISTANCE AGREEMENTS

4.1 Introduction

Mutual legal assistance (MLA) is a process by which jurisdictions seek and provide assistance to other jurisdictions in the gathering of evidence, investigation, and prosecution of criminal cases, and in tracing, freezing, seizing, and confiscating proceeds of crime. It facilitates cooperation in dealing with transnational and multinational cases of corruption. Agreements oblige states to cooperate with requests. There are two types of MLA agreements: bilateral (between two states) and multilateral (between more than two states). UNCAC, UNTOC, the OECD Convention and the ASEAN MLA Treaty are examples of multilateral conventions that provide mutual legal assistance in corruption cases.

MLA may be requested for a broad range of anti-corruption activities, as evidenced by Article 46(3) of UNCAC (set out in Section 4.3). In most instances, a jurisdiction requests the assistance of another jurisdiction through a formal written request, although MLA can and is sometimes provided without a formal request.¹³²

The UNODC states the importance of MLA:

The importance of effective mutual (legal) assistance as a tool to combat transnational crime cannot be overstated. Whatever the applicable legal system or tradition, criminal investigations and proceedings are based on evidence and increasingly that evidence in the criminal context is located outside of national borders. As a result, there is now an increased emphasis on a global level on the need to develop effective instruments that will allow for seeking and rendering assistance with cross border evidence gathering. While law enforcement co-operation by way of informal agreement and otherwise remains an important component of international cooperation, there are inherent limits to it in that it will not generally extend to the use of compulsory measures. Similarly, court to court requests, particularly as between states of different legal traditions may be of limited application and can prove slow and time consuming. For this reason, many states are striving to adopt instruments and measures to allow for the rendering of formal mutual (legal) assistance in a direct and effective manner.¹³³

In general, MLA is a three-step process that involves (1) preparing for MLA; (2) drafting; and (3) submitting a request for MLA.¹³⁴ Prior to drafting a request for MLA, the requesting authority decides whether to use the MLA channels or another intelligence or informal method of cooperation and determines the timing for submitting the request for MLA, the

¹³² See UNCAC, *supra* note 5, art 46(4).

¹³³ UNODC et al, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, E/CN15/2004/CRP11 (Vienna: UN, 11 May 2004), online (pdf): <http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf>.

¹³⁴ Pedro Gomes Pereira, "Mutual legal assistance" in *Tracing Illegal Assets Guide*, *supra* note 15 at 53-65.

status of the authority requesting MLA, the type of assistance sought, and the legal basis for the request, as well as what criminal offence(s) are being investigated.¹³⁵ The request for MLA must contain basic identification information, and the narrative section sets out the facts of the case, description of the assistance sought, objectives of the request, any procedures to be observed, and transcription of the criminal offences.¹³⁶ Once prepared, the request may be transmitted via diplomatic channels (as the general rule), via central authorities, or directly to the executing authority (if the applicable treaty or international agreement authorizes direct transmission).¹³⁷

4.2 Legal Basis

The legal basis for mutual legal assistance can arise out of (1) a convention, (2) a unilateral treaty (one country to another) or a bilateral treaty (between multiple countries), (3) unilateral and bilateral agreements, and (4) domestic legislation. Executing a large number of unilateral or bilateral treaties or agreements can be expensive and time consuming, especially where there are no other treaty arrangements with a country. As an alternative, some countries, like Australia, Thailand, and Japan, have enacted domestic legislation authorizing mutual legal assistance to countries where there is no treaty.¹³⁸ The assistance is usually premised on promises of reciprocity. However, only treaties can bind states under international law, and therefore legislation does not oblige the requested jurisdiction to assist the foreign requesting states.

4.3 UNCAC

Article 46 of UNCAC states:

1. State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.
3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

¹³⁵ *Ibid* at 54.

¹³⁶ *Ibid* at 58-59.

¹³⁷ *Ibid* at 59-60.

¹³⁸ Secretariat of the Asian Development Bank (ADB) & OECD Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, (Paris; Manila: ADB/OECD, 2007) [ADB/OECD MLA Report] at 32, online (pdf): <<https://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>>.

- a) Taking evidence or statements from persons;
 - b) Effecting service of judicial documents;
 - c) Executing searches and seizures, and freezing;
 - d) Examining objects and sites;
 - e) Providing information, evidentiary items and expert evaluations;
 - f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
 - g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
 - h) Facilitating the voluntary appearance of persons in the requesting State Party;
 - i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
 - j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
 - k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.
4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.
- ...
29. The requested State Party:
- a) shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
 - b) may, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.
30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

4.4 OECD Convention

Article 9 states:

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

4.5 Request Processes and Procedures

Requesting assistance varies depending on the jurisdictions and the treaties, agreements or legislation in place.¹³⁹ The request must be tailored to the requirements of the requested jurisdictions and must specify a legal basis for cooperation (i.e., through conventions, treaties, bilateral agreements, domestic legislation allowing international cooperation or promises of reciprocity). The request must also be related to a criminal matter, although assistance with non-conviction based confiscation may be possible. Some jurisdictions require charges to be filed or a final confiscation order before providing assistance with seizure or restraint of assets. The UNODC developed a Mutual Legal Assistance Request Writer Tool to assist in the process.¹⁴⁰

UNCAC Article 46 provides considerable detail on the request process under the convention. This detail is why some commentators note that “Article 46 is a typical example of what may be called a ‘mini treaty within a treaty.’”¹⁴¹ Similar mutual legal assistance provisions can be found in Article 18 of UNTOC.

4.5.1 US

The details of the US MLA process are summarized at Section 5.1. The 2016 FATF *Mutual Evaluation Report* (2016 US FATF *MER*) concluded that the United States provides constructive and timely mutual legal assistance across the range of international co-operation requests, including in relation to money laundering and asset forfeiture.¹⁴²

¹³⁹ For a detailed account of a typical asset recovery process involving MLA, see Tom Lasich, “The Investigative Process – A Practical Approach” in *Tracing Stolen Assets*, *supra* note 38, 49 at 51-59.

¹⁴⁰ “Mutual Legal Assistance Request Writer Tool” (last visited 7 September 2021), online: UNODC <<http://www.unodc.org/mla/index.html>>.

¹⁴¹ Rose, Kubiciel & Landwehr, *supra* note 110 at 445. For more on Article 46, see 440-473.

¹⁴² Financial Action Task Force (FATF), *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States*, Fourth Round Mutual Evaluation Report (Paris: FATF, 2016) [FATF-US

However, there may be barriers to obtaining beneficial ownership information in a timely way, and tax information is not generally available to foreign law enforcement authorities for use in non-tax criminal investigations.¹⁴³ The *MER* recommends, in particular, allocating more resources to process the large number of MLA and extradition requests, as well as taking urgent steps to ensure that adequate, accurate, and current information about beneficial owners of legal entities is available in a timely manner.¹⁴⁴

As of July 2015, the US was actively seeking MLA in 1,542 criminal matters related to money laundering, terrorist financing, and asset forfeiture.¹⁴⁵ Also, between 2009 and 2014, the US received 1,541 MLA requests in matters involving money laundering, terrorist financing, and asset forfeiture.¹⁴⁶

International asset sharing is encouraged by US authorities and is available even when a country makes no direct request for a share of forfeited proceeds of crime.¹⁴⁷ According to the *MER*, since 1989, more than \$257 million in forfeited assets were transferred to 47 countries from the Department of Justice Asset Forfeiture Funds (DOJ-AFF), and since 1994, the Treasury Forfeiture Fund (TFF) transferred more than \$37 million to 29 countries.¹⁴⁸

Overall, the report concluded that the United States is “largely compliant” with the FATF Recommendations 37 (“Mutual legal assistance”) and 38 (“Mutual legal assistance: freezing and confiscation”). The following is an excerpt from the *MER* assessing the US anti-money laundering and combatting the financing of terrorism (AML/CFT) regime:

BEGINNING OF EXCERPT

Recommendation 37 – Mutual legal assistance

In its 3rd MER [Mutual Evaluation Report], the U.S. was rated largely compliant with these requirements. The technical deficiency related to potential barriers to granting MLA requests linked to the laundering of proceeds that are derived from a designated predicate offense that is not covered.

Criterion 37.1 – The U.S. has a legal basis that would permit for the rapid provision of a wide range of MLA in relation to the investigation, prosecution and related proceedings

MER] at 163-164, online (pdf): <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>>. For a follow up to the 2016 FATF Report, see: FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States*, 3rd Enhanced Follow-Up Report & Technical Compliance Re-Rating, (Paris: FATF, 2020), online (pdf): <<https://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-States-March-2020.pdf>>. For more details on mutual legal assistance in the context of AML, see Chapter 4, Section 6.2.1.

¹⁴³ FATF-US MER, *ibid* at 163.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid* at 168.

¹⁴⁶ *Ibid* at 165.

¹⁴⁷ *Ibid* at 167.

¹⁴⁸ *Ibid*.

for ML [money laundering], TF [terrorism finance] and associated predicate offenses. A statutory legal framework applies to all MLA requests regardless of whether they are based on a letter rogatory, or letter of request: 18 USC §3512. MLA treaties (MLATs) themselves are also a legal framework under which MLA requests may be executed. Where a bilateral treaty is not in place, the basis for cooperation may often be found in multilateral or regional conventions,¹⁴⁹ and agreements.¹⁵⁰ Additionally, U.S. courts are authorized to provide direct MLA to international tribunals: 28 USC §1782.

Criterion 37.2 – The U.S. has a central authority for transmitting and executing MLA requests – DOJ-OIA [DOJ Office of International Affairs] through which must be channeled all requests in criminal matters for legal assistance requiring compulsory measures. DOJ-OIA has a prioritisation system in place for incoming and outgoing requests by which Treaty requests are prioritized above non-treaty requests. Crimes of violence, including terrorism cases, are given a high priority. High priority cases are dealt with by order of arrival or urgency (e.g. trial deadline). There is flexibility to deviate from these prioritizations in exceptional circumstances. However, due to their current IT system, the U.S. is only able to monitor progress and time taken to handle a request.

Criterion 37.3 – MLA is not prohibited or made to be subject to unduly restrictive conditions ...

Criterion 37.4 – The U.S. does not refuse requests for MLA on the sole ground that the offense is also considered to involve fiscal matters, even where the applicable MLATs exclude fiscal matters from the scope of assistance¹⁵¹.... Likewise, MLA requests are not refused on the sole grounds of secrecy or confidentiality requirements on FIs [financial institutions] or DNFBP [designated non-financial businesses and professions], except where information is protected by the attorney-client privilege. Attorney-client privilege may be overcome if it can be shown that the attorney was actively participating in the criminal activities of his/her client.

Criterion 37.5 – The U.S. maintains the confidentiality of MLA requests received, subject to fundamental principles of domestic law, in order to protect the integrity of the investigation or inquiry.... Where legal process is required, sealing orders are routinely

¹⁴⁹ [128] Including, but not exclusively: the Inter-American Convention on Mutual Assistance in Criminal Matters ("The OAS MLAT"), the Vienna Convention [arts 7-8), the Convention Combating Bribery of Foreign Public Officials in International Business Transactions (OECD) [arts. 9, 11]; the International Convention for the Suppression of the Financing of Terrorism [arts. 12-16]; the Palermo Convention [arts. 18, 21]; Convention Against Corruption (Merida) [arts. 46-49]; Council of Europe Convention on Cybercrime [arts. 25-35].

¹⁵⁰ [129] As of May 2015, the U.S. had 70 such accords in place with 85 territories.

¹⁵¹ [130] For instance the MLATs between the US and Switzerland, the Bahamas, and the Cayman Islands exclude fiscal matters, including offences involving taxes, customs duties, governmental monopoly charges and/or exchange control regulations, from the scope of available assistance. Assistance is however generally available for criminal tax matters relating to the proceeds from criminal offences.

issued on the basis of the country's invocation of a treaty's confidentiality provision and factual circumstances that counsel confidentiality.

Criterion 37.6 – Where MLA requests do not involve coercive actions, the U.S. does not make dual criminality a condition for rendering assistance. Most of the bilateral MLATs do not require dual criminality as a condition for granting assistance. Where dual criminality is a condition, this is usually restricted to requests for compulsory or coercive measures. In such instances, gaps in the ML offenses can adversely impact MLA particularly when the foreign request is based on ML activity derived from a predicate offense that does not fall within the definition of SUA [specified unlawful activity] or the foreign request does not identify the underlying predicate offense (see R.3 [*Money laundering offense*] and R.36 [*International instruments*]). Conduct-based dual criminality applies when issuing search warrants necessary to execute a foreign request: 18 USC 3512(e). There is no dual criminality requirement for most court orders issued pursuant to 18 USC §3512 in aid of requests for assistance from foreign authorities.

Criterion 37.7 – Where dual criminality applies, technical differences between the offense's categorization in the requesting State do not prevent the U.S. from providing the requested assistance. It is enough to determine that the underlying acts are criminalized in both States. The U.S. has not denied any MLA requests on the basis of dual criminality (ML, TF and asset forfeiture).

Criterion 37.8 – The powers and investigative techniques required under R.31 and which are otherwise available to domestic competent authorities are also available for use in response to MLA requests.... However, the interception of communications can only be undertaken as a part of a U.S. investigation.

Weighting and Conclusion:

The minor shortcomings identified in R.3 [*Money laundering offense*] could limit assistance when dual criminality applies. The interception of communications can only be undertaken as part of a U.S. investigation. The OIA case management system is being improved to facilitate the electronic monitoring of the processing of outgoing and incoming requests process and the monitoring of the time taken to handle these.

Recommendation 37 is rated largely compliant.

Recommendation 38 – Mutual legal assistance: Freezing and Confiscation

In its 3rd MER, the U.S. was rated largely compliant with these requirements. The technical deficiency related to potential barriers to granting MLA request linked to the laundering of proceeds that are derived from a designated predicate offense which is not covered.

Criterion 38.1 – The U.S. has a range of authorities to take action in response to requests by foreign countries to identify, freeze, seize or confiscate laundered property, proceeds,

and instrumentalities used or intended for use in ML, TF or associated predicate offenses, or property of corresponding value including:

- (a) Providing assistance in identifying and tracing assets mainly via informal police-to-police communication and information sharing networks
Additionally, the U.S may obtain evidence for court proceedings on behalf of a foreign request including testimony, documents, or tangible items: 18 USC 3512 (see R.37).
- (b) Restraining or seizing assets located in the U.S. upon the request of a foreign country for preservation purposes: 28 USC 2467(d)(3)(A)(i).
- (c) Enforcing foreign confiscation orders. The U.S. may also restrain untainted property as long as these are subject to forfeiture and provided all other requirements are met: 28 USC 2467.
- (d) Enforcing a foreign confiscation judgment on the condition that the requesting country is party to the Vienna Convention, a MLAT or other international agreement with the U.S. that provides for confiscation assistance. The offense must: i) be an offense for which forfeiture would be available under U.S. Federal law if the criminal conduct occurred in the U.S; or ii) is a foreign offense that is a predicate for a U.S. ML offense: 28 USC 2467 (a)(2) & 18 USC 1956(c)(7)(B).
- (e) Initiating its own civil forfeiture proceedings against any property, proceeds and instrumentalities: 18 USC 981(b)(4). In such cases, the U.S. can proceed if it can state sufficiently detailed facts to support a reasonable belief that the property would be subject to forfeiture under U.S. Federal law, based on its own evidence and evidence from the requesting State, of a predicate offense for confiscation under U.S. law which would make that the property subject to confiscation.

Gaps in the ML offenses and the requirement for dual criminality are potentially an issue when the predicate offense is not one covered in the U.S. However, no MLA request has been denied on the basis of dual criminality (ML, TF and asset forfeiture).

Criterion 38.2 – The U.S. has authority to provide assistance to requests for cooperation made on the basis of non-conviction-based (NCBF) proceedings and related provisional measures 18 USC 981(b)(4)(A)-(B). Provisional measures may also be carried out under the enforcement of a foreign judgment any time, before or after, the initiation of enforcement proceedings by a foreign nation, including NCBF proceedings: 28 USC 2467(d)(3)(A)(1).

Criterion 38.3 – The U.S. has arrangements for coordinating seizure and confiscation actions with other countries; and for managing and disposing of property frozen, seized, or confiscated whether by on its own behalf or on behalf of a foreign government.

Criterion 38.4 – The U.S shares the proceeds of successful forfeiture actions with countries that made possible, or substantially facilitated, the forfeiture of assets under U.S. law as set out in free-standing international asset sharing agreements or asset sharing provisions within mutual legal assistance agreements and multilateral treaties by 18 USC §981(i), 21

USC §881(e)(1)(E), and 31 USC §9703(h)(2). AFMLS may negotiate case specific, bilateral asset sharing arrangements even in the absence of specific agreement/treaty.

Weighting and Conclusion:

In the context of dual criminality requirements, the gaps identified under R.3 [Money laundering offense] may be a barrier to providing freezing and confiscation assistance, particularly when the predicate offense is not covered in the U.S.

Recommendation 38 is rated largely compliant.¹⁵²

END OF EXCERPT

4.5.2 UK

The details of the UK MLA process are summarized at Section 5.2.

4.5.3 Canada

The details of Canada's MLA process are summarized at Section 5.3.

The 2016 FATF *Mutual Evaluation Report* concluded that Canada is "largely compliant" with FATF Recommendations 37 ("Mutual legal assistance") and 38 ("Mutual legal assistance: freezing and con-fiscation").¹⁵³ The following is an excerpt from the report assessing the Canadian AML/CFT regime:

BEGINNING OF EXCERPT

Recommendation 37 – Mutual legal assistance

In its third MER [Mutual Evaluation Report], Canada was rated LC [Largely Compliant] with former R.36 and SR. V due to concerns about Canada's ability to handle MLA requests in a timely and effective manner and about the lack of adequate data that would establish effective implementation. Canada's legal framework for MLA was supplemented by Canada's new Protecting Canadians from Online Crime Act (PCOCA, in force 9 March 2015). The requirements of the (new) R.37 are more detailed.

Criterion 37.1 – Canada has a sound legal framework for international cooperation. The main instruments used are the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA); the relevant international conventions, the Extradition Act; 57 bilateral treaties on MLA in criminal matters, extradition and asset sharing; and MOUs for the other forms of assistance to exchange financial intelligence, supervisory, law enforcement or other information with counterparts. These instruments allow the country to provide

¹⁵² FATF-US MER, *supra* note 142 at 245-249.

¹⁵³ FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures - Canada*, Fourth Round Mutual Evaluation Report, (Paris: FATF, 2016) [FATF-Canada MER], online (pdf): <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>>.

rapid and wide MLA. In the absence of a treaty, Canada is able to assist in simpler measures (interviewing witnesses or providing publicly available documents), or, based in the MLACMA, to enter in specific administrative arrangements, that would provide the framework for the assistance.

Criterion 37.2 – Canada uses a central authority (the Minister of Justice, assisted by the International Assistance Group – IAG) for the transmission and execution of requests. There are clear processes for the prioritization and execution of mutual legal assistance requests, and a system called “iCase” is used to manage the cases and monitor progress on requests.

Criterion 37.3 – MLA is not prohibited or made subject to unduly restrictive conditions. Canada provides MLA with or without a treaty, although MLA without a treaty is less comprehensive. Requests must meet generally the “reasonable grounds to believe standard, in relation for example to MLACMA ss 12 (search warrant) and 18 (production orders). However, certain warrants (financial information, CC, s.487.018, tracing communications, and new s.487.015) may be obtained on the lower standard of “reasonable ground to suspect.”

Criterion 37.4 – Canada does not impose a restriction on MLA on the grounds that the offense is also considered to involve fiscal matters, nor on the grounds of secrecy or confidentiality requirements on FIs or DNFBPs [Designated Non-Financial Businesses and Professions].

Criterion 37.5 – MLACMA, s.22.02 (2) states that the competent authority must apply *ex parte* for a production order that was requested [on] behalf of a state of entity. In addition to that, the international Conventions signed, ratified and implemented by Canada include specific clauses requiring the confidentiality of MLA requests be maintained.

Criterion 37.6 – Canada does not require dual criminality to execute MLA requests for non-coercive actions.

Criterion 37.7 – Dual criminality is required for the enforcement of foreign orders for restraint, seizure and forfeiture or property situated in Canada. MLACMA, ss.9.3 (3) (a) and (b) and 9.4 (1) (3) (5) (a) (b) and (c) allow the Attorney General of Canada to file the order so that it can be entered as a judgment that can be executed anywhere in Canada if the person has been charged with an offense within the jurisdiction of the requesting state, and the offense would be an indictable offense if it were committed in Canada. This applies regardless of the denomination and the category of offenses used.

Criterion 37.8 – Most, but not all of the powers and investigative techniques that are at the Canadian LEAs’ [law enforcement agencies’] disposal are made available for use in response to requests for MLA. The relevant powers listed in core issue 37.1 are available to foreign authorities via an MLA request, including the compulsory taking of a witness statement (according to MLACMA, s.18).... Foreign orders for restraint, seizure and

confiscation can be directly enforced by the Attorney General before a superior court, as if it were a Canadian judicial order.

Weighting and Conclusion

The range of investigative measures available is insufficient.

Canada is largely compliant with R.37.

Recommendation 38 – Mutual legal assistance: freezing and confiscation

Canada was rated LC with R.38 in the 2008 MER due to the limited evidence of effective confiscation assistance, the rare occurrence of sharing of assets and the fact that Canada executed requests to enforce corresponding value judgments as fines. The framework remains the same.

Criterion 38.1 – Canada has the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize or confiscate laundered property and proceeds from crime (MLACMA, ss.9.3, 9.4 and CC, ss.462.32, 462.33), and instrumentalities used in or intended for use in ML [money laundering], predicate offenses or TF [terrorist financing]. There is, however, no legal basis for the confiscation of property of corresponding value. As was the case during its previous assessment, Canada still treats value-based forfeiture judgement as fines, which has limitations and cannot be executed against the property. If the fine is not paid, it can be converted into a prison sentence. Regarding the identification of financial assets new CC, s.487.018 allows the production of financial registration data in response to requests from foreign states.

Criterion 38.2 – In Canada, MLA is based on the federal power in relation to criminal law. Therefore, the enforcement of some foreign non-conviction based confiscation orders is not possible under the MLACMA because they were not issued by a “court of criminal jurisdiction.” However, in cases where the accused has died or absconded before the end of the foreign criminal proceedings, the MLACMA applies because the matter would still be criminal in nature. Due to Canada’s constitutional division of powers, the Government of Canada cannot respond to a request for civil forfeiture as such requests fall within the jurisdiction of Canada’s provinces. However, most of the Canadian provinces have already adopted legislation on a civil confiscation regime. Even if Canada is not able to provide assistance to requests for cooperation based on NCB proceedings, non-conviction based confiscation is possible under Canadian law. Should a foreign state seek to recover assets from Canada [through] NCB asset forfeiture, it must hire private counsel to act on its behalf in the province where the property or asset is located.

Criterion 38.3 – a) No particular legal basis is required in Canada for the coordination of seizure and confiscation actions. It is a matter primarily for national and foreign police authorities at the stage of seizure. Thus, via direct police-to-police contact, arrangements are made in relation to any relevant case.

b) The Seized Property Management Act sets out the mechanisms for the management and, when necessary, the disposition of property restrained, seized and forfeited ...

Criterion 38.4 – Canada shares confiscated property on a mutual agreement basis, under the Seized Property Management Act, s.11. Canada has 19 bilateral treaties regarding the sharing and transfer of forfeited or confiscated assets and equivalent funds.

Weighting and Conclusion

The seizure and confiscation regime has a deficiency, which is the impossibility of confiscation of equivalent value.

Canada is largely compliant with R.38.¹⁵⁴

END OF EXCERPT

4.5.4 Asia-Pacific Countries

Many Asia-Pacific countries experience significant challenges in making MLA requests to other countries and responding to MLA requests that they receive from other countries. In 1999, some jurisdictions in the Asia-Pacific region began cooperating with each other through the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (which is jointly managed by the OECD and the Asian Development Bank (ADB)) (the Initiative).¹⁵⁵ As of 2021, there are 31 members of the initiative who cooperate on a regional basis. In 2005, the Initiative identified ineffective MLA systems as a serious obstacle to fighting corruption. In 2007, the ADB and OECD published a detailed report on the problems and suggestions for improvement.¹⁵⁶ That report has been followed up by a 2017 ADB/OECD report entitled *Mutual Legal Assistance in Asia and the Pacific: Experiences in 31 Jurisdictions*.¹⁵⁷ This report focuses on common challenges, best practices, and practical tools. Annex B of the report provides statistical data from each country on MLA requests made, received, and rendered.

¹⁵⁴ *Ibid* at 196-198. For more on the law of MLA in Canada, see Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020).

¹⁵⁵ “ADB/OECD Anti-Corruption Initiative” (last visited 8 September 2021), online: OECD <<https://www.oecd.org/site/adboecdanti-corruptioninitiative/>>.

¹⁵⁶ ADB/OECD MLA Report, *supra* note 138 (see 61-72 for a detailed account of mutual legal assistance requests in Asia-Pacific countries).

¹⁵⁷ ADB/OECD Initiative Secretariat, *Mutual Legal Assistance in Asia and the Pacific: Experiences in 31 Jurisdictions* (Paris; Manila: OECD/ADB, 2017), online (pdf): <<https://www.oecd.org/corruption/ADB-OECD-Mutual-Legal-Assistance-Corruption-2017.pdf>>. For more on the MLA request process in Hong Kong, see Wayne Patrick Walsh, “International Recovery of Ill-Gotten Assets” (2011) UNAFEI Resource Material Series No 83 (UN, Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 2011) 48, online (pdf): <https://www.google.com/url?q=https://www.unafei.or.jp/publications/pdf/RS_No83/No83_09VE_Walsh.pdf&sa=D&source=editors&ust=1631074456237000&usg=AOvVaw0amnEj1yMXy-fBvSmd4fkW>.

4.6 Grounds for Refusal of MLA Request under UNCAC and OECD Convention

There are several grounds upon which a jurisdiction can refuse a request for mutual legal assistance. The specific grounds for refusal of a request for mutual legal assistance in the US, UK, and Canada are summarized in Sections 5.1, 5.2, and 5.3.

1. Dual Criminality. A request may be refused where the requested jurisdiction does not criminalize the conduct that the requesting jurisdiction is investigating or prosecuting. The problem may be resolved by employing a conduct-based approach, which involves re-examining the criminal conduct in order to fit the conduct into the criminal law framework of the requested jurisdiction. Some countries, for example Canada, do not require dual criminality for most requests based on treaties.

UNCAC Article 46(9) states the following with respect to the dual criminality requirement:

- (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;
- (b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;
- (c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

The OECD Convention in Article 9 states:

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

2. Essential Interests. Refusal may occur where the execution of the request could prejudice the “essential interests” of the requested jurisdiction (i.e., sovereignty, security, burden on public resources, and public order). Bilateral treaties may specify the essential interests that allow parties to deny mutual legal assistance. UNCAC also allows denial on grounds of essential interests:

Article 46(21). Mutual legal assistance may be refused:

- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests.

The meaning of the terms “essential interests” or “public interests” is not precise, which impairs the effectiveness of international cooperation treaties. Article 5 of the OECD Convention recognizes that the investigation and prosecution of corruption cases can be impacted by “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

3. Assets of *de minimis* value. As mutual legal assistance is resource intensive, UNCAC provides at Article 55(7) that jurisdictions can refuse to assist where the assets involved are *de minimis*.

4. Lack of information. Requests must provide sufficient evidence and information to enable the requested jurisdiction’s authorities to meet evidentiary thresholds in their domestic courts (see Art. 46(21)(a) and Article 55(7)).

5. Lack of due process in requesting jurisdiction. UNCAC Article 46(21)(d) states:

21. Mutual legal assistance may be refused:

- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

6. Double jeopardy and ongoing proceedings or investigations in the requested jurisdiction or severe penalty deemed to be too harsh. A requested state may deny assistance if the accused person has been acquitted or punished for the conduct underlying the request for assistance. They may also deny assistance if there are ongoing proceedings or investigations in the requested state concerning the same crime for which the requesting state seeks assistance.

7. Immunity. Some public officials are provided with immunity, but immunity can be waived or subsequently repealed. For instance, in the Ferdinand Marcos case, the successive Philippines government enabled action to be taken against him by providing a waiver of immunity.¹⁵⁸

8. Bank Secrecy is not a ground for refusing mutual legal assistance. UNCAC Articles 46(8), (22) and 40 state the following:

Article 46 – Mutual legal assistance

¹⁵⁸ Jaime S Bautista, “Recovery of the Marcos Assets” (Paper delivered at the UNAFEI, the Department of Justice of the Republic of the Philippines and the UNODC Regional Centre for East Asia and the Pacific Third Regional Seminar on Good Governance for Southeast Asian Countries, Manila, 9-12 December 2009), *Measures to Freeze, Confiscate and Recover Proceeds of Corruption, Including Prevention of Money Laundering* (Tokyo: UNAFEI, 2010) 72 at 73, online (pdf): <https://www.unafei.or.jp/publications/pdf/GG3/Third_GGSeminar_all.pdf>.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.
22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

Article 40 – Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

OECD Convention provides a similar obligation in Article 9(3).

9. Reasons must be provided for refusing mutual legal assistance.

UNCAC Article 46(23) states:

23. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may also be postponed.

UNCAC Article 46(25) and (26) states:

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

11. Power to Override by Bilateral Agreement. Paragraphs 9 to 29 of UNCAC Article 46 can be overridden by a bilateral agreement, as per Paragraph 7.

4.7 Barriers to MLA

MLA procedures are challenging for developing nations and nearly impossible for failing states due to the complexity and variety of formatting requirements (see

Section 6.1.3). The MLA process is time-consuming and often hindered by the difficulty of tracing the location and ownership of assets.¹⁵⁹

When central authorities for MLA are themselves corrupt, their potential to wreak havoc in MLA procedures is boundless. An example is provided in the case of James Ibori, a former governor of Delta State in Nigeria, who allegedly stole between \$300 million and \$3.4 billion while in public office. Investigations into Ibori by British law enforcement began in 2005. Assistance was provided by Nigeria's Economic and Financial Crimes Commission (EFCC) during the early stages of the investigation. In Nigeria, the Attorney General is the central authority for MLA purposes, and part way through the investigations, Michael Aondoakaa was appointed as the new Attorney General. Aondoakaa actively worked against investigation and prosecution of Ibori, among others, and, in his capacity as central authority, demanded that any evidence provided to the UK by the EFCC be returned. Although Aondoakaa was dismissed in 2010, he provides an example of the potential problems involved in entrusting MLA responsibilities to central authorities in corrupt states.¹⁶⁰

The Abacha Loot

Barriers exist even in relatively successful cases of asset recovery. The Abacha case in Nigeria provides an example of a fairly successful asset recovery effort, although many hurdles were encountered along the way. General Sani Abacha was Nigeria's last military dictator and allegedly pilfered between \$3 to \$5 billion from the country. Nigeria began its efforts to recover the "Abacha loot" in 1999 when it requested Switzerland to assist in freezing Abacha's accounts.

Daniel and Maton describe the successes and challenges encountered in the Abacha saga.¹⁶¹ At the time Daniel and Maton wrote their article in 2013, about \$2.3 billion had been recovered by Nigeria, and other funds have been recovered since then. After sixteen years, Swiss proceedings relating to the Abacha loot were concluded in March 2015 with a decision to return €360 million to Nigeria.

According to Daniel and Maton, Nigeria's ability to maintain political will from 1999 to the present has contributed greatly to successes in the asset recovery process. Nigeria also set up a Special Investigative Panel that uncovered valuable information to assist in MLA requests. In Switzerland, Nigeria was able to take part in proceedings through the *partie civile* procedure. This allowed Nigeria to persuade the Court that the Abacha family was a criminal organization, thereby shifting the burden of proof to the Abacha family to show that their funds were legitimate. Since the Abacha family was unable to do so, Nigeria recovered \$500 million. Nigeria promised to devote the money to projects for the benefit of the Nigerian people and the World Bank was appointed as trustee to ensure the funds were used properly. These proceedings lasted six years in total.

¹⁵⁹ For an in-depth discussion of barriers to MLA and asset recovery, and recommendations for success, see Stephenson et al, *supra* note 2.

¹⁶⁰ Daniel & Maton, *supra* note 113 at 307. See also UN Digest, *supra* note 13 at 11, 70.

¹⁶¹ Daniel & Maton, *supra* note 113 at 299–303.

Along with these relative successes, Daniel and Maton also describe the many challenges encountered during the asset recovery and MLA processes. For example, the UK took four years to provide the information requested by Nigeria. During this time, the Abacha family brought two applications for judicial review in the UK, slowing the process. The Abachas also mounted many challenges to MLA requests in other jurisdictions, using seemingly endless funding for such legal battles. The process of asset recovery was also hindered by Nigerian court judgments that were likely the product of bribes. For example, a Nigerian court complicated the MLA process in the UK by declaring MLA requests unconstitutional. Liechtenstein's Chief Examining Magistrate was also ordered by a court to refrain from interviewing Abacha's eldest son on the basis that such an interview would be against the rule of law and infringe sovereignty. In June 2014, however, Liechtenstein succeeded in returning \$227 million of the Abacha loot to Nigeria. In order to obtain this recovery and end legal challenges against the Liechtenstein proceedings by the Abacha family, Nigeria agreed to drop charges against Abacha's eldest son.

5. STATE-LEVEL ASSET RECOVERY REGIMES

5.1 US

Mutual legal assistance is almost always essential to the pursuit of asset recovery in large-scale corruption cases. The following excerpt from a 2011 StAR/World Bank publication, entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*,¹⁶² starts with a summary of MLA provisions in the US.

BEGINNING OF EXCERPT

United States

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The United States provides assistance directly based on bilateral and multilateral treaties, letters of request, and letters rogatory. The types of assistance available are very broad but, with regard to asset recovery, depend on the provisions of the applicable treaty or convention to a specific case.
- The United States has entered into bilateral MLA treaties with more than 70 jurisdictions.... An agreement was also entered into on June 25, 2003, between the United States and the European Union concerning mutual legal assistance that, among other things, provides a mechanism for more quickly exchanging information regarding bank accounts held by suspects in criminal investigations.

¹⁶² Stephenson et al, *supra* note 2.

- The United States has ratified the Merida Convention and may therefore grant MLA directly based on the provisions of the convention. The United States has also ratified the Inter-American Convention on Mutual Legal Assistance of the Organization of American States; the Vienna, Palermo, and the Financing of Terrorism conventions; the Inter-American Convention against Terrorism; the Inter-American Convention on Letters Rogatory and the Additional Protocol to the Convention; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and the Inter-American Convention against Corruption.
- The United States responds to requests in the form of letters of requests and letters rogatory, as well as to MLA requests, pursuant to US Code Title 28 Section 1782 and US Code Title 18 Section 3512 even in the absence of a treaty relationship. The United States is able to provide broad assistance in response to requests from foreign authorities.

A.2. Legal Preconditions for the Provision of MLA

- Most bilateral MLA treaties do not generally require dual criminality. Some but not all of them require dual criminality with respect to coercive measures ...
- Many forms of assistance based on letters of request or letters rogatory, including the issuance of compulsory measures, do not require dual criminality.

A.3. Grounds for Refusal of MLA

- Grounds for refusals are set out in the applicable bilateral and multilateral agreements, such as Article 7 of the Vienna Convention, Article 18 of the Palermo Convention, and Article 46 of the Merida Convention.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- The Office of International Affairs of the Department of Justice (OIA) is the U.S. central authority for all requests for MLA and coordinates all international evidence gathering.
- OIA has attorneys and support staff with responsibilities and expertise in various parts of the world and in different substantive areas. The OIA executes MLA requests through competent law enforcement authorities.... Requests for freezing, seizing, or confiscation of assets are executed in close cooperation with the Department of Justice's Asset Forfeiture Money Laundering Section.

...

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Most bilateral treaties allow for the provision of MLA during the investigative stage. Equally, OIA may apply to the courts for a production order or a search, freezing, or seizing warrant once an investigation has commenced in the requesting country, depending on the provisions of the MLA treaty or convention at issue.

Tracing

C.2. Available Tracing Mechanisms

- The types of measures available with respect to MLA requests by a specific country and with respect to a specific offense depend on the provisions of the applicable multilateral and bilateral treaties. In general, bilateral treaties allow for a substantial range of measures, including taking the testimony or statements of persons; providing documents, records, and other items; locating or identifying persons or items; serving documents; transferring persons in custody for testimony or other purposes; executing searches and seizures; assisting in proceedings related to immobilization and forfeiture of assets and restitution; collection of fines; and any other form of assistance not prohibited by the laws of the requested state.
- For requests based on letters of request or letters rogatory, OIA, based on US Code Title 18 Section 3512 or Title 28 Section 1782, may request the district court to order any person to give a testimony or statement or to produce a document or other thing for use in proceedings in a foreign tribunal, including in the course of criminal investigations conducted before the filing of formal accusations. Furthermore, OIA may apply to a federal judge for issuance of search warrants and other compulsory measures.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Information covered by financial secrecy may be provided, if necessary by a court order.
- Information subject to professional legal privilege is protected from disclosure.

Provisional Measures (Freezing, Seizing, and Restraint Orders)

C.4. Direct Enforcement of Foreign Freezing and Seizing Orders

- For requests based on a treaty or agreement that provides for assistance in forfeiture (for example, the Merida Convention), US Code Title 28 Section 2467 allows for the registration and subsequent direct enforcement of foreign restraining orders to preserve property that is or may become subject to forfeiture or confiscation. Recent case law has called into question the viability of this option in the prejudgment context, and the Department of Justice is considering the need for a statutory amendment to clarify the congressional intent to enforce foreign prejudgment restraining orders.

- Requests for enforcement of foreign orders have to be submitted, along with a certified copy of the foreign order, to the U.S. attorney general, who will make a final decision on whether to grant the request.

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** US Code Title 28 Section 2467
- **Procedure:** OIA, often in conjunction with the Asset Forfeiture and Money Laundering Section, may apply to the courts for issuance of a restraining order on behalf of the requesting country.
- **Evidentiary requirements:** The United States may initiate domestic seizing proceedings if the requesting country can establish through written affidavit that an investigation or proceeding is under way and that there are reasonable grounds to believe that the property to be restrained will be confiscated at the conclusion of such proceedings. The request has to be made pursuant to a treaty or agreement that provides for mutual assistance in forfeiture, and the foreign offenses that give rise to confiscation also have to give rise to confiscation under U.S. federal law.

...

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** US Code Title 28 Section 2467.
- **Procedure:** Requests for enforcement of foreign orders, including a copy of the foreign order, have to be submitted to the U.S. attorney general, who will in turn make a final decision on whether the request should be granted. If the request is granted, the attorney general may apply to the district court for enforcement.
- **Evidentiary requirements:** The requested state must provide a certified copy of the judgment and submit an affidavit or sworn statement by a person familiar with the underlying confiscation proceedings setting forth a summary of the facts of the case and a description of the proceedings that resulted in the confiscation judgment, as well as showing that the jurisdiction in question, in accordance with the principles of due process, provided notice to all persons with an interest in the property in sufficient time to enable such persons to defend against the confiscation and that the judgment rendered is in force and is not subject to appeal.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- The United States can seek the registration and enforcement of a foreign forfeiture judgment whether it is for specific property or an order to pay a sum of money, whether conviction based or non-conviction based.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- Both domestic and foreign confiscation orders may be executed toward legitimate assets of equivalent value to proceeds or instrumentalities of crime.

D. Types of Informal Assistance

- Assistance may be provided by the Financial Crimes Enforcement Network (FinCEN) (<http://www.fincen.gov/>), as well as U.S. regulatory, supervisory, and law enforcement authorities. However, all requests have to be channeled through FinCEN, which serves as the primary portal through which information may be shared.
- The United States does maintain and use law enforcement attaché offices in foreign jurisdictions primarily by the FBI, ICE, and DEA. The FBI has over 75 offices serving 200 countries. For details, visit [updated link: <<https://www.fbi.gov/contact-us/legal-attache-offices>>]. ICE has offices serving over 40 countries ... [updated link: <<https://www.ice.gov/contact/hsi-international-ops#>>].^{163 164}

END OF EXCERPT

The following excerpt is from a 2011 paper by Jean Weld entitled “Forfeiture Laws and Procedures in the United States of America”:

BEGINNING OF EXCERPT

III. OVERVIEW OF CURRENT U.S. FORFEITURE PROCESSES

A. Preference for Administrative Forfeiture

Each year, the majority, generally over 60 percent, of federal forfeitures in the U.S. are obtained through administrative forfeiture. The reason is that most seizures are not contested. This may seem strange at first, but when one considers that most of the property seized for forfeiture in the U.S. constitutes large bundles of cash, it is readily apparent why many seizures are not challenged, particularly if the person from whom the cash was seized is not arrested or later indicted. No one really wants to come forward to swear that he or she has an interest in such large amounts of generally quite unexplained U.S. currency. Administrative forfeiture is not used for real property or businesses. Since 1990, the Customs laws (19 U.S.C. § 1607, et seq.) have permitted administrative forfeiture of currency and monetary instruments¹⁶⁵ without limit, and of other personal property up to a value of \$500,000.

¹⁶³ [98] Practitioners should contact the nearest United States embassy to determine the appropriate attaché office.

¹⁶⁴ Stephenson et al, *supra* note 2 at 175–179.

¹⁶⁵ [3] Monetary instruments include such items as bank checks, traveller’s checks, money orders, and bearer paper, but not bank or other financial accounts.

An administrative forfeiture usually begins when a federal law enforcement agency seizes an asset identified during the course of a criminal investigation.¹⁶⁶ The investigation may be a purely federal one, or may be a task force which also involves state and/or local law enforcement agencies. The asset seizure must be based upon “probable cause” to believe that the property is subject to forfeiture. Once the asset is seized, attorneys for the seizing agency are required by CAFRA [Civil Asset Forfeiture Reform Act of 2000] to send notice to any persons whom the government has reason to believe may have an interest in the property. Such notice must be sent within 60 days of the seizure if a federal agent seized the property. An administrative forfeiture can also be based upon an “adoptive seizure,” where a state or local officer has seized the property under the authority of state or local law, but then transfers it to federal custody for forfeiture. In that case, the federal adopting agency has 90 days after the seizure within which to send notice.... A person receiving notice has 30 days within which to file a sworn claim with the seizing agency, asking for one of two types of relief: (1) the opportunity to challenge the forfeiture in court; or (2) remission or mitigation from the forfeiture.... If no one files a claim after the deadlines provided in the notice and publication expire, the property is summarily forfeited to the United States. Remission or mitigation may be provided if certain guidelines are met.

B. Civil (Non-Conviction Based) Judicial Forfeiture in the U.S.

In the United States, non-conviction based (“NCB”) forfeiture is known as “civil forfeiture.” This judicial process may be brought at any time prior to or after criminal charges are filed, or even if criminal charges are never filed. It is an action filed in court against a property, not against a person.¹⁶⁷ Once the U.S. Attorney’s Office receives a referral from a seizing agency of a seized asset case, that office has 90 days to either file a civil judicial case or include the seized asset in a criminal indictment and name it for criminal forfeiture. 18 U.S.C. § 983(a)(3)(A). If a civil case is not filed within those 90 days, the CAFRA “death penalty” will prevent the United States from ever filing a civil forfeiture case. 18 U.S.C. § 983(a)(3)(B). If the asset is included in an indictment and the defendant is later acquitted or has a conviction reversed on appeal, the property cannot be forfeited. For this reason, many U.S. prosecutors choose to file a timely civil forfeiture action and include the property for criminal forfeiture in an indictment. The law also allows the prosecutor or the claimant to obtain a “stay” of the civil forfeiture case while a criminal investigation is pending. Thus, if the defendant is convicted of an offence which

¹⁶⁶ [4] In the US, as in most countries, each agency is responsible for the enforcement of a different category of criminal laws: for example, the Drug Enforcement Administration (“DEA”) investigates drug crimes; the Federal Bureau of Investigation (“FBI”) investigates most white collar crime and terrorism; and the Immigration and Customs Enforcement (“ICE”) and Customs and Border Patrol (“CBP”) of the Department of Homeland Security investigate smuggling violations, intellectual property violations, human trafficking, passport fraud, drug violations at the border and bulk cash smuggling. Note that not all federal law enforcement agencies have administrative forfeiture authority.

¹⁶⁷ [5] This is why civil forfeiture actions in the U.S. have names like *United States v. One Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (because civil forfeiture is an in rem proceeding, the property subject to forfeiture is the defendant); *United States v. All Funds in Account Nos. 747.034/278, 295 F.3d 23* (D.C. Cir. 2002) (civil forfeiture actions are brought against property, not people).

will give rise to the forfeiture, the forfeiture may be obtained more easily in the criminal case, although it will not be final until all appeals are exhausted.

Because civil forfeiture does not depend upon a conviction, it may be filed at any time. Often the case will be filed under seal before criminal charges are brought, providing for Warrants of Arrest in Rem to be issued for the assets which may be served by the law enforcement officers at any time. These warrants are similar to seizure warrants, and are issued by the presiding judge in the civil forfeiture case. Rule G(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims (“Rule G(8)”) prescribes the procedures which must be followed in a civil forfeiture action, which include: (1) notice to all potential claimants, even if notice was already provided in an administrative process; and (2) full publication notice by either newspaper or internet. Claimants have 30 days from when they are notified to submit a sworn claim indicating the basis for asserting an interest in the property (even if a claim was already submitted in an administrative case), and must, within 20 days after a Claim is filed, file an Answer with the court directly responding to the allegations in the prosecutor’s judicial complaint. If those deadlines are not met, the prosecutor can seek a “default” judgment of forfeiture, which will generally be granted, particularly if the claimant is represented by counsel who blew the deadlines!

If a timely claim is filed, the case will follow the Federal Rules of Civil Procedure in U.S. District Court. Civil discovery in the nature of interrogatories and depositions may take place. Prior to discovery, either side may file for a judgment on the pleadings. Following discovery, either side may file for summary judgment on legal issues supported by uncontested facts. If the case survives this “motions practice,” either side may request a trial by civil jury of nine persons, of whom a majority must agree on a verdict of forfeiture in order for the property to be civilly forfeited to the United States. The government has to prove by a “preponderance of the evidence” that the property is linked to the underlying crime as alleged.¹⁶⁸ In the United States, civil forfeiture is not available for any type of “value-based” forfeiture judgment, money judgment, or property which is equivalent to the criminally-derived or involved property. Such forfeitures require that the defendant be bound by in personam jurisdiction. Because the jurisdiction in civil forfeiture is in rem, U.S. law requires a “nexus” to the crime – either as proceeds or instrumentality, or – in the case of money laundering – an “involvement in” the crime in some manner.

A Claimant in a civil forfeiture case may take one or both of two approaches to defending a forfeiture: (1) he or she may challenge the government’s ability to sustain its burden to prove the property has a “nexus” to the crime; and/or (2) he or she may assert an “innocent owner” status which would deny forfeiture even if the government proves forfeitability. If the Claimant asserts “innocent owner” status, he or she has the burden to prove that defence by a “preponderance of the evidence”. A civil forfeiture judgment may be appealed from the U.S. District Court to the U.S. Court of Appeals of that federal circuit. The appeal is first heard by a three judge panel; and, the losing party may seek rehearing by the panel or by the entire en banc panel of the circuit’s appellate judges. If

¹⁶⁸ [6] The “preponderance of the evidence” standard is also known in the United States as “more likely than not” and abroad is frequently referred to as a “balancing of the probabilities.”

the case involves a novel issue or one which has created a conflict between any of the eleven federal circuits, then certiorari may be granted by the U.S. Supreme Court.

C. Ease of Criminal Judicial Forfeiture in the U.S.

As previously noted and as in most countries providing for criminal forfeiture, criminal forfeiture in the United States is dependent upon a conviction of a defendant for a crime which provides a basis for the forfeiture.... Over the years, United States criminal forfeiture laws have gradually expanded, and in 2000, CAFRA added 28 U.S.C. § 2461(c) which provides that if any law provides for civil forfeiture, then the prosecutor may also include a criminal forfeiture for the property in a criminal indictment. Now prosecutors often seek parallel civil and criminal proceedings against the same property.

Criminal forfeiture is in personam, against the defendant. One drawback to this type of forfeiture under U.S. law is that only property in which the defendant has a true interest may be forfeited criminally. Property which is held by “nominees” or straw owners on behalf of the defendant may be forfeited criminally, but the government must prove that the defendant is the true owner ...

The greatest advantage which criminal forfeiture holds for prosecutors in the U.S. is that it affords the possibility of a money judgment for the amount of the proceeds of the crime, and property involved in the crime. If that property – for example, the direct proceeds obtained by a fraudulent scheme or the mansion which was used to store narcotics – is no longer owned by or in the possession of the defendant, the government can get a judgment against the defendant for an amount equivalent to the value of that property. Rule 32.2 of the Federal Rules of Criminal Procedure permits the government to seek forfeiture of “substitute assets” belonging to the defendant. The procedure for obtaining criminal forfeiture is a bifurcated process. First, the defendant must be found guilty by proof “beyond a reasonable doubt” by either a judge (if the defendant elects) or by a unanimous twelve person jury. Or the defendant may decide to plead guilty to the charged crimes. Following the entry of a guilty verdict or plea which will support forfeiture, the judge or jury will consider whether the government has shown the required “nexus” between the property named for forfeiture and the crime of conviction. If forfeiture is ordered, a Preliminary Order of Forfeiture is entered against the defendant, which becomes final at sentencing. This order may be appealed, along with the defendant’s convictions. Appeal is taken to the court of appeals for the relevant circuit, and beyond that to the U.S. Supreme Court if the issues are sufficiently important.

The Preliminary Order of Forfeiture must be served on anyone whom the prosecutor has reason to believe may have an interest in the property, and must be published unless it is a money judgment alone. Any interests asserted by third parties are heard in a separate part of the criminal case called an “ancillary proceeding,” which is held after a guilty verdict or plea against the defendant. To the extent that any third party proves by a preponderance of the evidence that he or she has an interest in the forfeited property which is superior to the defendant’s, the court must carve out that interest from the final order of forfeiture.

D. Strategy of Using Criminal vs. Civil Forfeiture Processes

1. Pros and Cons of Civil Forfeiture

(i) Pro: Lower standard of proof of the crime and no need for conviction.

The entire case in a civil forfeiture proceeding need be proven only by a “preponderance of the evidence” to a majority of a jury of nine. Thus, if there are proof problems which may make it difficult to prove the criminal conduct beyond a reasonable doubt to a unanimous jury of twelve, a civil proceeding may be the best venue for the forfeiture. If there are other impediments to obtaining a criminal conviction, such as the absence, death or incapacity of the defendant, a civil forfeiture proceeding will permit the forfeiture of the criminally linked property. This mechanism is exceedingly important in seizures of property, such as currency, where often the prosecutor cannot prove the exact crime which may have generated the unusual amount of cash, but has some evidence of criminal activity – such as a canine alert or ion scan¹⁶⁹ positive hit for the presence of narcotic solvent or drugs on the money, and perhaps previous criminal activity by the property owner which may explain the cash. Because of the lower burden of proof, forfeiture may be available in these cases. Also, if a criminal conviction is reversed on appeal, a civil forfeiture proceeding (which may have been stayed during the course of the criminal case) may rescue the forfeiture.

(ii) Pro: Property belonging to non-defendant parties may be forfeited

In a civil case, the prosecutor does not have to prove that the property owner committed or participated in the commission of the underlying criminal activity. As long as there is proof that the property is sufficiently linked to a crime, and the owner cannot satisfy the test for “innocent owner” by a preponderance of the evidence, the property may be forfeited.

...

(iii) Cons: Deadlines, duplicated resources, and liability for attorney’s fees

The CAFRA “death penalty” mentioned earlier means that if any of the filing deadlines are missed for a seizing agency giving notice, and the prosecutor filing an action, a civil forfeiture action is forever barred. Criminal forfeitures are not subject to any deadlines ...

2. Pros and Cons of Criminal Forfeiture

¹⁶⁹ [7] An ion scan is a portable, state-of-the-art mass spectrometry device which ionizes chemical compounds, generating charged molecules whose mass-to-charge ratios can be measured. Ion scans are used to detect the presence of explosives, drugs and drug residue in parts per billion. Scans can detect the particulate residue of over twelve types of narcotic drugs. In addition to scanning currency for seizure, ion scans are used to inspect cargo containers and luggage, to identify hidden compartments, and for passenger security at many airports.

(i) Pro: Forfeiture is addressed as part of the same proceeding as the criminal offence

Successfully obtaining forfeiture of all of the property sought for forfeiture in the criminal case saves an enormous amount of prosecutorial and judicial resources. Quite often, the court in the civil case will grant a “stay” while the criminal case proceeds. If the defendant reaches a point in the criminal prosecution of entering into an agreement to plead guilty to any of the criminal charges, the prosecutor will obtain – as part of that agreement – an agreement which addresses all of the assets sought for forfeiture. If a plea agreement is not reached and the case proceeds to trial, a criminal forfeiture judgment (including a money judgment) may be obtained based upon the same evidence as produced in the criminal case. Thus, there is no need for extra witnesses, or another court proceeding or another trial in order to obtain the forfeiture ...

(ii) Pro: A money judgment forfeiture is available and no attorney fees

Most significantly, if the property generated from the crime or used to commit the crime is no longer available for forfeiture, the prosecutor may request that the judge or jury enter a money judgment which may be collected against the untainted assets belonging to the defendant.

This money judgment is available for collection for years after the criminal case concludes. Finally, if criminal forfeiture is not successful – either because the defendant is acquitted or because a third party succeeds in obtaining release of the property – the government is not liable for anyone’s attorney’s fees.

(iii) Con: Only the defendant’s property may be forfeited

Because of this limitation, any legally recognized superior interest by a third party – even if that person knew of the criminal nature of the property – must be forfeited in a parallel civil forfeiture case, or it cannot be forfeited. Thus, often both proceedings are required in order to obtain the maximum forfeiture potential under U.S. law.

IV. PROPERTY SUBJECT TO FORFEITURE UNDER U.S. LAW**A. Proceeds Forfeitures**

Although the U.S. forfeiture system provides robust measures which may be used to deprive criminals of their ill-gotten gains, and U.S. prosecutors aggressively use this system to its best advantage, the truth is that it is overly complicated even for American prosecutors and judges. Most countries have enacted generic asset forfeiture laws, such as the Proceeds of Crime Acts (“POCAs”) found in many Commonwealth countries and threshold crimes forfeiture systems enacted in many civil law countries. In the United States, property which can be forfeited either civilly or criminally varies greatly from one offense to another...The Department of Justice has attempted several times to obtain passage of an all crimes approach with the introduction of Proceeds of Crime Act legislation. However, the bill has generally been dead-on-arrival in Congress because there is no apparent urgent need to obtain such a complete overhaul and because of

general political ambivalence toward forfeiture. So, we work with our hodgepodge of statutes the best we can.

The closest to an “all crimes” approach to forfeiture of proceeds in the United States is 18 U.S.C. § 981(a)(1)(C) which authorizes the forfeiture of the proceeds of over 200 state and federal offences. Most of these are subject to forfeiture because they are “specified unlawful activities” (“SUAs”) within the definition of 18 U.S.C. § 1956(c)(7). All of the UN Convention required crimes are included, such as terrorist financing, money laundering, arms smuggling, drug crimes, most varieties of fraud (except tax fraud), corruption, human trafficking, smuggling, counterfeiting, securities violations, violent crimes, and environmental crimes. Others are linked through cross-referencing the RICO law (18 U.S.C. § 1961) to state crimes such as gambling, arson, kidnapping, murder, obscenity and nearly all types of theft. U.S. courts have regarded “proceeds” as including any property, real or personal, tangible or intangible, which would not have been obtained “but for” the commission of the crime. The civil forfeiture law defines “proceeds” in several ways: (1) in cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly, as the result of the commission of the offence giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offence; (2) in cases involving lawful goods or lawful services that are sold or provided in an illegal manner, “proceeds” includes the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services; and (3) in cases involving bank or other financial fraud, “proceeds” for forfeiture purposes excludes any amount of fraudulent obligation which was repaid.

Under U.S. law, “proceeds” will also include any increase in value which has occurred to property generated from criminal activity. For example, if a house bought with drug proceeds increases in value 100 percent in ten years, the entire house is subject to forfeiture. “Proceeds” may also include the value of services and benefits received from criminal activity, such as human trafficking or forced labour, even if the defendant does not actually receive payment for those services. “Proceeds” forfeitures are strong medicine; however, they do require that the police and prosecutors trace the property obtained from the criminal activity, and in today’s era of transnational criminal activity, that endeavour can be difficult, if not impossible, in many cases.

B. Facilitating Property Forfeitures

“Facilitating property” is considered to be any property which makes the criminal activity more likely to occur. This term is the United States’ version of an “instrumentalities” of crime confiscation. Criminal and civil forfeiture of facilitating property has long been permitted in drug cases. Most of the forfeitures permitted under the more generic criminal forfeiture law, 18 U.S.C. § 982, and civil forfeiture law, 18 U.S.C. § 981, apply only to criminal proceeds. Immigration, telemarketing, identity theft, child pornography and alien smuggling are exceptions.

CAFRA added the requirement that in “facilitating property forfeitures”, the prosecutor must prove, by a preponderance of the evidence, that the property had a “substantial connection” to the underlying offence ...

C. Property “Involved In” Money Laundering

U.S. forfeiture law allows the criminal or civil forfeiture of any property which is “involved in” a money laundering offence. 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1). This concept reaches further than “facilitating” or instrumentality property primarily because it allows the prosecutor to forfeit also untainted property which has been commingled with the criminally-related property...The money laundering forfeiture provision is a popular one among U.S. prosecutors.

The primary limitation to its use is the assertion of the 8th Amendment defence of “excessive fines and penalties”.... In *Austin v. United States*, 509 U.S. 602, 622 (1993), the Supreme Court applied the 8th Amendment to civil forfeiture cases, determining that such forfeitures must be limited to property which is, in some way, “proportional” to the underlying crime committed.... [C]ourts generally look to the entire circumstances of a case to determine what is grossly disproportional to the crime, and what is not, for forfeiture purposes.

V. PROVISIONAL RESTRAINT OF PROPERTY UNDER U.S. LAW

Prosecutors in the U.S. must generally determine whether they will seek to seize or restrain assets prior to the initiation of either a criminal or civil forfeiture proceeding. A seizure always precedes an administrative forfeiture proceeding. The law recognizes the obvious principle that if property can effectively be restrained during the pendency of a forfeiture case, restraint is generally preferable to an actual seizure, which often requires significant expenditure of maintenance and storage fees.

A. Restraining Orders

U.S. laws provide a three-stage procedure for obtaining restraining orders against assets sought for either civil or criminal forfeiture. Prior to the initiation of criminal charges, a temporary restraining order (“TRO”) may be obtained for 14 days upon an ex parte application and without prior notice to anyone with an interest in the property. The prosecutor must establish in the application that there is probable cause to believe that the property is subject to forfeiture and that providing notice would jeopardize the availability of the property. The 14 day period may be extended upon good cause shown, permitting serial TRO’s until law enforcement agents have completed their “take down” of a criminal operation. Prior to the expiration of the initial TRO, the prosecutor must serve the order upon any potential parties in interest.

After affected parties have received notice and been given an opportunity to request a hearing, the prosecutor must demonstrate that: (1) there is a substantial probability that the U.S. will prevail on forfeiture and that failure to enter the order could result in the property’s becoming unavailable; and (2) the need to preserve the property outweighs

hardship to the affected parties. The court may then grant a 90-day restraining order, which can be extended upon good cause.

Once a criminal indictment or a civil forfeiture complaint is filed, the prosecutor may obtain a permanent pre-trial restraining order. The reason for this provision is that in either case, an independent entity has found probable cause to believe that the property will be forfeited, thus satisfying possible judicial concerns about violations of the U.S. Constitution's 4th Amendment protections against unreasonable searches and seizures. In a civil forfeiture, the judge makes that determination based on the civil complaint; in a criminal forfeiture, the grand jury makes the determination based upon allegations in the indictment ...

B. Seizure Warrants

Civil and criminal seizure warrants are both available, with slightly different standards. A civil seizure warrant may be issued by the court upon probable cause to believe the property is subject to forfeiture (18 U.S.C. § 981(b)), which is usually accomplished by an affidavit sworn to by a law enforcement officer. This seizure warrant is used for most administrative seizures.

A criminal seizure warrant requires not only a showing of probable cause for forfeiture, but also that a restraining order is insufficient to maintain the property (or its value) for forfeiture. This provision confirms that restraint during the course of a forfeiture proceeding is preferable; but if the government learns that property is being transferred, damaged, or destroyed, a criminal seizure warrant would be available.

C. Management of Restrained or Seized Assets

... [I]ssues of asset management should be considered when deciding whether and when to restrain or seize property subject to forfeiture. For example, most vehicles and other modes of transportation, such as boats, motorcycles, and recreational vehicles, are generally seized because of the depreciation in their value through continued use. Prior to seizure, a computation should be undertaken as to whether the overall costs of seizing, storing and maintaining the asset will be less than the anticipated sales price.

...

Most financial accounts should generally be simply restrained pending the outcome of the proceeding. Some investment accounts may need to be liquidated or converted with court approval to maintain their value.

D. Provisional Restraint of Assets Overseas

U.S. courts have extraterritorial jurisdiction over assets which are named in either a civil forfeiture action or a criminal indictment. The court may order a criminal defendant to "repatriate" any property named for criminal forfeiture. 18 U.S.C. §853(e)(4). Penalties for a failure to comply with a repatriation order can include a finding of contempt and/or a

sentencing enhancement to the defendant for obstruction of justice. Civil forfeiture provisions do not have a repatriation option, but the court can take “any action to seize, secure ...” the availability of property subject to civil forfeiture, which would include ordering any claimants to the case to take action with respect to foreign assets.^{170 171}

END OF EXCERPT

The 2016 US FATF *MER* notes that the federal authorities aggressively pursue high-value confiscation in large and complex cases and in respect of assets located both domestically and abroad.¹⁷² The law enforcement agencies at the federal level give high priority to both criminal and civil forfeiture and seek orders forfeiting property of equivalent value as a policy objective.¹⁷³ Although there is not much information available at state and local levels, it appears that civil forfeiture is actively pursued by some states.¹⁷⁴

In the US, domestic asset repatriation and restitution are managed at the federal level by the Department of Justice Assets Forfeiture Funds (DOJ-AFF)¹⁷⁵ and the Treasury Forfeiture Fund (TFF).¹⁷⁶ In the 2014 fiscal year, the combined value of assets in the DOJ-AFF and the TFF was about \$4.6 billion,¹⁷⁷ and between fiscal years 2010 and 2015, \$2.9 billion in forfeited assets was distributed to victims from the DOJ-AFF.¹⁷⁸ During the 2014 fiscal year, the TFF paid \$93.3 million in restitution to victims and shared \$68.5 million with other authorities and \$921,000 with foreign countries.¹⁷⁹ Asset recovery is facilitated by specialized units

¹⁷⁰ [9] One caveat our prosecutors must keep in mind is that if they have made an MLAT request to a foreign country asking the government to restrain assets, that restraint must be lifted before a repatriation order can be complied with.

¹⁷¹ Jean B Weld, “Forfeiture Laws and Procedures in the United States of America” in UNAFEI Resource Material Series No 83, *supra* note 157, 18, at 20–26, online (pdf): <https://www.unafei.or.jp/publications/pdf/RS_No83/No83_06VE_Weld1.pdf>.

¹⁷² FATF-US MER, *supra* note 142 at 4, 50.

¹⁷³ *Ibid* at 75.

¹⁷⁴ *Ibid* at 4.

¹⁷⁵ “Assets Forfeiture Fund (AFF)” (last updated 23 April 2021), online: DOJ <<https://www.justice.gov/afp/fund>>.

¹⁷⁶ “Treasury Executive Office for Asset Forfeiture (TEOAF)” (last visited 8 September 2021), online: US Department of the Treasury <<https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/treasury-executive-office-for-asset-forfeiture-teoaf>>.

¹⁷⁷ FATF-US MER, *supra* note 142 at 79.

¹⁷⁸ *Ibid* at 80–81. The US Department of Justice (DOJ) reports that “Since 2000, DOJ has returned over \$9 billion in assets to victims of financial fraud and theft ... with additional distributions anticipated in calendar year 2021”: US, DOJ, *Asset Forfeiture Program: FY 2022 Performance Budget, Congressional Justification* (Washington: DOJ, 2021) at 2, online (pdf): <<https://www.justice.gov/doj/page/file/1246261/download>>.

¹⁷⁹ FATF-US MER, *supra* note 142 at 81. More recently, see US, Department of the Treasury, Office of Inspector General, *Audit of the Department of the Treasury Forfeiture Fund’s Financial Statements for Fiscal Years 2019 and 2018* (Washington: Department of the Treasury, 2019) at 10, 13, online (pdf): <https://oig.treasury.gov/sites/oig/files/Audit_Reports_and_Testimonies/OIG-20-020.pdf> which states that “[t]he Fund expensed \$62.7 million for state and local and foreign equitable sharing expenses in FY 2019 as compared to \$138.5 million in FY 2018” (\$314,000 of which went to foreign countries in 2019), and that “[d]uring FY 2019, the Fund paid \$83.2 million in restitution to victims as

within the DOJ Money Laundering and Asset Recovery Section (MLARS), such as the International Unit (which includes the Kleptocracy Team), the Money Laundering and Forfeiture Unit and the Special Financial Investigations Unit,¹⁸⁰ as well as other DOJ units like the Organized Crime Drug Enforcement Task Force (OCDETF).¹⁸¹

The gaps in the US asset recovery legal framework include the fact that not all predicate offenses include the power to forfeit instrumentalities, as well as the lack of general power to obtain an order to seize or freeze property of corresponding/equivalent value which may become subject to a value-based forfeiture order.¹⁸² The *MER* recommends ensuring that all predicate offenses include the power to forfeit instrumentalities; that law enforcement authorities are able to seize and freeze pre-conviction, non-tainted assets that are likely to be required to satisfy a value-based forfeiture order in criminal proceedings; and that the AML proceeds recovery activities and statistics at the state level are more widely available.¹⁸³

The case of Teodoro Obiang, Second Vice President of Equatorial Guinea, provides an example of successful asset recovery by the US DOJ. Civil forfeiture actions against various assets in the US were settled in October 2014. Under the settlement, Obiang was required to forfeit a house in California, Michael Jackson memorabilia and a Ferrari, collectively worth over \$30 million. The case brought under the Kleptocracy Asset Recovery Initiative, which was launched by the DOJ in 2010 and established a dedicated team of prosecutors, investigators and financial analysts for investigation and prosecution in asset recovery cases. In accordance with the Initiative's goals, the recovered funds were to be used for the benefit of the citizens of Equatorial Guinea. \$20 million was set aside for a private charitable organization in Equatorial Guinea, while \$10 million was to be forfeited to the US and used for the benefit of the people of Equatorial Guinea to the extent permitted by law.¹⁸⁴

compared to \$524.8 million in FY 2018."

¹⁸⁰ "Money Laundering and Asset Recovery Section (MLARS)" (last visited 8 September 2021), online: DOJ <<https://www.justice.gov/criminal-mlars>>.

¹⁸¹ FATF-US MER, *supra* note 142 at 77 (note however that there have been some changes to the organizations since this publication, and the correct groups are noted above).

¹⁸² *Ibid* at 50, 78.

¹⁸³ *Ibid* at 51, 78.

¹⁸⁴ Department of Justice, 14-1114, Press Release, "Second Vice President of Equatorial Guinea Agrees to Relinquish More Than \$30 Million of Assets Purchased with Corruption Proceeds" (10 October 2014), online: <<http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased>>. For commentary on the process and the challenges of returning successfully-recovered assets, and more specifically, the Obiang settlement, see Matthew Stephenson, "Whatever Happened with that Charity that the Obiang Settlement was Supposed to Fund?" (23 April 2019), online (blog): *The Global Anticorruption Blog* <<https://globalanticorruptionblog.com/2019/04/23/whatever-happened-with-that-charity-that-the-obiang-settlement-was-supposed-to-fund/>>; Transparency International France, Press Release, "Definitive Conviction of Teodorin Obiang in France Sends Strong Message, Allows Asset Restitution to Equatorial Guinea" (30 July 2021), online: *TI* <<https://www.transparency.org/en/press/teodorin-obiang-conviction-asset-recovery-equatorial-guinea-france#>>; and Sarah Saadoun, "How to Return Stolen Assets Responsibly: Civil Society Groups Develop New Principles", *Human Rights Watch* (10 November 2020), online: <<https://www.hrw.org/news/2020/11/10/how-return-stolen-assets-responsibly>>.

5.2 UK

In their book *Corruption and Misuse of Public Office*, Nicholls et al. summarize the various options in the UK for restraining and recovering the proceeds of crime in both the criminal and civil realms. The following is a summary based on their book.¹⁸⁵

Criminal confiscation and restraint orders are used to assist asset recovery in criminal proceedings. The Crown Court exercises confiscation powers under the *Proceeds Of Crime Act 2002 (POCA)*.¹⁸⁶ Confiscation in the UK is value-based, meaning a defendant must pay a sum equal to the value of the benefits accrued through criminal conduct. The prosecution might also request a compensation order for victims, since otherwise confiscated assets are forfeited to the Crown. The court may also decline to make a confiscation order if the victim intends to pursue proceedings against the defendant.

In confiscation proceedings, the court will consider whether the defendant has a criminal lifestyle, which reverses the burden of proof, requiring the defendant to demonstrate that assets were acquired legitimately. A defendant will have a criminal lifestyle if they are convicted of offences in Schedule 2 of *POCA* (money laundering offences are included, but bribery offences are not), have committed an offence over a period of at least six months and benefitted from it, or have been convicted of a combination of offences that comprise a “course of criminal activity.” If the defendant does not have a criminal lifestyle, the court will consider whether they benefitted from particular criminal conduct when determining the recoverable amount.

Restraint orders are a key pre-confiscation tool that prevent dissipation of assets during criminal proceedings. Any property in which the defendant has a legal or beneficial interest will be targeted, including jointly held property and tainted gifts to third parties. Reasonable living expenses are allowed for the defendant. Restraint orders may be accompanied by disclosure orders and repatriation orders, which may require, for example, repatriation of money in offshore accounts.

POCA also provides for non-conviction based forfeiture. The applicant must prove on a balance of probabilities that the assets were obtained through unlawful conduct, including conduct occurring abroad, and that the property is in fact held by the defendant. However, NCB forfeiture, unlike confiscation, does not have a mechanism for compensation orders for victims. A victim can, however, claim a legitimate interest in recovered property, as the Nigerian government did in order to recover £1 million in the *Alamieseigha* case in 2007.

In private actions, claimants have a variety of options to assist in the tracing and preservation of assets during proceedings. The most important is the freezing injunction, discussed in

¹⁸⁵ Colin Nicholls QC et al, *Corruption and Misuse of Public Office*, 3rd ed (New York: Oxford University Press, 2017) at 273–297. See also, “Proceeds of Crime” (last updated 19 December 2019), online: *Crown Prosecution Service* <<https://www.cps.gov.uk/legal-guidance/proceeds-crime>>.

¹⁸⁶ *Proceeds of Crime Act 2002* (UK), c 29 [*POCA*]. For a detailed report of asset recovery data from 2016–2021, see Home Office, “Asset Recovery Statistical Bulletin: Financial Years Ending 2016 to 2021” (9 September 2021), online: *UK Government* <<https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2016-to-2021>>.

more detail below. Claimants can also apply for search and seizure orders, which will be carried out by the claimant's counsel and an independent solicitor, as well as bankers' books orders which allow the claimant's legal team to inspect bank records without notice to the defendant. Finally, claimants in private actions can also seek injunctions to preserve assets and evidence.

The following excerpt from the 2011 StAR/World Bank publication entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*¹⁸⁷ describes the use of restraint and recovery mechanisms when foreign jurisdictions are involved, with a focus on MLA procedures.

BEGINNING OF EXCERPT

United Kingdom

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The *Crime (International Co-operation) Act (CICA)* [updated link: <http://www.legislation.gov.uk/ukpga/2003/32/contents>] allows for the provision of mutual legal assistance to any country.
- The *Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (POC)* [updated link: <http://www.legislation.gov.uk/uksi/2008/302/contents/made>] allows for the issuance of restraint warrants and the confiscation of assets upon request or based on an order issued by a foreign country in both conviction based and non-conviction based proceedings.
- The *Criminal Justice (International Cooperation) Act 1990 (Enforcement of Overseas Forfeitures) Order (CRIJICA)* [updated link: <http://www.legislation.gov.uk/ukpga/1990/5/contents>] regulates the restraining and forfeiture of the instrumentalities of crime upon request or based on an order issued by a foreign country.
- The United Kingdom has entered into [at least 40 bilateral MLA agreements¹⁸⁸]....
- The United Kingdom is a party to the following multilateral agreements, which include provisions on mutual legal assistance: the Merida, Vienna, and Palermo conventions; the European Convention on Mutual Legal Assistance in Criminal Matters and Additional Protocol; the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and Protocol to the Convention on Mutual Assistance in Criminal Matters

¹⁸⁷ Stephenson et al, *supra* note 2.

¹⁸⁸ UK, International Criminality Unit, *International MLA & Extradition Agreements the UK is Party To*, (Home Office, 2016), online(pdf): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/516418/Treaty_List.pdf.

between Member States of the European Union; and the Harare Scheme. However, the United Kingdom may provide MLA directly based only on domestic law and not on international treaties.

A.2. Legal Preconditions for the Provision of MLA

- Reciprocity is generally not required for the provision of MLA.
- Dual criminality is not required for most measures under the CICA. However, requests for search and seizure for evidentiary reasons as well as restraint and confiscation of assets are subject to dual criminality; that is, they cannot be executed unless the underlying criminal conduct would be an offense under U.K. law.

A.3. Grounds for Refusal of MLA

- Requests involving double jeopardy will not be executed.
- Requests relating to offenses punishable with the death penalty or relating to trivial offense may be refused.
- Requests that affect the U.K. national security or other U.K. essential interests may be declined.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- For assistance in England, Wales, and Northern Ireland, the U.K. Home Office, Judicial Cooperation Unit, is the central authority to receive all requests for MLA.
- ...
- The central authorities ensure that requests meet the form requirements and the requirements under U.K. law and subsequently disseminate requests to the relevant domestic authorities for implementation.
- ...

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Measures pursuant to CICA Sections 13–15 as well as account and customer information orders may be issued as soon as an investigation for an offense has been initiated in the requesting country.
- ...
- Search and seizing orders in England, Wales, and Northern Ireland (CICA Section 17) may be taken only if criminal proceedings have been instituted or an arrest been made in the requesting country.

*Tracing***C.2. Available Tracing Mechanisms**

- Obtaining of Evidence (CICA Sections 13–15): Evidence gathering orders may be issued if a request is made in connection with criminal proceedings or a criminal investigation in the requesting state. In England, Wales, and Northern Ireland, suspects cannot be compelled to attend court or be coerced to provide evidence under oath for the purposes of MLA ...
- CICA Section 17: Search and seizing warrants for England, Wales, and Northern Ireland may be issued if criminal proceedings have been instituted or an arrest has been made in the requesting country; if the conduct in question would constitute an arrestable offense had it been committed in the United Kingdom; and if there are reasonable grounds to suspect that evidence is in the United Kingdom relating to the offense ...
- Customer Information Orders (CICA Sections 32 and 37): Orders may be issued requiring a financial institution to provide any customer information it has relating to the person specified in the order if the specified person is subject to an investigation in the requesting country, if the investigation concerns serious criminal conduct, if the conduct meets dual criminality, and if the order is sought for the purposes of the investigation. A customer information order has effect regardless of any restrictions on the disclosure of information that would otherwise apply.
- Account Monitoring Orders (CICA Sections 35 and 40): Orders may be issued requiring a financial institution specified in the application to provide account information of the description specified in the order and at the time and in the manner specified if there is a criminal investigation in the requesting country and if the order is sought for the purposes of the investigation ...
- Interception of Telecommunication: This measure is available only to parties of the EU Convention on Mutual Legal Assistance in Criminal Matters.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Customer or account information orders pursuant to CICA Sections 32, 37, 35, and 40 have effect regardless of any restrictions on the disclosure of information that would otherwise apply. Therefore, they may also be used to obtain information covered by banking secrecy.
- Information covered by legal privilege is protected and may not be subject to search and seizing warrants.

*Provisional Measures (Freezing, Seizing, and Restraint Orders)***C.4. Direct Enforcement of Foreign Freezing and Seizing Orders**

- **Legal basis:** Foreign freezing orders are executed through CICA Sections 17 and 18.

- **Procedure:** Direct application of foreign freezing orders through a decision by the territorial authority for the part of the United Kingdom in which the evidence to which the order relates is situated. Only orders relating to criminal proceedings or investigations for an offense listed in the CICA may be directly applicable ...

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** POC Articles 8, 58, and 95.
- **Procedure:** Countries may apply for issuance of a restraint order by the Crown Court.
- **Evidentiary requirements:** An order may be issued if a criminal investigation has been started in the requesting country or proceedings for an offense have been initiated and not concluded in the requesting country and if there is reasonable cause to believe that the alleged offender named in the request has benefited from his criminal conduct. The POC provides for the seizing order to extend to any “realizable property,” which is defined to include any free property held by the defendant or by the recipient of a tainted gift.

...

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** POC Articles 21, 68, and 107.
- **Procedure:** Foreign conviction-based confiscation orders may be registered and subsequently directly enforced in the United Kingdom if the Crown Court is satisfied that the conditions of the POC are met.
- **Evidentiary requirements:** A foreign confiscation order may be executed if it was made based on a conviction, if it is in force and final, if giving effect to the order will not violate any rights of the Human Rights Act of 1998, and if the property specified in the order is not subject to a charge under U.K. law.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- POC Articles 143 ff. allow for the registration and implementation of (civil) forfeiture orders. Article 147 permits an application for a property freezing order to preserve property so that it is available to satisfy an external order enforced in the United Kingdom by means of civil recovery.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- Criminal confiscation in the United Kingdom is value-based, that is, the defendant’s proceeds of crime are calculated as a value and the defendant is then ordered to pay that amount. Therefore, equivalent-value confiscation is possible.

D. Types of Informal Assistance

- Informal assistance may be provided by the police; the Serious Organized Crime Agency (FIU) (<http://www.soca.gov.uk/>), and the Financial Services Authority (<http://www.fsa.gov.uk/>).
- The United Kingdom has attaché offices in France, Italy, Pakistan, Spain, and the United States.^{189 190}

END OF EXCERPT

The following is an excerpt from the Basel Institute on Governance's *Tracing Stolen Assets: A Practitioner's Handbook*, published in 2009:¹⁹¹

BEGINNING OF EXCERPT

II. Freezing orders

1. Background

The order takes its name from *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509. The Civil Procedure Rules now refer to it as a freezing injunction (CPR 25.1(1)(f)). It developed as a form of recourse against foreign-based defendants with assets within the UK and consequently the early authorities assumed that the injunction was not available against English-based defendants. In the same vein an early judicial guideline for the grant of the order required claimants to establish a risk of the removal of assets from the jurisdiction.

Section 37(3) of the Supreme Court Act 1981 now provides that the injunction may be granted to prevent defendants from removing from the jurisdiction 'or otherwise dealing with' the assets. Section 37 forms the basis of the jurisdiction for granting freezing injunctions 'in all cases in which it appears to the court to be just and convenient to do so'. The Court of Appeal held in *Babanaft International Co. S.A. v Bassatne* [1990] Ch. 13 that the wording of subsection 3 did not restrict the scope, geographical or otherwise, of s.37(1).

¹⁸⁹ [97] Practitioners should inquire with the nearest British High Commission to determine the nearest attaché. [Update — the Serious Organized Crime Agency was replaced by the National Crime Agency in 2013. See <<https://www.nationalcrimeagency.gov.uk/>>].

¹⁹⁰ Stephenson et al, *supra* note 2 at 170–174.

¹⁹¹ *Tracing Stolen Assets*, *supra* note 38 at 90–99. See also "Practice Direction – Civil Recovery Proceedings" (last updated 21 March 2018), online: *Justice* <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/civilrecovery_pd#IDAJBVL>. For a discussion of Property Freezing Orders under POCA, see Nicholls et al, *supra* note 185 at 292–294. For more on the recent Account Freezing Orders and Account Forfeiture Orders, see Jonah Anderson, Joseph Carroll & Lucy Rogers, "Dealing with Account Freezing and Account Forfeiture Orders" (5 May 2021), online: *White & Case* <<https://www.whitecase.com/publications/alert/dealing-account-freezing-and-account-forfeiture-orders>>.

The Civil Procedure Rules currently provide that the injunction may be granted in relation to assets 'whether located within the jurisdiction or not' (CPR 25.1(1)(f)).

2. Purpose and effect

A freezing order prohibits D from unjustifiably dissipating his assets within the jurisdiction so that there are insufficient or no assets left to satisfy a judgment against him. To preserve assets pending enforcement, a freezing order can also be obtained post-judgment. If D has insufficient assets within the jurisdiction to meet the quantum of C's claim, the court can grant a worldwide freezing order.

3. Penal notice

Freezing orders, as well as search orders, are endorsed with a Penal Notice, which warns that disobedience of it may be regarded as contempt of court[, the penalty for which may be imprisonment, a fine or seizure of assets. Contempt may extend to any third parties who are notified of the order and do anything which helps or permits a breach [of] its terms. However, since the English court has no jurisdiction over third parties located abroad, the worldwide order has to be recognised, registered or enforced by the relevant foreign courts to be effective. This process is often described as 'domesticating' the English order.

The orders usually freeze assets up to a financial limit, calculated according [to] the value of C's claim with likely legal costs and interest taken into account ...

A freezing order bites on the individual not his assets (*in personam*) and as such it does not grant any proprietary rights over the assets of D. It therefore does not confer on C any advantage in the event of D's insolvency ...

4. Asset disclosure

The standard freezing order requires D to give details of the value, location and details of assets within the jurisdiction or elsewhere, for a worldwide freezing order. This enables C to identify the whereabouts of the assets and notify third parties of the freezing order. D may refuse to provide some or all of this information if in providing it, he is likely to incriminate himself. The assertion of self incrimination privilege has been much curtailed in the United Kingdom (UK) by the Fraud Act 2006 – and in practical terms by the fact that reliance on the privilege is generally regarded as in effect an admission of liability ...

5. Application and requirements

The application to the court for a freezing order, as well as a search order, is almost invariably made *without notice* to D (*ex parte*).... This is done so as not to 'tip off' D and T about C's intention to commence proceedings or to take any legal steps to secure assets and/or evidence ...

6. Grounds

In order to obtain a freezing order, C needs to show:

- A good arguable case; and
- A real risk of unjustifiable dissipation of assets; and
- That the order is just and convenient in all the circumstances

The court will not automatically conclude that because D is alleged to be dishonest he cannot be trusted not to dissipate his assets. Careful consideration should therefore be given in the evidence to the profile and background of D.

7. Cross-undertaking in damages

The court will require C to give a 'cross-undertaking in damages' which is a promise to comply with any order that it may make if it decides that the freezing order caused loss to D and that D should be compensated for that loss. This may include provision of security to fortify the cross-undertaking in damages.

8. Full and frank disclosure

On a *without notice* application the court is being asked to grant a hugely intrusive order against D who has not had a chance to be heard. Therefore C and his lawyers must give full and fair disclosure of all the material facts, including what D is likely to argue in his defence, or against C, or any facts likely to be relied upon. If there has not been full and frank disclosure, there is a real risk that the court will set aside the order.

...

III. Proprietary injunctions

If C contends that D is holding C's property (which can include cash) or the traceable proceeds of his property (the '*proprietary assets*') then the court can grant a proprietary freezing injunction. Its terms are typically more draconian than a standard (non-proprietary) freezing order and can restrain any dealings with the proprietary assets so that D cannot use them to pay for living or legal expenses.

When applying for a proprietary injunction, C needs to show a good arguable case and that it is just and convenient that the order be granted. He does not need to establish a risk of dissipation, because the nature of C's claim is that D is holding his assets or the proceeds of those assets. As a result the proprietary injunction does give C priority over D's creditors on the asset pool.

IV. Ancillary orders

The English courts have developed a number of orders to assist victims of fraud and corruption in their fight against those who attempt to delay and obfuscate. These include specific disclosure orders, which require disclosure of particular documents to help

identify the nature and location of assets or passport orders requiring delivery up of all travel documents and prohibiting D from leaving the jurisdiction.... Third party disclosure (*Norwich Pharmacal*) orders require third parties who are mixed up in the wrongdoing (whether innocently or not) to disclose information that will assist in the identification of wrongdoers, allow assets to be traced and to establish the validity of proprietary claims against third parties or tracing assets into the hands of third parties. Banks through which stolen funds are believed to have passed are an obvious target for such orders.

In addition, third party freezing orders can be obtained against third parties but only where there is good reason for believing that assets ostensibly held by third parties are in reality D's assets. This is known as the *Chabra* jurisdiction. These orders are particularly useful where D has structured his affairs through sham trusts or other opaque vehicles so as to give the impression that he has no interest in the assets in question.

A critical weapon for the claimants is to be found in section 25 of the Civil Jurisdiction and Judgments Act 1982. Section 25 allows an English court to grant interim relief in aid of proceedings elsewhere. These are commonly invoked where assets are located in England, but D is located outside the jurisdiction, in the place where the substantive proceedings are being conducted. It is not necessary for foreign proceedings to have been commenced as long as they will be commenced. One can obtain relief in England – subject to demonstrating a sufficient geographical nexus – which cannot be obtained in the location of the substantive action.

...

3. General

As technology advances daily, the English Courts have shown themselves, time and again, to be adept and creative in assisting the victim claimant to recover the proceeds of fraud and corruption. The last years have seen an explosion of applications made under Section 25 Civil Jurisdiction and Judgment Acts (see section IV, last paragraph) – this enables the Courts on application without notice by the victim to utilise the panoply of weaponry available to the Court to assist a foreigner with jurisdiction in its pursuit of the fraudster or corrupt official. The dictator, the businessman, the ex-politician or the 419 crook against whom proceedings have been started or are about to be started in a host domestic state – wherever in the world that may be – can find themselves the subject of International Freezing and Tracing Order relief where proceedings are commenced in England on the basis that there is sufficient nexus with England and Wales to justify it. The nexus can be in terms of the location of property, perhaps a small shareholding in an operating company in which the defendant has a claimed beneficial interest, even if owned offshore but beneficially by him, or by the simple expedient of him being present in England and Wales at a particular time so that service upon him, *in personam*, can be effected.

END OF EXCERPT

In 1980, the *Bankers Trust* case¹⁹² introduced a new type of disclosure order which requires a bank to furnish information about assets and transactions normally protected by the bank's duty of confidentiality. In the case involving Nigeria's last military dictator General Sani Abacha, a UK court was requested to issue a Bankers Trust order requiring named banks to disclose copies of bank statements, account opening forms, customer information, debit and credit notes, as well as internal bank memoranda regarding the operation of the accounts.¹⁹³ As a result, disclosure was obtained from about twenty banks on approximately 100 Abacha family members, associates and corporate entities.¹⁹⁴

The following is an excerpt from a 2009 StAR/World Bank publication entitled *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*:

BEGINNING OF EXCERPT

The Assistance of U.K. Law Enforcement

When trying to trace, freeze, and recover the illicit gains of a corrupt official found either to be in or to have been laundered through the United Kingdom, a foreign state may do one of the following:

- Invoke the mechanism of mutual legal assistance, and working with a U.K. law enforcement agency either
 - restrain assets¹⁹⁵ (during a criminal investigation) and having obtained a criminal conviction in the foreign state, enforce its own recovery order in England and Wales¹⁹⁶; or
 - freeze assets and having obtained either an NCB or conviction based asset recovery order in the foreign state, give effect to that order by means of an NCB asset forfeiture order in England and Wales (known in the United Kingdom as civil recovery).¹⁹⁷
- Invite a U.K. law enforcement agency to adopt the case for investigation with a view to bringing in England and Wales

¹⁹² *Bankers Trust v Shapira*, [1980] 1 WLR 1274 (QBD). Martin Kenney discusses the value of Bankers Trust orders in his blog post: see Kenney, *supra* note 105.

¹⁹³ For more details about the so-called "Abacha loot" see Section 4.7.

¹⁹⁴ UN Digest, *supra* note 13 at 40-41.

¹⁹⁵ [212] Requests will go through the United Kingdom Central Authority (with the exception of requests seeking enforcement via the NCB route, which should go through the High Court of England and Wales), which passes it to the appropriate law enforcement agency, such as the Serious Organised Crime Agency (SOCA), the Crown Prosecution Service (CPS), Her Majesty's Revenue and Customs (HMRC), or the Serious Fraud Office (SFO).

¹⁹⁶ [213] *Proceeds of Crime Act 2002* (United Kingdom) Part 11 and Order in Council 2005/3181 Parts 2, 3, and 4 re cooperation in the recognition and enforcement of foreign, conviction-based asset recovery orders.

¹⁹⁷ [214] *Proceeds of Crime Act 2002* (United Kingdom) Part 11 and Order in Council 2005/3181, Part 5 re the cooperation in the recognition and enforcement of foreign, NCB asset recovery orders.

- a criminal prosecution in the United Kingdom (if that is feasible) and if a conviction is obtained, seek a criminal confiscation order;
- cash detention and forfeiture (if applicable); or
- NCB asset forfeiture proceedings (civil recovery) and seek a civil recovery order.

If a criminal confiscation order is obtained, a compensation order (in favor of a victim) may also be made in the same case. A foreign state may also, therefore, intervene in criminal confiscation proceedings and seek a compensation order. A criminal confiscation order requires the defendant to pay back the value of the benefit from a given crime (the proceeds).¹⁹⁸ If there are insufficient funds with which to fulfill both a criminal confiscation order and a compensation order, the court can require a proportion of the realized assets under the criminal forfeiture order to be used to discharge the compensation order.¹⁹⁹ A detailed consideration of this area is outside the scope of this contribution.

In proceedings for NCB asset forfeiture, the true owner of property is entitled to seek a declaration from the civil court that he has a valid claim to the property (or property which it represents) because it was unlawfully taken from him.²⁰⁰

If either a conviction based confiscation or NCB asset forfeiture order is registered and enforced in England, the recovered property (or money equivalent) is not automatically transmitted to the foreign state and the English court has no power with which to remit the property to the foreign jurisdiction. Instead, the proceeds of the recovered property (or money equivalent) are placed in the U.K. Government's Consolidated Fund. Some countries have entered into asset-sharing agreements with the United Kingdom in respect of conviction based confiscation cases. These, however, are not thought to apply to NCB asset forfeiture. The United Kingdom is taking steps to enter into either bilateral treaties or memoranda of understanding with foreign states with regard to NCB asset forfeiture. Asset sharing agreements may also be entered into on a case-by-case basis. With respect to corruption cases, the United Kingdom has ratified UNCAC, and as such is mindful of its obligations under that Convention.²⁰¹

END OF EXCERPT

¹⁹⁸ [215] *Proceeds of Crime Act 2002* (United Kingdom), Section 6, and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24. In confiscation proceedings it is not necessary to link a particular crime to a particular benefit. The court can, therefore, assume that all of the defendant's properties held over the previous six years are the proceeds of crime. This is known as the option of "general criminal conduct confiscation." Prior to the making of the confiscation order a restraint order may be obtained from the court to prevent the dissipation of assets that may later need to be sold to satisfy the confiscation order.

¹⁹⁹ [216] *Proceeds of Crime Act 2002* (United Kingdom), Section 13 (5)–(6).

²⁰⁰ [217] *Proceeds of Crime Act 2002* (United Kingdom), Section 281.

²⁰¹ Greenberg et al, *supra* note 40 at 120. For more on the UK, see: "Asset Recovery Guide United Kingdom 2017" (1 December 2017), online: *StAR* <<https://star.worldbank.org/resources/asset-recovery-guide-united-kingdom-2017>>. For recent updates on and evaluation of confiscation and civil recovery law in the UK, see Peter Alldridge, "Proceeds of Crime Law since 2003 – Two Key Areas" (2014) *Crim L Rev* 171.

5.3 Canada

The following excerpt from the 2011 StAR/World Bank publication *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*,²⁰² starts with a summary of mutual legal assistance provisions in Canada, since MLA is usually essential to the pursuit of asset recovery in large-scale corruption cases:

BEGINNING OF EXCERPT

Canada

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The *Mutual Legal Assistance in Criminal Matters Act* (MLACMA) [updated link: <<http://laws-lois.justice.gc.ca/eng/acts/M-13.6/>>] [as amended *Protecting Canadians from Online Crime Act*²⁰³] allows for the provision of MLA. Canada may not provide MLA directly based on multilateral conventions but only pursuant to the provisions of the MLACMA.
- The *Canada Evidence Act* (EA) [updated link: <<http://laws-lois.justice.gc.ca/eng/acts/C-5/>>] Section 46 allows for the provision of certain forms of MLA, including certain coercive measures, based on letters rogatory if criminal proceedings are pending abroad.
- Canada has entered into bilateral treaties with 33 countries ...
- Canada has ratified the Merida Convention, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Vienna and Palermo Conventions, the Organization of American States Inter-American Convention on Mutual Assistance in Criminal Matters, and the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

A.2. Legal Preconditions for the Provision of MLA

- Dual criminality is generally not required for requests based on bilateral or multilateral treaties. Administrative agreements with non-treaty states may be concluded only for indictable offenses under Canadian law and thus require dual criminality.
- Foreign restraint and seizing orders may be enforced directly in Canada only if they relate to an indictable offense under Canadian law.

²⁰² Stephenson et al, *supra* note 2.

²⁰³ SC 2014, c 31. Section 41 provides that production orders for obtaining bank information, transmission data or tracking data described in the *Code* may be used by Canadian authorities who receive assistance requests from their international partners.

- Reciprocity is required and assumed for countries that have signed a relevant treaty, convention, or administrative agreement with Canada. Administrative agreements may be entered into for specific cases and in the absence of an applicable treaty.

A.3. Grounds for Refusal of MLA

Pursuant to MLACMA Section 9.4, the minister of justice must refuse requests if there are:

- Reasonable grounds to believe that the request has been made for the purpose of punishing a person by reason of his or her race, sex, sexual orientation, religion, nationality, ethnic origin, language, color, age, mental or physical disability, or political opinion.
- Enforcement of the order would prejudice an ongoing proceeding or investigation.
- Enforcement of the order would impose an excessive burden on the resources of federal, provincial, or territorial authorities.
- Enforcement of the order might prejudice Canada's security, national interest, or sovereignty.
- Refusal of the request is in the public interest.

Further grounds for refusal may be contained in applicable bilateral, multilateral, or administrative agreements.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- The Ministry of Justice is the central authority to receive any requests for MLA.
- In practice, the ministry performs its function as central authority through the International Assistance Group (IAG), which reviews and coordinates the implementation of MLA requests. The IAG may receive requests either through diplomatic channels or directly from the central authority of the requested entity or state.

...

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Tracing measures under the MLACM are available once a criminal investigation has been initiated in the requesting country.
- The measures under the EA, including direct enforcement of foreign freezing and seizing orders, are available only after formal charges have been brought before a foreign court or tribunal. It is not required that a conviction has been obtained.

*Tracing***C.2. Available Tracing Mechanisms**

- Under MLACMA Section 11 and 12, search warrants may be issued by a Canadian court if there are reasonable grounds to believe that an offense has been committed under the law of the requesting country, evidence of the commission of the offense or information on the whereabouts of a suspect will be found in the place to be searched, and it would not be appropriate to issue a production order. The person executing the search warrant may seize any thing he believes will afford evidence of, has been obtained by, is intended to be used, or has been used in the commission of an offense.
- Under MLACMA Section 18, a Canadian judge may issue a production order if there are grounds to believe that an offense has been committed under the law of the requesting country, and evidence of the commission of the offense or information on the whereabouts of the suspect will be found in Canada. Items or documents subject to privilege or nondisclosure under Canadian law cannot be compelled. EA Section 46 also allows for the issuance of production orders and for the compelled testimony of witnesses by Canadian courts if criminal charges have been brought in the requesting country.
- Other measures provided for under the MLACMA and the EA include video or audio-link of a witness in Canada to proceedings in a foreign jurisdiction, an order for the lending of exhibits that have been tendered in Canadian court proceedings, an order for the examination of a place or site in Canada, the transfer of a sentenced prisoner to testify or assist in an investigation, and service of documents and account monitoring orders.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Privileged information can be obtained pursuant to an MLAT search warrant if any information over which privilege is claimed is sealed and filed with the court.

*Provisional Measures (Freezing, Seizing, and Restraint Orders)***C.4. Direct Enforcement of Foreign Freezing or Seizing Orders**

- MLACMA Section 9.3 allows for the direct enforcement of foreign restraint or seizing orders if a person has been charged with an offense in the requesting jurisdiction and if the offense would be an indictable offense in Canada.
- Upon approval by the minister of justice, the attorney general may file the order with the Superior Court of Criminal Jurisdiction of the relevant province. The order is then entered as an order of that court and may be executed in Canada.

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** There are no provisions that permit domestic provisional measures within the Criminal Code to be used by a foreign state.

...

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** MLACMA Section 9.
- **Procedure:** Subject to approval by the minister of justice, MLACMA Section 9 allows for the direct enforcement of foreign confiscation judgments in Canada. Upon approval by the minister, the attorney general may file the judgment with the Superior Court of Criminal Jurisdiction of the relevant province. The order is then entered as the judgment of that court and may be executed in Canada pursuant to domestic law.
- **Evidentiary requirements:** Foreign confiscation judgments may be enforced in Canada if the affected person has been convicted of an offense in the requesting country, if the offense would be an indictable offense under Canadian law, and if the judgment is final. The judgment may extend to any offense-related property or any proceeds of crime.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- Some but not all provinces in Canada can enforce civil forfeiture orders.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- A foreign confiscation order may be enforced under MLACMA section 9 (see C.6.).

D. Types of Informal Assistance

- Informal assistance may be provided by the FINTRAC (FIU and FI Supervisor) (<http://www.fintrac.gc.ca/>), the Office of the Superintendent of Financial Institutions (<http://www.infosource.gc.ca/inst/sif/fed04-eng.asp>), provincial securities regulators, and the police.
- MOUs are required only by FINTRAC (both as supervisor and as FIU). All other authorities are empowered to provide decentralized types of assistance also in the absence of MOUs.
- Canada maintains and uses attaché offices.^{204 205}

END OF EXCERPT

²⁰⁴ [92] Practitioners should contact the nearest Canadian embassy to determine the appropriate attaché office.

²⁰⁵ Stephenson et al, *supra* note 2 at 113–116.

(1) Freezing Assets of Corrupt Foreign Officials Act**a) Preconditions for a Freezing Order or Regulation**

The *Freezing Assets of Corrupt Foreign Officials Act (FACFOA)*²⁰⁶ was introduced in 2011 to respond to the aftermath of the fall of several dictatorships in the Middle East during the Arab Spring. The legislation allows the Minister of Foreign Affairs to quickly freeze the assets of a foreign political figure upon a written request of a foreign government. The foreign state must also assert that the individual “has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship.”²⁰⁷ The FACFOA defines a “foreign state” as a state other than Canada and includes any government or political subdivision of the foreign state as well as any agency or department of the government or political subdivision.²⁰⁸

Once the foreign state has made a request, the Governor in Council (i.e., the Cabinet) must ensure that three preconditions are fulfilled before making an order or regulation that freezes a person’s assets. First, the Governor in Council must be satisfied that any persons targeted for asset seizure qualify as “politically exposed” foreign persons.²⁰⁹ The FACFOA defines a “politically exposed foreign person” as a person who holds or who has held one of several enumerated offices in a foreign state. The list includes specific offices such as “head of state” and “military officer with the rank of general or above.” However, the definition also includes a residual clause specifying that the “holder of any prescribed office or position” would also fall under the definition of “politically exposed foreign person.”²¹⁰ This residual clause is important because it allows the Governor in Council to prescribe other government positions as politically exposed foreign persons in regulations under FACFOA. This power ensures that it would be possible for FACFOA to target corrupt officials who do not hold an enumerated title, such as former Colonel Gaddafi of Libya (although he has never actually been the target of an order or regulation under FACFOA).²¹¹ The definition of “politically exposed foreign person” also includes “any person who, for personal or business reasons, is or was closely associated with such a person [a person holding an enumerated or prescribed office as defined above], including a family member.”²¹² This language further expands the category of person who may be the subject of an order or regulation. Second, before issuing an order or regulation, the Governor in Council must also be satisfied that “there is internal turmoil or an uncertain political situation in the foreign state.” Finally, the Governor in Council must be satisfied that “the making of the order or regulation is in the

²⁰⁶ SC 2011, c 10 [FACFOA].

²⁰⁷ *Ibid*, s 4(1). See the *Legislative Summary of Bill C-61: The Freezing of Assets of Corrupt Foreign Officials Act*, by Erin Shaw & Julian Walker, Pub No 40-3-C61-E (Ottawa: Library of Parliament, 2011) [Leg Summary Bill 61] online: <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/403C61E>.

²⁰⁸ *Ibid* at s 2(1).

²⁰⁹ *Ibid* at s 4(2)(a).

²¹⁰ *Ibid* at s 2(1).

²¹¹ Martin Asser, “The Muammar Gaddafi Story”, *BBC News* (21 October 2011), online: <<http://www.bbc.com/news/world-africa-12688033>>.

²¹² FACFOA, *supra* note 206, s 2(1).

interest of international relations.”²¹³ There have, however, been some concerns regarding the lack of evidence required for the Governor in Council to make an asset seizure regulation under *FACFOA*.²¹⁴

The current *FACFOA* allows for persons affected by an order or regulation under section 4 to apply for ministerial reconsideration of their status as a “politically exposed person.”²¹⁵ However, the only way to otherwise contest the substantive or procedural validity of an order or regulation under *FACFOA* is to apply for judicial review under section 18.1 of the *Federal Courts Act*.²¹⁶

b) “Freezing” Regulations under *FACFOA*

Two regulations have been created to freeze assets under *FACFOA*. The first regulation, in 2011, targeted foreign officials from Tunisia and Egypt,²¹⁷ and the second, in 2014, targeted foreign officials from Ukraine.²¹⁸ The original number of persons listed in those regulations was 123 for Tunisia, 148 for Egypt, and 18 for Ukraine. The Tunisia and Egypt regulation has been amended several times. According to media reports, under the Tunisia and Egypt regulation, the government targeted residential property valued at CDN\$2.55 million and bank accounts containing CDN\$122,000.²¹⁹ However, it is not clear how much of that money was returned to the people of Tunisia. The *FACFOA* itself does not provide a mechanism for the return of assets. Instead, usually a further step, such as an MLA request, is needed to return the assets.²²⁰

Both sets of regulations were extended for an additional five years and each has been the subject of judicial review by individuals who argue that they should either not be considered

²¹³ *Ibid*, s 4(2)(c).

²¹⁴ For more information, see House of Commons, Standing Committee on Foreign Affairs and International Development, *Evidence*, 42-1, No 50 (7 March 2017) at 1630-1635; Leg Summary Bill 61, *supra* note 207 at 10; “Statutory Review of the Special Economic Measures Act and the Freezing Assets of Corrupt Foreign Officials Act” (last visited 8 September 2021), online: *House of Commons* <<https://www.ourcommons.ca/Committees/en/FAAE/StudyActivity?studyActivityId=8977138>>; and House of Commons, Standing Committee on Foreign Affairs and International Development, *Evidence*, 42-1, No 31 (2 November 2016) at 1555 (Maya Lester) (which relates to the lack of evidence for EU Sanctions).

²¹⁵ *FACFOA*, *supra* note 206, s 13.

²¹⁶ Leg Summary Bill 61, *supra* note 207 at 10.

²¹⁷ *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011-78. See also the extending order: *Order Extending the Application of the Freezing Assets of Corrupt Foreign Officials (Tunisia) Regulations*, SOR/2021-26.

²¹⁸ *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2014-44. See also the extending order: *Order Extending the Application of the Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2019-69.

²¹⁹ Jim Bronskill, “Canada Froze Billions in Assets to Support Arab Spring: RCMP”, *The Globe and Mail* (15 July 2012), online: <<http://www.theglobeandmail.com/news/national/canada-froze-billions-in-assets-to-support-arab-spring-rcmp/article4417551/>>.

²²⁰ House of Commons, Standing Committee on Foreign Affairs and International Development, *Evidence*, 42-1, No 26 (17 October 2016) at 1555 (Hugh Adsett).

politically exposed foreign persons or that the regulations should not have been extended. In both cases, the Federal Court of Canada dismissed the applications.

In *Djilani v Canada (Foreign Affairs)*,²²¹ the Court found that the *FACPOA* and the Tunisia regulation did not infringe on the applicants' right to liberty and security under the Canadian Constitution, the process under the legislation was fair, the applicants' designation as politically exposed foreign persons was warranted, and the decision to extend the end date of the regulation was justified based on the situation in Tunisia.

In *Portnov v Canada (Foreign Affairs)*,²²² the Court found that the Minister was justified in adding Mr. Portnov's name to the Schedule in the Ukraine regulations based on an assertion of impropriety by the foreign state. The regulation and the inclusion of Mr. Portnov's name was extended, despite Ukraine not requesting an extension. In a subsequent proceeding,²²³ the Court found that, failing evidence of improper considerations, the extension, without a foreign request, was a valid exercise of the Crown's prerogative over the conduct of foreign affairs.

c) Duties to Disclose and Offences for Non-Disclosures

Section 8 of *FACFOA* imposes a duty on banks and other enumerated or prescribed entities to determine, on an ongoing basis, whether they are in possession or control of property that they have reason to believe belongs to a politically exposed foreign person who is the subject of an order or regulation under section 4. Section 9 of *FACFOA* imposes an obligation on any Canadian or person in Canada to report any property that they know to be in their possession, or knowledge of a property transaction, that is the subject of an order or regulation under section 4.

Section 10 of *FACFOA* creates hybrid offences for willfully contravening orders made under section 4 or the duties imposed by sections 8 and 9. In both cases, the maximum penalties are five years in prison for an indictable offence or for a summary conviction, a fine of CDN\$25,000 and a maximum of one year in prison.

d) Economic and Logistical Costs

Several concerns about the economic and logistical burdens individuals and entities face under *FACFOA* have arisen. For example, the complexity of Canada's multiple pieces of legislation governing sanctions means that Canadian companies and banks have to spend considerable resources to ensure compliance.²²⁴ Andrea Charron notes that because the *FACFOA* applies to property within Canada, it could impose a particularly onerous burden on companies or banks involved in domestic real estate transactions.²²⁵ It remains unclear

²²¹ 2017 FC 1178.

²²² 2018 FC 1248.

²²³ *Portnov v Canada (Attorney General)*, 2019 FC 1648. Portnov's appeal of this decision was dismissed: 2021 FCA 171.

²²⁴ House of Commons, Standing Committee on Foreign Affairs and International Development, *Evidence*, 42-1, No 27 (19 October 2016) at 1540 (Andrea Charron).

²²⁵ *Ibid* at 1615.

how onerous tracking asset transactions of a relatively small group of individuals really is or whether the money banks and companies have to spend on compliance goes beyond the simple cost of doing business in a heavily-regulated industry.

Government institutions currently provide informational support to institutions affected by *FACFOA*. While the Office of the Superintendent of Financial Institutions does not have a legislated role under *FACFOA*, it provides notice and guidance to federally regulated financial institutions about duties and expectations under *FACFOA* regulations. For example, it issued a notice when the Ukraine regulations were released under the *Act*.²²⁶

(2) *Special Economic Measures Act*

The *Special Economic Measures Act (SEMA)*²²⁷ allows the Governor in Council to make orders or regulations taking economic measures against a foreign state. The Governor in Council can do this in order to implement a call for sanctions from an association of states of which Canada is a member or “if the Governor in Council is of the opinion that ... a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.”²²⁸ The Governor in Council can also order the freezing or seizure of property belonging to the foreign state, to individuals in that foreign state, or to nationals of that foreign state not normally residing in Canada.²²⁹ Whereas the function of *FACFOA* is to aid foreign governments in freezing assets held by members of corrupt former regimes, *SEMA* allows Canada to act on its own to further the effectiveness of multilateral sanctions.²³⁰

(3) *Sergei Magnitsky Law*

Sergei Magnitsky was a well-respected tax lawyer in Russia. Bill Browder, founder and CEO of Hermitage Capital Management LTD (the largest foreign investment fund in Russia at the time) was Magnitsky’s client. In response to the fraudulent taking of some of Browder’s assets, Magnitsky investigated and discovered a \$230 million tax fraud by senior Russian officials. Once the incident became public, Magnitsky, Browder, and others were investigated by Russian officials on suspicion of tax fraud. Browder and the others fled Russia before they could be arrested. Magnitsky refused to leave Russia because he knew he had done nothing wrong, and he wanted to have the senior Russian officials who were involved in the theft and tax fraud brought to justice. He was arrested in October 2008 and grossly tortured and maltreated until his death in prison on November 16, 2009. Why?

²²⁶ See Office of the Superintendent of Financial Institutions, *The Freezing Assets of Corrupt Foreign Officials Act Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, (Notice) (Ottawa: OFSI, 5 March 2014), online: <<http://www.osfi-bsif.gc.ca/Eng/fi-if/amlc-clrpc/snc/facfo-bbde/Pages/2014-03-05-RAFACFOUR.aspx>>.

²²⁷ SC 1992, c 17 [*SEMA*].

²²⁸ *Ibid*, s 4(1.1)(b).

²²⁹ Leg Summary Bill 61, *supra* note 207 at 6.

²³⁰ For an updated list of regulations under *SEMA*, see “Canadian Sanctions Legislation” (last modified 24 March 2021), online: *Government of Canada* <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/legislation-lois.aspx?lang=eng>.

Because he refused to recant his allegations of official corruption and falsely confess to tax evasion himself.²³¹

Since Sergei's death, Browder has devoted his life to getting justice for Sergei. One of those manifestations of justice has been the enactment in the US of the *Sergei Magnitsky Rule of Law Accountability Act of 2012* (later known as the *Magnitsky Act*), which after a long and suspenseful political ride became law in December 2012.²³² The law authorizes the President to impose visa bans and freeze and seize the assets of Russians responsible for gross violations of human rights and significant acts of corruption. In 2016, the *Magnitsky Act* was expanded to include all foreign officials—Russian or otherwise.²³³

In October 2017, Canada followed suit by enacting the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*.²³⁴ The *Act* authorizes visa bans and freezing and seizing of assets of foreign officials from any country who are responsible for gross human rights violations and significant corruption. In early November 2017, Canada issued its first round of sanctions listing 52 human rights violators in Russia, Venezuela, and South Sudan. As of August 25, 2021 there are now 70 foreign nationals listed under the *Act's* regulations.²³⁵

(4) Criminal Forfeiture of Proceeds of Crime

Canada's *Criminal Code*²³⁶ also deals with the proceeds of crime:

- Section 462.32 provides search and seizure powers of the proceeds of crime;
- Section 462.33 provides for restraint and freezing of the proceeds of crime; and
- Section 462.37 provides for the forfeiture of proceeds of crime.

When property is forfeited under section 462.37, it is forfeited to the government that prosecuted the offender unless a third party has a valid and lawful interest in the property. In that case, the property would be returned to that person under section 462.41. This third party could include a requesting state in the case of corruption of foreign public funds. Section 462.37(2.1) can be used to issue forfeiture orders for property located outside Canada, but the order can only be enforced through a request to the foreign state's government.

Where the offender is convicted of an offence and has subsequently died, or been at large for more than six months, property can also be forfeited under section 462.38. This property

²³¹ See Bill Browder, *Red Notice: A True Story of High Finance, Murder and One Man's Fight for Justice* (New York: Simon & Schuster, 2015). Browder gives a lively, detailed account of his experiences in Russia, of Magnitsky's arrest, detention, torture, and death, and the subsequent events leading to the enactment of the *Magnitsky Act* in the US.

²³² *Sergei Magnitsky Rule of Law Accountability Act of 2012*, Pub L No 112-208, 126 Stat 1496 (2012).

²³³ *Global Magnitsky Human Rights Accountability Act*, Pub L 114-328, 22 USC § 2656.

²³⁴ SC 2017, c 21.

²³⁵ *Justice for Victims of Corrupt Foreign Officials Regulations*, SOR/2017-233, Schedule, section 1 lists 70 foreign nationals (see "Schedule (Section 1) Foreign Nationals" (last modified 25 August 2021), online: *Justice Laws* <<https://laws.justice.gc.ca/eng/regulations/SOR-2017-233/page-2.html#h-842596>>).

²³⁶ RSC 1985, c C-46.

is available for return through the sharing with another state under section 11 of the *Seized Property Management Act*, provided there is a reciprocal bilateral agreement.²³⁷

(5) Effectiveness and Challenges

The 2016 FATF *MER* assessing the Canadian AML/CFT regime notes that asset recovery is generally low, although some provinces, such as Quebec, seem to be more effective in recovering assets linked to crime.²³⁸ Canada has made some progress since its 2008 evaluation in terms of asset recovery, but the fact that assets of equivalent value cannot be recovered hampers the recovery of proceeds of crime, and confiscation results do not adequately reflect Canada's money laundering risks.²³⁹ The *MER* recommends an increase in timeliness of access, by competent authorities, to accurate and up-to-date beneficial ownership information; the use of financial intelligence to investigate money laundering and trace assets; ensuring that asset recovery is pursued as a policy objective throughout Canada; and making greater use of the available tools to seize and restraint proceeds of crime other than drug-related assets and cash, especially proceeds of corruption, including foreign corruption and other major asset generating crimes.²⁴⁰

Transparency International (TI) released a report in 2014 outlining the difficulties in recovering assets following the Arab Spring, including problems repatriating assets after they were frozen under schemes such as *FACFOA* in Canada. Problems include premature *Mutual Legal Assistance Act* requests, lack of evidence-gathering capacity in requesting countries, and insufficient use of informal channels.²⁴¹

6. EFFECTIVENESS OF ASSET RECOVERY REGIMES

The following is an excerpt from a 2014 OECD publication entitled *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*.²⁴² While the data is now outdated, it does

²³⁷ *Seized Property Management Act*, *supra* note 30. For a detailed practical summary of Canada's proceeds of crime forfeiture laws, see Peter M German, *Proceeds of Crime and Money Laundering: Includes Analysis of Civil Forfeiture and Terrorist Financing Legislation* (Thomson Reuters, 1998) (loose-leaf, updated bimonthly).

²³⁸ FATF-Canada *MER*, *supra* note 153 at 3, 6, 36.

²³⁹ *Ibid* at 36.

²⁴⁰ *Ibid* at 9, 36-37.

²⁴¹ Anti-Corruption Helpdesk, Maira Martini, *Lessons Learnt from Recovering Assets in Egypt, Libya, and Tunisia*, (Berlin: TI, 2014), online (pdf):

<http://www.transparency.org/files/content/corruptionqas/Lessons_Learnt_in_recovering_assets_from_Egypt_Libya_and_Tunisia_2014.pdf>. See also Gray et al, *supra* note 22; Oduor et al, *supra* note 42; Public Safety Canada, *Civil Forfeiture Regimes in Canada and Internationally*, by Elaine Koren, (Literature Review), RDIMS #745292, (Ottawa: Public Safety Canada, 2013) online (pdf):

<<https://www.publicsafety.gc.ca/lbr/archives/cn63313146-eng.pdf>>. For more on Canada generally, see *Canada's Asset Recovery Tools: A Practical Guide*, (Government of Canada/StAR Initiative, 2013), online (pdf): <<https://star.worldbank.org/sites/star/files/Canada%E2%80%99s-Asset-Recovery-Tools-A-Practical-Guide.pdf>>.

²⁴² Kjetil Hansen et al, *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*, (Paris: OECD, 2014), online (pdf):

give a sense of the low levels of stolen and frozen assets returned to the country from which they are taken:

BEGINNING OF EXCERPT

5.1 ASSET RECOVERY EFFORTS BY OECD MEMBER COUNTRIES: TAKING STOCK

In preparing for the Fourth High-Level Forum on Aid Effectiveness in Busan, Korea (December 2011), the OECD and the Stolen Asset Recovery (StAR) initiative surveyed OECD countries to take stock of their commitments on asset recovery. The survey measured the amount of funds frozen and repatriated to any foreign jurisdiction between 2006 and 2009. It found that during this time, only four countries (Australia, Switzerland, the United Kingdom and the United States) had returned stolen assets, totalling USD 276 million, to a foreign jurisdiction. These countries, plus France and Luxembourg, had also frozen a total of USD 1.225 billion at the time of the survey.

In 2012, the OECD and StAR launched a second survey measuring assets frozen and returned between 2010 and June 2012. In this time period, a total of approximately USD 1.4 billion of corruption-related assets had been frozen. In terms of returned assets, a total of USD 147 million were returned to a foreign jurisdiction in the 2010-June 2012 period. This is a slight decrease from the USD 276 million recorded from the last survey round.

...

Also, during 2010-June 2012, the majority of returned assets and 86% of total assets frozen went to non-OECD countries while in the 2006-09 period asset recovery mainly benefited OECD countries.

Freezing stolen assets

... [During 2010-June 2012], Switzerland accounted for the largest volume of frozen assets (56%), followed by the United Kingdom (32%) and the United States (8%). These countries all have large financial centres and have made asset recovery a political priority.... Many OECD countries have not frozen any corruption-related assets to date. While this may be due to legal and policy obstacles, it may also be that few illicit assets had been placed in these countries to start with.

Recovered stolen assets

... From 2006 to 2009, four OECD member countries reported the return of corruption-related assets. More than half, 53%, was returned by Switzerland, and another large share, 44%, by the United States, while Australia (with 3%) and the United Kingdom (with 1%) accounted for much smaller returned amounts. Only three OECD countries had returned

<http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf>. For a discussion of asset recovery in the context of the Arab Spring, see Zinkernagel, Monteith & Pereira, *supra* note 17 at 3.

corruption-related assets between 2010-June 2012: the United Kingdom (45% of total assets returned) followed by the United States (41%) and Switzerland (14%).

5.2 ASSET RECOVERY IN THE CONTEXT OF THE ARAB SPRING

The Arab Spring has helped focus attention on international asset recovery. As long-standing governments began to tumble in Tunisia, Egypt and Libya in early 2011, banks and governments the world over started freezing billions of dollars held by these countries' previous leaders and their associates. For example, a mere hour after Egypt's ex-president Hosni Mubarak stepped down in February 2011, the Swiss government ordered its banks to freeze his assets held in Switzerland on suspicion that they were the proceeds of corruption. Other OECD member countries followed suit. The European Union ordered an EU-wide freeze of assets linked to Tunisia's ex-president Zine El Abidine Ben Ali in January 2011, and of assets linked to ex-President Hosni Mubarak in March the same year. Despite the heightened attention to asset recovery following the Arab Spring, relatively few assets have to date been returned to the affected countries, and the process of recovering the stolen assets is proving to be both long and cumbersome (Cadigan and Prieston, 2011). The main obstacle to returning stolen assets to these countries is being able to provide solid enough proof that the assets were gained through corruption.

As a response to these challenges, several OECD member countries have aided the process of bringing forth asset recovery cases and delivering such proof. Switzerland has sent judicial experts to both Egypt and Tunisia; US investigators and prosecutors have visited Egypt, Libya and Tunisia to work directly with their requesting country officials; and Canada has provided assistance on asset recovery to Tunisian officials.

In addition, some governments have taken steps to strengthen domestic inter-agency co-operation.

END OF EXCERPT

6.1 Challenges to Effective Asset Recovery

After analyzing the data from 2006 to 2012 on asset recovery cases in OECD member countries, the StAR report, *Few and Far: The Hard Facts on Stolen Asset Recovery*, concludes that "a huge gap remains between the results achieved and the billions of dollars that are estimated stolen from developing countries."²⁴³ The report also criticizes OECD members for the "disconnect between high-level international commitments and practice at the country level" due to lack of interest and prioritization.²⁴⁴

²⁴³ Gray et al, *supra* note 22 at 2.

²⁴⁴ *Ibid.*

In the conclusion to their 2013 book, Gretta Zinkernagel, Charles Monteith and Pedro Pereira offer a mixed, but optimistic, assessment of the progress made to date in asset recovery. They note that:

[T]he efforts to prosecute international corruption and money laundering cases and to successfully recover stolen assets have made considerable progress over the last five years. However, not all challenges have been overcome and, apart from a handful of cases, little money has effectively been recovered, especially in international cases. This has led to frustrations among citizens at large, as in the Egypt-Mubarak cases, as well as among concerned authorities in requesting and requested states.

On the other hand, we have seen a clear increase in action: cases under investigation with assets at stake have increased exponentially. Ten years ago, there were fewer than 60 foreign bribery offenses under investigation, with the vast majority of them conducted by the US (which, in these cases alone, recovered over USD 5 billion of assets and disgorged profits). Today there are over 500 ongoing investigations being conducted by over 50 different countries.²⁴⁵

Other commentators are more critical. For example, Paul Sarlo states:

In the context of anti-corruption, the role of the World Bank in StAR, an asset-recovery program, is a continuation of its role as a lender – advice-driven and inefficacious. “[A]sset recovery is *undertaken by states* using legal procedures, which means that StAR does not investigate cases, prosecute cases or request mutual legal assistance.” StAR is oxymoronic because it results in the World Bank instructing corrupt governments about how to recoup stolen loans, even though the governments themselves are probably complicit in the speculation [theft] of the loans. The situation is like advising the fox that was in the henhouse about how later to return the eggs. Even when a government is not involved in the theft of a loan and has legitimate interest in its return, prospects for asset recovery are dim because the process is a slog, laden with formidable obstacles – twenty-nine to be exact, by the World Bank’s count.²⁴⁶ “[Asset recovery] requires hacking through thickets of international law. It cuts across criminal, civil and administrative justice. It relies on cooperation between countries (and between agencies within countries) that are often unable or unwilling to share information.”²⁴⁷

...

With these impediments to asset recovery, the slogan for StAR should be “[e]asy to steal, easier to keep.” Although asset recovery may become less

²⁴⁵ Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, “Conclusion” in Zinkernagel, Monteith & Pereira, *supra* note 17, 347 at 347–348.

²⁴⁶ [103] “Recovering Stolen Assets: Making a Hash of Finding the Cash,” *The Economist* (May 11, 2013) at 63.

²⁴⁷ [104] *Ibid.*

arduous in the future, countries could have to depend on StAR – with all its legal expenses, political red tape, and general complications – much less if the World Bank were to perform due diligence before making loans. [some footnotes omitted]²⁴⁸

Two main challenges identified in the earlier chapters of *Emerging Trends in Asset Recovery*²⁴⁹ deal with the complications inherent in transnational legal cooperation and the difficulties in determining the beneficial ownership of corporations and trusts. Each of these challenges is briefly discussed below.

6.1.1 Transnational Communication and Cooperation

Transnational criminal law is a complex area. Successfully prosecuting corruption offences, including money laundering and recovering assets held in other jurisdictions, requires efficient communication and close cooperation between all states involved. However, Rudolf Wyss argues that in practice mutual legal assistance frequently falls short of this standard. Instead, in many cases “a strange desire to preserve a country’s own domestic legal system coupled with a passive attitude at the beginning of MLA challenges disregard the keyword ‘assistance’ in mutual legal assistance procedures.”²⁵⁰ Wyss explains that:

The traditional perception of the roles of the requesting and requested States often results in a passive attitude on the part of the requested State. Some requested States do not even answer requests that seem at first glance to have little chance of being accepted. In cases in which responses are provided to the requesting State, sometimes after a long period of time, the response usually includes a long enumeration of the missing elements in the request. Such attitudes and delays on the part of judicial authorities is in sharp contrast to the speed with which business transactions can be carried out by criminals. In a number of countries complicated channels of transmission for MLA requests are still in place. Consequently, not only is time lost before the request can reach the hands of the competent magistrates but sometimes the whole case-file is lost.

Other requested countries’ practice is to send a standard model of a ‘perfect’ MLA request to the requesting magistrate who finds it difficult to understand the model, because it is written from the sole viewpoint of the requested State and generally does not take into account the legal differences of the requesting countries. Requesting States are bombarded with manuals, guidebooks and links to Internet pages none of which bring any further concrete assistance. From experience, these usually well-intended tools can sometimes lead instead to a great deal of confusion

²⁴⁸ Paul Sarlo, “The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank’s Lending Practices” (2014) 45:4 Geo J Intl L 1293 at 1310-1311.

²⁴⁹ Zinkernagel, Monteith & Pereira, *supra* note 17.

²⁵⁰ Rudolf Wyss, “Proactive Cooperation within the Mutual Legal Assistance Procedure” in Zinkernagel, Monteith & Pereira, *supra* note 17, 105 at 107.

amongst the investigating authorities or can even discourage them from taking further steps or actions.²⁵¹

Strengthening both official and informal channels of communication between states is necessary if the MLA process is to function as intended.

The settlements in the VimpelCom corruption scandal offer an example of successful international cooperation in a foreign bribery case. On February 18, 2016, Amsterdam-based VimpelCom Limited, an issuer of publicly traded securities in the United States and its wholly owned Uzbek subsidiary Unitel LLC, admitted to a conspiracy to pay more than \$114 million in bribes to a government official in Uzbekistan to enable them to operate in the Uzbek telecommunications market.²⁵²

Pursuant to its agreement with the US Department of Justice, VimpelCom agreed to pay a criminal penalty of more than \$230 million to the US, including \$40 million in forfeiture. On the same day, the Department of Justice filed a civil complaint seeking forfeiture of more than \$550 million held in Swiss bank accounts, which constitute bribes made to the Uzbek official or funds involved in the laundering of those payments. This action follows an earlier civil complaint filed by the Department of Justice on June 29, 2015, which sought forfeiture of more than \$300 million in bank and investment accounts held in Belgium, Luxembourg, and Ireland. In that case the US District Court for the Southern District of New York entered a partial default judgment (on January 11, 2016) against all potential claimants, other than the Republic of Uzbekistan. In its verified claim filed on January 26, 2016, Uzbekistan indicated that on July 20, 2015, the Tashkent Regional Criminal Court issued a final criminal judgment confirming the rightful ownership of the assets in question by Uzbekistan.²⁵³

In its Press Release on the resolution of the criminal case, the US Department of Justice acknowledged that law enforcement professionals from the Public Prosecution Service of the Netherlands, the Swedish Prosecution Authority, the Office of the Attorney General in Switzerland and the Corruption Prevention and Combating Bureau in Latvia provided significant cooperation and assistance in this matter.²⁵⁴ Law enforcement in Belgium, France, Ireland, Luxembourg, and the United Kingdom also provided valuable assistance.²⁵⁵ The case is also an example of extensive domestic cooperation between law enforcement agencies in the United States, including the DOJ, SEC, the Immigration and Customs

²⁵¹ *Ibid* at 106–107.

²⁵² United States Department of Justice, Press Release, “VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme” (18 February 2016) [Vimpel Press Release], online: <<https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>>.

²⁵³ Conference of the States Parties to the UNCAC, Open-ended Intergovernmental Working Group on Asset Recovery, *Settlements and Other Alternative Mechanisms in Transnational Bribery Cases and their Implications for the Recovery and Return of Stolen Assets*, CAC/COSP/WG2/2016/2 (18 July 2016) [Mechanisms for Asset Recovery] at para 36, online (pdf): <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604599e.pdf>>.

²⁵⁴ Vimpel Press Release, *supra* note 252.

²⁵⁵ *Ibid*.

Enforcement's Homeland Security Investigations, and the Internal Revenue Service Criminal Investigation Division.

6.1.2 Need for Mandatory Public Disclosure of Beneficial Ownership

In addition to the difficulties raised by mutual legal assistance, the international financial system creates its own challenges. Corrupt officials, criminals and those they employ have created many ingenious ways to disguise the beneficial ownership of illicit funds using trusts, shell companies, and other vehicles. As pointed out by Jason Sharman, shell companies in most countries can be set up easily and inexpensively online, without any connection required between the beneficial owner's location and the jurisdiction of incorporation.²⁵⁶ This allows criminals to frustrate investigations by ensuring that the corporate service provider and the money launderer are in separate jurisdictions. Out of date company registries, particularly in developing countries, add further difficulty to tracing the beneficial owner.²⁵⁷ While significant gains have been made in financial regulation, driven in part by the FATF, this enhanced regulation has sparked new innovations by criminals. As Markus Schulz explains:

For decades, banks and financial institutions have identified beneficial owners as part of their AML [anti-money-laundering] program. Therefore, those years of experience should make it easy to identify beneficial owners. The challenges, however, have not much changed over the years. If anything, it may be even harder today to identify beneficial ownerships than it was in the past. People who have something to hide, like money launderers, corrupt politicians, rogue employees and fraudsters, seek to channel illegitimate funds through the system. At the same time as banks and financial institutions have increased their efforts to make it harder to abuse the system, criminals are getting smarter at exploiting the system.²⁵⁸

Schulz recommends an improved system for identifying politically exposed persons (PEPs) as well as regulations requiring company registers to maintain a record of beneficial ownership.²⁵⁹ Sharman recommends the establishment of "a new global standard mandating that all registries contain the identity of all beneficial owners and that this information be publicly accessible to all."²⁶⁰ Sharman also recommends an improved system for identifying politically exposed persons.²⁶¹ For a more detailed discussion of disclosure of beneficial ownership in the UK, the US, and Canada, see Section 6.1.2.1, 6.1.2.2 and 6.1.2.3.

²⁵⁶ Jason Sharman, "Shell Companies and Asset Recovery: Piercing the Corporate Veil" in Zinkernagel, Monteith & Pereira, *supra* note 17, 67.

²⁵⁷ *Ibid* at 68–69. For a frequently updated map illustrating commitments and action towards beneficial ownership, see "Worldwide Commitments and Action" (last visited 9 September 2021), online: *Open Ownership* <<https://www.openownership.org/map/>>.

²⁵⁸ Markus E Schulz, "Beneficial Ownership: The Private Sector Perspective" in Zinkernagel, Monteith & Pereira, *supra* note 17, 75 at 75. Also on the importance of UBOs, see Joseph Kraus, "Public Access is Critical for UBO Register Success" (23 January 2020), online (blog): *The FCPA Blog* <<https://fcpcblogger.com/2020/01/23/public-access-is-critical-for-ubo-register-success/>>.

²⁵⁹ Schulz, *ibid* at 80–81.

²⁶⁰ Sharman, *supra* note 256 at 70, 80–81.

²⁶¹ *Ibid*.

The Global Organization of Parliamentarians Against Corruption (GOPAC)²⁶² also advocates for further transparency through the identification of beneficial owners. GOPAC recommends requirements for financial institutions to demand a declaration of beneficial ownership and impose strict “know your customer” measures.²⁶³

A significant development in the global movement towards mandatory disclosure of beneficial ownership was implemented through the Extractive Industries Transparency Initiative (EITI).²⁶⁴ EITI is briefly discussed in Chapter 9, Section 5.2.1. In December 2015, the EITI Board decided that disclosure of the beneficial ownership of companies involved in the extractive industries must be mandatory.²⁶⁵ The EITI Standard was reissued in February 2016 and now requires disclosure of beneficial ownership. The second requirement of the EITI Standard sets out the timeline and requirements for how the beneficial ownership disclosure were to be gradually implemented beginning in 2017 (and culminating in public disclosure by 2020).²⁶⁶

Global concern about the use of shell corporations, trusts, nominee directors, and shareholders to hide beneficial ownership of criminal proceeds has reached a new level of concern.²⁶⁷ For asset recovery and AML regimes to be effective, authorities must be able to identify the natural persons who actually own and benefit from a given corporation’s bank account, real property, or other assets. In 2013, the G8 made a commitment to transparency of company ownership, and in 2014 the G20 adopted 10 high-level principles on beneficial ownership transparency. However, TI’s 2018 Review still found that “[e]leven G20 countries have ‘weak’ or ‘average’ beneficial ownership legal frameworks. This has dropped from 15 in 2015, but progress is too slow.”²⁶⁸

²⁶² “Overview” (last visited 9 September 2021), online: *Global Organization of Parliamentarians Against Corruption (GOPAC)* <<http://gopacnetwork.org/>>.

²⁶³ GOPAC, “Transparency Through Beneficial Ownership Declarations” (2013) 1:1 GOPAC Position Paper, online (pdf): <http://gopacnetwork.org/Docs/PositionPapers/PP_GTFAML_EN_WEB.pdf>.

²⁶⁴ “What We Do” (last visited 9 September 2021), online: *EITI* <<https://eiti.org/About>>.

²⁶⁵ Kjerstin Andreassen and Victor Ponsford, eds, *2016 Progress Report: From Reports to Results*, (Oslo: EITI International Secretariat, 2016) at 5, online (pdf): <<https://eiti.org/sites/default/files/documents/progressreport.pdf>>.

²⁶⁶ Dyveke Rogan, ed, *The EITI Standard 2016*, (Oslo: EITI International Secretariat, 2016) at 17-21, online (pdf): <https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf>. See also “History of the EITI” (last visited 9 September 2021), online: *EITI* <<https://eiti.org/history>> for an overview of the development of EITI standards; “Guide to Implementing the EITI Standard” (last visited 9 September 2021), online: *EITI* <<https://eiti.org/guide#sign-up-and-governance>>; and “Implementation status” (last visited 9 September 2021), online: *EITI* <<https://eiti.org/countries>> which illustrates the implementation status of EITI by country.

²⁶⁷ Phyllis Atkinson, “The Use of Corporate Vehicles to Conceal Illegal Assets” in *Tracing Illegal Assets Guide*, *supra* note 15 at 95-111; and StAR Initiative, Emile van der Does de Willebois et al, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (Washington, DC: The International Bank for Reconstruction and Development/World Bank, 2011).

²⁶⁸ Maira Martini & Maggie Murphy, *G20 Leaders or Leggards? Reviewing G20 Promises on Ending Anonymous Companies*, (Berlin: TI, 2018), online (pdf): <https://images.transparencycdn.org/images/2018_G20_Leaders_or_Laggards_EN.pdf> For the 2015 Report, see Maira Martini & Maggie Murphy, *Just for Show? Reviewing G20 Promises on Beneficial Ownership*, (Berlin: TI, 2015), online (pdf):

6.1.2.1 UK

In 2015, the UK government enacted Part 7 of the *Small Business, Enterprise & Employment Act 2015 (SBEE)*,²⁶⁹ which amended the *Companies Act 2006*²⁷⁰ “to require companies to keep a register of people who have significant control over the company (PSCs).”²⁷¹ The *SBEE* inserted Part 21A of the *Companies Act 2006*, which identifies which companies are required to maintain a register. The only companies exempted from the register are “DTR5 issuers” and companies exempted by regulation. These exempt companies are companies which “are bound by disclosure and transparency rules (in the UK or elsewhere) broadly similar to the ones applying to DTR5 issuers.”²⁷² DTR5 issuers are “principally companies whose shares are traded on the Main Market of the London Stock Exchange and AIM.”²⁷³ Thus, UK companies that were previously not subject to transparency and disclosure rules are now subject to the mandatory public disclosure of persons with significant control over the company. The *Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016 (UK)*²⁷⁴ also require some Limited Liability Partnerships to keep a registry of persons with significant control. Persons with significant control, which include, amongst other things, persons with 25% or more of the shares in a company, are fully defined in the *Companies Act 2006* Schedule 1A.²⁷⁵ The beneficial ownership registry also applies to “Politically Exposed Persons” who hold a share of 5% or more of a company.

Under the rules instituted under the *SBEE*, companies are required to keep a registry of people with significant control. The Companies House registry is available to law enforcement officials investigating money laundering or engaged in criminal asset recovery. The failure to keep a registry of persons with significant control or to file an annual report with Companies House are offences, subject to penalties of fines, imprisonment, and freezing of assets or interests.²⁷⁶

<https://images.transparencycdn.org/images/2015_G20BeneficialOwnershipPromises_EN.pdf>.

²⁶⁹ *Small Business, Enterprise and Employment Act 2015 (UK)*, c 26, part 7.

²⁷⁰ *Companies Act 2006 (UK)*, c 46.

²⁷¹ *Small Business, Enterprise and Employment Act 2015 (UK)*, c 26, part 7, s 81.

²⁷² *Companies Act 2006 (UK)*, c 46, part 21A.

²⁷³ “Companies Act 2006: New Rules on People with Significant Control” (26 January 2016), online: *Dentons* <<http://www.dentons.com/en/insights/newsletters/2016/january/26/uk-corporate-briefing/uk-corporate-briefing-winter-2016/companies-act-2006-new-rules-on-people-with-significant-control>>.

²⁷⁴ 2016 No 340, Schedule 1.

²⁷⁵ *Companies Act 2006 (UK)*, c 46, Schedule 1A.

²⁷⁶ Note, however, that there has been significant criticism of the system due to the failure to verify accuracy of entries. See for example, Eric Lochner, “Eric Lochner on Customer Due Diligence: UBOs in Diapers” (10 May 2018), online (blog): *The FCPA Blog* <<https://fcpublog.com/2018/05/10/eric-lochner-on-customer-due-diligence-ubos-in-diapers/>>, which pointed out that Global Witness found “4,000 toddlers are listed as beneficial owners of companies registered in the United Kingdom” in 2018. See also Nienke Palstra, “UK Government’s ‘No-Questions-Asked’ Approach to Companies Gives Money Launderers a Free Pass” (6 May 2019), online (blog): *Global Witness* <<https://www.globalwitness.org/en/blog/uk-governments-no-questions-asked-approach-to-companies/>>. For a more positive (albeit, earlier) review, see: Nienke Palstra, “Three Ways the UK’s Register of the Real Owners of Companies is Already Proving its Worth” (24 July 2018), online (blog): *Global Witness* <<https://www.globalwitness.org/en/blog/three-ways-uks-register-real-owners->

(i) Overseas Territories and Crown Dependencies

Following the Paradise Papers leak in 2017, the UK Overseas Territories and Crown Dependencies came under scrutiny for their role in facilitating corruption and money laundering. In response, anti-corruption practitioners have advocated for greater transparency through publicly-accessible beneficial ownership registers.

Ali Shalchi & Federico Mor's 2021 briefing paper states:

All British Overseas Territories and Crown Dependencies have or will introduce public company beneficial ownership registers. An amendment introduced by MPs to the *Sanctions and Anti-Money Laundering Act 2018* intended to require the UK Government to legislate to ensure British Overseas Territories introduce such registers by the end of 2020, although the Government interpreted this provision differently and British Overseas Territories have now committed to introduce such registers by the end of 2023. Crown Dependencies have also committed to do so after the EU reviews the implementation of its own public registers, in 2022 or 2023.²⁷⁷

On June 19, 2019, the Crown Dependencies revealed their commitment to tabling publicly-accessible beneficial ownership registries legislation by the end of 2023.²⁷⁸ In July 2020, eight Overseas Territories (OTs) (namely, Anguilla, Bermuda, Cayman Islands, the Falkland Islands, Montserrat, the Pitcairn Islands and St Helena, Ascension Island and Tristan da Cunha, and the Turks and Caicos Islands) announced commitments to introduce publicly accessible registers.²⁷⁹

companies-already-proving-its-worth/>; and for a full overview and analysis of the registry entries, see "The Companies We Keep: What the UK's Open Data Register Actually Tells us About Company Ownership" (last visited 9 September 2021), online: *Global Witness* <<https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/companies-we-keep/>>. See also Elizabeth Hearst, "Hiding in Plain Sight: The Dark Side of Company Registration and What it Could be Facilitating", Opinion Piece, *AML Intelligence* (15 June 2021), online: <<https://www.amlintelligence.com/2021/06/hiding-in-plain-sight-the-dark-side-of-company-registration-and-what-it-could-be-facilitating/>> and Oliver Bullough, "How Britain Can Help You Get Away with Stealing Millions: a Five-Step Guide", *The Guardian* (5 July 2019), online: <<https://www.theguardian.com/world/2019/jul/05/how-britain-can-help-you-get-away-with-stealing-millions-a-five-step-guide>>.

²⁷⁷ UK, HC Library, *Registers of Beneficial Ownership* (Briefing Paper No 8259) by Ali Shalchi & Federico Mor (London: HC Library, 2021), online (pdf): <<https://researchbriefings.files.parliament.uk/documents/CBP-8259/CBP-8259.pdf>>.

²⁷⁸ Naomi Hirst, "Transparency is the New Normal – and the Crown Dependencies Know It" (19 June 2019), online (blog): *Global Witness* <<https://www.globalwitness.org/en/blog/transparency-is-the-new-normal-and-the-crown-dependencies-know-it/>>.

²⁷⁹ Foreign & Commonwealth Office, Press Release, "UK Government Welcomes Announcements by Eight Overseas Territories to Tackle Illicit Finance" (15 July 2020), online: <<https://www.gov.uk/government/news/uk-government-welcomes-announcements-by-eight-overseas-territories-to-tackle-illicit-finance>>. For an interesting (and entertaining) debate on the utility of imposing beneficial ownership regimes on OTs and CDs, see the following blog posts: Martin Kenney, "Martin Kenney: Open Company UBO Registers are not the Panacea to Financial

(ii) Property Ownership Transparency

As of yet, the UK land registries do not disclose beneficial ownership.²⁸⁰ However, the UK does intend on introducing a beneficial ownership register for overseas-owned UK companies. Despite steps taken to introduce this register since Prime Minister David Cameron's 2016 announcement "[warning] foreign companies ... that they will be required to disclose the beneficial ownership of UK property, including around 100,000 properties in England and Wales owned by foreign companies," including a Draft Bill in 2018, positive feedback on the Bill by a Joint Committee in 2019, and further statements of commitment to the effort in 2020, a timetable for introducing the register is yet to be announced.²⁸¹ Instead, responses on this issue have been vague at best, and evasive at worst:

In a Ministerial Statement on 21 July, 2020, Paul Scully, Minister for Small Business, Consumers and Labour Markets, noted the Government's commitment to introduce the register:

The Government committed in primary legislation, through Section 50 of the Sanctions and Anti-Money Laundering Act 2018, to report to Parliament annually on the progress that has been made towards putting in place such a register. The register is included as one of the key measures of the UK's Economic Crime Plan 2019-2022[1], and the December 2019 Queen's Speech included a commitment to progress the required legislation.

However, he did not commit to a timetable for the legislation:

This register will be novel, and careful consideration is needed before any measures are adopted, as it is imperative that the register is as robust as it reasonably can be, with reliable data and sufficient deterrent effects to make it clear that the UK property market is not a safe haven for dirty money. Engagement with members of civil society, business and the property market throughout all nations of the United Kingdom has been ongoing to ensure the proposed measures work equitably across the country.

An answer to a parliamentary question asked by Dame Margaret Hodge in September 2020, enquiring about the timetable for the proposal, referred her back to the July statement above. A response on 3 February, 2021 to a similar

Crime" (7 May 2018), online (blog): *The FCPA Blog* <<https://fcpublog.com/2018/5/7/martin-kenney-open-company-ubo-registers-are-not-the-panacea/>>; Richard Messick, "Public Disclosure of Beneficial Ownership: Do the Naysayers Have a Point?" (9 May 2018), online (blog): *The Global Anti-Corruption Blog* <<https://globalanticorruptionblog.com/2018/05/09/public-disclosure-of-beneficial-ownership-do-the-naysayers-have-a-point/>>; Matthew Stephenson, "Public Beneficial Ownership Registries: A Response To Recent Criticisms" (15 May 2018), online (blog): *The Global Anti-Corruption Blog* <<https://globalanticorruptionblog.com/2018/05/15/public-beneficial-ownership-registries-a-response-to-recent-criticisms/>>; and Kenney, *supra* note 105.

²⁸⁰ Shalchi & Mor, *supra* note 277 at 10. For background on this development, read John Hatchard, "Money Laundering, Public Beneficial Ownership Registers and the British Overseas Territories: the Impact of the Sanctions and Money Laundering Act 2018 (UK)" (2018) 30:1 Denning LJ 185.

²⁸¹ Shalchi & Mor, *supra* note 277 at 10-12.

question tabled by Labour MP Dan Carden said that the Government “will legislate when Parliamentary time allows”.

During the Second Reading of the Financial Services Bill 2012-21 on Monday, 9 November, 2020, in response to a request from SNP Treasury Spokesperson Alison Thewliss for an update on the status of the Registration of Overseas Entities Bill, Economic Secretary to the Treasury John Glen replied that “I think I have demonstrated that I have quite a lot to deal with in the Treasury, but I would be very happy to correspond with the hon. Lady further on the status of that Bill.” [footnotes omitted]²⁸²

(iii) Trusts

In 2017, the UK enacted a beneficial ownership register for trusts.²⁸³ When the register was introduced, it was originally only accessible to law enforcement.²⁸⁴ However, the EU’s Fifth Anti-Money Laundering Directive (5AMLD) now requires data in the register to be disclosed to persons who demonstrate a “legitimate interest.”²⁸⁵ Additionally, 5AMLD expanded the register’s reach to all UK trusts, other than the specified exceptions.²⁸⁶

6.1.2.2 US

The lack of beneficial ownership laws is one of the most significant loopholes in the AML and counter terrorism financing laws in the US. The Department of Treasury introduced the Customer Due Diligence Final Rule²⁸⁷ to close this gap. The Final Rule became effective July 11, 2016, and institutions were required to comply by May 11, 2018. There are three core requirements introduced by the rule:

- (1) identifying and verifying the identity of the beneficial owners of companies opening accounts;
- (2) understanding the nature and purpose of customer relationships to develop customer risk profiles; and

²⁸² *Ibid* at 12-13.

²⁸³ *Ibid* at 14.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid*. For more on 5AMLD and the changes to the trust registry, see “Trust Registration Extension – An Overview” (last updated 4 May 2021), online: *UK Government* <<https://www.gov.uk/guidance/trust-registration-extension-an-overview>>; and “Anti-Money Laundering and Countering the Financing of Terrorism” (last visited 10 September 2021), online: *European Commission* <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/anti-money-laundering-and-countering-financing-terrorism_en>.

²⁸⁷ “Information on Complying with the Customer Due Diligence (CDD) Final Rule” (last visited 9 September 2021), online: *FinCEN* <<https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule>>.

- (3) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.²⁸⁸

Under the Final Rule, beneficial owners can stem from two prongs. The “ownership prong” includes every individual who directly or indirectly owns 25% or more of a company. Under the “control prong,” a beneficial owner is a single individual with significant responsibility to control, manage or direct the legal entity.²⁸⁹ Each company will therefore have between one and five beneficial owners.

The Final Rule does not apply retroactively, meaning it only applies to accounts opened on or after May 11, 2018.²⁹⁰

On January 2, 2021, the US Senate voted to override President Trump’s veto of an omnibus bill, which included the *Corporate Transparency Act of 2019*.²⁹¹ The statute amended Title 31 of the *United States Code* and required the creation of a registry of beneficial owners within FinCEN of certain entities formed or registered to do business in the United States.²⁹²

6.1.2.3 Canada

Canada currently lags behind other countries in adopting beneficial ownership laws. As Transparency International Canada (TI Canada) notes, “[i]n Canada, more rigorous identity checks are done for individuals getting library cards than for setting up companies.”²⁹³ TI

²⁸⁸ United States, Department of Treasury, Press Release, “Treasury Announces Key Regulations and Legislation to Counter Money Laundering and Corruption, Combat Tax Evasion” (5 May 2016), online: <<https://www.treasury.gov/press-center/press-releases/Pages/jl0451.aspx>>.

²⁸⁹ “FinCEN Releases Final Rule on Beneficial Ownership and Risk-Based Customer Due Diligence” (10 May 2016), online (pdf): *Covington & Burling LLP* <https://www.cov.com/-/media/files/corporate/publications/2016/05/fincen_releases_final_rule_on_beneficial_ownership_and_risk_based_customer_due_diligence.pdf>.

²⁹⁰ Jacqueline M Allen, Elizabeth A Khalil & Jesse Tyner Moore, “FinCEN Releases Long-Awaited Beneficial Ownership Final Rule” (16 May 2016), online (blog): *Consumer Financial Services Law Blog* <<https://www.lexology.com/library/detail.aspx?g=ddac5253-49e7-4f37-9f14-2307800ae5d3>>.

²⁹¹ *William M (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*, Pub L No 116-283 (HR 6395), 134 Stat 338, 116th Cong 2d Sess, § 6401-6403.

²⁹² Kerry O’Rourke Perri et al, “Corporate Transparency Act and New Implications for US Special Purpose Vehicles, Wealth Structuring and Other Arrangements” (26 January 2021), online: *White & Case* <<https://www.whitecase.com/publications/alert/corporate-transparency-act-and-new-implications-us-special-purpose-vehicles>>. See also Shruti Shah & Alex Amico, “Washington Targets Beneficial Owners with the Corporate Transparency Act” (21 December 2020), online (blog): *The FCPA Blog* <<https://fcpublog.com/2020/12/21/washington-targets-beneficial-owners-with-the-corporate-transparency-act/>>; and Joshua Goodman, “New Law Down on Shell Companies to Combat Corruption”, *St Catherine’s Standard* (10 January 2021), online: <<https://www.stcatharinesstandard.ca/ts/news/world/us/2021/01/10/new-law-cracks-down-on-shell-companies-to-combat-corruption.html>>.

²⁹³ Adam Ross, *No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts*, (Toronto: TI Canada, 2016) at 6, online (pdf): <<https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5dfb8a955179d73d7b758a98/1576766126189/no-reason-to-hide.pdf>>.

Canada rates Canada's compliance with the G20 principle as being weak or very weak in 7 of 10 principles.

In their 2016 Report, TI Canada notes "[a]s a testament to the secrecy afforded in Canada, the law firm at the centre of the Panama Papers leak, Mossack Fonseca, marketed Canada to its clients as an attractive place to set up anonymous companies."²⁹⁴ At that time, Canada had approximately 3.4 million business corporations²⁹⁵ and an estimated millions of trusts.²⁹⁶ Trusts are treated as private contracts and can be guarded by attorney-client privilege. Trusts provide a greater degree of anonymity to beneficial owners than corporations.²⁹⁷ This level of secrecy is a huge hindrance to law enforcement efforts.

Nominees are individuals or entities appointed to act on behalf of a beneficial owner. They add another layer of secrecy to companies.²⁹⁸ Nominee owners are a common means of money laundering and hiding crime proceeds through real estate. TI Canada noted that a study in 2004 found that "of 149 proceeds of crime cases successfully pursued by the RCMP ... nominee owners were used in over 60% of real estate purchases made with laundered funds."²⁹⁹ TI Canada noted that of the 42 high-end properties sold in Vancouver in the previous five years, 26% were bought by students or homemakers with no visible known income or wealth.³⁰⁰

A beneficial ownership regime is crucial for Canada to have an effective, proactive regime to combat corruption, money laundering, as well as offences such as drug trafficking and fraud, and to assist in the recovery of proceeds of corruption and other crimes. The key recommendation made by TI Canada in this regard is:

The Government of Canada should work with the provinces to establish a central registry of all companies and trusts in Canada, and their beneficial owners. The registry should be available to the public in an open data format. Corporate directors and trustees should be responsible for submitting beneficial ownership information and keeping it accurate and up to date.³⁰¹

Other recommendations include the following:

- Nominees should be required to disclose that they are acting on another's behalf, and the beneficial owners they represent should be identified.

²⁹⁴ *Ibid* at 15.

²⁹⁵ *Ibid* at 17. As there is no central registry for corporations in Canada, TI Canada contacted each provincial and territorial registry, noting the basic data was not readily available to registry employees in most parts of Canada.

²⁹⁶ *Ibid* at 18.

²⁹⁷ *Ibid* at 18.

²⁹⁸ *Ibid* at 19.

²⁹⁹ *Ibid* at 27.

³⁰⁰ *Ibid* at 31.

³⁰¹ *Ibid* at 37.

- Corporate registries should be given adequate resources and a mandate to independently verify the information filed by legal entities, including the identities of directors and shareholders.
- Beneficial ownership information should be included on property title documents, and no property deal should be allowed to proceed without that disclosure.
- The Government of Canada should make it mandatory for all reporting sectors – including real estate professionals – to identify beneficial ownership before conducting transactions.
- All government authorities in Canada should require beneficial ownership disclosure as a prerequisite for companies seeking to bid on public contracts.³⁰²

Another problem Canada faces in requiring mandatory disclosure of beneficial ownership is the finding of the SCC in *Reference re Securities Act*,³⁰³ that a national securities commission would be unconstitutional. As a result, TI Canada voiced concerns regarding Canada's ability to reach a national consensus or impose a national requirement on beneficial ownership transparency requirements.³⁰⁴

There is change on the horizon for Canada, however. Due to its federalist form of government, companies can be incorporated federally or provincially, resulting in the need for either 11 corporate registries of beneficial ownership or one, all-encompassing registry. The Canadian government has started down the latter route with public consultations.³⁰⁵ It is also possible for the provinces, which have constitutional authority over property and civil rights, to create beneficial ownership registries for property transactions. British Columbia was the first to do so, enacting the *Land Owner Transparency Act (LOTA)*.³⁰⁶ That legislation mandates disclosure of the names of beneficial owners of land, including companies. The effectiveness of beneficial ownership registries revolves around the quality of information received; its authentication; whether the registry is public or private, or an amalgam of both; and whether there is effective enforcement. *LOTA* has already been criticized by observers, leaving it to be seen whether it achieves its intended goals.³⁰⁷

³⁰² *Ibid* at 7. For a full list of recommendations, see *ibid* at 38-39.

³⁰³ *Reference re Securities Act*, 2011 SCC 66.

³⁰⁴ For further reading, see also Mora Johnson's detailed study entitled *Secret Entities: A Legal Analysis of the Transparency of Beneficial Ownership in Canada*, (Ottawa: Publish What you Pay Canada, 2017), online (pdf):

<<https://static1.squarespace.com/static/5c4638563c3a53c04e226492/t/5c6c9f5cee6eb00cf07a72fd/1550622558640/secret-entities.pdf>>.

³⁰⁵ "Strengthening Corporate Beneficial Ownership Transparency in Canada" (February 2020; last modified 19 March 2020), online: *Government of Canada* <<https://www.ic.gc.ca/eic/site/142.nsf/eng/00001.html>>.

³⁰⁶ SBC 2019, c 23 (Royal Assent on 16 May 2019).

³⁰⁷ Zena Olijnyk, "New British Columbia Land Registry Won't Stop Money Laundering: CD Howe Institute", *Canadian Lawyer* (12 November 2020), online: <<https://www.canadianlawyermag.com/practice-areas/criminal/new-british-columbia-land-registry-wont-stop-money-laundering-c.d.-howe-institute/335205>>; Kevin Comeau, *BC's Public Registry to*

6.1.3 Other Challenges

Developing countries face additional challenges due to a lack of resources, expertise, investigative experience, foreign contacts, and institutional stability for pursuing complex transnational asset recovery proceedings and MLA requests. The MLA system is particularly impossible for failing states. Section 4 of Canada's *FACFOA* aims to deal with failed states by allowing the freezing of assets on request from countries experiencing "political turmoil" or "an uncertain political situation."³⁰⁸ The "Duvalier law" in Switzerland represents another attempt to fill in the gaps of the international asset recovery framework in relation to states where the rule of law has broken down (see Section 3.1 for more on the "Duvalier law").³⁰⁹

Political immunity presents another barrier to asset recovery. In some states, immunities have been extended to protect various public officials, who are then able to use immunities to block or delay investigation and prosecution for corruption or money laundering.³¹⁰

Mark Vlasic also pointed out that lack of political will often hinders asset recovery: "often, when states compare the costs of pursuing an asset recovery agenda to uncertain benefits, the risk of stepping outside the status quo is more than they are willing to take on."³¹¹ Stephen Kingah notes that requesting countries must hire an "army of attorneys" and expensive firms specializing in asset tracing.³¹² To make matters worse, many jurisdictions allow the owner of seized or restrained assets to deplete those assets for their own legal fees,

Combat Money Laundering: Broken on Arrival, Commentary No 583 (Toronto: CD Howe Institute, 2020), online: <<https://www.cdhowe.org/public-policy-research/bc%E2%80%99s-public-registry-combat-money-laundering-broken-arrival>>; Mallory Hendry, "Real Estate Legal Report: The Devil in the Details", *Canadian Lawyer* (11 February 2020), online: <<https://www.canadianlawyermag.com/practice-areas/real-estate/real-estate-legal-report-the-devil-in-the-details/326166>>; and Aidan Macnab, "BC's Real Estate Owner Requirements a Huge Burden for Clients, say Lawyers", *Canadian Lawyer* (1 June 2019), online: <<https://www.canadianlawyermag.com/practice-areas/real-estate/b.c.s-real-estate-owner-requirements-a-huge-burden-for-clients-say-lawyers/276179>>.

³⁰⁸ Currie & Rikhof, *supra* note 154 at 408.

³⁰⁹ For further discussion of challenges faced by developing countries, see Jesse Mwangi Wacanga, "Hurdles in Asset Recovery and Fighting Corruption in Developing Countries: The Kenya Experience" in Zinkernagel, Monteith & Pereira, *supra* note 17, 147. Note also, that to date none of the Duvalier funds in Switzerland have been returned to Haiti: "Haiti Still Waiting for Swiss Courts to Free Funds Stolen by Dictators, More than Thirty Years On", *MercoPress* (12 November 2021), online: <<https://en.mercoPress.com/2020/11/12/haiti-still-waiting-for-swiss-courts-to-free-funds-stolen-by-dictators-more-than-thirty-years-on>>; and Marie Maurisse, "Haitian Dictator Money Remains a Tough Nut to Crack", *SwissInfo* (10 November 2020), online: <<https://www.swissinfo.ch/eng/haitian-dictator-money-remains-a-tough-nut-to-crack/46150206>>.

³¹⁰ Silvio Antonio Marques, "Political Immunities: Obstacles in the Fight against Corruption" in Zinkernagel, Monteith & Pereira, *supra* note 17, 93.

³¹¹ Mark V Vlasic, "Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems" (2010) 5:2 *Yale J Intl Affairs* 106 at 112.

³¹² Stephen Kingah, "Effectiveness of International and Regional Measures in Recovering Assets Stolen from Poor Countries" (2011) 13 *U Botswana LJ* 3.

which are often exorbitant.³¹³ This dissipation of assets can discourage originating countries from pursuing asset recovery proceedings.

Returned assets may be further reduced by asset sharing agreements with the requested country. As Matthew Stephenson points out, although Article 57(5) of UNCAC requires states to enable the return of all confiscated property, Article 14(3)(b) of UNTOC allows states to consider negotiating case-by-case asset sharing agreements.³¹⁴ Originating countries may lack the resources for these lengthy negotiations and may find themselves in a weak negotiating position since the requested country has custody of the confiscated assets.

The authors of *Barriers to Asset Recovery* also point out that inadequate enforcement of AML measures, particularly regulation of gateways into financial centres, prevents the interception of stolen assets.³¹⁵ In the StAR publication, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, the authors outline asset recovery challenges resulting from the increasing use of settlements, as opposed to full trials, in foreign bribery cases.³¹⁶ In 365 settlements between 1999 and mid-2012, sanctions amounting to \$6 billion were imposed by countries other than the corrupt official's country. Of that \$6 billion, only \$197 million (3.3%) was returned to the corrupt official's country. Between mid-2012 and the end of April 2016, monetary sanctions totalling \$4 billion were imposed, but only \$7 million (0.18%) was returned to the corrupt official's country.³¹⁷ That pitiful figure arose from just one case in which a settlement (a deferred prosecution agreement) was entered into by the Serious Fraud Office of the UK and Standard Bank in November 2015, and required the latter to pay \$6 million in compensation and \$1 million in interest to Tanzania.³¹⁸ Also, between 1999 and mid-2012, roughly \$556 million was returned or ordered returned in cases where the jurisdiction of enforcement and the jurisdiction of the corrupt foreign officials were the same, whereas between mid-2012 and the end of April 2016 this sum amounted to just \$137,325.³¹⁹ Beginning in April 2014, the Office of the Attorney General of Switzerland (OAG) opened dozens of investigations in relation to the Petrobras corruption scandal, resulting in \$800 million in assets being frozen, and in March 2016 the OAG announced that \$70 million of frozen assets were to be unblocked and returned to

³¹³ Stephenson et al, *supra* note 2 at 94–95.

³¹⁴ *Ibid* at 77–78.

³¹⁵ *Ibid* at 33–34.

³¹⁶ Settlements include “any procedure short of a full trial,” such as plea agreements, deferred prosecution agreements and non-prosecution agreements: Oduor et al, *supra* note 42 at 1.

³¹⁷ Mechanisms for Asset Recovery, *supra* note 249 at paras 21, 33. For ongoing updates on asset recovery efforts, see “Asset Recovery Watch Database” (last visited 9 September 2021), online: StAR <<https://star.worldbank.org/asset-recovery-watch-database>>.

³¹⁸ Serious Fraud Office, Press Release, “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/>>.

³¹⁹ Mechanisms for Asset Recovery, *supra* note 253 at para 34.

Brazil.³²⁰ In 2019, Swiss prosecutors stated that CHF365 million had been returned so far to Brazil, with over CHF700 million having been seized.³²¹

According to the authors of *Left out of the Bargain*, settlements are often lacking in transparency with negotiations taking place behind closed doors.³²² Further, affected countries are often unaware of ongoing cases in other countries until they are over. Even when affected countries have the opportunity to participate in negotiations elsewhere, for example as a *partie civile*, they often lack the resources and knowledge of other legal systems to follow through.³²³ The authors suggest that countries pursuing settlements inform affected countries of the facts of the case and legal avenues to asset recovery, such as seeking a restitution order.³²⁴ StAR also recommends that states permit third parties to be included in settlement agreements in foreign bribery cases.

Finally, the desire to respect civil liberties presents another obstacle to crafting effective asset recovery regimes. As explained by Julio Bacio-Terrancino, asset recovery initiatives have the potential to infringe on property rights and the presumption of innocence, as well as rights to privacy and a fair trial during investigation and other rights in relation to the offence of illicit enrichment (see below).³²⁵

6.2 Emerging Tools in Asset Recovery

StAR found that OECD members are increasingly turning to less traditional avenues of asset recovery. Instead of waiting for slow mutual legal assistance requests from corrupt officials' jurisdictions, some jurisdictions have initiated their own investigations.³²⁶ Although criminal confiscation is generally considered the most obvious tool in asset return, many

³²⁰ Office of the Attorney General of Switzerland, Press Release, "Petrobras Affair: Further USD 70 Million of Frozen Assets to be Unblocked and Returned to Brazil" (17 March 2016), online: <<https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-61034.html>>.

³²¹ Associated Press, "Swiss Say they Returned \$365M to Brazil in Petrobras Probe", *ABC News* (9 April 2019), online: <<https://abcnews.go.com/International/wireStory/swiss-returned-365m-brazil-petrobras-probe-62266990>>.

³²² Oduor et al, *supra* note 42 at 3.

³²³ *Ibid* at 86.

³²⁴ If a third party can show direct and proximate damage resulting from a crime, prosecutors in common law countries will act on their behalf. For example, in the Oil-for-Food bribery scandal in Iraq, the company Vitol SA was ordered to pay \$13 million to the Iraqi people after pleading guilty (*ibid* at 93).

³²⁵ Julio Bacio-Terrancino, "Lurking Corruption and Human Rights" (2010) 104 *Am Soc Intl Law Proceedings* 245. For a discussion of potential issues regarding the right to a fair trial in transnational asset recovery proceedings, see Radha Dawn Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases" (2013) 9:4 *Utrecht L Rev* 147. For more on forfeiture and the presumption of innocence, see Johan Boucht, "Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) of ECHR" (2014) 5:2 *New J European Crim L* 221.

³²⁶ Gray et al, *supra* note 22 at 2.

cases analyzed by StAR used administrative actions for freezing assets, NCB confiscation, reparation payments, and settlement agreements to facilitate the return of assets.³²⁷

Some other new techniques for pursuing asset recovery have emerged in recent years and are discussed below.

(1) Illicit Enrichment Offences

The offence of illicit enrichment assists in asset recovery by relaxing proof burdens. Prosecutors only need to prove that a defendant cannot justify their illicit funds through legitimate income sources. Article 20 of UNCAC requests states to consider establishing a criminal offence of illicit enrichment. Because the offence has the potential to deteriorate the presumption of innocence and the privilege against self-incrimination, critics discourage the creation of the offence in states with a weak rule of law and weak governance. Prosecutorial discretion also makes the offence vulnerable to abuse.³²⁸

(2) Unexplained Wealth Orders

The UK government recommended the creation of a system of unexplained wealth orders (UWOs) in the *Criminal Finances Bill* introduced in the UK House of Commons on October 13, 2016.³²⁹ Australia already has a system for making unexplained wealth orders in five of its six states and all of its territories.³³⁰ The UK *Criminal Finances Act 2017*³³¹ (*Act*) (which came into force on January 31, 2018) is aimed at targeting the revenue generated by organized crime, with a particular focus on money laundering and terrorist finance.³³² Perhaps the most novel and potentially controversial power introduced by the *Act* is the introduction of unexplained wealth orders, which place a burden on individuals whose assets are disproportionate to their income to explain the origin of their wealth.³³³ The *Act* amends *POCA* to allow a court to make an UWO upon application from an enforcement

³²⁷ *Ibid.*

³²⁸ L Muzila et al, “Illicit Enrichment: An Emerging Tool in the Asset Recovery Process” in Zinkernagel, Monteith & Pereira, *supra* note 17, 245. For a detailed analysis of illicit enrichment, see StAR Initiative, Lindy Muzila et al, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, (Washington, DC: International Bank for Reconstruction and Development/World Bank, 2012).

³²⁹ *Criminal Finances Bill* (UK), 2016-2017 sess (2016), Bill 75.

³³⁰ Koren, *supra* note 241.

³³¹ 2017, c 22 [CFA].

³³² UK, HC Library, *Criminal Finances Bill* (Briefing Paper No 07739) by Joanna Dawson et al (London: HC Library, 2016) at 4, online:

<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>>.

³³³ *Ibid.* For recent commentary on UWOs, see Anton Moiseienko, “Unexplained Wealth Orders in the UK: What Will This Year Bring?”, Commentary (11 February 2021), online: *RUSI*

<<https://rusi.org/explore-our-research/publications/commentary/unexplained-wealth-orders-uk-what-will-year-bring>>; UK, HC Library, *Unexplained Wealth Orders* (Briefing Paper No CBP 9098) by Ali Shachli (London: HC Library Research Service, 2021), online (pdf):

<<https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf>>; and Jonathan Fisher, “Unexplained Wealth Orders have not been a Complete Damp Squib” (22 March 2021), online (blog): *FT Adviser* <<https://www.ftadviser.com/opinion/2021/03/22/unexplained-wealth-orders-have-not-been-a-complete-damp-squib/>>.

authority such as the Crown Prosecution Service or the SFO.³³⁴ The Court must be satisfied that the respondent has property valued over £100,000. The Court must also be satisfied that “there are reasonable grounds for suspecting that the known sources of the respondent’s law fully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.”³³⁵ Finally, the Court must be satisfied either that there are reasonable grounds to suspect that the respondent, or a person connected with the respondent, is involved in serious criminal activity, or that the respondent is a “Politically Exposed Person” (PEP).³³⁶ A PEP is defined as a person who has been “entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State,”³³⁷ or a family member or close associate of such a person.

If granted, a UWO places a requirement on the respondent to explain the source of their assets within a specified period of time.³³⁸ If the respondent fails to respond in the specified period, the assets will then be considered “recoverable property” and subject to civil forfeiture under Part 5 of *POCA*. If a respondent purports to comply with the UWO, the enforcement agency may undertake further enforcement or investigatory proceedings. The *Act* also makes it an offence to knowingly or recklessly make “a statement that is false or misleading in a material particular” when purporting to comply with a UWO. Statements made when attempting to comply with an UWO would not be admissible as evidence against a respondent in criminal proceedings.³³⁹ Section 2 of the *Act* amends *POCA* to provide for freezing of assets identified in an UWO, while section 3 amends *POCA* to allow for enforcement of UWOs overseas.³⁴⁰

TI assessed the *Act* while it was at the bill stage for its possible human rights impact and concluded that there are sufficient safeguards included in the legislation to prevent UWOs from being abused.³⁴¹

(3) Other Measures

The *Criminal Finances Bill* also introduced five other measures aimed at criminal proceeds in addition to the UWO regime, namely disclosure orders (sections 7 and 8); changes to strengthen the suspicious activity report regime (section 11); new civil powers for proceeds of crime recovery (sections 14-16); terrorist financing powers (sections 35-43); and corporate offences of failure (sections 44-52).

³³⁴ *POCA*, *supra* note 186.

³³⁵ *CFA*, *supra* note 331, s 362B(2).

³³⁶ *Ibid*, s 362B(4).

³³⁷ *Ibid*, s 1.

³³⁸ Dawson et al, *supra* note 332 at 4.

³³⁹ *CFA*, *supra* note 331, s 1.

³⁴⁰ *Ibid*, ss 2-3.

³⁴¹ Rachel Davies Teka, “Unexplained Wealth Orders” (30 May 2017), online: TI <<https://www.transparency.org.uk/unexplained-wealth-orders-brief-guide>>.

(a) Proceeds of Crime Recovery

The *Act* creates new civil powers that allow law enforcement agencies to seize proceeds of crime that are stored in bank accounts or in non-cash valuables such as jewels or precious metals.³⁴²

(4) New Forms of Civil Damages

New measures of damages provide another useful tool in asset recovery. As pointed out by Emile van der Does de Willebois and Jean-Pierre Brun, those who pay bribes are rarely caught, which could encourage the perception that compensation orders are merely a cost of doing business.³⁴³ Punitive damages would increase deterrence and encourage plaintiffs to bring actions. The emerging concept of social damages provides another recourse for victims of corruption and is already employed in Costa Rica. The concept is explained by van der Does de Willebois and Brun:

To ensure full compensation and deterrence when punitive damages are not applicable, other jurisdictions have tried to use the concept of social damages. In some jurisdictions, a social damage may be defined as the loss that is not incurred by specific groups or individuals but by the community as a whole. This could include damages to the environment, to the credibility of the institutions, or to collective rights including health, security, peace, education, good governance, and good public financial management. It is different from damages to collective rights, which belong to a restricted and identifiable group of individuals or legal entities. Social damage can be pecuniary and nonpecuniary.³⁴⁴

(5) Financial Disclosure for Public Employees

Richard Messick points out that financial disclosure requirements for public employees are also useful in asset recovery. Disclosure can provide evidence of a predicate offence if discrepancies exist between an official's disclosed finances and other records. Messick recommends that states create a criminal offence around non-reporting to support asset recovery actions. The author also recommends following Trinidad's example in making forfeiture of an asset automatic when an official knowingly omits the asset from disclosure statements.³⁴⁵

(6) Donor Assistance to Assist Poor Countries in Pursuing Asset Recovery

Finally, Mason recommends that aid agencies contribute resources to asset recovery proceedings in donor countries as a means to assisting development in donee countries, since donees often lack the resources to carry out MLA requests and transnational

³⁴² *CFA*, *supra* note 331, ss 14-16.

³⁴³ van der Does de Willebois & Brun, *supra* note 69 at 648.

³⁴⁴ *Ibid* at 649.

³⁴⁵ Richard E Messick, "How Financial Disclosure Laws Help in the Recovery of Stolen Assets" in Zinkernagel, Monteith & Pereira, *supra* note 17, 235.

proceedings.³⁴⁶ StAR echoes this recommendation, advising development agencies to allocate assistance funds to domestic law enforcement efforts that could lead to return of assets to developing countries.³⁴⁷

³⁴⁶ Phil Mason, “Being Janus: A Donor Agency’s Approach to Asset Recovery” in Zinkernagel, Monteith & Pereira, *supra* note 17, 197.

³⁴⁷ Gray et al, *supra* note 22 at 56.

CHAPTER 6

INVESTIGATION AND PROSECUTION

GERRY FERGUSON AND SEAN BOYLE*

* Sean Boyle wishes to thank Patrick Palmer for his assistance in updating this chapter.

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The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

The economic and social costs of corruption are massive. The possible consequences provide a major incentive for global anti-corruption measures, exemplified by the widespread adoption of the UNCAC and the OECD Convention.

Anti-corruption enforcement is a vital part of the fight against global corruption. Prevention of corruption before it occurs is the ideal goal. However, when prevention fails and corruption occurs, investigation and punishment of corrupt offenders becomes critical. Robust enforcement instills public confidence that states will not sit idly by while corporations and individuals pursue illicit profits at the expense of the global citizenry. Effective detection, prosecution, and sanctioning of corrupt offenders will also have a deterrent effect, which is crucial to prevention. The strongest disincentive to corruption is a high likelihood of being caught and brought to justice.¹

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

This chapter discusses the international provisions that mandate effective methods for investigation, prosecution, and sanctioning of corruption offences and the implementation of these enforcement provisions in the US, UK, and Canada. Different structural approaches to anti-corruption enforcement around the globe are introduced, followed by a brief examination of the powers and techniques necessary for enforcement.

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

Anti-corruption enforcement can become entangled with international relations, generating considerable financial and socio-political costs for the enforcing State Party. In the case of BAE, discussed in Chapter 1, Section 10, the UK would have paid a high price to prosecute BAE's bribery of Saudi officials. According to news reports, Prince Bandar of Saudi Arabia threatened to withdraw security and intelligence support for UK soldiers in Iraq and to

¹ Because "[s]uccessful detection of corruption depends upon insiders to report wrongdoing," Rose-Ackerman points out the tension between the need to deter and to detect corruption offences: "One conundrum for anti-corruption efforts is the possible tension between the goals of signaling credible expected punishments and using the law to induce perpetrators to provide evidence." See Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 *Ann Rev L Soc Sci* 217 at 221-222.

cancel an \$80 billion aircraft contract with BAE.² Faced with the loss of strategic support that would endanger British lives in Iraq and the loss of a contract which would cost British jobs at home, UK Prime Minister Tony Blair pressured Attorney General Lord Goldsmith to drop the UK Serious Fraud Office (SFO)'s investigation into BAE's alleged bribery of Saudi officials; Goldsmith (and thus the SFO) reluctantly acquiesced, eventually "agree[ing] to find a plausible justification for halting the investigation."³ Faced with the cost to Britain, Tony Blair effectively stopped the prosecution, but he may have decided differently if he had taken a wider view of the global cost of corruption and considered its negative effect on millions of the world's poorest people.⁴ The BAE case thus illustrates an important point: political will is essential to effective enforcement of anti-corruption measures. It is impossible to realize this political will by narrowly focusing on domestic concerns. The consequence is that the independence of the enforcement process is compromised.

In Canada, the "SNC-Lavalin affair" provides a more recent illustration of the same point. SNC-Lavalin Group Inc., a construction company based in Montreal, was investigated for alleged bribes related to the company's operations in Libya. The company lobbied to negotiate a deferred prosecution agreement (known as a "remediation agreement" in Canada) with the prosecution.⁵ The Director of Public Prosecutions (DPP), who reports to the Attorney General, informed the Attorney General that she would not invite SNC-Lavalin to negotiate a remediation agreement. The Attorney General accepted the DPP's decision and refused to intervene. Later, however, Canadian Prime Minister Trudeau was found to have used his position of authority over the Attorney General to seek to influence her decision on whether to overrule the DPP.⁶ While SNC-Lavalin would eventually enter a guilty plea, the political and public fallout was nonetheless significant: the former Attorney General was ejected from the government caucus, and increased public scrutiny was directed towards the remediation agreement as an enforcement tool.

These cases illustrate the reality that political interests can hinder the investigation or prosecution of corruption. Foreign corruption offences involve a distinct, political dimension which can manifest itself amidst enforcement efforts and undermine prosecutorial independence. For instance, Prime Ministers Blair and Trudeau could rationalize their conduct by pointing to the potential effect of sanctions on the public labour force, thereby elevating domestic political concerns over global ones. From the perspective

² See for example, Lowell Bergman, "Frontline: Black Money" (4 September 2009), online (video): PBS <<http://video.pbs.org/video/1114436938/>>.

³ David Leigh & Rob Evans, "How Blair put pressure on Goldsmith to end BAE investigation", *The Guardian* (21 December 2007), online: <<https://www.theguardian.com/world/2007/dec/21/bae.tonyblair>>.

⁴ It should be noted that BAE later faced charges related to corruption in Germany and the US and also paid fines in the UK for bribery offences committed in Tanzania. See Chapter 1, Section 10.

⁵ The remediation agreement is a relatively new enforcement tool in Canada. Remediation agreements are explored in depth in Section 6.3.3.

⁶ Mario Dion, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, (Ottawa: Parliament of Canada, 2019), online (pdf): <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf>>.

of critics at least, the conclusion which irresistibly follows is that some actors really are “too big to prosecute.”⁷

To prevent states from improperly interfering with the prosecution of corruption, it has been suggested that corruption should be made an international crime to be prosecuted in an international court. As discussed in Chapter 1, Section 1, over 100 world leaders have signed a declaration for the creation of an International Anti-Corruption Court. However, this is an unrealistic solution on the grounds that heads of states are unlikely to be persuaded to add corruption to the small list of international crimes any time soon. There is also a movement to have grand corruption treated as a violation of international human rights, which could therefore be dealt with through international human rights processes. For more information, see Chapter 1, Section 1.4.4.

Further complicating enforcement is the fact that bribery of foreign public officials is, by its nature, extraterritorial. When a company bribes or attempts to bribe a foreign official, the jurisdiction of at least two countries is engaged—the country in which the company is based and the country in which the foreign official is based.⁸ This raises fundamental questions about whether, and how, to coordinate investigative efforts where there may be discrete interests and distinct levels of ability to conduct investigations among the involved countries. Where coordination cannot be achieved, a risk arises that offenders will be subject to prosecutions in multiple jurisdictions for the same conduct. Arguably, this is contrary to the principle of “double jeopardy.” It may also dissuade actors from self-reporting or cooperating with investigating authorities. These risks are canvassed in Section 7.

2. INTERNATIONAL OBLIGATIONS

Criminalization of corrupt behaviour is meaningless without robust law enforcement. To support the overall anti-corruption scheme of UNCAC, chapters III (Criminalization and law enforcement) and IV (International cooperation) include provisions that facilitate the effective investigation and prosecution of corruption offences. While narrower in scope than UNCAC, the OECD Convention also contains provisions to promote effective law enforcement.

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

- (1) Immunities and Pre-Trial Release of Defendants;
- (2) Specialized Anti-Corruption Enforcement Bodies;
- (3) Discretionary Power to Investigate and Prosecute Corruption;
- (4) Investigatory Power to Search Financial Records;

⁷ See for example, Nick Wagoner, “Was BAE Too Big to Debar?” (19 April 2011), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2011/4/19/was-bae-too-big-to-debar.html>>.

⁸ This, of course, is the most basic example. The corporate structure and operations of a multinational company may involve underlying conduct that attracts jurisdiction from several different countries.

- (5) Protection of Witnesses, Victims, Whistleblowers and Participants;
- (6) International Cooperation in Investigation and Cooperation;
- (7) Jurisdiction for Prosecution and Transfer of Criminal Proceedings;
- (8) Extradition; and
- (9) Use of Special Investigative Techniques.

As ratifiers of UNCAC and the OECD Convention, the US, UK, and Canada are required to implement the provisions of the conventions in their domestic statutes and law enforcement practices. In the sections that follow, the convention requirements and the manner in which the US, UK, and Canada have implemented each of these nine enforcement topics will be described.

Section 2.1 begins by considering the reviewing mechanisms by which each country's implementation of the convention requirements is monitored.

2.1 Peer Review Process

State Parties are held accountable for implementing the anti-corruption measures of the conventions by the peer country review reports (in the case of UNCAC) and Phase 3 Reports (in the case of the OECD Convention). These reviews also allow State Parties to respond to the reviewing group's recommendations regarding more effective ways to implement provisions of the anti-corruption conventions and to offer feedback in respect to the fight against corruption in their country.

Some have criticized UNCAC's implementation review mechanism for the lack of depth and rigour it involves. Although the country review reports are completed by expert teams from randomly selected peer countries, the reports are largely "desk reviews" of the self-assessments completed by the countries being reviewed. Country visits by the expert teams are not mandatory and are contingent upon consent of the country being reviewed. In addition, even though the UN resolution adopting the review mechanism encouraged governments to include civil society and private sector input during the review process, a country being reviewed is not required to include input from these important sources. Notwithstanding these criticisms, the peer country review reports provide good summaries of the apparent implementation of anti-corruption law enforcement provisions in the US, UK, and Canada.

The OECD's review mechanism is regarded by many as more rigorous than the UNCAC review. The Phase 3 reports are written by two peer countries that act as lead examiners. The country being reviewed responds to a detailed questionnaire designed to elicit information concerning the country's implementation of the OECD Convention and previous recommendations of the OECD Working Group on Bribery. Each Phase 3 report involves a mandatory on-site visit led by the two peer countries to determine the veracity of the information on the questionnaire. The peer country reports are assessed by the entire Working Group on Bribery, made up of representatives from all State Parties to the Anti-

Bribery Convention, who evaluate each country's performance and adopt conclusions. Excerpts from the Phase 3 reports will be reproduced later in this chapter.

2.2 UNCAC and OECD Provisions and their Implementation

For the sake of this discussion, the relevant provisions of the UNCAC and the OECD Convention are not quoted verbatim. Instead, the content of the UNCAC provisions is summarized based on the *Legislative Guide for the Implementation of the United Nations Convention against Corruption (Legislative Guide)*.⁹ Likewise, the OECD Convention provisions are summarized rather than quoted.¹⁰ Summaries of the US,¹¹ UK,¹² and Canadian¹³ provisions in this section are largely from Executive Summaries produced by the UNODC's Implementation Review Group of the United Nations Convention against Corruption.

2.2.1 Immunities and Pre-Trial Release

UNCAC

Article 30 (mandatory) requires State Parties to:

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

⁹ United Nations Office on Drugs and Crime (UNODC), *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed (United Nations, 2012) [Legislative Guide (2012)], at 134, online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

¹⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, S Treaty Doc No 105-43 (entered into force 15 February 1999) [OECD Convention], online : <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

¹¹ UNODC, *Review of Implementation of the United Nations Convention against Corruption: Executive Summaries, Fiji and USA*, Implementation Review Group, 3rd Sess, UN Doc CAC/COSP/IRG/I/1/1/Add6 (2012) at 11-21, online (pdf): <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1251970e.pdf>>.

¹² UNODC, *Review of Implementation of the United Nations Convention against Corruption: Executive Summaries, UK and Northern Ireland*, Implementation Review Group, 4th Sess, UN Doc CAC/COSP/IRG/I/2/1/Add12 (2013) at 27-31, online (pdf): <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1382015e.pdf>>.

¹³ UNODC, *Review of Implementation of the United Nations Convention against Corruption: Executive Summaries, Canada*, Implementation Review Group, 5th Sess, UN Doc CAC/COSP/IRG/I/3/1/Add8 (2014) at 2-6, online (pdf): <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>>.

OECD Convention

There is no mention of immunities or pre-trial release/detention.

US

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

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

UK

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

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

Canada

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

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

Autocratic and Kleptocratic Countries

By way of contrast, it should be noted that some of the most kleptocratic regimes in the world have enacted immunity laws which protect the President and/or other senior officials from prosecution for accepting bribes and robbing their nations' wealth.

Several examples are illustrative. An extreme example is that of Teodoro Obiang, who was appointed as Vice President of Equatorial Guinea by his father, the President, and given immunity from corruption charges—notwithstanding the fact that the country's

Constitution did not provide for a vice president position. This, of course, suggests that the appointment was solely *for* the purposes of providing immunity.¹⁴ In Nigeria, the Constitution provides immunity to the president, vice-president, and state and deputy state governors of all 36 states. According to the Economic and Financial Crimes Commission in Nigeria, this immunity was exploited by an estimated 31 out of the 36 state governors, such as the corrupt Ibori of Delta State.¹⁵ In Cameroon, President Paul Biya has been in power since 1982 and is immune from prosecution. Amendments to the Constitution since his presidency began have removed presidential term limits, meaning Biya can be president for life, and also created immunity for presidents after leaving office, meaning he is protected even after his presidency ends.¹⁶ In Romania, the National Anti-Corruption Directorate is facing hurdles in charging Prime Minister Victor Ponta, for conflict of interest, money laundering, forgery, and tax evasion. Ponta's majority in Parliament blocked attempts to lift Ponta's immunity in June 2015, and his party is trying to pass laws making the prosecution of graft more difficult.¹⁷ Presidential pardons can also be used to protect corrupt officials from the law, as demonstrated by the former Nigerian President Goodluck Jonathan's pardon of former state governor Diepreye Alamieyeseigha, who had been convicted of corruption offences.¹⁸

2.2.2 Specialized Enforcement Bodies

UNCAC

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

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

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

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

¹⁴ John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham; Northampton: Edward Elgar, 2014) at 82.

¹⁵ *Ibid* at 83.

¹⁶ *Ibid* at 81.

¹⁷ "Corruption in Romania: Immune System", *The Economist* (11 June 2015), online: <<http://www.economist.com/news/europe/21654081-law-change-may-help-victor-ponta-prime-minister-dodge-prosecution-immune-system>>.

¹⁸ Hatchard, *supra* note 14 at 84.

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- Providing such authorities all necessary information, upon request.

Article 39 (mandatory) requires State Parties:

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

OECD Convention

Article 5 provides that:

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

Annex I (“Good Practice Guidelines on Implementing Specific Articles of the Convention”) provides the following guidance in respect to implementing Article 5:

Complaints of bribery of foreign public officials should be seriously investigated and credible allegations assessed by competent authorities.

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

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

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

suspected acts of bribery of foreign public officials in international business transactions.

US

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

UK

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

Canada

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

Commentary

While the US, UK, and Canadian law enforcement bodies are generally recognized as independent and honest, that is not the case in many other countries, which makes enforcement of anti-corruption laws in those countries infrequent and arbitrary. It also reduces or prevents the possibility of any meaningful coordination between countries with more sophisticated, independent enforcement bodies and countries who lack them.

Both the UNCAC and the OECD Convention call for adequate resources for law enforcement. Considering the size and impact of corruption committed by businesses from the US, UK, and Canada, it seems that the UK and Canada are seriously under-resourced, certainly in comparison to the US.

In particular, Canada provides a case study illustrating the difference between *adopting legislation* to implement obligations into domestic law, on the one hand, and *seriously enforcing* those laws, on the other. While the *Corruption of Foreign Public Officials Act (CFPOA)*¹⁹ came into force in 1999, Canada devoted virtually no resources to enforcement for the next nine years. In fact, it was not until 2008 that Canada established a specific body for the purposes of CFPOA enforcement. In 2008, the Canadian government established the International Anti-Corruption Team (IACT) within the RCMP's Commercial Crime Branch. The IACT consisted of two teams, one in Ottawa and one in Calgary (the corporate home of many companies in the extractive resources sector). Predictably, enforcement activity increased in the years following.²⁰ However, these two teams were dismantled five years later and reassigned to other somewhat-related matters.

¹⁹ SC 1998, c 34.

²⁰ Milos Barutciski & Sabrina Bandali, "Corruption at the Intersection of Business and Government: The OECD Convention, Supply-Side Corruption, and Canada's Anti-Corruption Efforts to Date" (2015) 53:1 Osgoode Hall LJ 231 at 254-55, online: <<https://canlii.ca/t/sv9r>>.

2.2.3 Discretionary Power

UNCAC

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

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

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

OECD Convention

Article 5, as discussed in Section 2.2.2, and the Commentary to that Article, are directed at ensuring impartial and transparent enforcement of bribery of foreign public officials.

US

Traditionally, prosecutors in common law systems have had very broad and independent discretionary powers to prosecute or decline to pursue allegations of violations of criminal law. Those discretionary powers are constrained only by considerations such as strength of the evidence, deterrent impact, adequacy of other remedies and collateral consequences, and in general are not supposed to include political or economic factors. At the federal level, prosecutorial discretion over criminal law is vested solely in the Department of Justice and the Attorney General. Allegations of prosecutorial misconduct can be brought before the courts at any time, including allegations of selective prosecution based on a number of prohibited factors.

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

UK

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

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

The SFO receives a core budget from Her Majesty's Treasury, which can be supplemented as necessary to enable the office to take on large cases. In 2019-20, the budget was £60.6 million. Until 2013-14, the SFO received a portion of money recovered from investigations. However, as this was infrequent and highly unpredictable, the SFO agreed all proceeds would go to the Treasury with a fixed sum added to the SFO's funding.²¹

Canada

In carrying out their duties in the public interest, Canadian prosecutors exercise wide discretion over which criminal charges are pursued and they are obliged to exercise fair, impartial, and independent judgement in those decisions. Guidance is provided in the *Public Prosecution Service of Canada Deskbook (PPSC Deskbook)*, as well as in confidential practice directives.

In general, the provincial ministries of justice are delegated authority to prosecute *Criminal Code* offences (including domestic corruption cases), while the federal Public Prosecution Service of Canada (PPSC) prosecutes *CFPOA* offences.²²

2.2.4 Investigatory Power to Search Financial Records

This topic is also covered in Chapter 5.

UNCAC

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

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

²¹ "About Us" (last visited 19 August 2021), online: *Serious Fraud Office* <<https://www.sfo.gov.uk/about-us/>>.

²² There are, however, exceptions to the rule. The *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (QB) [*Niko Resources*] and *R v Griffiths Energy International*, 2013 AJ No 412 (QB) [*Griffiths Energy*] cases are two such examples. A fuller discussion of *Niko Resources* can be found in Chapter 2.

GLOBAL CORRUPTION

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

OECD Convention

Article 9 dealing with Mutual Legal Assistance provides:

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

Recommendation III also states:

each Member country [should] take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:

...

- vi) laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation.

US

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

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

UK

The UK is generally compliant with UNCAC Article 40. The provision of information by financial institutions is generally governed by dated case law, which still holds as good practice addressing how and why confidentiality may be breached.²³ Bank records are also available by search warrant and through mandatory bank reporting of suspicious transactions.

The UK has a value-based confiscation system. Confiscation, as well as the detection, freezing, seizing and administration of property, are mainly covered in a comprehensive

²³ *Tournier v National Provincial and Union Bank of England* (1924), 1 KB 461.

manner by the *Proceeds of Crime Act 2002* and the *Sentencing Act 2020*. The basic regulations in England and Wales, Scotland, and Northern Ireland are identical.

Canada

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

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

Canada has also enacted the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to implement specific measures to detect and deter money laundering and to facilitate the investigation or prosecution of money laundering offences.²⁴ The statute establishes record keeping and client identification requirements for financial services providers, as well as reporting requirements for suspicious activity. The *Act* also created the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), which is Canada's financial intelligence unit.

2.2.5 Witness, Victim, Whistleblower, and Participant Protection

Protection of whistleblowers is examined in detail in Chapter 13.

UNCAC

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

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

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

²⁴ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17.

GLOBAL CORRUPTION

Article 37 (mandatory) provides that State Parties must:

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

OECD Convention

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

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

US

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

From an operational point of view, the protection of witnesses' and victims' physical security can be secured through the Federal Witness Security Program,²⁵ if these persons meet the requirements for participation in that program. Other procedures are also in place to provide limited protection through financial assistance for relocation.

With regard to the protection of reporting persons, the federal *Whistleblower Protection Act of 1989* makes the Office of the Special Counsel (OSC) responsible for, *inter alia*, protecting employees, former employees, and applicants for employment from twelve statutory prohibited personnel practices, as well as receiving, investigating and litigating allegations of such practices.

The protection of witnesses may also be extended to cooperating informants and defendants who agree to become government trial witnesses. The discretionary powers of the

²⁵ For more information, see "Witness Security Program" (last visited 19 August 2021), online: *US Marshals Service* <<http://www.usmarshals.gov/witsec/>>.

prosecution services are of relevance. In addition to granting immunity, prosecutors often negotiate a plea agreement with a defendant to induce that defendant's cooperation by dismissing one or more of the charges, and/or by recommending that the defendant receive a lower sentence in exchange for their cooperation.

UK

UK chief officers of police and heads of law enforcement agencies have access to an extensive range of measures to protect witnesses, based on the provisions of the *Serious Organized Crime and Police Act 2005 (SOCPA)*, including full witness protection programmes involving witness relocation, a change of identity and a high degree of confidentiality. These measures fully cover the requirements of Article 32.

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

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

Canada

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

With regard to persons reporting corruption, section 425.1 of the *Criminal Code* makes it a criminal offence for an employer to demote, terminate, or otherwise affect or take disciplinary action against an employee who reports a possible offence under any federal or provincial act or regulation, either before a report takes place or in retaliation after a report is made. In addition, the *Public Servants Disclosure Protection Act (PSDPA)* provides a mechanism for public servants to make disclosures of wrongdoing, and established the office of the Public Sector Integrity Commissioner to investigate those alleged wrongdoings and investigate complaints of reprisals. The *PSDPA* also provides members of the public with protection from reprisal by their employers for having provided, in good faith, information to the Public Sector Integrity Commissioner concerning alleged wrongdoing in the federal public sector. Other protections are available at the provincial level.

2.2.6 International Cooperation

Mutual legal assistance is dealt with in Chapter 5, Section 4.

UNCAC

Article 43 (mandatory) provides:

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

Article 46 (mandatory) provides:

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

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

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

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

OECD Convention

Article 9 (mandatory) on Mutual Legal Assistance states:

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

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

Article 11 (mandatory) provides:

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

US

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

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

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

UK

UK law enforcement authorities engage in broad, consistent and effective cooperation with international counterparts to combat transnational crime, including UNCAC offences. This cooperation relates, *inter alia*, to exchanges of information, liaising, law enforcement coordination and the tracing of offenders and of criminal proceeds. A particularly prominent role in such activities is played by the Serious Organised Crime Agency (SOCA), and examples of SOCA's activities were provided during the UNCAC Review of UK laws. Important roles are also played by the SFO, the City of London Police, the specialized units of the Metropolitan Police, and other law enforcement authorities. The level and effectiveness of these activities indicates effective compliance with UNCAC Article 48.

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

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

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

Canada

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) has a mandate to exchange financial intelligence with other State Parties in relation to money laundering and terrorist financing. Information received by FINTRAC is shared as appropriate with Canadian police and other designated agencies. Such information can also relate to corruption offences: between March 31, 2019 and March 31, 2020, FINTRAC received 227 queries for information from foreign financial intelligence units in relation to money laundering and terrorist activity financing, and provided 234 disclosure packages.²⁶

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

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

²⁶ Canada, Financial Transactions and Reports Analysis Centre of Canada, *2019-20 Annual Report*, (Ottawa: FINTRAC, 2020) at 25, online (pdf): <<https://www.fintrac-canafe.gc.ca/publications/ar/2020/ar2020-eng.pdf>>.

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

2.2.7 Jurisdiction and Transfer of Criminal Proceedings

UNCAC

Article 42 (mandatory) at paragraph 5 states:

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

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

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

OECD Convention

Article 4 (mandatory) states:

3. 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.

US

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

US authorities will sometimes decline to prosecute foreign offenders under *FCPA* jurisdiction when these offenders are facing prosecution for the same acts of corruption in a foreign jurisdiction. For example, there was no US prosecution under the *FCPA* of Griffiths Energy Inc. on the grounds that the company's bribery was adequately prosecuted and punished in Canada.²⁷ However, this is a matter of discretion for DOJ prosecutions. As

²⁷ *Griffiths Energy*, *supra* note 22.

discussed in Section 7, the DOJ may prosecute an offender even if a prosecution for the same underlying conduct has been concluded in another jurisdiction.

UK

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

Canada

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

2.2.8 Extradition²⁸

UNCAC

Article 44 (mandatory) recommends that:

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

OECD Convention

Article 10 (mandatory) states:

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the

²⁸ Sometimes politics play a role in extradition proceedings. For example, in 2015, an Austrian court refused to extradite Dmytro Firtash, a Ukrainian national, to the US after the DOJ laid charges for violations of the FCPA committed in India. Firtash is a pro-Russian Ukrainian and argued that the DOJ was motivated by political concerns. The court agreed with Firtash and criticized the DOJ. See Richard L Cassin, "The FCPA Blog Goes 'Above the Law'" (20 June 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/6/20/the-fcpa-blog-goes-above-the-law.html>>.

ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

US

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

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

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

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

The US has bilateral extradition treaties with 133 states or multilateral organizations, such as the European Union. All incoming and outgoing extradition requests are reviewed and evaluated by the Office of International Affairs, DOJ, and the Office of the Legal Adviser, Department of State.²⁹

UK

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

The UNCAC Review makes clear, however, that the UK is able to extradite to all states, even those which are in neither Category 1 (EU Member States) nor Category 2 (designated non-EU Member States) of the *Extradition Act 2003*.³⁰ Under section 193 of the *Extradition Act 2003*, if a state is a party to an international convention to which the UK is also a party, the UK may designate the state under section 193 and thereby allow extradition to that state. No designations have been made under section 193 regarding UNCAC. Nevertheless, where an

²⁹ For detailed information on US extradition law, see M Cherif Bassiouni, *International Extradition: United States Law and Practice*, 6th ed (New York: Oxford University Press, 2014).

³⁰ *Extradition Act 2003* (UK).

extradition request is received from a state that is not a designated extradition partner and the person sought is wanted for conduct covered by a convention that the UK has ratified, the UK will consider whether to enter into a “special extradition arrangement” under section 194. In this manner, the UK may comply with the extradition requirements of UNCAC.

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

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

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

Similarly, the review indicates that the differences between extradition procedures in Scotland and other parts of the UK are of more technical than substantive significance and do not affect the review’s conclusion that the UK complies with the requirements of the Convention.³¹

Canada

In Canada, extradition is provided for under bilateral and multilateral agreements to which Canada is a party and, in limited circumstances, through a specific agreement under Canada’s *Extradition Act*.³² Canada has signed 51 bilateral extradition conventions and is also a party to four multilateral treaties. Canada also accepts UNCAC as the legal basis for extradition where it does not have an existing agreement in place with a requesting State Party and has informed the Secretary-General of the UN accordingly. UNCAC has been used as the legal basis for extradition on a number of occasions.

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

³¹ For detailed information on UK extradition law see, Clive Nicholls QC et al, *Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Assistance*, 3rd ed (Oxford University Press, 2013) and Edward Grange & Rebecca Niblock, *Extradition Law: A Practitioner’s Guide*, 3rd ed (Legal Action Group, 2021).

³² *Extradition Act*, SC 1999, c 18.

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

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

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

The Supreme Court of Canada in *Lake v Canada (Minister of Justice)*³³ explained that the process of extradition from Canada has two stages, a judicial and executive one. As the Court states:

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

After an individual has been committed for extradition, the Minister reviews the case to determine whether the individual should be surrendered to the requesting state. This stage of the process has been characterized as falling “at the extreme legislative end of the *continuum* of administrative decision-making” and is viewed as being largely political in nature: *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631, at p. 659. Nevertheless, the Minister's discretion is not absolute. It must be exercised in accordance with the restrictions.³⁴

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

³³ *Lake v Canada (Minister of Justice)*, 2008 SCC 23.

³⁴ *Ibid* at paras 21-22.

it is based on motives of a discriminatory nature, such as the race, sex, language, religion or nationality of the person.³⁵

2.2.9 Special Investigative Techniques

UNCAC

Article 50 (mandatory) requires:

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

OECD Convention

No mention of investigative techniques.

US

US laws permit controlled deliveries,³⁶ electronic surveillance and undercover operations in accordance with legal limits and constitutional protections.³⁷ For further discussion, see Section 4.

UK

The UK has cooperated with foreign law enforcement authorities.

UK laws permit controlled deliveries, electronic surveillance and undercover operations in accordance with legal limits, which include reliance on the abuse of process doctrine.³⁸ For further discussion, see Section 4.

³⁵ For detailed information on Canadian extradition law, see Garry Botting, *Canadian Extradition Law Practice*, 5th ed (LexisNexis Canada, 2015) and Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 544-559.

³⁶ Controlled deliveries are normally discussed in the context of the law surrounding entrapment. Controlled deliveries do not constitute entrapment and are therefore legal.

³⁷ John Bourdeau et al, "Search and Seizures in Matter of Electronic Surveillance, Generally" in *American Jurisprudence*, 2nd ed (Thomson Reuters) (last updated August 2021), § 347 and Francis C Amendola et al, "Undercover Activities" in *Corpus Juris Secundum, Criminal Procedure and Rights of Accused* (last updated August 2021), § 269.

³⁸ For information on investigation powers in the UK, see Colin Nicholls et al, *Corruption and Misuse of Public Office*, 3rd ed (New York: Oxford University Press, 2017) at 220-227.

Canada

Canadian law permits the use of controlled deliveries, electronic surveillance and undercover operations, subject to legal and constitutional limits under domestic law and the *Charter of Rights and Freedoms*.³⁹ For further discussion, see Section 4.

3. ENFORCEMENT BODIES

3.1 UNCAC and OECD Provisions

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

Article 36(b) of UNCAC requires State Parties “to grant the body or persons the necessary independence to carry out its or their functions effectively without undue influence.” This “necessary independence” requirement is vital to effective enforcement, but the term is vague and not uniformly implemented. The *Legislative Guide* recommends the creation of entirely new enforcement bodies independent from existing law enforcement organizations to satisfy UNCAC’s requirements. It also suggests that specializing and enlarging the power of an existing enforcement organization may be an appropriate course of action depending on the State Party’s particular circumstances.⁴⁰

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

The lack of specific guidance on how to ensure independence in anti-corruption enforcement underscores the difficulty of preventing political and economic interests from influencing investigations and prosecutions. Creating an independent enforcement system is easier said than done. This is particularly acute in those jurisdictions, such as the US, UK, and Canada where the roles of minister of justice (a member of the executive) and attorney general (the top prosecutor) are carried out by the same individual. The extent to which the attorney general can maintain prosecutorial independence while also serving as a member of the government is perhaps rightly questioned.⁴¹ Whatever structure the enforcement body

³⁹ Don Stuart, *Canadian Criminal Law*, 8th ed (Toronto: Thomson Reuters, 2020).

⁴⁰ *Legislative Guide* (2012), *supra* note 9 at 148.

⁴¹ In fact, this question was squarely raised in the SNC-Lavalin affair and led to a review being commissioned on the dual nature of the role. The Honourable A Anne McLellan, PC, OC, AOE, *Review of the Roles of the Minister of Justice and Attorney General of Canada*, (28 June 2019), online: *Office of the Prime Minister* <<https://pm.gc.ca/en/news/backgrounders/2019/08/14/review-roles-minister-justice-and-attorney-general-canada#roles>>.

takes, it must be sufficiently independent from government to ensure that its decisions to enforce anti-corruption measures are not compromised by national or international governmental concerns or, worse, by corrupt government officials.

The OECD publication, *Specialised Anti-Corruption Institutions: Review of Models*,⁴² provides a summary of the criteria for effective enforcement bodies and a good survey of the different types of enforcement bodies in operation around the world:⁴³

BEGINNING OF EXCERPT

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

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

⁴² OECD, *Specialised Anti-Corruption Institutions: Review of Models*, 2nd ed (Paris: OECD Publishing, 2013), online: <<http://dx.doi.org/10.1787/9789264187207-en>>.

⁴³ *Ibid* at 12-15.

specialised anti-corruption bodies often due to high corruption-levels in existing agencies. In addition, these countries often create separate specialised bodies in response to pressure from donors and international organisations.

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

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

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

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

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

...

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

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

END OF EXCERPT

3.1.1 Hong Kong's Independent Commission

Hong Kong provides an instructive blueprint for effective enforcement bodies. Hong Kong's Independent Commission Against Corruption (ICAC) has achieved laudable independence and has been extensively copied by countries with systemic corruption problems:

Inspired by the success story of Hong Kong's anti-corruption commission and its three-pronged approach to fighting corruption and also encouraged by international conventions, many countries around the world, including in Eastern Europe, established specialised bodies to prevent and combat corruption. Creating such bodies was often seen as the only way to reduce widespread corruption, as existing institutions were considered too weak for the task, or were considered to be part of the corruption-problem and could therefore, not be part of the solution for addressing it.⁴⁴

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

Hong Kong's Independent Commission Against Corruption (ICAC) is often regarded as a model of the way in which efforts to prevent and control corruption should be organized and implemented. Its achievement in transforming Hong Kong from a place where corrupt practices were accepted to a place in which they are the exception has been widely admired and studied.... [T]he ICAC's success is attributed to its distinctive characteristics, which may be said to form a syndrome in the sense that each of its features is thought to be necessary for the organization to work well.⁴⁵ These distinctive characteristics of the ICAC are as follows:

- A unitary body with sole authority over corruption control rather than multiple anti-corruption organizations operating simultaneously;
- Independence from the Hong Kong government;
- Structural divisions that reflect the ICAC's three-pronged approach: Corruption Prevention, Community Relations, and Operations Departments;
- Wide policing powers including the right of arrest and detention;

⁴⁴ *Ibid.*

⁴⁵ Ian Scott, "The Hong Kong ICAC's Approach to Corruption Control" in Adam Graycar & Russell Smith, eds, *Handbook of Global Research and Practice in Corruption* (Cheltenham: Edward Elgar, 2011), 401 at 401. Unfortunately, the Chinese government's sweeping crackdown in the past two to three years on freedom of expression, pro-democracy activities, and opposition of any kind to Beijing's policies and plans, has led to a politicalization of the ICAC, which threatens its longstanding reputation for impartiality and independence from government influence: James Griffiths, "Once the Pride of Hong Kong, Some Fear Anti-Corruption Force has Become Another Weapon Against the Pro-Democracy Opposition", *The Globe and Mail* (5 August 2021), online: <<https://www.theglobeandmail.com/world/article-once-the-pride-of-hong-kong-some-fear-anti-corruption-force-has-become/>>.

- Secure funding independent from a budget approved by the government;
- Personnel that are not susceptible to corruption;
- The political will to combat corruption; and
- Public support and goodwill towards the ICAC (the organization has been voted the most trusted organization in Hong Kong several times).

There has been some debate as to whether the Hong Kong model should be followed widely or whether the structure of the ICAC works only in the specific cultural context of Hong Kong. Bertrand de Speville provides an in-depth discussion of the merits of Hong Kong's ICAC and an answer to critics who view the ICAC model as impractical for other countries.⁴⁶

3.1.2 Quebec's UPAC

In 2011, Quebec became the first province in Canada to create a permanent anti-corruption enforcement agency. UPAC, the *Unité permanente anticorruption* (Permanent Anticorruption Unit), consists of staff seconded from six different governmental agencies: *Sûreté du Québec* (police); *Revenu Québec* (tax collection); *Ministère des Transports* (roads and infrastructure); *Commission de la construction du Québec* (responsible for labour relations in the construction industry); and *Ministère des Affaires municipales* (municipal affairs). UPAC started in 2011 with 200 employees and a \$31 million budget. By 2016, UPAC had grown to 320 employees and a budget of \$48 million.⁴⁷ UPAC is headed by the Anti-Corruption Commissioner, a role created through the provincial *Anti-Corruption Act*.⁴⁸

From 2011 to October 2016, UPAC charged 169 individuals and 14 businesses with domestic criminal corruption offences, resulting so far in 27 individuals convicted. There have also been penal investigations of regulatory offences leading to charges against 59 individuals and 45 businesses, resulting thus far in convictions of 13 individuals and 9 businesses. In addition, UPAC does significant work in the prevention of corruption. It has held 774

⁴⁶ Bertrand de Speville, "Anticorruption Commissions: The 'Hong Kong Model' Revisited" (2010) 17:1 *Asia-Pacific Rev* 47.

⁴⁷ Robert Lafrenière, "Unité permanente anticorruption" (Presentation delivered at the Follow the Money: Corruption, Money Laundering & Organized Crime Conference, Vancouver, 28 October 2016).

⁴⁸ *Anti-Corruption Act*, CQLR c L-6.1. Note that in 2019, Ontario also created an entity directed at anti-corruption and complex white collar crimes, named the Serious Fraud Office: see Lawrence E Ritchie, Alexander Cobb & Sandy Hay, "Ontario establishes a Serious Fraud Office" (16 September 2019), online (blog): *Osler* <<https://www.osler.com/en/blogs/risk/september-2019/ontario-establishes-a-serious-fraud-office>>; and Greg McArthur, "New Ontario Initiative Targets Complex, White-Collar Crimes", *The Globe and Mail* (20 August 2019), online: <<https://www.theglobeandmail.com/canada/article-new-ontario-initiative-targets-complex-white-collar-crimes/>>.

sessions on corruption and improper use of public office, which were attended by over 22,000 public office holders and workers.⁴⁹

As set forth in the *Anti-Corruption Act*, the “mission of the Commissioner is to ensure, on behalf of the state, the coordination of actions to prevent and to fight corruption in contractual matters within the public sector. The Commissioner exercises the functions conferred on the Commissioner by this Act, with the independence provided for in this Act.”⁵⁰ The Anti-Corruption Commissioner has a mandate to:

- Coordinate investigations in relation to the *Criminal Code*, penal and fiscal law;
- Receive, record and examine disclosures of wrongdoings;
- Make recommendations to governmental and public administrators; and
- Play an educative and preventative role in the fight against corruption.⁵¹

One of the highest profile cases involving UPAC is the arrest and guilty plea of Gilles Vaillancourt, mayor of Laval from 1989 to 2012. Vaillancourt was arrested in 2013 as part of a sweep by UPAC that saw 36 individuals arrested. Following a guilty plea, Brunton J accepted a joint submission for a 6-year prison sentence and restitution of about \$7 million, much of which was hidden in Swiss bank accounts.⁵²

3.1.3 Guatemala’s External Commission

In creating the International Commission against Impunity in Guatemala (CICIG) in 2006, Guatemala became the first country to adopt an external foreign body to help fight corruption. CICIG was formed out of an agreement between the UN and Guatemala after a request for support from the Government of Guatemala. The CICIG operated as an independent body which supported the investigation of serious crimes and strengthened national judicial institutions in Guatemala.⁵³

Guatemala, as a post-conflict country with a large populace, presented a particularly fertile ground for corruption. With upwards of 17 million residents, the Republic of Guatemala is Central America’s most populous country. The country endured a civil war from 1960 to 1996 that saw over 200,000 people either killed or “disappeared” at the hands of the government.⁵⁴ As Nina Lakhani writes, a “1996 peace deal ended the conflict but not the

⁴⁹ Lafrenière, *supra* note 47.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Postmedia News, “Ex-Laval Mayor Gilles Vaillancourt Pleads Guilty to Fraud, Could Face Six-Year Prison Term”, *National Post* (1 December 2016), online: <<https://nationalpost.com/news/politics/ex-laval-mayor-gilles-vaillancourt-pleads-guilty-to-fraud>>; Canadian Press, “Former Laval mayor Gilles Vaillancourt Sentenced to 6 Years for Fraud”, *CTV News* (15 December 2016), online: <<http://www.ctvnews.ca/canada/former-laval-mayor-gilles-vaillancourt-sentenced-to-6-years-for-fraud-1.3205149>>.

⁵³ United Nations, “International Commission Against Impunity in Guatemala” (last visited 19 August 2021), online: *UN Political and Peacebuilding Affairs* <<https://dppa.un.org/en/mission/cicig/>>.

⁵⁴ “Guatemala” (last visited 19 August 2021), online: *The Center for Justice and Accountability* <<http://cja.org/where-we-work/guatemala/>>.

criminality. Instead, new groups infiltrated politics, security forces and the criminal justice system, operating with almost total impunity.”⁵⁵ Approximately 6,000 homicides occur in Guatemala annually (about twenty times more per capita than in Canada) and corruption reaches the highest levels of civil servants and elected officials. In 2015, Transparency International (TI) scored Guatemala 28/100, ranking it 123 of 168 countries based on perceptions of corruption.⁵⁶ In 2021, Guatemala received a score of 25/128, and the country now ranks 150 out of the 180 countries.⁵⁷

Backed by the UN, CICIG began operating in Guatemala in 2007. During its operations, CICIG had a staff complement of 150 individuals who had come from about 20 countries and a budget of \$12-15 million per year,⁵⁸ close to half of which was funded by the US.⁵⁹ CICIG’s mandate was to be extended by the Guatemalan congress every two years. It worked with the Public Prosecutors Office, National Civil Police, and other state institutions to combat crimes committed by clandestine security groups and to implement measures aimed at strengthening the justice system.⁶⁰ CICIG’s enforcement efforts led to the arrests of hundreds of individuals, including former President Otto Pérez Molina, who resigned from office in 2015.⁶¹

While CICIG’s mandate was broader than anti-corruption reform, anti-corruption efforts had been prioritized by Iván Velásquez Gómez, CICIG’s commissioner between 2013 and 2019.⁶² Velasquez, a former investigating judge of Columbia’s Supreme Court, set five priorities for CICIG: 1) contraband 2) administrative corruption 3) illegal campaign financing 4) judicial corruption, and 5) drug trafficking and money laundering.⁶³

Despite a rocky start, which included the resignation of two commissioners in its first five years,⁶⁴ CICIG experienced a breakthrough through an investigation dubbed “*La Linea*.” This investigation involved customs officials taking bribes to reduce duties. The case

⁵⁵ Nina Lakhani, “Guatemalan President’s Downfall Marks Success for Corruption Investigators”, *The Guardian* (9 September 2015), online <<https://www.theguardian.com/world/2015/sep/09/guatemala-president-otto-perez-molina-cicig-corruption-investigation>>.

⁵⁶ “Corruption Perceptions Index 2015” (last visited 19 August 2021), online: *Transparency International* (TI) <<https://www.transparency.org/en/cpi/2015/index/>>.

⁵⁷ “Corruption Perceptions Index 2021” (last visited 15 February 2021), online: *TI* <<https://www.transparency.org/en/cpi/2021/index/gtm>>.

⁵⁸ Lakhani, *supra* note 55.

⁵⁹ Steven Dudley, “Guatemala’s CICIG: An Experiment in Motion Gets a Report Card”, *Insight Crime* (24 March 2016), online: <<http://www.insightcrime.org/news-analysis/guatemala-cicig-an-experiment-in-motion-gets-a-report-card>>.

⁶⁰ “About Us” (last visited 19 August 2021), online: *International Commission against Impunity in Guatemala* <<http://www.cicig.org/index.php?page=about>>.

⁶¹ He has remained in office since his arrest in 2015.

⁶² Under the agreement between the UN and the Government of Guatemala, CICIG’s Commissioner was appointed by the Secretary-General of the United Nations.

⁶³ International Crisis Group, *Crutch to Catalyst? The International Commission Against Impunity in Guatemala*, Latin America Report No 56, (Brussels: ICG, 2016) at 6, online: <<https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/crutch-catalyst-international-commission-against-impunity-guatemala>>.

⁶⁴ *Ibid* at 4-5.

eventually resulted in a presidential resignation and ignited a social movement. Over the course of eight months, CICIG and the prosecutor's office investigated a network of senior state officials who were alleged to have defrauded customs revenues. The investigation intercepted some 66,000 telephone calls and over 6,000 electronic messages. On April 16, 2015, 21 suspects were arrested.⁶⁵

On September 1, 2015, following months of protests, Congress voted to remove Molina's presidential immunity, a measure that passed 132-0.⁶⁶ The following day, President Molina resigned as president. Molina was arrested on September 3, 2015.

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

Based on these developments, CICIG could be credibly cited as a blueprint for eradicating established practices of corruption even where corruption had reached the highest echelons of government. For example, a poll in 2015 found CICIG to be Guatemala's most trusted institution with 66% positive rating, well beyond the trust of the police (26%), judges (25%), Congress (12%) and the Presidency (11%).⁶⁷

The success of CICIG led to calls for similar institutions to be set up in other countries. For example, the Organization of American States and the government of Honduras signed an agreement to establish the Support Mission Against Corruption and Impunity in Honduras (MACCIH), which began operating on April 19, 2016.⁶⁸ MACCIH has full autonomy and independence to work with government institutions to dismantle corruption and impunity. MACCIH's efforts are focused on: 1) prevention and fighting against corruption 2) reform of criminal justice 3) political-electoral reform, and 4) public security.⁶⁹

However, in January 2019, President Morales announced that CICIG would be expelled from Guatemala as a result of "serious violations" of national and international laws. This was nine months prior to the expiration of CICIG's mandate. Commentators were quick to suggest that the true motivation of the expulsion was to insulate the President and other members of the Guatemalan ruling elite from investigations which were already underway.⁷⁰ Tensions had arisen between President Morales and Commissioner Velásquez

⁶⁵ *Ibid* at 7-8.

⁶⁶ Twenty-six Congress members were absent and did not vote. *Ibid* at 10, 22.

⁶⁷ *Ibid* at 13.

⁶⁸ Honduras scored 31/100 on TI's 2015 corruption index and ranked 112 out of 168 countries. See TI, *supra* note 56.

⁶⁹ "Mission to Support the Fight against Corruption and Impunity in Honduras - About the Mission" (last visited 19 August 2021), online: *Organization of American States* <<http://www.oas.org/en/spa/dsds/maccih/new/mision.asp>>.

⁷⁰ Tom Phillips, "Guatemalan President Condemned after Ejecting UN Anti-Corruption Group", *The Guardian* (8 January 2019), online: <<https://www.theguardian.com/world/2019/jan/08/guatemalan-president-condemned-after-ejecting-un-anti-corruption-group>>.

dating back to early 2017, when prosecutors charged President Morales' brother and son with fraud.⁷¹

When President Morales' term ended in 2020, he was succeeded by President Alejandro Giammattei. Giammattei and the Attorney General appointed Juan Francisco Sandoval, an internationally-recognised anti-corruption advocate, as head of Guatemala's Special Prosecutors Office Against Impunity (FECI). But in July 2021, Sandoval was summarily fired after the FECI continued to investigate the country's political and financial elite, including President Giammattei.⁷² The firing of Sandoval puts a nail in the coffin of independent corruption prosecutions in Guatemala for the foreseeable future.

The success of CICIG and, unfortunately, the circumstances of its demise are instructive. CICIG could continue to do its work only to the extent that the Government of Guatemala would permit. Where the commission and the government enjoyed a collaborative relationship, CICIG clearly did effective work. On the other hand, the investigation of President Morales shows a potential weakness in this structure: if the work of the commission depends on the strength of its relationship with the government, any investigation that implicates the head of state could undermine the entire operation.

3.2 Levels of Independence in Enforcement

A problem in many developing countries is not only the relative lack of independence of enforcement bodies, but a lack of resources and power. Martin Painter argues that "independence" is overstated as an enforcement body ideal. Independence can be symbolic and is largely irrelevant if the enforcement body lacks the power to truly enforce anti-corruption measures.⁷³ "[I]n the matter of investigation," writes Painter, "it is the raw operational power of the [anti-corruption agency] that seems to matter, as much if not more than its purported political independence."⁷⁴

⁷¹ Rachel Schwartz, "Guatemala's President Tried to Expel the UN Commissioner who Announced he was Under Investigation", *The Washington Post* (6 September 2017), online: <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/06/guatemalas-president-tried-to-shut-down-a-u-n-commission-that-announced-it-was-investigating-him/?utm_term=.8d55cfcbcb4b>.

⁷² Alex Papadovassilakis & Shane Sullivan, "Guatemala's War Between Morales and CICIG Not Over Yet", *InSight Crime* (22 April 2021), online: <<https://insightcrime.org/news/cicig-guatemala-president-morales/>>; "Guatemala Appoints Controversial New Anti-Corruption Prosecutor", *Al Jazeera* (3 August 2021), online: <<https://www.aljazeera.com/news/2021/8/3/guatemala-appoints-controversial-figure-to-tackle-corruption>>; "Guatemala Attorney General Fires Top Anti-Corruption Prosecutor", *Al Jazeera* (24 July 2021), online: <<https://www.aljazeera.com/news/2021/7/24/guatemala-attorney-general-fires-top-anti-corruption-prosecutor>>; and Maurizio Guerrero, "A Highly Respected UN Legacy to Fight Corruption Crumbles in Guatemala", *Pass Blue* (25 August 2021), online: <<https://www.passblue.com/2021/08/25/a-highly-respected-un-legacy-to-fight-corruption-crumbles-in-guatemala/>>.

⁷³ Martin Painter, "Myths of Political Independence, or How Not to Solve the Corruption Problem: Lessons for Vietnam" (2014) 1:2 Asia & Pacific Policy Stud 273.

⁷⁴ *Ibid* at 279.

His sentiment appears to be confirmed by the very low rates of corruption in certain developed countries like Sweden, for example, where enforcement bodies are powerful, but not independent from government. In 2013, Sweden ranked third on TI's Corruption Perception Index, though it has no specialized anti-corruption agency. Like the US and Canada (except Quebec), Sweden's anti-corruption forces are organized as units within the general police force and prosecution service. Comparing Sweden to under-developed countries with systemic corruption problems may be a fool's errand given the wide cultural and economic divide that separates them.⁷⁵

For anti-corruption enforcement bodies, an organizational framework which gives the appearance of independence is also no guarantee of effectiveness. Bangladesh is a leading example. In the executive summary from UNCAC's country review report of Bangladesh, the expert team of reviewers concluded that the Anti-Corruption Commission (ACC) in Bangladesh is sufficiently independent because it is comprised of three commissioners who are appointed by the President, are not eligible for reappointment and cannot be removed from their positions unless strict procedures are followed.⁷⁶ But this "independence" is superficial at best. In the ACC's investigation of SNC-Lavalin's alleged bribery of Bangladeshi public officials in the Padma bridge case (discussed in Chapter 1), the independence of the ACC was seemingly compromised by the self-interest of high-ranking Bangladeshi politicians.

Bangladesh Minister of Communications Syed Abul Hossain was the most senior public official allegedly involved in the SNC-Lavalin bribery. Ultimate award of the engineering contract required his approval and he allegedly stood to gain \$2 million as a bribe (4% of the \$50 million contract). In the wake of the bribery allegations, Hossain resigned from his position in the Prime Minister's cabinet, after which the Prime Minister called him a "patriot." Subsequently, Hossain was not charged with bribery as a result of the ACC's investigation. The World Bank convened an external panel of experts to assess the completeness and fairness of the ACC's initial investigation. While agreeing with the ACC's decision to investigate the seven persons who were formally charged, the external panel's final report, issued in February 2013, stated that "there was no legal reason to exclude the name of the former Minister of Communications from the initial list of persons to be investigated.... Thus, as of the date of this report, the Panel cannot conclude that the activity of the ACC constitutes a full and fair investigation."⁷⁷ In September 2014, the ACC concluded, however, that no bribery or conspiracy had taken place. It recommended the

⁷⁵ For a laudable report on the challenges of effective anti-corruption enforcement in developing countries, see Hannes Hechler et al, *Can UNCAC Address Grand Corruption? A Political Economy Analysis of the UN Convention against Corruption and its implementation in three countries*, U4 Report 2011:2 (U4 Anti-Corruption Resource Centre; Chr Michelsen Institute, 2011), online: <<http://www.u4.no/publications/can-uncac-address-grand-corruption/>>.

⁷⁶ UNODC, *Review of Implementation of the United Nations Convention against Corruption: Executive Summaries, Bangladesh*, Implementation Review Group, 3rd Sess, UN Doc CAC/COSP/IRG/I/1/1/Add8 (2012), online (pdf): <<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1254364e.pdf>>.

⁷⁷ World Bank, *Final Report of the External Panel of Experts Re: The Padma Multipurpose Bridge Project*, (2013).

acquittal of all seven accused persons in spite of what appears to be very convincing evidence collected by the World Bank and Canadian investigators.

According to an article in Bangladesh's leading newspaper, *The Daily Star*, the ACC's politically-motivated decision not to charge Hossain and their final conclusion that no bribery had taken place was not surprising. *The Daily Star* claims these actions just provide further proof of the enforcement body's lack of independence and effectiveness: "[T]he ACC's credibility is mired in controversy once again. Its failure to gather evidence in the Padma bridge case has again proved that the anti-[corruption] watchdog fails to go ahead with the case against individuals enjoying the blessing of the government higher-ups."⁷⁸

Some measure of independence from government is necessary at both the investigatory and prosecutorial stages. For example, it may be counter-productive for an enforcement body that has complete investigatory independence to submit its findings to a governmental prosecution agency, especially if the investigation is into the activities of the prosecutors themselves. In the well-documented corruption case of former Pennsylvania Attorney General Ernie Preate,⁷⁹ the Pennsylvania Crime Commission, which investigated Preate, had independent power to begin investigations, interview witnesses under oath, gather evidence, and subpoena financial records. They performed a protracted investigation into Preate despite intense political pressure to refrain from doing so. Eventually, the Commission gathered enough evidence for an airtight case against Preate, but having no prosecutorial authority, they were in the awkward position of lobbying the Pennsylvania Attorney General's office to prosecute the incumbent Attorney General. The Pennsylvania Attorney General's office did not prosecute, but Preate was eventually prosecuted by the federal government for racketeering and corruption offences. He was convicted and sentenced to two year's imprisonment, but not before the Pennsylvania Crime Commission was disbanded by Preate's political allies in the state legislature.

3.3 Investigative and Prosecutorial Bodies

Unlike Hong Kong with its ICAC, the US, UK, and Canada (except Quebec) do not have unitary anti-corruption bodies with independence from government and monopolies over law enforcement. Each of these countries has multiple national agencies working together to combat domestic and international corruption.

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

⁷⁸ Shakhawat Liton, "The Patriot and His Friends", *The Daily Star* (31 October 2014), online: <<http://www.thedailystar.net/the-patriot-and-his-friends-48085>>.

⁷⁹ See Chapter 7 of Brad Bumstead's *Keystone Corruption: A Pennsylvania Insider's View of a State Gone Wrong* (Philadelphia: Camino Books, 2013).

3.3.1 US

The following excerpt is from the UNCAC *Country Review Report of the United States of America*:⁸⁰

BEGINNING OF EXCERPT

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

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

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

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

DOJ has also dedicated increased resources to combating domestic public corruption. The Federal Bureau of Investigation, for example, currently has 639 agents dedicated to investigating public corruption matters, compared to 358 in 2002. Using these resources, DOJ aggressively investigates, prosecutes, and punishes corruption of and by public officials at all levels of government (including local, state, and national public officials),

⁸⁰ From UNODC, *Country Review Report of the United States of America* (2013) at 17-19, online (pdf):

<<http://www.unodc.org>

/documents/treaties/UNCAC/CountryVisitFinalReports/2013_11_19_USA_Final_Country_Report.pdf

>. Reprinted with the permission of the United Nations. For more on US enforcement bodies see Chapter 10 of Robert W Tarun & Peter P Tomczak, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 5th ed (Chicago: ABA Publishing, 2018).

in all branches of government (executive, legislative, and judicial), as well as individuals from major United States political parties.

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

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

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

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

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

The SEC Enforcement Division is responsible for civil enforcement of the FCPA with respect to issuers of securities traded in the United States. In January 2010, the Division created a specialized FCPA unit with approximately 30 attorneys. In addition, the SEC

has other trained investigative and trial attorneys outside the FCPA Unit who pursue additional FCPA cases. The FCPA Unit also has in-house experts, accountants, and other resources such as specialized training, state-of-the-art technology and travel budgets to meet with foreign regulators and witnesses.

...

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

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

END OF EXCERPT

In April 2016, the DOJ announced an enhanced *FCPA* enforcement strategy. Part of the strategy involved increasing enforcement resources. The Fraud Section of the DOJ increased its *FCPA* unit by more than 50% by adding 10 more prosecutors, while the FBI established three new squads dedicated to *FCPA* enforcement. The new strategy also emphasized strengthening coordination with foreign counterparts.⁸¹

⁸¹ Memorandum from US Department of Justice Criminal Division, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* by Andrew Weissman, Doc No 20530 (Washington, DC: DOJ, 2016) at 1, online (pdf): <<https://www.justice.gov/archives/opa/blog-entry/file/838386/download>>. See also the updated policy: US, Department of Justice Criminal Division, *FCPA Corporate Enforcement Policy, Justice Manual* 9-47.120 (updated March 2019) [CEP], online (pdf): <<https://www.justice.gov/criminal-fraud/file/838416/download>>.

3.3.2 UK

The following excerpt is from the UNCAC *Country Review Report of the United Kingdom*:⁸²

BEGINNING OF EXCERPT

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

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

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

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

90. The Public Prosecution Service (PPS) is the principal prosecuting authority in Northern Ireland. In addition to taking decisions as to prosecution in cases investigated by the police in Northern Ireland, it also considers cases investigated by

⁸² UNODC, *Country Review Report of the United Kingdom*, (2013), online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/UK_Final_country_review_report_18.3.2013.pdf>. For more on UK enforcement bodies, see Nicholls et al, *supra* note 38, c 7.

other statutory authorities, such as HM Revenue and customs. The PPS is headed by the Director of Public Prosecutions for Northern Ireland.

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

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

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

94. The Serious Organised Crime Agency (SOCA) was established by the Serious Organised Crime and Police Act 2005 (SOCPA). Its functions are set out in that Act and (in relation to civil recovery functions) in the Serious Crime Act 2007. The functions are to prevent and detect serious organised crime; to contribute to its reduction in other ways and the mitigation of its consequences; and to gather, store, analyse and disseminate information on organised crime. SOCA works in close collaboration with UK intelligence and law enforcement partners, the private and third sectors, and equivalent bodies internationally. In Scotland, the SCDEA has a primary role in preventing and detecting serious organised crime. SOCA houses the UK's Financial Intelligence Unit (UKFIU). The unit has national responsibility for

receiving analysing and disseminating financial intelligence submitted through the Suspicious Activity Reports (SARs) regime, and receives over 200,000 SARs a year. These are used to help investigate all levels and types of criminal activity, from benefit fraud to international drug smuggling, and from human trafficking to terrorist financing. SOCA also has an Anti-Corruption Unit which supports UK partners (police and/or prosecutors) in tackling corruption that enables organised crime and works to increase knowledge of the use of corruption in support of organised crime. The unit also tackles corruption directed against SOCA, or public sector corruption impacting on SOCA.

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

96. The FSA does not enforce the Bribery Act. However, authorised firms are under a separate, regulatory obligation to identify and assess corruption risk and to put in place and maintain policies and processes to mitigate corruption risk. The FSA can take regulatory action against firms who fail adequately to address corruption risk; for example, the FSA has fined two firms for inadequate anti-corruption systems and controls. The FSA does not have to obtain evidence of corruption to take action against a firm.

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

98. There are a number of coordination groups which bring together the different agencies working on international corruption issues. The Politically Exposed Persons (PEPs) Strategic Group, which meets quarterly, provides a strategic lead and coordinates government departments and agencies to tackle money laundering by

corrupt PEPs. With the planned creation of the NCA in 2013, a new group was established in 2012 to interface between the NCA build on economic crime and the DFID-funded cross-agency work on international anti-corruption. This is the International Corruption Intervention Group which co-ordinates activity between the DFID funded overseas corruption units (the Metropolitan Police Service Proceeds of Corruption Unit; the City of London Police Overseas Anti- Corruption Unit and the Serious Organised Crime Agency International Corruption Intelligence Cell).

END OF EXCERPT

The NCA replaced the SOCA in 2013. Corruption investigations are overseen by the NCA's Economic Crime Command. Additionally, the City of London Overseas Anti-Corruption Unit, established in 2006 and funded by the Department for International Development, investigates corruption and bribery in developing countries.

3.3.3 Canada

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

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

In 2008, the RCMP established the International Anti-Corruption Unit, which comprises two seven-person teams based in Ottawa and Calgary. This structure is currently undergoing a reorganization process to make available additional resources and expertise in the investigation of corruption and other complex cases in the newly established Sensitive Investigations Unit. The Unit's mandate will include carrying out investigations of the CFPOA of Canada, related criminal offences and assisting foreign enforcement agencies or governments with requests for international assistance (asset recoveries and extraditions).⁸³

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

⁸³ UNODC, "Executive Summaries, Canada", *supra* note 13.

In 2013, the RCMP disbanded the International Anti-Corruption Units and reorganized their resources for investigating corruption. The International Anti-Corruption Program is now managed under the umbrella of the RCMP Federal Policing Criminal Operations (FPCO) directorate. The FPCO provides subject matter expertise internally and externally to national and international partners, including other government departments. RCMP investigators in the National Division (Ottawa) are responsible for investigating offences under the *CFPOA* and, as of 2014, the RCMP has the exclusive authority to lay an information (i.e., initiate a charge) in respect to *CFPOA* offences.⁸⁴

Restricting the burden of investigation and prosecution to the RCMP has the potential to hamper enforcement capability.⁸⁵ On the other hand, the RCMP has striven toward an integrated approach to anti-bribery efforts. The RCMP has established a tip-line partnership with the Competition Bureau regarding allegations of bid-rigging, bribery, price fixing, conflict of interest, false invoicing and product switching. RCMP Headquarters also has an established point of contact within the Department of Justice's International Assistance Group to ensure priority is given to requests for mutual legal assistance in foreign bribery matters.⁸⁶

The Public Prosecution Service of Canada (PPSC) was created in 2006 to discharge the criminal prosecution mandate of the Attorney General of Canada for all federal criminal offences, including those under the *CFPOA*. The PPSC is an independent organization, reporting to Parliament through the Attorney General. The PPSC has established a subject matter expert position located in Ottawa for international corruption cases to help ensure a consistent approach to the prosecution of *CFPOA* offences.⁸⁷

Unlike in the US, Canadian securities regulation authorities cannot investigate and prosecute *CFPOA* breaches and have not undertaken administrative enforcement proceedings for foreign corrupt practices.⁸⁸ Transparency International Canada

⁸⁴ Global Affairs Canada, "Implementation of the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Enforcement of the Corruption of Foreign Public Officials Act (September 2019-August 2020)", 21st Annual Report to Parliament (last modified 28 October 2020) [2019-2020 Annual Report to Parliament], online: <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-21.aspx?lang=eng>>.

⁸⁵ Public Safety Canada, *Corruption in Canada: Definitions and Enforcement*, by Anne-Marie Lynda Boisvert, Peter Dent & Ophelie Brunelle Quraishi (Deloitte LLP), Report No 46 (Her Majesty the Queen in Right of Canada, 2014) at 46, online (pdf): <https://publications.gc.ca/site/archivée-archived.html?url=https://publications.gc.ca/collections/collection_2015/sp-ps/PS18-10-2014-eng.pdf>.

⁸⁶ 2019-20 Annual Report to Parliament, *supra* note 84.

⁸⁷ *Ibid.*

⁸⁸ Wendy Berman & Jonathan Wansbrough, "A Primer on Canada's Foreign Anti-Corruption Enforcement Regime", *Mondaq* (9 October 2014) at 16, online: <<http://www.mondaq.com/canada/x/345442/White+Collar+Crime+Fraud/Risky+Business+A+Primer+on+Canadas+Foreign+AntiCorruption+Enforcement+Regime>> (note: the redirect link on this page is expired, but the pdf may be accessed here: <<https://studylib.net/doc/11485412/risky-business-a-primer-on-canada%E2%80%99s-foreign-anti-corrupti>>).

recommends that Canada involve provincial securities regulators in *CFPOA* enforcement in a similar manner to the US Securities Exchange Commission.⁸⁹ However, the inherent institutional challenges are worth noting. Unlike the US, Canada does not have a centralized securities regulator at the federal level. Securities regulation is managed through separate regulators for each of the ten provinces and three territories. This may add an extra, though not insurmountable, obstacle toward engaging Canadian securities commissions in the enforcement of *CFPOA* breaches.

3.4 Cooperation Agreements

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

Ease of travel from country to country provides serious offenders with a way of escaping prosecution and justice. Processes of globalization allow offenders to more easily cross borders, physically or virtually, to break up transactions and obscure investigative trails, to seek a safe haven for their person and to shelter the proceeds of crime. Prevention, investigation, prosecution, punishment, recovery and return of illicit gains cannot be achieved without effective international cooperation.⁹⁰

Recognizing this, Article 46 of UNCAC and Article 9 of the OECD Convention require State Parties to provide Mutual Legal Assistance (MLA) to other State Parties investigating and prosecuting corruption. See Chapter 5, Section 4 for a more thorough description of MLA. See also Section 2.2.6, for a discussion of cooperative investigations across borders.

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

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

In addition to MLA, which often involves the bureaucratic formalities of state-to-state communication, Article 48 of UNCAC requires cooperation between State Parties' law enforcement bodies (i.e., police-to-police). Article 48(2) recommends that the law

⁸⁹ Transparency International Canada has noted that this lack of availability of conditional sentences or discharges is problematic for the prosecution of less severe violations of the *CFPOA*. See Transparency International Canada, *UNCAC Implementation Review: Civil Society Organization Report*, (October 2013) at 11, online (pdf): <https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5e3b09ebfb8df43f9b31c4fb/1580927469051/20131219-UNCAC_Review_TI-Canada.pdf>.

⁹⁰ *Legislative Guide* (2012), *supra* note 9 at 143.

enforcement bodies of State Parties enter into direct bilateral or multilateral cooperation agreements with other State Parties' enforcement bodies to streamline international corruption investigations and prosecutions.

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

4. INTERNAL AND EXTERNAL INVESTIGATIONS

For the purposes of this section, it is important to distinguish between internal and external corruption investigations. External investigations are those performed by public enforcement bodies into allegations of corruption against individuals and corporations, while internal investigations are conducted internally by a company's board, management, or in-house counsel as part of that company's internal compliance program or in response to reports of corruption within their own company. Internal compliance programs and the role of the corporate lawyer are discussed at length in Chapter 8. In brief, most large corporations have internal compliance programs to monitor the legality of their international business activities and to prevent violations of anti-corruption legislation.

As discussed in Section 6.2.1, evidence of a corporation's strong internal compliance program (including accounting procedures and controls) can serve as an affirmative defence to a corruption charge under the UK *Bribery Act*. In prosecutions under the *FCPA*, evidence of a corporation's strong internal compliance program and cooperation with external investigations is often the basis for declining to charge, entering into a deferred prosecution agreement or reducing the sentence in cases where bribery convictions are obtained. There are additional reasons why a company would choose to conduct an internal investigation:

- To gather evidence and prepare a defence or negotiation strategy for prosecutions, enforcement actions and/or litigation with shareholders;
- To fulfill management's fiduciary duty to the company's shareholders and satisfy shareholder concerns; and
- To assess the effectiveness of internal accounting procedures.

The board may hire outside counsel to conduct or manage the internal investigation. There is a significant financial cost incurred when a company is subject to a corruption investigation. As Mike Koehler notes, before settling with a company, enforcement agencies will ask where else the conduct may have occurred, necessitating a team of lawyers, forensic accountants and other specialists to travel and investigate around the world. Avon, which

settled with the SEC and DOJ for \$135 million, spent \$350 million in pre-enforcement expenses from 2009-2011.⁹¹ Insurance carriers have responded with products covering investigation costs during corruption investigations.⁹²

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

4.1 Internal Sources

4.1.1 Anonymous Reports

Robust internal compliance programs (discussed more fully in Chapter 9) generally include a mechanism for receiving anonymous reports from employees or others about suspected corrupt conduct.

In the US, the *Sarbanes-Oxley Act* of 2002, which was enacted in response to the highly publicized accounting scandals at Enron and WorldCom, requires publicly traded corporations to provide an anonymous channel for whistleblowing employees to report wrongdoing.⁹³ The *Act* also prohibits employers from taking adverse retaliatory action against whistleblowers.⁹⁴ The *FCPA Resource Guide* states that “[c]ompanies may employ, for example, anonymous hotlines or ombudsmen”⁹⁵ to satisfy the anonymous reporting mechanism requirement.

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

In June 2011, an anonymous source reported, through our confidential ethics hotline, that our majority-owned joint venture in Kenya may have made certain improper payments. In July 2011, an employee of our subsidiary in Angola reported that similar improper payments may have been made in Angola. Outside counsel and forensic accountants were retained to investigate the alleged improper payments in Kenya and

⁹¹ Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham: Edward Elgar, 2014) at 178.

⁹² Lawrence J Trautman & Kara Altenbaumer-Price, “Lawyers, Guns, and Money: The Bribery Problem and the UK Bribery Act” (2013) 47 *Intl Lawyer* 481 at 512.

⁹³ *Sarbanes-Oxley Act*, Pub L No 107-204, 116 Stat 745, s 301 [SOX]; United States Securities and Exchange Commission, *Final Rule: Standards Related to Listed Company Audit Committees*, (File No S7-02-03) (25 April 2003), online: <<https://www.sec.gov/rules/final/33-8220.htm>>.

⁹⁴ *SOX*, *supra* note 93, s 806.

⁹⁵ Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Department of Justice and Security Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed (2020) at 61, online (pdf): <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>>.

Angola, including our compliance in those countries with the U.S. Foreign Corrupt Practices Act. We do not believe that the amount of the payments in question in Kenya and Angola, or any revenue or operating income related to those payments, are material to our business, results of operations, financial condition or liquidity.

As a result of our review of these matters, we have implemented, and are continuing to implement, appropriate remedial measures and have voluntarily disclosed the results of our initial investigation to the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”), and are cooperating with those agencies in their review of these matters. We are unable to predict the outcome of the review by the DOJ and SEC.⁹⁶

In early 2015, the SEC charged Goodyear Tire & Rubber Company with violating the books and records provisions of the *FCPA* because of the bribes discussed above.⁹⁷ Goodyear neither admitted nor denied the allegations, but agreed to pay more than \$16 million to settle the charges.⁹⁸ The SEC credited Goodyear for the “company’s self-reporting, prompt remedial acts, and significant cooperation with the SEC’s investigation.”⁹⁹ Furthermore, Goodyear announced that the DOJ had closed their inquiry and would not be charging the company with any criminal offences.¹⁰⁰

4.1.2 Internal and External Accounting

As discussed in Chapter 2, “books and records” offences are an integral part of anti-corruption legislation. In order to satisfy the general accounting requirements of anti-corruption legislation and various other regulatory provisions, such as the provisions of the *US Securities Exchange Act*,¹⁰¹ public corporations are obliged to perform regular internal and external audits and regularly release published accounts of their business performance. Auditors may discover accounting discrepancies that suggest corruption activity, leading to an internal investigation.

⁹⁶ United States Securities and Exchange Commission, *Form 10-K Annual Report of Goodyear Tire & Rubber Company*, (Washington, DC: 2012) at 20-21, online:

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

⁹⁷ United States Securities and Exchange Commission, Press Release, 2015-38, “SEC Charges Goodyear with FCPA Violations” (24 February 2015), online:

<<http://www.sec.gov/news/pressrelease/2015-38.html>>.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ United States Securities and Exchange Commission, *Form 10-K Annual Report of Goodyear Tire & Rubber Company*, (Washington DC: 2014) at 20, online:

<<https://www.sec.gov/Archives/edgar/data/42582/000095012315002527/gt-q4201410k.htm>>.

Although there has been no official confirmation of this by the DOJ, it is likely accurate, as the DOJ usually announces charges simultaneously with SEC settlements.

¹⁰¹ 15 USC § 78a et seq.

4.1.3 Competitor Complaints

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

Whether a competitor reports its suspicions to the competing company itself or to law enforcement depends on factors like the seniority of the employees under suspicion and the perceived strength of a company's internal compliance program. Interestingly, in Dow Jones' "Anti-Corruption Survey Results 2014," only 33% of companies surveyed reported ever having lost business to competitors because of corruption, and this number appears to be falling.¹⁰² While a majority of the companies agreed that bribery should always be reported, only 13% of companies reported ever having taken action against a corrupt competitor.

4.1.4 External Investigation Reports

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

4.1.5 Other Sources

A company may be alerted to the corrupt behaviour of its employees through various other sources. For example, in the notable *FCPA* case, *US v Kay*, the impugned foreign payments came to the attention of the SEC after Mr. Kay voluntarily revealed this information to company counsel. The US Court of Appeals for the Fifth Circuit described it in this way:

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

¹⁰² Welchans Research Group, *Anti-Corruption Survey Results 2014*, (Dow Jones, 2014), online (pdf): <<http://images.dowjones.com/company/wp-content/uploads/sites/15/2014/04/Anti-Corruption-Survey-Results-2014.pdf>>.

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

The SEC launched an investigation into ARI, Murphy, and Kay. Murphy and Kay were eventually indicted on twelve counts of violating the *FCPA*.¹⁰³

4.2 Internal Investigations by Corporations: Five Basic Steps

As discussed above, corporations are incentivized to fully investigate reports of corruption against their own officers and employees, and to voluntarily disclose the results of those investigations to the relevant enforcement authorities. Internal investigations may show that there was no wrongdoing or that the corporation met the standard of care required for an affirmative defence to corruption charges under, for example, the UK *Bribery Act*. At the very least, evidence of a robust internal investigation and voluntary disclosure weighs in the company's favour at the sanction stage. Additionally, corporations may be motivated to internally investigate reports of corruption rather than suffer the hardship and ignominy of external investigations by the relevant enforcement bodies.

In order to accomplish all of this, an internal investigation must be carried out in a thorough and logical manner such that external auditors and enforcement bodies will accept the findings of the internal investigation. In serious cases, it is highly advisable to hire external counsel known to the enforcement body for high competence and unquestioned integrity to conduct the internal investigation.

While the exact contours of an internal investigation will be case and company-specific, Robert Tarun and Peter Tomczak provide an instructive summary of five basic steps for meeting a standard of thoroughness and precision in an internal investigation, which are reviewed below.¹⁰⁴

4.2.1 Determine Scope of the Allegation

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

¹⁰³ *US v Kay*, 513 F (3d) 432 (5th Cir 2007), online (pdf):

<<http://www.justice.gov/criminal/fraud/fcpa/cases/kayd/10-24-07kay-5th-circuit-opinion.pdf>>.

¹⁰⁴ Tarun & Tomczak, *supra* note 80.

4.2.2 Develop Facts through Interviews and Document Review

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

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

4.2.3 Assess Jurisdictional and Legal Issues

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

4.2.4 Report to the Company

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

4.2.5 Recommend and Implement Remedial Measures

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

over the world, with lawyers and an outside auditor accumulating 1.5 million billable hours.¹⁰⁵ Siemens now employs hundreds of full-time compliance personnel.¹⁰⁶

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

4.3 External Sources

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

4.3.1 Voluntary Disclosures

According to Koehler, "voluntary disclosures are the single largest source of corporate *FCPA* enforcement actions."¹⁰⁷ This reflects the reality that corporations, especially those with internal compliance programs and various regulatory auditing requirements, are in the best position to know whether they have committed any corruption offences. Additionally, the DOJ and the SEC strongly encourage voluntary disclosures and advise corporations that if they disclose violations and cooperate with enforcement, they may escape prosecution in some circumstances or their penalties will be significantly less severe.¹⁰⁸ According to

¹⁰⁵ Siri Schubert & T Christian Miller, "At Siemens, Bribery Was Just a Line Item", *The New York Times* (20 December 2008), online:

<<http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html>>.

¹⁰⁶ The long list of Siemens' remedial measures is detailed in Tarun & Tomczak, *supra* note 80 at 557-560.

¹⁰⁷ Koehler, *supra* note 91 at 173.

¹⁰⁸ In the Canadian context, one could ask whether the new owners of Griffiths Energy International (*supra* note 22), who voluntarily disclosed bribes in Chad, received any significant reduction in sentence, compared to Niko Resources (*supra* note 22), which did not self-disclose. Griffiths Energy paid \$10.35 million (fine) whereas Niko Resources paid nearly \$9.5 million (fine and victim surcharge). Griffiths Energy also spent \$5 million on its internal investigation, which it turned over to the RCMP, saving the RCMP a significant amount of money, whereas Niko Resources cost the RCMP approximately \$1 million in investigation expenses. The major difference in the two cases was the size of the bribe: \$2 million in the *Griffiths* case compared to \$200,000 in the *Niko Resources* case. On the other hand, Griffiths Energy implemented a robust anti-corruption policy after the initial investigation revealed bribery, while Niko Resources did not. Thus, the Court put Niko Resources on probation for three years and required implementation of an anti-corruption compliance program as a condition of probation.

Koehler, “in 2012, 50 percent of all corporate *FCPA* enforcement actions were the result of voluntary disclosures.”¹⁰⁹

Despite promises of leniency in the US, the actual benefit to a corporation of voluntarily disclosing corruption violations is often unclear. Recent studies, cited by Koehler, show no difference between the fines and penalties levied against disclosing and non-disclosing companies. Indeed, Tarun and Tomczak write, “the SEC, especially through aggressive disgorgement of profits, can quickly eviscerate the credit the DOJ has extended to companies for voluntary disclosure and substantial cooperation in *FCPA* investigations.”¹¹⁰

On the other hand, in 2014, Andrew Ceresney, the Director of the SEC Division of Enforcement, maintained that cooperation is “always in the company’s best interest.”¹¹¹ Ceresney pointed out that the SEC offers incentives such as non-prosecution agreements and reduced penalties, and is committed to “making sure that people understand there will be such benefits.”¹¹² In cases of “extraordinary cooperation,” Ceresney notes that penalties will be significantly lower. For example, in 2014, Layne Christensen Co. was charged with making improper payments to African officials, but thanks to self-reporting and cooperation, its penalty was reduced to 10% of the disgorgement amount, as opposed to the usual penalty of closer to 100% of the disgorgement amount. Ceresney also warned that the consequences will be worse and opportunities to gain credit through cooperation will be lost if a company chooses not to self-report and the SEC subsequently discovers violations through investigation or whistleblowers. A company’s failure to self-report could also indicate that their compliance program and controls were inadequate.

In the UK, the SFO issued, in 2009, guidance on dealing with foreign corruption.¹¹³ The guidance encouraged UK companies to voluntarily disclose corruption offences with the promise of more lenient negotiated civil settlements, rather than criminal prosecutions.¹¹⁴ The Balfour Beatty case is a prime example. Balfour Beatty self-reported bribery payments made to secure engineering and construction contracts as part of a UNESCO project to rebuild the Alexandria Library in Egypt.¹¹⁵ As a result of the company’s voluntary disclosure, the SFO agreed not to bring criminal charges and required the relatively low

¹⁰⁹ Koehler, *supra* note 91 at 173.

¹¹⁰ Tarun & Tomczak, *supra* note 80 at 385.

¹¹¹ Andrew Ceresney, “Remarks at the 31st International Conference on the Foreign Corrupt Practices Act” (Speech delivered at the 31st International Conference on the Foreign Corrupt Practices Act, National Harbour, Maryland, 19 November 2014), online: <http://www.sec.gov/News/Speech/Detail/Speech/1370543493598>.

¹¹² *Ibid.*

¹¹³ Nicholls et al, *supra* note 38 at 210.

¹¹⁴ Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Burlington, VT; Farnham, UK: Ashgate Publishing, 2014) at 121, reports that the SFO’s new director, David Green, removed this guidance in October 2012 after a review. However, Green maintains that self-reporting is encouraged.

¹¹⁵ David Leigh & Rob Evans, “Balfour Beatty Agrees to Pay £2.25m Over Allegations of Bribery in Egypt”, *The Guardian* (7 October 2008), online: <https://www.theguardian.com/business/2008/oct/07/balfourbeatty.egypt>.

amount of £2.5 million to be returned as a civil recovery.¹¹⁶ The SFO's guidance was updated in 2012 in response to criticisms that the previous approach had been too "corporate-friendly," indicating "a return to a more prosecutorial way of running the SFO."¹¹⁷ In a speech given in 2016, Ben Morgan, the Joint Head of Bribery and Corruption in the UK, noted that deferred prosecutions cannot be "a cosy deal," but must be sufficiently lenient to reward self-reporting and cooperation. Morgan also noted that some view a discount of one third of the fine as an insufficient incentive. Previous deferred prosecution agreements demonstrate the willingness of UK courts to consider a discount of up to 50% in the right circumstances, as the court did in the UK's second case involving the use of the new DPA option.¹¹⁸ In 2020, the SFO published a new chapter in its *Operational Handbook* on how Crown Prosecutors implement DPAs.¹¹⁹ While this addition does not represent "dramatic changes to the SFO's policies and practices regarding consideration and credit available for self-reporting and co-operation as part of negotiated resolutions ... it does provide additional clarity."¹²⁰

4.3.2 Whistleblowers

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

¹¹⁶ Nicholls et al, *supra* note 38 at 48-49.

¹¹⁷ *Ibid* at 210.

¹¹⁸ Ben Morgan, "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" (Speech given as part of a panel comprising the Rt Hon Sir Edward Garnier QC MP, Alison Levitt QC & Stuart Alford QC, 17 October 2016), online: <https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defence-prosecution/>.

¹¹⁹ See the speech of Lisa Osofsky, Director of the SFO, which preceded the release of this additional guidance: "Fighting fraud and corruption in a shrinking world" (13 April 2019), online: SFO <https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/>.

¹²⁰ Simon Airey et al, "Approaching Self-Reporting & Co-operation Standards in the US, UK & French Enforcement" (15 December 2020), online: *Paul Hastings* <https://www.paulhastings.com/insights/client-alerts/approaching-self-reporting-and-co-operation-standards-in-u-s-u-k-and-french> (which includes a comparison of co-operation standards between the UK, US, and France). For the SFO's documents and standards, see "Corporate Co-Operation Guidance" (August 2019), online: SFO <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/>; and "Corporate Self-Reporting" (last visited 31 August 2021), online: SFO <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-self-reporting/>. For a commentary on the difficulty of deciding whether to voluntarily disclose, see Ruth Cowley et al, "Self-Reporting Bribery: the Ongoing Dilemma" (August 2018), online: *Norton Rose Fulbright* <https://www.nortonrosefulbright.com/en/knowledge/publications/37889dc7/self-reporting-bribery-the-ongoing-dilemma>.

UNCAC recommends that State Parties consider extending these same protections to all persons who report corruption offences.

Recent legislative reforms in the US may result in an increase in the number of corruption investigations sparked by whistleblowers in the near future. Under section 922 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* of 2010, if a whistleblower's information leads to an enforcement action, the whistleblower will be entitled to an award of 10 to 30 percent of any resulting monetary sanctions in excess of \$1 million. Pursuant to legislative reforms that came into force in 2021, the *Anti-Money Laundering Act 2020* enhanced the anti-money laundering whistleblower program. Under the new program, whistleblowers may obtain an award of up to 30% of all monetary sanctions recovered in enforcement actions resulting from their tips.¹²¹

Meanwhile, in the UK, the Director of the SFO is a prescribed person for the purposes of whistleblower legislation. From April 1, 2019 to March 31, 2020, the SFO Intelligence Division reported that it had managed 128 whistleblowing disclosures. Of those, the SFO took further action in relation to 121 disclosures, including by: delivering a personalised response to the whistleblower, requesting additional information from the whistleblower, conducting further enquiries, or making contact with partner law enforcement and regulatory agencies.¹²²

See Chapter 13 for more on whistleblower laws and policies.

4.3.3 Competitor Complaints

Competitor complaints may result in external investigations. The *Hydro Kleen*¹²³ case, which resulted in the first conviction under Canada's *CFPOA*, began with a competitor complaint.

Hydro Kleen Systems Inc., a Canadian company, competed with other industrial cleaning companies, including Innovative Coke Expulsion Inc. (ICE), for contracts in the US and Canada. The employees of both companies often travelled back and forth across the US-Canada border with industrial cleaning equipment. To facilitate easy movement of its employees and equipment across the border, Hydro Kleen paid bribes to a US border guard. The border guard, on his own initiative, also began to deny ICE employees' admission to the US on multiple occasions. The border guard also improperly photocopied confidential

¹²¹ Katrina A Hausfeld et al, "The New Anti-Money Laundering Act of 2020: A Potential Game-Changer for Enforcement and Compliance" (11 January 2021), online: *DLA Piper* <<https://www.dlapiper.com/en/us/insights/publications/2021/01/new-aml-act-is-a-game-changer/>>.

¹²² See UK, Serious Fraud Office, *Annual Report on Whistleblowing Disclosures 2019-20*, (London: SFO, 2020), online: <<https://www.sfo.gov.uk/download/annual-report-on-whistleblowing-disclosures-2019-20/>>. The SFO is required to publish an annual report concerning the number of whistleblowing disclosures made by workers about their employers. To be included in the report, the disclosure must be a "qualifying" disclosure. This means: (1) the worker reasonably believes that the information disclosed is substantially true and relates to, *inter alia*, a serious fraud, and (2) the Director of the SFO reasonably believes that in the reasonable belief of the worker the disclosure is made in the public interest and tends to show, *inter alia*, a criminal offence.

¹²³ *R v Watts / R v Hydro Kleen*, [2005] AJ No 568 (QB).

ICE documents that he had required the employees to present, which he then passed on to Hydro Kleen. When ICE became aware, the company reported the guard's conduct, and their suspicions about Hydro Kleen to an Alberta court and received a court order to search Hydro Kleen's premises for the confidential ICE documents. After the resulting investigation, Hydro Kleen pled guilty to bribing a public foreign official under the *CFPOA*.¹²⁴

The Padma Bridge case also provides a possible example of a competitor complaint. As discussed in Chapter 1, Section 1.2, after the initial bidding process for the Padma River Bridge project, SNC-Lavalin was reportedly in second position behind the Halcrow Group, a multinational engineering firm based in the UK, who had submitted a lower and more competitive bid. Following the alleged bribery conspiracy, however, SNC-Lavalin moved to first position and was awarded the bridge contract. As financiers of the Padma Bridge project, the World Bank initiated an investigation into the alleged bribery conspiracy, but it is easy to imagine that SNC-Lavalin's competitor, the Halcrow Group, was upset by the cloak and dagger bidding process and reported their suspicions to the World Bank.

4.3.4 Diplomatic Embassies and Trade Offices

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

For example, a Canadian diplomat was instrumental to the instigation of an investigation and the ultimate conviction obtained in *R v Niko Resources Ltd* under the *CFPOA*. In the agreed statement of facts submitted during the *Niko Resources* case, it came to light that "the RCMP investigation into Niko Canada began after the Canadian Department of Foreign Affairs and International Trade (DFAIT) alerted the RCMP on June 20, 2005, to news stories concerning a possible violation of the *Corruption of Foreign Public Officials Act* by the Niko family of companies."¹²⁵ DFAIT was informed of the possible corruption by David Sproule, Canada's High Commissioner to Bangladesh, after reading a *Daily Star* article which reported that Niko had "gifted" a luxury SUV to a Bangladeshi minister. For another example of involvement of a foreign trade office in a bribery case, see *R v Karigar*.¹²⁶

4.3.5 Cooperative Foreign Enforcement Bodies

National enforcement bodies that have cooperation agreements with foreign enforcement bodies often refer investigations or exchange information about corruption activity that lead

¹²⁴ *Ibid*. A more in-depth account of *Hydro Kleen* can be found in Norman Keith, *Canadian Anti-Corruption Law and Compliance*, 2nd ed (Toronto: LexisNexis, 2017) at 180–186. Additionally, *Hydro Kleen* is further considered in Chapter 7, Section 6.5.

¹²⁵ *Niko Resources Ltd*, *supra* note 22 (Agreed Statement of Facts), online (pdf): <[http://www.osler.com/uploadedFiles/Agreed statement of facts.pdf](http://www.osler.com/uploadedFiles/Agreed%20statement%20of%20facts.pdf)>.

¹²⁶ 2013 ONSC 5199. *R v Karigar* is discussed in Chapter 7, Section 6.5.

to external investigations. For example, in 2007 the DOJ in the US referred their investigation into Innospec Ltd. to the UK's SFO.¹²⁷

4.3.6 Non-Governmental Organizations

Non-governmental organizations like TI are instrumental in reporting corruption activity.¹²⁸ Beginning in 2003, TI began operating Advocacy and Legal Advice Centres (ALACs) around the globe to empower witnesses and victims of corruption to fight back. As of the date of writing, over 270,000 people have contacted ALACs and their reports of corrupt activity have been passed on to enforcement bodies and recorded by TI in their role as advocates for change.

4.4 Elements of External Investigation

The following extract from Tony Kwok Man-Wai's "Effective Investigation of Corruption Cases: The Hong Kong Experience"¹²⁹ provides a good overview of the elements of a corruption investigation.¹³⁰ While Kwok's paper is focused on investigations carried out by Hong Kong's ICAC, the requisite elements are similar for police investigations of bribery in other countries.

BEGINNING OF EXCERPT

A. Introduction

The Hong Kong Independent Commission Against Corruption (ICAC) is popularly regarded as a successful model in fighting corruption, turning a very corrupt city under colonial government into one of the relatively corruption-free places in the world. One of the success factors is its three-pronged strategy — fighting corruption through deterrence, prevention and education. All three are important but in my view, deterrence is the most important. That is the reason why ICAC devoted over 70% of its resources into its Operations Department, which is responsible for investigating corruption. Nearly all of the major corruption cases I have dealt with were committed by people in high authority. For them, they have certainly been educated about the evil of corruption, and they may also be subject to certain degrees of corruption prevention control. But what inspired them to commit corruption? The answer is simply greed, as they would weigh the fortune they could get from corruption against the chance of being discovered. If they think that it is a low risk, high-return opportunity, they will likely succumb to the temptation. So how can we

¹²⁷ See Nicholls et al, *supra* note 38 at 52-53 for a fuller discussion.

¹²⁸ See "Transparency International" (last visited 19 August 2021), online: TI <<https://www.transparency.org/en/>> for more information.

¹²⁹ Tony Kwok Man-Wai, *Effective Investigation of Corruption Cases: The Hong Kong Experience*, (UNAFEI, 2013), online (pdf): <<https://www.unafei.or.jp/publications/pdf/GG7/sp3.pdf>>.

¹³⁰ *Ibid* at 50-56.

deter them from being corrupt? The only way is to make them realize that there is a high risk of being caught. Hence the Mission of the ICAC Operations Department is — to make corruption a high-risk crime. To do that, you need a professional and dedicated investigative force.

B. Difficulties of Investigating Corruption

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

C. Corruption and Organized Crime

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

D. Prerequisites for an Effective Investigation

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

- a. Independent — corruption investigations can be politically sensitive and embarrassing to the Government. The investigation can only be effective if it is truly independent and free from undue interference. This depends very much on whether there is a top political will to fight corruption in the country, and whether the head of the anti-corruption agency has the moral courage to stand against any interference.
- b. Adequate investigative power — because corruption is so difficult to investigate, you need adequate investigative power. The HK ICAC enjoys wide investigative power. Apart from the normal police power of search,

arrest and detention, it has power to check bank accounts, intercept telephone communications, require suspects to declare their assets, require witnesses to answer questions on oath, restrain properties suspected to be derived from corruption, and hold the suspects' travel documents to prevent them from fleeing the jurisdiction. Not only is the ICAC empowered to investigate corruption offences, both in the Government and private sectors, they can investigate all crimes which are connected with corruption. I must hasten to add that there is an elaborate system of checks and balances to prevent abuse of such wide power.

- c. Adequate resources — investigating corruption can be very time-consuming and resource intensive, particularly if the cases cross jurisdictions. In 2007, the HK ICAC's annual budget amounted to US\$90M, about US\$15 per capita. You may wish to multiply this figure with your own country's population and work out the anti-corruption budget that needs to be given to be the equivalent of ours! However, looking at our budget from another angle — it represents only 0.3% of our entire Government budget or 0.05% of our Gross Domestic Product (GDP). I think you will agree that such a small "premium" is a most worthwhile investment for a clean society.
- d. Confidentiality — it is crucial that all corruption investigations should be conducted covertly and confidentially, at least before an arrest is made, so as to reduce the opportunities for compromise or interference. On the other hand, many targets under investigation may prove to be innocent, and it is only fair to preserve their reputation before there is clear evidence of their corrupt deeds. Hence in Hong Kong, we have a law prohibiting any one, including the media, from disclosing any details of ICAC investigation until overt action such as arrests and searches have been taken. The media once described this as a "press gag law" but they now come to accept it as the right balance between press freedom and effective law enforcement.
- e. International mutual assistance — many corruption cases are now cross-jurisdictional and it is important that you can obtain international assistance in the areas such as locating witnesses and suspects, money trails, surveillance, exchange of intelligence, arrest, search and extradition, and even joint investigation and operation.
- f. Professionalism — all the investigators must be properly trained and professional in their investigations. The HK ICAC strives to be one of the most professional law enforcement agencies in the world. ICAC is one of the first agencies in the world to introduce the interview of all suspects under video, because professional interview techniques and the need to protect the integrity of the interview evidence are crucial in any successful corruption prosecution. The investigators must be persons of high integrity. They must adhere strictly to the rule of confidentiality, act fairly and justly in the discharge of their duties, respect the rights of others, including the suspects

and should never abuse their power. As corruption is so difficult to investigate, they need to be vigilant, innovative and prepared to spend long hours to complete their investigation. ICAC officers are often proud of their sense of mission, and this is the single most important ingredient of success of ICAC.

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

E. Understanding the Process of Corruption

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

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

attempt to locate the source of funds and whether there was any third person who assisted in handling the bribe payment.

4. Payment of bribe — The bribe would then be paid. The investigator should attempt to find out where, when and how the payment was effected.
5. Disposal of bribe — On receipt of the bribe, the receiver would have to dispose the cash. The investigator should try to locate how the bribe was disposed, either by spending or depositing into a bank account.
6. Act of abuse of power – To prove a corruption offence, you need to prove the corrupt act or the abuse of position, in return for the bribe. The investigator needs to identify the documents or other means proving this abuse of authority.

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

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

F. Methods to Investigate Corruption

Investigating corruption can broadly be divided into two categories:

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

1. Investigating Past Offences

The investigation normally commences with a report of corruption and the normal criminal investigation technique should apply. Much will depend on the information provided by the informant and from there, the case should be developed to obtain direct, corroborative and circumstantial evidence. The success of such investigations relies on the meticulous approach taken by the investigators to ensure that “no stone is left unturned”. Areas of investigation can include detailed checking of the related bank accounts and company ledgers, obtaining information from various witnesses and sources to corroborate any meetings or corrupt transaction, etc. At the initial stage, the investigation should be covert and kept confidential. If there is no evidence discovered in this stage, the investigation should normally be curtailed and the suspects should not be interviewed. This would protect the suspects, who are often public servants, from undue harassment. When there is a reasonable suspicion or

evidence discovered in the covert stage, the investigation can enter its overt stage. Action can then be taken to interview the suspects to seek their explanation and if appropriate, the suspects' home and office can be searched for further evidence. Normally further follow-up investigation is necessary to check the suspects explanation or to go through the money trails as a result of evidence found during searches. The investigation is usually time-consuming.

2. Investigating Current Corruption Offences

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

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

G. Investigation Techniques

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

- Ability to identify and trace persons, companies and properties
- Interview technique
- Document examination
- Financial Investigation
- Conducting a search & arrest operation
- Surveillance and observation
- Acting as undercover agent
- Handling informers

- Conducting an entrapment operation

H. Professional Investigative Support

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

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

I. Financial Investigation Section

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

- **Witness Protection Section**

ICAC has experienced cases where crucial witnesses were compromised, with one even murdered, before giving evidence. There should be a comprehensive system to protect crucial witnesses, including 24-hour

protection, safe housing, new identity and overseas relocation. Some of these measures require legislative backing.

J. Conclusion and Observation

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

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

END OF EXCERPT

4.5 Investigative Strategy

Charles Monteith, an anti-corruption specialist with working experience at both the International Centre for Asset Recovery (ICAR) and the SFO, wrote a brief, informative chapter on the importance of establishing an investigative strategy and plan when dealing with corruption allegations.¹³¹ Monteith points out that planning and strategizing are instrumental in meeting the unique challenges posed by corruption cases. These challenges include the overwhelming amounts of data involved in untangling transactions and tracing assets, dealing with aggressive defence lawyers and a disinterested public, and the time lapse before corrupt conduct is brought to light. The transnational nature of many corruption cases creates other challenges and calls for mutual trust, cooperation, coordination, and information sharing. Careful planning is needed to navigate these features of cross-border investigations.

The author outlines the key pieces of a successful investigation. As multiple agencies are often involved in each corruption case, cooperation between agencies is required to set the stage for the investigation. This means choosing a lead agency, allocating responsibilities and sharing information. Monteith also stresses the importance of assembling a team of

¹³¹ Charles Monteith, "Case and Investigation Strategy" in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (Bern: Peter Lang, 2013) at 183.

intelligence officers, financial investigators, analysts, and lawyers in order to ensure the right expertise is available at the right time.

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

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

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

4.6 Investigative Techniques

As Kwok's paper notes, detecting corruption and gathering evidence of corruption can be both difficult and time-consuming.¹³² Effective enforcement has many elements, two of which are well-trained and well-funded investigators who have the investigative powers essential to the task. However, the bestowing of investigative powers on investigators must be subject to checks and balances in respect to all persons' fundamental privacy interests. For that reason, in common law countries like the US, UK, and Canada, investigative techniques which involve a significant invasion into a person's reasonable expectation of privacy of person or property normally require a judicial warrant—i.e., prior approval for the search or interception granted by an independent judicial officer who finds there are reasonable grounds to believe evidence of corruption will be found by the search or interception. Without reasonable grounds, searches and interceptions are generally illegal. While the laws on electronic interception, monitoring, and search and seizure vary in the

¹³² Kwok, *supra* note 129 at 52.

US,¹³³ UK,¹³⁴ and Canada,¹³⁵ each country authorizes such techniques subject to significant checks and balances. Electronic surveillance generally includes eavesdropping, wiretapping, and intercepting communications from cell-phones (both oral and text messages), emails, and postal services.¹³⁶

4.6.1 International Provisions

4.6.1.1 UNCAC

Article 50 states:

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

...

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

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

4.6.1.2 OECD Convention

No specific articles on special investigative procedures.

¹³³ For the law of search and seizure in the US, see Wayne R LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 6th ed (Thomas Reuters, 2020). For the law on electronic surveillance, interception and wiretaps see Bourdeau, *supra* note 37 and Amendola, *supra* note 37.

¹³⁴ For the law of search and seizure in the UK, see David Ormerod QC & David Perry QC, eds, *Blackstone's Criminal Practice 2021*, 31st ed (Oxford: Oxford University Press, 2020).

¹³⁵ For the law of search and seizure in Canada, see Tim Quigley, *Procedure in Canadian Criminal Law*, 2nd ed (Toronto: Carswell, 2005) (loose-leaf updated 2021) or Tim Quigley, *Procedure in Canadian Criminal Law: 2015 Student Edition* (Toronto: Carswell, 2015). For the law on electronic surveillance, interception and wiretaps, see Robert Hubbard et al, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (Toronto: Canada Law Book, 2000) (loose-leaf updated 2018).

¹³⁶ Nicholls et al, *supra* note 38 at 221; Quigley (2005), *supra* note 135 at 8-49.

4.6.2 Controlled Deliveries

Controlled deliveries are a common technique in the investigation of offences such as possession of illegal drugs or stolen goods, and, though less likely, could be used to investigate ongoing bribery. Controlled deliveries involve investigation during the commission of a crime rather than afterward. For example, the police may believe that A is in possession of drugs, stolen goods or proceeds of crime and that A is going to deliver those goods to B, the kingpin or higher official of the organized activity. Rather than arrest A, the police will follow A to the delivery point in order to discover the identity of B and facilitate the arrest of both A and B. Controlled deliveries are lawful in the US,¹³⁷ UK,¹³⁸ and Canada.¹³⁹ They raise no special concerns.

4.6.3 Integrity Testing versus Entrapment

While Article 50 of UNCAC does not specifically mention integrity testing (also referred to as “virtue testing”), the *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigations* (UN Handbook)¹⁴⁰ promotes integrity testing as an “extremely effective ... investigative tool as well as ... an excellent deterrent.”¹⁴¹ Moreover, the UN Handbook encourages the use of random integrity testing and targeted integrity tests based on suspicion.¹⁴² For example, integrity testing has been used very effectively by the New York Police Department to detect internal corruption¹⁴³ and in the UK to detect the presence of issues (not amounting to criminal offences) in private institutions.¹⁴⁴ Integrity testing, especially when coupled with video surveillance, can be very intrusive and is therefore generally subject to the rules of entrapment (discussed below), as well as criminal procedure and human rights legislation.¹⁴⁵ In some countries integrity testing is illegal unless there is reasonable suspicion that the persons being tested are violating a particular law.¹⁴⁶

¹³⁷ Joshua D Poyer, “*United States v Miggins*: A Survey of Anticipatory Search Warrants and the Need for Uniformity Among the Circuits” (2004) 58:2 U Miami L Rev 701 at 705.

¹³⁸ William C Gilmore, “Police Co-Operation and the European Communities: Current Trends and Recent Developments” (1993) 19:4 Commonwealth L Bull 1960 at 1962.

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

¹⁴⁰ UNODC, *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigations* by Natalie Christelis & Petter Langseth (Vienna: UNODC, 2004), online: <<https://digitallibrary.un.org/record/561662?ln=en>>.

¹⁴¹ *Ibid* at 91.

¹⁴² *Ibid* at 90.

¹⁴³ *Ibid* at 92.

¹⁴⁴ Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (New York: Oxford University Press, 2011) at 202.

¹⁴⁵ *Ibid*.

¹⁴⁶ For example, in Canada this would be considered an abuse of process and a violation of the section 8 right to privacy under the *Canadian Charter of Rights and Freedoms*. See also Section 4.6.3.3. In the UK, it is not clear whether virtue or integrity testing a person without reasonable suspicion (i.e., “randomly”) amounts to unlawful entrapment: see Simester et al, *Simester and Sullivan’s Criminal*

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

4.6.3.1 US

There is no unified approach to the defense of entrapment in the US.¹⁴⁷ Instead, there are two major approaches: (a) a subjective approach and (b) an objective approach.¹⁴⁸ Federal courts¹⁴⁹ and a majority of state courts follow the subjective approach, also called the *Sherman-Sorrells* doctrine.¹⁵⁰ This approach has a two-step test: (1) was the offense induced by a government agent; and (2) was the defendant predisposed to commit the type of offense charged?¹⁵¹ There are a variety of factors taken into account during this test.¹⁵² The focus of the *Sherman-Sorrells* doctrine is on the propensity of the defendant to commit the offense rather than the officer’s actions.¹⁵³

The objective approach, also known as the Roberts-Frankfurter¹⁵⁴ approach, is followed by a few state courts.¹⁵⁵ This approach uses a test which focuses on the conduct of the government agent and determines if the offense was induced by the agent “employing methods of persuasion or inducement, which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.”¹⁵⁶ When the test is being applied it is necessary to consider the surrounding circumstances.¹⁵⁷ These two approaches differ in procedure, including whether a judge or jury considers the issue.¹⁵⁸ Under both approaches a finding of entrapment will normally lead to an acquittal, but no defense is available for offenses of bodily harm.¹⁵⁹

Law: Theory and Doctrine, 7th ed (Oxford: Hart Publishing, 2019) at 815-821.

¹⁴⁷ Paul H Robinson, *Criminal Law Defenses: Criminal Practice Series* (Thomson West, 1984) at 511 (note: this resource is updated annually).

¹⁴⁸ Wayne R LaFave, *Substantive Criminal Law*, vol 2, 3rd ed (Thomson Reuters, 2018) at 124-135.

¹⁴⁹ Federal courts follow the subjective approach. Since bribery falls under federal jurisdiction in the US, the subjective approach is the relevant test for bribery.

¹⁵⁰ LaFave, *supra* note 148 at 124-125. The approach is named after *Sherman v United States*, 365 US 369 (1958) [*Sherman*] and *Sorrells v United States*, 287 US 435 (1932) [*Sorrells*], in which the majority adopted this approach.

¹⁵¹ LaFave, *ibid* at 125-128.

¹⁵² For a full list of the relevant factors, see *ibid* at 128-129.

¹⁵³ *Ibid* at 129.

¹⁵⁴ Named after the judges who authored the concurring opinions in *Sorrells* and *Sherman*.

¹⁵⁵ LaFave, *supra* note 148 at 132-133.

¹⁵⁶ *Ibid* at 133, citing *Model Penal Code* § 2.13.

¹⁵⁷ *Ibid*.

¹⁵⁸ For a full analysis of the procedural differences between the two approaches see *ibid* at 138-146.

¹⁵⁹ Robinson, *supra* note 147 at 524.

There is also debate in the US about whether entrapment should be considered an excuse (leading to an acquittal) or a non-exculpatory defense.¹⁶⁰ In two cases, the courts acknowledged that a finding of entrapment may sometimes be used as a due process (non-exculpatory) defense leading to a stay of proceedings.¹⁶¹ As a result, LaFave suggests that “a ‘reasonable suspicion’ prerequisite may ... emerge as an aspect of the due process limits upon encouragement activity” to curb over-involvement by the government.¹⁶²

4.6.3.2 UK

The House of Lords has traditionally affirmed that there is no substantive defence of entrapment available in English law.¹⁶³ Instead, a finding of entrapment could lead to exclusion of evidence or result in a reduced sentence on the basis that the entrapment constituted an abuse of process.¹⁶⁴ However, in response to a European Court of Human Rights decision,¹⁶⁵ the House of Lords in *R v Loosely* and *Attorney General's Reference (No 3 of 2000)*¹⁶⁶ concluded that when a defendant has been entrapped to an extent that the continued prosecution of a crime “amounts to an affront to the public conscience,” the appropriate remedy for that abuse of process is a stay of proceedings.¹⁶⁷ This holding acknowledges in effect a non-exculpatory defence of entrapment.¹⁶⁸

When determining whether entrapment has occurred the court considers multiple factors, including whether the investigation was undertaken in good faith.¹⁶⁹ If the investigation was based on reasonable suspicion of an individual, group of individuals or a specific location, the court will likely find the investigation was undertaken in good faith.¹⁷⁰ The good faith criterion has the effect of curbing the use of random virtue integrity testing based on speculation, as these types of investigations may lead to a stay of proceedings for abuse of process.¹⁷¹

The test described in *R v Loosely* applies to all covert investigations.¹⁷² As stated by Nicholls et al., investigators must investigate, not create, the offence.¹⁷³ Investigators therefore must be cautious when deploying undercover agents and participating sources or when

¹⁶⁰ *Ibid* at 515.

¹⁶¹ LaFave, *supra* note 148 at 148. *United States v Russell*, 411 US 423 (1973), *Hampton v United States*, 425 US 484 (1976).

¹⁶² LaFave, *ibid* at 151; *United States v Twigg*, 588 F (2d) 373 (3rd Cir 1978).

¹⁶³ Simester et al, *supra* note 146 at 816, 818; Nicholls et al, *supra* note 38 at para 2.18.

¹⁶⁴ Pursuant to s 78 of the *Police and Criminal Evidence Act 1984* and *R v Latif*, [1996] 1 All ER 353 (HL); Simester et al, *supra* note 146 at 819.

¹⁶⁵ *Teixeira de Castro v Portugal*, [1998] Crim LR 751.

¹⁶⁶ These two cases were heard together: [2002] Cr App R 29.

¹⁶⁷ Nicholls et al, *supra* note 38 at para 2.19.

¹⁶⁸ Simester et al, *supra* note 146 at 819-820; Nicholls et al, *supra* note 38 at para 2.19.

¹⁶⁹ Nicholls et al (2011), *supra* note 144 at 202; see also Simester et al, *supra* note 146 at 820 for the full list of factors.

¹⁷⁰ Nicholls et al (2011), *ibid*.

¹⁷¹ *Ibid*.

¹⁷² *Ibid* at 200.

¹⁷³ *Ibid*.

conducting intelligence-led integrity testing, which responds to intelligence that a target is or may be committing crime.¹⁷⁴

4.6.3.3 Canada

In Canada, entrapment is a non-exculpatory defence and a finding of entrapment will result in a stay of proceedings for abuse of process.¹⁷⁵ Under Canadian law, entrapment can occur in two situations: (a) “the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in a criminal activity or pursuant to a *bona fide* inquiry, [or,] (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.”¹⁷⁶

In regard to (a), the Supreme Court of Canada has created a threshold of reasonable suspicion or *bona fide* inquiries before random virtue testing is lawful.¹⁷⁷ Random virtue testing involves law enforcement officers approaching individuals randomly (i.e., without reasonable suspicion that an individual is already engaged in a particular criminal activity) and presenting them with the opportunity to commit a particular crime. The Supreme Court of Canada held that random virtue testing is an improper use of police power.¹⁷⁸ However, the Court has also acknowledged an exception. Under this exception, law enforcement officials may present any individual with an opportunity to commit a particular offence during a *bona fide* inquiry into a sufficiently defined location if it is reasonably suspected that criminal activity is occurring in that location.¹⁷⁹

In regard to (b), the Court has outlined relevant factors for consideration when determining whether the police have gone beyond providing an opportunity and instead induced the commission of an offence.¹⁸⁰ Courts will objectively assess the conduct of the police and their agents rather than assessing the effect of the police conduct on the accused’s state of mind.¹⁸¹

The biggest challenge to the application of the entrapment test in recent years has arisen in the buying and selling of drugs using cell-phones, referred to as dial-a-dope cases. The SCC

¹⁷⁴ *Ibid.* For a detailed account of covert investigation techniques in the UK, see *ibid* at 190-200; Simester et al, *supra* note 146 at 815-821; and “Abuse of Process” (last updated 20 July 2021), online: Crown Prosecution Service <<https://www.cps.gov.uk/legal-guidance/abuse-process>>.

¹⁷⁵ Stuart, *supra* note 39 at 669.

¹⁷⁶ *R v Mack*, [1988] 2 SCR 903 [*Mack*] at para 130 quoting Estey J in *Amato v The Queen*, [1982] 2 SCR 418.

¹⁷⁷ Stuart, *supra* note 39 at 673. For a detailed analysis of the two-part entrapment test, see Steven Penney, “Entrapment Minimalism: Shedding the ‘No Reasonable Suspicion or Bona Fide Inquiry’ Test” (2019) 44:2 Queens LJ 356.

¹⁷⁸ *Mack*, *supra* note 176 at para 133.

¹⁷⁹ *R v Barnes*, [1991] 1 SCR 449 [*Barnes*] at 463.

¹⁸⁰ For a full list of factors see Stuart, *supra* note 39 at 673-674.

¹⁸¹ *Ibid* at 672.

considered these type of cases in *R v Ahmad*¹⁸² and *R v Li*.¹⁸³ A majority of the Court (5-4) reaffirmed the two-part entrapment defence set out in *R v Mack*¹⁸⁴ and *R v Barnes*,¹⁸⁵ and then proceeded to examine and further explain the first branch of entrapment (i.e., virtue or integrity testing) in the context of the various forms of dial-a-dope operations.

While entrapment normally involves undercover police operations, some undercover operations cannot constitute entrapment because they are used to detect past crimes, not induce future crimes. In Canada, the most controversial form of this covert police activity is the “Mr. Big Operation.”¹⁸⁶

4.6.4 Obtaining Financial Reports

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

4.6.4.1 US

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

Where the official actions involve civil enforcement of SEC anti-bribery and books and records violations, a “formal order of investigation” can be issued privately by the SEC which carries with it a subpoena power for financial records.¹⁸⁷

¹⁸² 2020 SCC 11. See Stuart, *supra* note 39 at 673-674. See also “Reasonable Suspicion Required: The SCC’s Approach To Entrapment In *R v Ahmad*”, online (blog): *Weisberg Law - Criminal Lawyers* <<https://www.weisberg.ca/reasonable-suspicion-r-v-ahmad/>>; Aidan Macnab, “SCC rules on entrapment in dial-a-dope drug investigations”, *Canadian Lawyer* (1 June 2020), online: <<https://www.canadianlawyermag.com/practice-areas/criminal/scc-rules-on-entrapment-in-dial-a-dope-drug-investigations/330103>>; and Andrew Matheson & Kishan Lakhani, “Help Me Out: Drawing Distinctions in the Entrapment Defence” (28 July 2020), online: *McCarthy Tetrault* <<https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/help-me-out-drawing-distinctions-entrapment-defence>> for further commentary.

¹⁸³ 2020 SCC 12.

¹⁸⁴ *Mack*, *supra* note 176.

¹⁸⁵ *Barnes*, *supra* note 179.

¹⁸⁶ For the latest restrictions on the use of “Mr. Big Operations,” see *R v Hart*, 2014 SCC 52 and *R v Mack*, 2014 SCC 58. See a recent application of this framework in *R v Moir*, 2020 BCCA 116.

¹⁸⁷ Tarun & Tomczak, *supra* note 80 at 344.

4.6.4.2 UK

In addition to the general police power to apply to a court for a search and seizure warrant, section 2 of the *Criminal Justice Act 1987* grants power to the Director of the SFO to compel disclosures orally and in writing of information and documents relevant to an SFO investigation. There are limits on the use that can be made of statements obtained from the person under investigation and certain information is protected by solicitor-client privilege. The SFO disclosure orders are frequently directed to banks, accountants or other professional consultants and can override duties of confidence, but are only enforceable against UK institutions and persons.¹⁸⁸ The *Act* also creates offences and sanctions for those who refuse to comply with an order to disclose information.¹⁸⁹

4.6.4.3 Canada

Domestic corruption offences are enforced by the relevant municipal or provincial police agencies. Enforcement of foreign bribery offences under *CFPOA* is conducted by special units within the RCMP. Unlike the Director's power in the SFO to order disclosure of relevant financial orders, no similar power exists for the RCMP or for municipal or provincial police. Instead, the police must obtain search warrants from a court in order to obtain financial records, unless of course the person or company under investigation is fully cooperating with the police. For example, in *R v Griffiths Energy International*, the company, under a new board of directors, voluntarily reported the company's acts of corruption and handed over to the RCMP the results of their extensive internal investigation.¹⁹⁰ On the other hand, in the SNC-Lavalin investigation and subsequent charges related to corruption in Libya and Tunisia, the RCMP executed a search warrant on SNC-Lavalin headquarters in Montreal in April 2012.

4.6.5 Forensic Accountants

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

In *The Law of Fraud and the Forensic Investigator*, David Debenham asserts that "[u]nderstanding the rules of evidence is a critical part of the forensic accountants' skill set."¹⁹¹ Potentially relevant evidence should always be brought forward, unless it is covered by privilege, to ensure the investigation has access to all pertinent documents. Debenham suggests that even potentially illegally-obtained evidence can be brought forward, particularly in civil proceedings. Often relevant evidence is left out due to misunderstandings about the law of evidence and too easily assumed privilege.¹⁹² Where

¹⁸⁸ For more detail on SFO disclosure orders, see Nicholls et al, *supra* note 38 at 211-212.

¹⁸⁹ *Ibid* at 212-213.

¹⁹⁰ *Griffiths Energy*, *supra* note 22.

¹⁹¹ David Debenham, *The Law of Fraud and the Forensic Investigator*, 5th ed (Toronto: Thomson Reuters, 2016) at 987.

¹⁹² *Ibid*.

privilege is asserted, possibly in an attempt to veil wrongdoing, forensic accountants must be well informed on the legal rules of evidence in order to navigate the situation.

Forensic accountants should also be attentive to conflicts of interest. If a forensic accountant has accepted a retainer to investigate financial statements of a client, a conflict of interest can arise if they discover evidence of criminal activity. If the conflict involves a former client or if the accountant is acting as a corporate auditor, the accountant's fiduciary duties may prevent them from disclosing confidential information to persons other than their client.

5. DISPOSITIONS RESULTING FROM INVESTIGATIONS

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

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

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

5.1 Criminal Options and Procedures

Pursuing corruption through the criminal process involves three components:

- (1) Charging policies and the choice of charges;

- (2) Guilty plea negotiations, settlement agreements or prosecution by trial; and
- (3) Sentencing an offender after a guilty plea or after a conviction at trial.

5.2 Civil Options and Procedures

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

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

5.3 Comparative Data on Remedies for Foreign Bribery

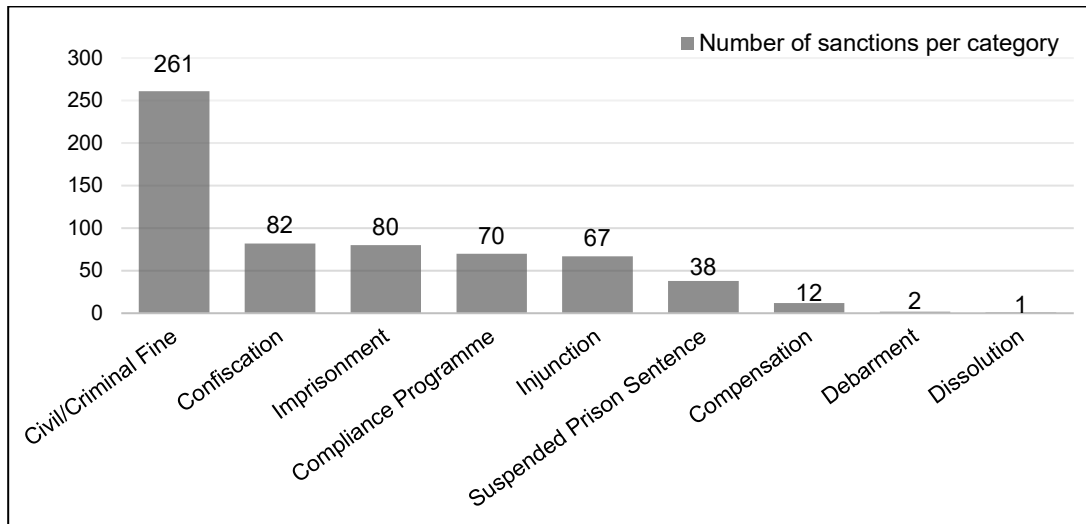
The summary of data in Figure 6.1 is based on 427 foreign bribery convictions and sanctions imposed on 263 individuals and 164 collective entities.¹⁹³

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

¹⁹³ OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, (Paris: OECD Publishing, 2014) at 18, online: <<http://dx.doi.org/10.1787/9789264226616-en>>. As of April 2021, this remains the last comprehensive *Foreign Bribery Report* produced by the OECD.

implement Directive 2014/24/EU which requires mandatory exclusion of economic operators that have been found guilty of corruption.

Figure 6.1 *Types of Sanctions Imposed*



Note. Adapted from *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*.¹⁹⁴

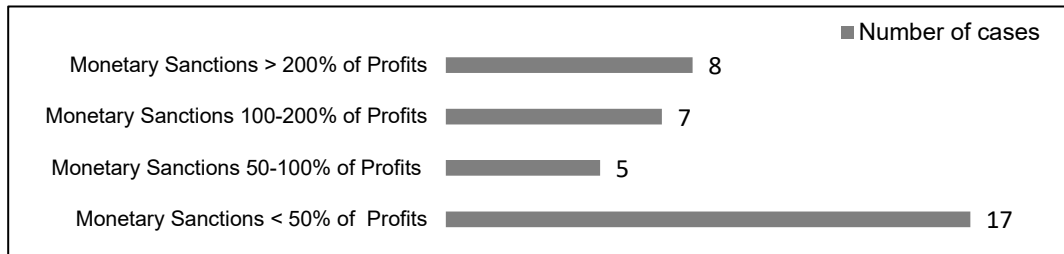
It is important to note that 69% of sanctions were imposed through settlement procedures, while 31% were imposed through convictions.

Not listed in Figure 6.1 are the substantial costs of foreign bribery enforcement actions that either cannot be quantified in monetary terms or do not constitute official sanctions, such as:

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

Figure 6.2 illustrates the monetary sanctions imposed as a percentage of profits obtained. It is based on 37 foreign bribery cases occurring between February 15, 1999 and June 1, 2014.

¹⁹⁴ *Ibid* at 18–20, 28.

Figure 6.2 *Monetary Sanctions as a Percentage of Profits Obtained*

Note. Adapted from *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*.¹⁹⁵

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

6. CHARGING POLICIES

All prosecuting bodies have technical standards and procedures that must be followed in entering criminal charges or launching civil enforcement actions. Examples of these standards are discussed in this section. Notwithstanding these formal guidelines, the decision to prosecute invariably requires the prosecutor to be satisfied there is a reasonable likelihood that the defendant can be convicted, and the public interest will be served by prosecution.

6.1 US

As described in Section 3.3.1, the US has two enforcement bodies tasked with prosecuting *FCPA* offenses: (i) the DOJ, which is solely responsible for criminal prosecutions and civil proceedings against non-public issuers; and (ii) the SEC, which is responsible for civil

¹⁹⁵ *Ibid* at 28.

enforcement actions against public issuers (corporations that are publicly traded on a US stock exchange or otherwise required to file securities documents with the SEC), as well as the agents and employees of public issuers.

The jurisdiction of the DOJ and SEC necessarily overlap in a large number of cases. According to Koehler, it is common for the DOJ and SEC to simultaneously prosecute the same *FCPA* offenses and to coordinate the announcement and resolution of their enforcement actions on the same day.¹⁹⁶ The DOJ and SEC may also coordinate with other jurisdictions and announce settlements on the same day. Companies and individuals being investigated for *FCPA* violations must be cognizant of the coordinated power of the DOJ and SEC and may negotiate with the two bodies accordingly. For example, a corporation willing to accept a hefty settlement with the SEC involving disgorgement of profits may be able to negotiate more lenient treatment by the DOJ in the criminal proceedings. The DOJ and SEC may also offset sanctions in light of fines received in foreign jurisdictions.

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

In short, the net effect of the above DOJ and SEC enforcement policies, and the 'carrots' and 'sticks' embedded in them, is often to induce business organizations subject to *FCPA* scrutiny to resolve enforcement actions for reasons of risk aversion and not necessarily because the enforcement agencies have a superior legal position. Business organizations are further motivated to resolve *FCPA* enforcement actions, including those based on aggressive enforcement theories, because the DOJ resolution vehicles typically do not result in any actual prosecuted charges against the company and the SEC resolution vehicles typically used traditionally have not required the company admit the allegations.¹⁹⁷

6.1.1 DOJ

The DOJ has jurisdiction to prosecute and pursue criminal convictions. In determining whether and how to resolve an *FCPA* matter, DOJ prosecutors are guided by the *Principles of Federal Prosecution*,¹⁹⁸ in the case of individuals, and the *Principles of Federal Prosecution of*

¹⁹⁶ Koehler, *supra* note 91 at 55.

¹⁹⁷ *Ibid* at 60.

¹⁹⁸ US, Department of Justice, "s 9-27.000 — Principles of Federal Prosecution" in *Justice Manual* (last revised 2018) [*Justice Manual*], online: <<http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>>.

*Business Organizations*¹⁹⁹ and *FCPA Corporate Enforcement Policy (CEP)*,²⁰⁰ in the case of companies.

The *Principles of Federal Prosecution* are set out in the US Attorney's Manual at chapter 9-27.000. These principles guide DOJ prosecutors in making the core decisions within their jurisdiction—commencing or declining prosecution, selecting charges, and plea bargaining. In deciding whether to initiate a prosecution, DOJ prosecutors are directed by the following general principle:

- A. The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that a substantial federal interest would be served by the prosecution, unless, in [their] judgment, prosecution should be declined because:
 - 1. The person is subject to effective prosecution in another jurisdiction; or
 - 2. There exists an adequate non-criminal alternative to prosecution.²⁰¹

As this principle makes clear, the prosecutor's belief that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain a conviction is a necessary, but not sufficient, condition for commencing prosecution.

The prosecution must also serve a "substantial federal interest." To determine whether a substantial federal interest exists, the prosecutor is advised to weigh all relevant considerations, including: the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the person is convicted.²⁰²

¹⁹⁹ "s 9-28.000 — Principles of Federal Prosecution of Business Organizations", in *Justice Manual*, *supra* note 198, online: <<http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>>.

²⁰⁰ *CEP*, *supra* note 81.

²⁰¹ "s 9-27.220 — Grounds for Commencing or Declining Prosecution" in *Justice Manual*, *supra* note 198, online: <<https://www.justice.gov/archives/usam/archives/usam-9-27000-principles-federal-prosecution#9-27.220>>.

²⁰² "s 9-27.230 — Initiating and Declining Charges — Substantial Federal Interest" in *Justice Manual*, *supra* note 198, online: <<https://www.justice.gov/archives/usam/archives/usam-9-27000-principles-federal-prosecution#9-27.230>>.

The *Principles of Federal Prosecution of Business Organizations* (*Principles of Federal Prosecution*) are codified in US Attorney's Manual at chapter 9-28.000.²⁰³ These principles guide the prosecution of corporate crime. Generally, DOJ prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. However, several additional factors require consideration. These principles are:

- 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 willingness to cooperate with the government's investigation, including as to potential wrongdoing by the corporation's agents;
- the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging or resolution decision;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the corporation's remedial actions, including any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
- 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 remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

Several factors compel the DOJ prosecutor to consider the corporation's *pre-indictment* conduct, e.g., cooperation, voluntary disclosure of wrongdoing, and remediation or restitution.²⁰⁴ Cooperation is defined broadly as helping the DOJ ascertain the identity of corrupt actors and providing the DOJ with disclosure of relevant facts and evidence.²⁰⁵

²⁰³ "§ 9-28.000 — Principles of Federal Prosecution of Business Organizations", in *Justice Manual*, *supra* note 198, online: <<https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations>>.

²⁰⁴ "§ 9-28.400 — Special Policy Concerns" in *Justice Manual*, *supra* note 198, online: <<https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.400>>.

²⁰⁵ "§ 9-28.000 — Principles of Federal Prosecution of Business Organizations", *supra* note 203.

However, according to Koehler, the history of DOJ enforcement shows that even raising legal arguments and disputing the DOJ's enforcement theory is classified as "not cooperating" and can lead to the DOJ bringing criminal charges.²⁰⁶

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

6.1.1.1 Defense Counsel Submissions ("White Papers")

DOJ prosecutors can only pursue a prosecution if the evidence against the accused would "probably be sufficient" to obtain a conviction and a "substantial federal interest" would be served. It follows that if defense counsel can present compelling reasons why the case against their client will not succeed, they stand an excellent chance of preventing charges from ever being brought or pursued.

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

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

White papers are presented in the context of settlement offers and negotiations, so they are privileged documents under the rules of evidence. If a prosecutor proceeds with criminal charges after defense counsel has submitted a white paper, the contents of the paper are inadmissible as evidence against the defendant at trial.

6.1.2 SEC

The SEC Division of Enforcement's *Enforcement Manual* outlines various policies and procedures for the investigation of potential violations of US securities laws.²⁰⁷ The *Enforcement Manual* also sets forth the guiding principles that SEC staff will consider when determining whether to open or close an investigation and whether civil charges are warranted.

²⁰⁶ Koehler, *supra* note 91 at 56.

²⁰⁷ US Securities and Exchange Commission Division of Enforcement, *Enforcement Manual*, (28 Nov 2017) [SEC *Enforcement Manual*], online (pdf): <<https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>>.

SEC staff may become aware of potential *FCPA* violations in a variety of ways including: complaints from the public; tips from whistleblowers, public sources such as media reports; and referrals from other government agencies or self-regulatory organizations. The SEC also uses more proactive investigative techniques. In 2020, the SEC announced its first enforcement actions arising out of the Division of Enforcement's EPS Initiative, which "utilizes risk-based data analytics to uncover potential accounting and disclosure violations caused by, among other things, earnings management practices."²⁰⁸

The threshold determination for opening a new investigation is low because the purpose of an investigation is to gather additional facts to help evaluate whether an investigation would be an "appropriate use of resources." In determining whether to open an investigation, SEC staff will consider several factors, including: the statutes or rules potentially violated; the egregiousness of the potential violation; the potential magnitude of the violation; whether the potentially harmed group is particularly vulnerable or at risk; whether the conduct is ongoing; whether the conduct can be investigated efficiently and within the statute of limitations period; and whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct. SEC staff may also consider whether the case involves a possibly widespread industry practice that should be addressed, whether the case involves a recidivist, and whether the matter gives SEC an opportunity to be visible in a community that might not otherwise be familiar with SEC or the protections afforded by the securities laws.²⁰⁹

6.1.2.1 Defense Counsel Submissions ("Wells Submission")

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

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

²⁰⁸ US Securities and Exchange Commission, Press Release, 2020-226, "SEC Charges Companies, Former Executives as Part of Risk-Based Initiative" (28 September 2020), online <<https://www.sec.gov/news/press-release/2020-226>>.

²⁰⁹ SEC *Enforcement Manual*, *supra* note 207 at 12-14.

6.1.3 Alternatives to Criminal Charges

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

(i) NPAs

An NPA is a private agreement between the DOJ and the alleged offender agreeing to a certain set of facts and legal conclusions. In essence, an NPA is a contract where both sides provide consideration: the DOJ agrees not to prosecute the alleged offender for its alleged offenses and allows the company to continue doing business in the international marketplace, while the alleged offender agrees to certain terms, including implementing compliance undertakings and paying the equivalent of criminal or civil fines and penalties. Under the NPA, the DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. Thus, if the alleged offender breaches the NPA, the DOJ may file charges.

An NPA is not filed with a court but is instead maintained by the parties. Typically, NPAs are not made public. However, where an NPA is with a company for *FCPA*-related offenses, the agreement is made publicly available through the DOJ’s website.

(ii) DPAs

A DPA is a written agreement between the DOJ and an alleged offender. Unlike NPAs, DPAs are filed with a court; thus on their face, they are similar to plea agreements. DPAs contain facts and legal conclusions agreed to by both parties and the alleged offender promises to fulfill compliance requirements and pay criminal penalties. In an NPA, the DOJ agrees not to prosecute the alleged offender if the terms of the agreement are satisfied. In a DPA, the DOJ agrees to defer prosecution of the alleged offender for a stipulated period of time. If the terms of the agreement are fulfilled, the DOJ agrees to drop all charges. A DPA allows a person or company to avoid a formal guilty plea and will signal resolution of the matter to important audiences such as lenders, investors, and customers.²¹⁰

Criticism of NPAs and DPAs

Those, like Koehler, who are critical of the dominant use of NPAs and DPAs, point to their lack of transparency.²¹¹ Negotiations for the agreements are privately held behind closed doors and NPAs are not filed with any court. In addition, most NPAs and DPAs include “muzzle clauses” preventing companies from commenting publicly on DOJ investigations, the circumstances of the alleged offenses, or the subsequent NPAs. The consequences for violating a muzzle clause can be severe.

²¹⁰ Tarun & Tomczak, *supra* note 80 at 253.

²¹¹ Koehler, *supra* note 91 at 64–66.

In 2012, a financial institution named Standard Chartered agreed with the DOJ to enter into a DPA with a standard muzzle clause and a criminal penalty of \$230 million.²¹² A few months later during an earnings call with investors, Standard Chartered's chairman made benign comments about clerical mistakes that the company had made which led to its criminal penalty. Upon hearing of the comments, DOJ prosecutors demanded a transcript of the conference call and threatened to bring criminal charges if the company's chairman did not make a full, public retraction of the comments.²¹³

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

- The DOJ can use its leverage and the “carrots” and “sticks” it possesses to induce business organizations under scrutiny to resolve an enforcement action and pay a criminal fine.
- The DOJ can use an NPA or DPA to insulate its version of facts and enforcement theories from judicial scrutiny.
- In the resolution agreement, the DOJ can include a “muzzle clause” prohibiting anyone associated with the company from making any statement inconsistent with the DOJ's version of the facts or its enforcement theories.
- If the DOJ believes, in its sole discretion, that a public statement has been made contradicting its version of the facts of its enforcement theories, the DOJ can “pounce” and threaten to bring actual criminal charges.²¹⁴

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

Although it is supposedly justified because it prevents future crimes, I suggest that the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing. Just going after the company is also both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager? And from a moral standpoint, punishing a company and its many innocent employees

²¹² *Ibid* at 65.

²¹³ *Ibid* at 65-66.

²¹⁴ *Ibid* at 66.

and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.²¹⁵

(iii) SEC “Neither Admit nor Deny” Settlements

According to Koehler, the typical vehicle for resolution of an SEC *FCPA* enforcement action is the “neither admit nor deny” settlement where a corporation agrees to pay civil penalties and institute compliance controls without admitting or denying any of the SEC’s allegations.²¹⁶

While the SEC announced in 2010 that it approved the use of NPAs and DPAs in civil enforcement actions, the use of such agreements is rare—and, according to the *Enforcement Manual*, they are restricted to very limited circumstances.²¹⁷ By 2014, NPAs and DPAs had only been used to resolve two SEC *FCPA* enforcement actions,²¹⁸ although Koehler expects to see greater use of these resolution vehicles in the future.²¹⁹ In 2016, the SEC announced two NPAs connected to bribes paid to Chinese officials by foreign subsidiaries of American companies.²²⁰

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

In view of this criticism, the SEC amended its “neither admit nor deny” settlements policy in 2012, announcing “that the settlement language would not be included in SEC enforcement actions involving parallel: (i) criminal convictions; or (ii) NPAs or DPAs that include admissions or acknowledgements of criminal conduct.”²²¹ In 2013, the SEC announced that alleged offenders would not be able to enter into settlement agreements without admitting wrongdoing in certain cases where the alleged misconduct harmed large numbers of investors, was particularly egregious, or where the alleged offender obstructed the SEC’s investigative process.²²²

²¹⁵ Jed S Rakoff, “The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?”, *The New York Review* (9 January 2014), online:

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

²¹⁶ Koehler, *supra* note 91 at 66.

²¹⁷ SEC *Enforcement Manual*, *supra* note 207 at 103.

²¹⁸ Koehler, *supra* note 91 at 68.

²¹⁹ *Ibid.*

²²⁰ US Securities and Exchange Commission, Press Release, 2016-109, “SEC Announces Two Non-Prosecution Agreements in FCPA Cases” (7 June 2016), online:

<<https://www.sec.gov/news/pressrelease/2016-109.html>>.

²²¹ Koehler, *supra* note 91 at 67.

²²² *Ibid.*

6.1.4 SEC Policy on Cooperation

In determining whether to credit a company for self-policing, self-reporting, and/or cooperation, the SEC is guided by the 2001 *SEC Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, often called the *Seaboard Report*.²²³ The *Seaboard Report* applies to all SEC matters, as well as *FCPA* offenses, and outlines 13 criteria the SEC will consider.²²⁴ The *Seaboard Report* also identifies four broad measures of a company's cooperation including:

1. *Self-policing* prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
2. *Self-reporting* of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies and to self-regulatory organizations;
3. *Remediation*, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
4. *Cooperation* with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.²²⁵

The 13 criteria do not limit the SEC, nor do they guarantee that the SEC will not follow through with an enforcement action—even if a company has satisfied all of the criteria.²²⁶

In January 2010, the *Seaboard Report* was supplemented and strengthened by a series of measures including the 2010 *SEC Policy Statement Concerning Cooperation by Individuals in Its Investigation and Related Enforcement Actions*.²²⁷ These 2010 measures were designed to clarify the incentives for individuals and companies who provide early assistance in SEC investigations. Furthermore, the 2010 measures formally recognized cooperation tools available in SEC enforcement matters including cooperation agreements, deferred

²²³ Tarun & Tomczak, *supra* note 80 at 378, 393.

²²⁴ US Securities and Exchange Commission, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Securities Exchange Act Release No 44969, Accounting and Auditing Enforcement Release No 1470 (23 October 2001), online: <<http://www.sec.gov/litigation/investreport/34-44969.htm>>.

²²⁵ For more information on how companies can promote cooperation during an SEC investigation or enforcement-related activities, see *Enforcement Cooperation Program* (Department of Justice and Securities Exchange Commission, 2016), online: <<http://www.sec.gov/spotlight/enfcoopinitiative.shtml>>.

²²⁶ Tarun & Tomczak, *supra* note 80 at 345, 392-393.

²²⁷ US, Securities and Exchange Commission, *Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions* by Elizabeth Murphy, (SEC Rel No 34-61340) (13 January 2010) [2010 *SEC Policy Statement*], online (pdf): <<https://www.sec.gov/rules/policy/2010/34-61340.pdf>>.

prosecution agreements, and non-prosecution agreements.²²⁸ Finally, the 2010 policy on individual cooperation delineated four criteria the SEC will consider when determining whether and how much to credit cooperation by an individual, including:

1. The assistance provided by the cooperating individual;
2. The importance of the underlying matter;
3. The societal interest holding the individual accountable; and
4. The risk profile of the cooperating individual.²²⁹

These criteria are similar to the 13 criteria in the *Seaboard Report* for evaluation of company cooperation by the SEC.²³⁰

6.1.5 No Charges

6.1.5.1 Immunity Requests

An employee of a company may wish to cooperate with the SEC and provide information; however, Tarun and Tomczak recommend that defense counsel “seek [an immunity request from the SEC] before a client makes a statement of cooperation.”²³¹ If an individual can provide testimony and/or facilitate cooperation that will significantly assist in the investigation, the SEC may arrange for an immunity order to protect that individual against criminal prosecution.²³²

6.1.5.2 Declination

The *FCPA Corporate Enforcement Policy (CEP)* provides that, when a company has voluntarily self-disclosed misconduct in an *FCPA* matter, fully cooperated, and timely and

²²⁸ Andrew J Leone, Edward Xuejun Li & Michelle Liu-Watts, “On the SEC’s 2010 Enforcement Cooperation Program” (2020) *Journal of Accounting and Economics*, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684075>. This paper also explores to what extent voluntary disclosure resulted in leniency from the SEC.

²²⁹ 2010 *SEC Policy Statement*, *supra* note 227.

²³⁰ For more detailed information on US charging policies, including a list of factors considered by the DOJ and SEC, see Tarun & Tomczak, *supra* note 80, c 9, 10. For further commentary and industry best practices, see Shari A Brandt, Margaret W Meyers & Jamie A Schafer, “United States: Avoiding Common Pitfalls When Cooperating with Government Investigations” (9 October 2020), online: *Global Investigations Review* <<https://globalinvestigationsreview.com/review/the-investigations-review-of-the-americas/2021/article/united-states-avoiding-common-pitfalls-when-cooperating-government-investigations>>. For some criticism of the lack of clarity provided by the SEC on cooperation and leniency, see Robert Cohen & Brook Jackling, “A Call for Greater Clarity Around SEC Cooperation Credit” (8 April 2021), online: *Law360* <<https://www.law360.com/articles/1372610/a-call-for-greater-clarity-around-sec-cooperation-credit>>.

²³¹ Tarun & Tomczak, *supra* note 80 at 356.

²³² *Ibid* at 356-357.

appropriately remediated, there will be a presumption that the DOJ will decline prosecution absent aggravating circumstances.²³³

Aggravating circumstances which may warrant a criminal resolution include, *inter alia*, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.²³⁴ However, even where aggravating circumstances exist, the DOJ may still decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme.²³⁵

The *CEP* also provides for limited credit in certain circumstances:

- For instance, if a criminal resolution is warranted for a company that has nevertheless voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the DOJ:
 - will accord, or recommend to a sentencing court, a 50% reduction off the low end of the *Guidelines* fine range (except in the case of a criminal recidivist); and
 - generally will not require appointment of a monitor if a company has implemented an effective compliance program.
- If a company does not voluntarily self-disclosure, but nevertheless fully cooperates, and timely and appropriately remediates, the company will receive, or the DOJ will recommend to a sentencing court, up to a 25% reduction off the low end of the *Guidelines* fine range.

The *CEP* also recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with the *CEP*, there will be a presumption of a declination in accordance with and subject to the other requirements of the *CEP*. In appropriate cases, an acquiring company that discloses

²³³ *CEP*, *supra* note 81.

²³⁴ *Ibid.*

²³⁵ See, e.g., Department of Justice, Fraud Section, *Declination Letter, Cognizant Technology Solutions Corporation*, (13 February 2019), online (pdf): <<https://www.justice.gov/criminal-fraud/file/1132666/download>>; Department of Justice, Fraud Section, *Declination Letter, Insurance Corporation of Barbados Limited*, (23 August 2018), online (pdf): <<https://www.justice.gov/criminal-fraud/page/file/1089626/download>>; and Department of Justice, Fraud Section, *Declination Letter, Guralp Systems Limited*, (20 August, 2018), online (pdf): <<https://www.justice.gov/criminal-fraud/page/file/1088621/download>>.

misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

Declinations “awarded” under the *CEP* are made public.²³⁶ A declination is awarded pursuant to the *CEP* if it would have been prosecuted or criminally resolved except for the company’s voluntary disclosure, full cooperation, remediation or restitution, etc.

For example, in 2012 the DOJ charged Garth Peterson, the former managing director for Morgan Stanley’s Real Estate Group in China, with conspiring to evade internal accounting controls. However, neither the DOJ nor the SEC charged Morgan Stanley.²³⁷ Tarun and Tomczak assert there were multiple reasons why the DOJ and SEC may elect to decline charging a company: the company was the victim of a rogue employee; the company provides repeated ethics training; the bribe was small; an internal investigation followed the discovery of the problem; remedial action including discipline was taken; the company had strong internal controls in place; or the company voluntarily disclosed the misconduct and fully cooperated with the investigation.²³⁸

6.1.6 Patterns in FCPA Enforcement

As discussed in Section 1, the investigation and prosecution of corrupt behaviour can be compromised by strategic state interests. When substantial criminal and civil penalties are in play at the level of prosecution, outside interests can bring intense pressure not to prosecute or engage in enforcement proceedings against defendants. Provisions like Article 36 of UNCAC and Article 5 of the OECD Convention address this by mandating that enforcement bodies should be created with the necessary independence to remain uninfluenced by State Parties’ other interests.

But is it possible to actually achieve this kind of independence? It is trite to say that law enforcement does not occur in a vacuum, free from all context. In “Cross-National Patterns in FCPA Enforcement,” Nicholas McLean undertakes an empirical analysis of US enforcement actions under the *FCPA*.²³⁹ Using enforcement data over a ten-year period (2001-2011), McLean investigates four possible determinants for decreased or increased enforcement in cases involving foreign officials: i) corruption levels in the foreign country ii) level of US foreign direct investment (FDI) in the foreign country iii) level of international cooperation between the US and the foreign country, and iv) US foreign policy interests. Each of the variables was subject to equivocal hypotheses. On one hand, one might expect to see more *FCPA* cases involving countries with high levels of recorded corruption. It seems logical that in countries where corruption is a common part of doing business, more *FCPA* violations will occur. However, if a country has a reputation for widespread corruption, the

²³⁶ “Declinations” (last updated 6 August 2020), online: *US Department of Justice - Fraud Section* <<https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>>.

²³⁷ See Tarun & Tomczak, *supra* note 80, c 9 at 358.

²³⁸ *Ibid* at 358-362.

²³⁹ Nicholas McLean, “Cross-National Patterns in FCPA Enforcement”, Note, (2012) 121:7 Yale LJ 1970, online: <<http://www.yalelawjournal.org/note/cross-national-patterns-in-fcpa-enforcement>>. See also Ellen Gutterman, “Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act” (2015) 53:1 Osgoode Hall LJ 31.

consequent increased risk of incurring criminal liability by doing business in that country could produce a chilling effect on US business there, leaving fewer *FCPA* cases involving that country.

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

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

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

Interestingly, McLean's conclusions suggest that *FCPA* cases are not unduly influenced by other US policy interests. Increased *FCPA* enforcement occurs involving countries with higher levels of corruption, increased US FDI and greater international cooperation with the US. However, there is no variation in *FCPA* enforcement associated with US foreign policy interests.

6.2 UK

6.2.1 Criminal Charges

The SFO is an independent government department in the UK which only prosecutes the most serious or complex cases of fraud.²⁴⁰ The SFO is a specialist prosecuting authority which is unique in the UK insofar as it both investigates *and* prosecutes its cases.²⁴¹ The *Criminal Justice Act 1987* established the SFO and its primary investigative tools.²⁴²

²⁴⁰ Nicholls et al, *supra* note 38 at 208.

²⁴¹ "SFO Historical Background and Powers" (last visited 20 August 2021), online: *Serious Fraud Office* <<https://www.sfo.gov.uk/publications/corporate-information/sfo-historical-background-powers/>>.

²⁴² *Criminal Justice Act 1987* (UK), 1987, c 38.

The work of the SFO is guided by a series of policies and protocols, including:²⁴³

1. *The Code for Crown Prosecutors*;²⁴⁴
2. *Attorney General's Guidance on Plea Discussions in Cases of Serious or Complex Fraud*;²⁴⁵
3. *Guidance on Corporate Prosecutions*;²⁴⁶
4. Guidance on the approach of the SFO to overseas corruption offences;²⁴⁷
5. *Joint Prosecution Guidance on the Bribery Act 2010*;²⁴⁸
6. *Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America*;²⁴⁹ and
7. *Deferred Prosecution Agreements Code of Practice*.²⁵⁰

As with any criminal case, the SFO begins by applying *The Code for Crown Prosecutors* when deciding whether to prosecute. *The Code for Crown Prosecutors* prescribes a two-stage test for charging an offender (the “Code Test”). The first stage—the “evidential stage”—requires there to be sufficient evidence for the prosecutor to consider there is a “realistic prospect of conviction.”²⁵¹ The second stage—the “public interest stage”—requires a weighing of public interest factors for and against a prosecution.²⁵²

²⁴³ Peter Alldridge, “Bribery and the Changing Pattern of Criminal Prosecution” in Jeremy Horder & Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (New York: Cambridge University Press, 2013) 219 at 224-25.

²⁴⁴ UK, Crown Prosecution Service, *The Code for Crown Prosecutors*, 8th ed (October 2018) [*Code for Crown Prosecutors*], online (pdf): <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf>.

²⁴⁵ UK, Attorney General's Office, *Guidance of the Attorney General on Plea Discussions in Cases of Serious or Complex Fraud*, (29 November 2012), online: <https://www.gov.uk/guidance/plea-discussions-in-cases-of-serious-or-complex-fraud--8>.

²⁴⁶ “Corporate Prosecutions – Legal Guidance” (last visited 20 August 2021) [*Guidance on Corporate Prosecutions*], online: *Director of Public Prosecutions* http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/.

²⁴⁷ See Serious Fraud Office, *Approach of the Serious Fraud Office to Dealing with Overseas Corruption*, (Serious Fraud Office, 2009), online (pdf): https://www.millerchevalier.com/sites/default/files/resources/uk_sfo_guidance.pdf.

²⁴⁸ UK, Minister of Justice, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (2011) [*Joint Prosecution Guidance* (2010)], online (pdf): <https://www.sfo.gov.uk/?wpdmdl=1456>.

²⁴⁹ UK, Attorney General's Office, *Attorney General's Domestic Guidance for Handling Criminal Cases Affecting both England, Wales, or Northern Ireland and the United States of America* (18 January 2007), online (pdf): <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>.

²⁵⁰ UK, Serious Fraud Office & Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (London: SFO & CPS) [*DPA Code*], online (pdf): <https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice>.

²⁵¹ This evidential stage is frequently described by reference to a probability of conviction in excess of 50 percent. See Alldridge, *supra* note 243 at 225.

²⁵² *Ibid.*

The Code for Crown Prosecutors sets out the following considerations which will be relevant to the assessment of the public interest:

- How serious is the offence committed?²⁵³
- What is the level of culpability of the suspect?²⁵⁴
- What are the circumstances of and the harm caused to the victim?²⁵⁵
- What was the suspect's age and maturity at the time of the offence?²⁵⁶
- What is the impact on the community?²⁵⁷
- Is prosecution a proportionate response?²⁵⁸
- Do sources of information require protecting?²⁵⁹

Several of these factors will be salient to the prosecution of corporate wrongdoers, principally the seriousness of the offence. As Peter Alldridge points out, there is arguably "an inherent public interest in bribery being prosecuted in order to give practical effect to Parliament's criminalization of such behaviour."²⁶⁰ Bribery is a serious offence, as evidenced by the maximum sentence of ten years' imprisonment.

However, other factors (e.g., the suspect's age and maturity at the time of the offence) may be less salient to corporate bodies. Therefore, further direction is supplied by the *Guidance on Corporate Prosecution*:

Additional factors in favour of prosecution

- a. A history of similar conduct ...
- b. The conduct alleged is part of the established business practices of the company;
- c. The offence was committed at a time when the company had an ineffective corporate compliance programme;
- d. The company had been previously subject to warning, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct;
- e. Failure to report wrongdoing within reasonable time of the offending coming to light; (the prosecutor will also need to consider whether it is appropriate to charge the company officers responsible for the failures/ breaches);

²⁵³ *Code for Crown Prosecutors*, *supra* note 244, s 4.14(a).

²⁵⁴ *Ibid*, s 4.14(b).

²⁵⁵ *Ibid*, s 4.14(c).

²⁵⁶ *Ibid*, s 4.14(d).

²⁵⁷ *Ibid*, s 4.14(e).

²⁵⁸ *Ibid*, s 4.14(f).

²⁵⁹ *Ibid*, s 4.14(g).

²⁶⁰ Alldridge, *supra* note 243 at 226.

f. Failure to report properly and fully the true extent of the wrongdoing.²⁶¹

Additional public interest factors against prosecution

- a. A genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims ...
- b. A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the company ...
- c. The existence of a genuinely proactive and effective corporate compliance programme;
- d. The availability of civil or regulatory remedies that are likely to be effective and more proportionate ...
- e. The offending represents isolated actions by individuals, for example by a rogue director.
- f. The offending is not recent in nature, and the company in its current form is effectively a different body to that which committed the offences ...
- g. A conviction is likely to have adverse consequences for the company under European Law, always bearing in mind the seriousness of the offence and any other relevant public interest factors ...
- h. The company is in the process of being wound up.²⁶²

According to Monteith, the SFO's general approach is that "ethical businesses running into difficulties"²⁶³ will not face prosecution, whereas companies that continually engage in corruption and see corruption as a means of getting ahead are likely to be prosecuted. Aggravating and mitigating factors, such as whether there was a breach of position of trust, will also be considered before proceeding with a prosecution.²⁶⁴ Finally, prosecutors must be careful not to consider national economic interests while making the decision to charge, as this would be contrary to Article 4 of the OECD Convention.²⁶⁵

²⁶¹ *Guidance on Corporate Prosecutions*, *supra* note 246 at para 32.

²⁶² *Ibid.*

²⁶³ Charles Monteith, "Bribery and Corruption: the UK Framework for Enforcement" in Horder & Alldrige, *supra* note 243, 251 at 252.

²⁶⁴ For a full list of factors see Karen Harrison & Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom*, 2nd ed (London: Routledge, 2016) at 189-190.

²⁶⁵ Nicholls et al, *supra* note 38 at para 7.63. See also the sentencing guidelines for corporate prosecutions published by the Sentencing Council "which can help inform prosecutors when they are making DPAs" and the "rules" published by the Criminal Procedure Rules Committee regarding the application and approval process for DPAs, which are both linked to the SFOs guidance page: "Deferred Prosecution Agreements" (last visited 1 September 2020), online: SFO <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/>>.

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

The Director of Public Prosecutions or the Director of the SFO must also give personal consent for prosecutions under the *Bribery Act*.²⁶⁶

6.2.2 Plea Agreements

Compared with the US, formal negotiated plea agreements are a relatively recent concept in the UK. Since 2009, the Attorney General's *Guidelines on Plea Discussions in Cases of Serious or Complex Fraud* have enabled plea agreements between prosecutors and potential defendants prior to charge, whether following self-reporting or an SFO investigation (as in the case of BAE). In criminal cases, plea agreements allow the defendant and the prosecutor to agree on an admission of facts and an appropriate sentence or penalty.

However, a judge makes the final sentencing decision. Judicial discretion in sentencing is a key component of judicial independence in the UK. The judge's role is not simply to "rubber stamp" settlements.²⁶⁷ This is forcefully summarized by the trial judge in *R v Innospec*.²⁶⁸

Innospec Ltd., a UK subsidiary of a US firm, pleaded guilty to a charge of conspiracy to corrupt and agreed to pay a fine. Its parent, Innospec Inc., entered into a global settlement with the SFO and DOJ, pursuant to which it agreed to pay a fine. Lord Justice Thomas (later Lord Chief Justice) reluctantly approved,²⁶⁹ but he was highly critical of the process under which the settlement was concluded. He specifically rejected the notion that the director of the SFO could enter into an agreement with an offender as to sanction:

The court was faced with an agreement made between the DOJ, the SEC, the OFAC and SFO as to the division of the sum these bodies had considered Innospec was able to pay. This was not a matter that received judicial determination in either the UK or the US (save that inherent in the Federal District Court's approval of the plea agreement). As it is the position in both the US and the UK that it is for the court ultimately to determine the sanction to be imposed for the criminal conduct, an agreement between prosecutors as to the division, even if it had been within the power of the Director of the SFO (which as I have explained it was not), cannot be in accordance with basic constitutional principles ...

...

I have concluded that the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again.²⁷⁰

²⁶⁶ *Joint Prosecution Guidance*, *supra* note 248 at 1.

²⁶⁷ Allidridge, *supra* note 243 at 231.

²⁶⁸ *R v Innospec Ltd*, [2010] EW Misc 7 (EWCC) [*Innospec*].

²⁶⁹ Particularly salient in this regard was Innospec's apparent inability to pay.

²⁷⁰ *Innospec*, *supra* note 268 at paras 43, 45.

The agreed-upon statement of facts in a plea agreement can also constrain a judge in sentencing, since the charges are limited by those facts. For example, in the BAE case, bribery was clearly at play, but the admission of facts allowed only for accounting charges.²⁷¹ The court warned that in extreme situations, charges might be too inappropriate for a judge to allow the case to proceed. The court also criticized the fact that the wording of the SFO press release formed part of the plea agreement with BAE.²⁷²

The Stolen Asset Recovery Initiative (StAR) has criticized plea agreements in the UK for their lack of transparency.²⁷³ Although a public hearing takes place to determine the sentence, settlement documents are not made public. Agreements are only made public in rare cases, and some settlement agreements include a confidentiality clause preventing prosecutors from disclosing certain information.

6.2.3 Alternatives to Criminal Charges

6.2.3.1 Civil Forfeiture

Civil (non-conviction based) forfeiture, discussed in Chapter 5, Section 2, allows the SFO to recover the proceeds of crime. Non-conviction based civil recovery orders were first intended as a fallback mechanism for situations in which criminal proceedings would not succeed. However, in 2009, the Home Secretary and Attorney General issued guidance advising civil forfeiture as an alternative even when criminal proceedings are possible.²⁷⁴ Alldridge points out that this shift occurred after a new asset recovery incentive scheme was established, under which 50% of civil recovery goes to the investigating, prosecuting and enforcing body.²⁷⁵

6.2.3.2 DPAs

Due to the difficulty of meeting the high threshold of initiating a charge and securing the successful prosecution of corporate offenders, the UK also introduced deferred prosecution agreements (DPAs) through the *Crime and Courts Act 2013*²⁷⁶ as an alternative to criminal prosecution. This occurred after the UK government published initial plans in May 2012 for the introduction of DPAs, receiving an overwhelmingly positive response with 86% of

²⁷¹ *R v BAE Systems plc*, [2010] EW Misc 16.

²⁷² Alldridge, *supra* note 243 at 239.

²⁷³ Jacinta Anyango Oduor et al, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (Washington, DC: StAR/World Bank/UNODC, 2014) at 28-29.

²⁷⁴ UK, Attorney General's Office, *Asset Recovery Powers for Prosecutors: Guidance and Background Note 2009*, (29 November 2012), online: <<https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009>>. See also Alldridge, *supra* note 243 at 246.

²⁷⁵ Alldridge, *supra* note 243 at 246.

²⁷⁶ 2013, c 22.

respondents supporting the proposals.²⁷⁷ The very idea of DPAs is somewhat novel for UK prosecutors, given that plea bargaining is not as significant a part of the criminal justice system as it is in the US.²⁷⁸ Michael Bisgrove and Mark Weekes caution that the “[i]ntroduction of the alternative is clearly not supposed to be a gold standard for prosecution but a compromise, allowing for effective punishment and regulation within a reasonable timeframe, where, in their absence, there might be none.”²⁷⁹ As of April 2021, the UK has concluded nine DPAs.²⁸⁰

The *Deferred Prosecution Agreements Code of Practice (DPA Code)*,²⁸¹ issued pursuant to the *Crime and Courts Act 2013*, guides the DPA process.²⁸² An invitation to negotiate a DPA is a matter for the prosecutor’s discretion, which is exercised in light of the factors established in the *DPA Code*.²⁸³

Like the *Code for Crown Prosecutors*, the *DPA Code* prescribes a two-stage test that a prosecutor must apply before entering into a DPA. The first stage is the evidential stage, which is met if (a) the evidentiary stage of the full Code Test is met or (b) there is reasonable identification evidence and grounds to believe that further investigation will establish a realistic prospect of conviction in accordance with the full Code evidentiary test.²⁸⁴ The second stage is the public interest stage, which is met if the public interest would be served by entering into a DPA rather than a prosecution. The more serious the offence at issue, the more likely prosecution will serve the public interest instead of a DPA.²⁸⁵ The specific public interest factors for consideration are set out in detail at sections 2.8.1 through 2.10 of the *DPA Code*, largely adopting the factors set out in the *Code for Crown Prosecutors* and *Guidance for Corporate Prosecution*.²⁸⁶

If a DPA is appropriate, it must be approved by a court at a preliminary hearing.²⁸⁷ A court must also approve the agreement once the terms are settled.²⁸⁸ The prosecutor will then

²⁷⁷ UK, Ministry of Justice, *Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations*, Response to Consultation CP(R) 18/2012 (23 October 2012) at para 18, online (pdf): <<https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf>>.

²⁷⁸ See UK, Serious Fraud Office, *Operational Handbook*, “Guilty Pleas and Plea Bargaining” (2012). See *Innospec*, *supra* note 268 (in which Thomas LJ sternly warns that plea bargains are improper under UK law and that “no such arrangement should be made again”); and *R v Dougall*, [2010] EWCA Crim 1048.

²⁷⁹ Michael Bisgrove & Mark Weekes, “Deferred Prosecution Agreements: A Practical Consideration” (2014) 6 Crim LR 416 at 419.

²⁸⁰ “Deferred Prosecution Agreements”, *supra* note 265.

²⁸¹ *DPA Code*, *supra* note 250.

²⁸² *Ibid.*

²⁸³ *Ibid.*, s 2.1.

²⁸⁴ *Ibid.*, ss 1.1(i.)(a)-(b), 2.2(i.).

²⁸⁵ *Ibid.*, ss 1.2(ii.); 2.4.

²⁸⁶ *Ibid.*, ss 2.8.1-2.10.

²⁸⁷ *Ibid.*, s 9.

²⁸⁸ *Ibid.*, s 10.

indict the person, but suspend the indictment pending satisfactory performance of the terms set out in the DPA.²⁸⁹ Once these terms are satisfied, the SFO will dismiss all charges.

The DPA negotiations are confidential, and information disclosed during the negotiations is subject to the *Crime and Courts Act 2013*. The prosecutor must disclose information to ensure the parties to the negotiation are informed and the information is not misleading.²⁹⁰ A DPA must be governed by clear, agreed-upon terms that are “fair, reasonable, and proportionate.”²⁹¹ Generally, terms will include an end date, an agreement to cooperate with the investigation, a financial order, cost of the prosecutor, activity restrictions and reporting obligations.²⁹² A financial order under a DPA may require victim compensation, payment of a penalty, charitable donations, or disgorgement of profits.²⁹³ The terms can also require a monitor to ensure compliance and report misconduct.²⁹⁴ In the event of a breach of the terms of the DPA, the prosecutor must notify the court. Small breaches can be rectified without court intervention, or through a court-approved remedy and cost award. If a material breach occurs or the court does not approve a remedy, the DPA may be terminated.²⁹⁵ If the DPA is terminated due to breach by the offender, the prosecutor can lift the indictment and reinstitute criminal proceedings if the full Code Test is established.²⁹⁶

6.2.3.3 Civil Settlement

Furthermore, as described in Section 4.3.1, the SFO issued guidance in 2009 to encourage companies to self-report violations of the *Bribery Act*. Companies that voluntarily disclose corruption offences are treated more leniently and may be able to negotiate civil settlements in lieu of criminal sanctions. This is an attractive alternative for companies because they can control publicity and avoid the automatic consequences of a criminal conviction.²⁹⁷

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

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

²⁸⁹ *Ibid*, s 1.6.

²⁹⁰ *Ibid*, ss 4.1, 5.2.

²⁹¹ *Ibid*, s 7.2.

²⁹² *Ibid*, ss 7.8, 7.10.

²⁹³ *Ibid*, s 7.9.

²⁹⁴ *Ibid*, ss 7.11-7.12.

²⁹⁵ *Ibid*, ss 12.2-12.5.

²⁹⁶ *Ibid*, s 12.

²⁹⁷ Alldridge, *supra* note 243 at 241.

Where directors of a company have profited from corrupt conduct or been personally involved in the offences, the company will be prosecuted criminally, regardless of whether the offence is voluntarily disclosed. This reflects the SFO's "zero tolerance" policy for *Bribery Act* offences. In such cases, however, voluntary disclosure may be favourably taken into account during criminal plea negotiations.²⁹⁸

The increased use of non-conviction based forfeiture, DPAs, and civil settlements represents a shift away from the use of criminal prosecution to punish bribery. Alldridge is wary of this trend, warning that "[t]he possibility of the power of money operating to prevent adverse publicity and the other effects of convictions is a clear one to which regard must be had."²⁹⁹ On the other hand, these enforcement tools—which are certainly more attractive to those who may be charged with corruption offences—may reflect the continued primacy of self-reporting and cooperation from corporate bodies as part of successful enforcement efforts.

6.3 Canada

6.3.1 Prosecution Policies and Guidelines

Section 91(27) of the *Constitution Act, 1867*, gives exclusive jurisdiction to the federal Parliament to enact legislation in respect of criminal law and procedure. Accordingly, unlike the US, Canada has one *Criminal Code* governing criminal law. In Canada, the federal government has delegated its powers to prosecute crimes in the *Criminal Code* to provincial attorneys-general.³⁰⁰ Domestic bribery offences, including breach of trust by a public officer, are in the *Criminal Code*; thus, provincial prosecutors are responsible for prosecuting those crimes.³⁰¹ Each province has its own written and unwritten policies on the prosecution of crimes. For example, provincial prosecutorial guidelines for Ontario and British Columbia are available online.³⁰²

However, Parliament has also chosen to place some crimes in legislation outside of the *Criminal Code*. There are some crimes enacted in other federal statutes such as the *Controlled*

²⁹⁸ See Nicholls et al, *supra* note 38 at 287-289 for a description of the SFO's process in negotiating civil settlements.

²⁹⁹ Alldridge, *supra* note 243 at 239.

³⁰⁰ There are a few examples in which the *Criminal Code*, RSC 1985, c C-46, grants jurisdiction to prosecute to both federal and provincial authorities.

³⁰¹ In Canada, there are 10 provinces and three territories. The territories have fewer legislative powers than the provinces. The federal government has not delegated prosecution of criminal offences in the *Criminal Code*, *ibid*, to the territories. Thus, federal prosecutors are responsible for *Criminal Code* prosecutions in those 3 territories.

³⁰² Attorney General of Ontario, *Crown Prosecution Manual*, (updated 18 August 2020) online: <<https://www.ontario.ca/document/crown-prosecution-manual/>>; BC Ministry of Attorney General, *Crown Counsel Policy Manual*, online: <<http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>>.

Drugs and Substance Act,³⁰³ the *Competition Act*,³⁰⁴ the *Customs Act*,³⁰⁵ and, importantly for this discussion, the *CFPOA*. The federal government, represented by federal prosecutors, is responsible for prosecuting all criminal offences that are not in the *Criminal Code*. The PPSC is an independent agency led by a Director of Public Prosecutions (DPP), which fulfills the role of federal prosecutor in Canada. Bribery of foreign public officials and books and records offences with the purpose of bribing a foreign official are crimes enacted in the *CFPOA*. Thus, the PPSC is responsible for deciding whether to prosecute an offence under the *CFPOA*.³⁰⁶

In September 2014, a new PPSC *Deskbook* was issued containing directives and guidelines which all federal prosecutors must follow.³⁰⁷ These directives and guidelines instruct federal prosecutors in all aspects of the exercise of their prosecutorial discretion.

Much like the guidelines in the US and the UK, the PPSC *Deskbook* sets out a two-fold test for deciding whether to prosecute federal offences. The first step is to determine whether there is a “reasonable prospect of conviction.” This requires the prosecutor to objectively assess the whole of the evidence likely to be available at trial, including any credible evidence that would favour the accused, to determine whether there is a reasonable prospect of conviction.³⁰⁸

The second step is to determine whether a prosecution would “best serve the public interest.” With respect to the public interest, the prosecutor must consider: the seriousness or triviality of the offence, the harm caused, the victim impact, the individual culpability of the alleged offender, the need to protect confidential informants and the need to maintain confidence in the administration of justice.³⁰⁹

In contrast, several “irrelevant criteria” are expressly recognized:

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

³⁰³ SC 1996, c 19.

³⁰⁴ RSC 1985, c C-34.

³⁰⁵ RSC 1985, c 1 (2nd Supp).

³⁰⁶ Boisvert et al, *supra* note 85 at 29.

³⁰⁷ Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook*, (last modified 5 March 2020) [PPSC *Deskbook*], online: <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/index.html>>.

³⁰⁸ *Ibid*, Part 2.3, s 3.1.

³⁰⁹ *Ibid*, Part 2.3, s 3.2.

- d. The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.³¹⁰

Part V of the PPSC *Deskbook* provides specific directions and guidance for certain types of prosecutions. Among these are *CFPOA* offences and prosecutions. At Part 5.8, the *Deskbook* provides the following guidance on the decision of whether to prosecute a *CFPOA* offence:

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

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

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

The PPSC *Deskbook* also provides guidance with respect to coordination and annual reports for the prosecutions under the *CFPOA*. The guideline calls for federal coordination of all *CFPOA* investigations and charges, recognizing the “inherent international dimension of prosecutions under the *CFPOA* and the potential impact on Canada’s relationship with other states.”³¹¹ It also provides data collection procedures for *CFPOA* offences to enable the tabling of an Annual Report to Parliament as required by section 12 of the *CFPOA*.³¹²

Prior to the publication of the PPSC *Deskbook*, Canadian authorities indicated to the OECD Working Group on Bribery (WGB) that the PPSC was in the process of revising its federal prosecution guidelines. In the OECD Phase 3 evaluation of Canada’s compliance with the OECD Convention, the WGB recommended Canada clarify that considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved are never proper.³¹³ In *Canada: Follow-up to the Phase 3 Report and Recommendations* (2013), the Canadian authorities responded that:

³¹⁰ *Ibid*, Part 2.3, s 3.3.

³¹¹ *Ibid*, Part 5.8, s 3.1.

³¹² *Ibid*, Part 5.8, s 3.3.

³¹³ OECD, Working Group on Bribery, *Canada: Follow-Up to the Phase 3 Report & Recommendations*, (2013) at 7-8, online (pdf) : <<https://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>>.

understanding the Deskbook's guidance in its proper context would lead to the conclusion that Article 5 considerations would not come into play in the decision of whether or not to prosecute offences under the CFPOA.³¹⁴

But they further advised:

This said, the PPSC has been re-writing the Federal Prosecution Service Deskbook.... The chapter of the Deskbook dedicated to the CFPOA is part of this review process, and consideration is being given to including specific reference to Article 5 of the Convention.³¹⁵

Gerry Ferguson, in a previous edition of this chapter, doubted that the PPSC *Deskbook* fully implements Article 5 of the OECD Convention. Ferguson expressed his doubt in this way:

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

Ferguson's concerns certainly gain new significance in light of the SNC-Lavalin affair, previewed in Section 1. Although national economic interest and the identity of the accused are expressly irrelevant in deciding whether to prosecute a *CFPOA* offence, Prime Minister Trudeau nevertheless attempted to interfere in the exercise of prosecutorial discretion. That Prime Minister Trudeau was unsuccessful suggests that prosecutors are aware of the policies which guide them. That the Prime Minister even attempted to do so (and rationalized the effort in terms of the public interest), however, shows the potential hollowness of the policy.

6.3.2 Background to Implementing DPAs

Until recently, the deferred prosecution agreement as an enforcement tool was noticeably absent from Canada's enforcement regime. Prior to 2018, Canada lacked the DPA for the resolution of any criminal charge. The absence of this enforcement tool, which had been

³¹⁴ *Ibid* at 8.

³¹⁵ *Ibid.*

adopted previously in the US and the UK, was frequently the subject of academic and legal commentary.³¹⁶

In 2017, the Government of Canada announced it would conduct a public consultation seeking input on a possible Canadian DPA regime. They conducted this public consultation throughout 2017. Government officials met with 370 participants and received 75 written submissions.

The Government then published a report which summarized the views of the participants.³¹⁷ The majority of participants supported the implementation of a Canadian DPA regime. In general, participants expressed the view that DPAs could be a useful, additional tool for prosecutors to use at their discretion in appropriate circumstances to address corporate criminal wrongdoing. They were further of the view that DPAs could result in effective, proportionate, and dissuasive sanctions, while also meeting other objectives, such as helping to identify corporate and individual criminal liability (for example, by encouraging self-reporting and requiring corporate accused to identify implicated individuals for prosecution purposes); enhancing compliance and improving corporate culture; and reducing the potential negative impact of a conviction on innocent third parties.³¹⁸

However, some participants doubted there was a demonstrable need for DPAs. They expressed concern that DPAs could be viewed as favouring large companies over small companies and individual offenders.³¹⁹

6.3.3 Remediation Agreement Regime

On September 19, 2018, the *Criminal Code* was amended to introduce the Canadian equivalent of a DPA, known as a “Remediation Agreement.” The *Code* expresses the purposes of the remediation agreement regime as follows:

- a. to denounce an organization’s wrongdoing and the harm that the wrongdoing has caused to victims or to the community;
- b. to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;
- c. to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;

³¹⁶ See, e.g., Connor Bildfell, “Justice Deferred: Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases” (2016) 20:2 Can Crim L Rev 161. Bildfell examines the use of DPAs in the US and the UK and the advantages and concerns surrounding their use before proposing that Canada adopt DPAs in limited and controlled circumstances. See also Chapter 7, Section 6.6.

³¹⁷ Government of Canada, *Expanding Canada’s Toolkit to Address Corporate Wrongdoing – What We Heard Report*, P4-78/2017E-PDF 978-0-660-23562-2 (22 February 2018), online (pdf): <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf>>.

³¹⁸ *Ibid* at 4-5.

³¹⁹ *Ibid* at 4.

- d. to encourage voluntary disclosure of the wrongdoing;
- e. to provide reparations for harm done to victims or to the community; and
- f. to reduce the negative consequences of the wrongdoing for persons—employees, customers, pensioners and others—who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.³²⁰

In Chapter 7, the remediation agreement regime, as a sanction for bribery and corruption offences, is described in detail. The focus in this chapter is to describe how remediation agreements work as part of overall enforcement activity in Canada.

With respect to enforcement, the principal significance of the remediation agreement regime is that it expands an otherwise limited range of enforcement tools in Canada. The *Corruption in Canada: Definitions and Enforcement* report highlights some of the limitations in Canadian foreign bribery initiatives:

- Under the *CFPOA*, only criminal prosecutions can be brought against legal entities, unlike in the US where the SEC has a parallel civil investigative and prosecutorial power.
- There are no provisions providing for voluntary disclosure or self-reporting to regulatory authorities.
- Although Canada has disclosure protection law, it does not encourage disclosure by offering financial incentives, as is the case in the US. Incentives may encourage corporations to cooperate with authorities.
- The *CFPOA* does not provide for any debarment sanctions following an individual's or business' conviction for bribery or books and records provisions (although debarment consequences are found elsewhere: see Chapter 7, Section 8.6).³²¹

6.3.3.1 Remediation Agreement Negotiation Procedure

In 2020, the PPSC *Deskbook* was updated to provide guidance with respect to negotiating a remediation agreement. The test for determining whether a remediation agreement is appropriate reflects the test for prosecuting a criminal offence generally.³²² However, two features of the remediation agreement regime make it distinct from other decisions involving prosecutorial discretion. The first is that remediation agreements can be used only for corporate defendants. The second is that, while the individual prosecutor is responsible for carrying out the negotiation, the prosecutor must receive the Attorney General's consent before inviting a corporation to negotiate a remediation agreement.

³²⁰ *Criminal Code*, *supra* note 300, s 715.31.

³²¹ Boisvert et al, *supra* note 85 at 29.

³²² PPSC *Deskbook*, *supra* note 307, Part 3.21, s 2.

As a threshold issue, a remediation agreement may be considered only if there is a reasonable prospect of conviction. A remediation agreement is an alternative to traditional prosecution and should only be pursued if a prosecution is otherwise viable. Further, the prosecutor must be satisfied this threshold is met on the basis of a full law enforcement investigation. An internal investigation from the organization is no substitute.³²³

If the threshold test is met and the prosecutor is of the view that a remediation agreement is appropriate, then a series of approvals must be sought, culminating ultimately with the consent of the Attorney General. The prosecutor may recommend to the Chief Federal Prosecutor (CFP) that the consent of the Attorney General should be sought. If the CFP agrees that negotiation of a remediation agreement is in the public interest, they must advise the Deputy DPP of the intention to seek the Attorney General's consent and prepare a legal memorandum explaining how the requirements have been satisfied. If the Deputy DPP agrees, then they will forward the recommendation to the DPP who, on behalf of the Attorney General, will make the final decision as to whether to invite the accused to negotiate a remediation agreement.³²⁴ The Attorney General is vested with final authority to approve the invitation to a corporate accused to negotiate a remediation agreement.³²⁵

Throughout this process, the "public interest" takes primacy and constrains the exercise of the prosecutor's discretion. The *Code* enumerates several factors that must be considered as part of the public interest:

- a. the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- b. the nature and gravity of the act or omission and its impact on any victim;
- c. the degree of involvement of senior officers of the organization in the act or omission;
- d. whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- e. whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
- f. whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- g. whether the organization—or any of its representatives—was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;

³²³ *Ibid*, Part 3.21, s 3.1.

³²⁴ *Ibid*, Part 3.21, ss 3.1-3.2.

³²⁵ *Criminal Code*, *supra* note 300, s 715.32(1)(d).

- h. whether the organization—or any of its representatives—is alleged to have committed any other offences, including those not listed in the schedule to this Part; and
- i. any other factor that the Crown counsel considers relevant.³²⁶

While all of the listed factors must be considered, the weight given to each will be case specific. Additionally, if the organization is accused of a *CFPOA* offence, the *Code* specifically sets out that consideration must not be given to the national economic interest, the potential effect on relations with a foreign state, or the identity of the organization or any individual involved.³²⁷

6.3.3.2 Future of Remediation Agreements

At the time of writing, no remediation agreements have been announced in Canada.

No doubt, the SNC-Lavalin affair has attracted heightened public scrutiny toward the remediation agreement as an enforcement tool. Even prior to the scandal, some critics openly surmised that the remediation agreement regime was enacted specifically to resolve the charges against SNC-Lavalin Group Inc. Given the fallout of the SNC-Lavalin affair, one can only suppose that the first remediation agreement will be of significant interest—to the legal profession, to the business world, and to the public at large.

Whether remediation agreements will be effective in realizing their purported advantages—self-reporting, promoting accountability, fostering a compliance culture and enhancing public confidence in addressing corporate wrongdoing—remains to be seen. As between the models adopted in the US and the UK, Canada has adopted a model more similar to that of the UK. The remediation agreement is subject to court approval but, unlike the UK, no preliminary application must be made to the court before concluding the agreement. This may be an insufficient level of judicial oversight to allay some of the concerns regarding the imposition of a DPA regime in Canada.

Ultimately, the true measure of the impact of remediation agreements on Canadian enforcement activity remains to be seen. However, the tool arrives at a time when there is increased domestic and international pressure on Canada to enhance its enforcement efforts against global corruption and bribery. In this regard, one cannot view the introduction of a DPA regime in Canada solely as a welcome development from the perspective of corporate actors and their counsel. The introduction of a more flexible tool to enforce foreign bribery and corruption offences may be viewed favourably by Canadian enforcement authorities, which lacked mechanisms other than traditional prosecution and guilty pleas for the purposes of enforcement.

³²⁶ *Ibid*, s 715.32(2).

³²⁷ *Ibid*, s 715.32(3).

7. CONCURRENT JURISDICTION ISSUES

Issues of concurrent jurisdiction are inevitable given the extraterritorial nature of foreign bribery offences. The offence of bribery of foreign officials involves at least two countries—the one in which the offender resides, and the one in which the foreign public official resides. Yet, the offence remains one of domestic law and is prosecuted by domestic authorities. This raises the possibility that individuals or corporations charged with corruption offences may find themselves subject to criminal proceedings in multiple jurisdictions for the same underlying conduct.

7.1 Parallel Proceedings

While the global effort to increase enforcement against corruption is generally positive, it does lead to some potentially problematic issues. One such issue is the problem of parallel proceedings referenced earlier: multiple countries could bring enforcement efforts against a single actor based on the same offending conduct.

As Jay Holtmeier notes, when the *FCPA* was enacted in 1977, the US took the lead in global corruption enforcement.³²⁸ Other major global players have recently come on board, including Germany and the UK. The UK has become a more active prosecutor of foreign bribery with the passing of the *Bribery Act* in 2010. China amended its corruption law in 2011 to include corruption of foreign public officials, but has done nothing so far to enforce that law.³²⁹ Brazil strengthened its domestic and foreign corruption laws with the *Clean Company Act* in 2003.³³⁰ These and other pieces of legislation have led to instances of overlapping or concurrent jurisdiction in which multiple states may prosecute the same corrupt activity.

As discussed, the potential for a multiplicity of prosecutions follows naturally from the extraterritorial nature of the foreign bribery offence. It may also be the by-product of international cooperation between enforcement bodies. However, the limits to the extent of this “cooperation” must be noted. Though a pure, principled desire to fight corruption is the ideal, enforcement bodies can be motivated (for political reasons and otherwise) to justify their operations with highly publicized convictions. Thus, if multiple enforcement bodies have cooperated in a corruption investigation (especially where they have devoted extensive resources), each enforcement body may still be motivated to prosecute the corruption offence themselves, regardless of how many other enforcement bodies have jurisdiction.

Parallel proceedings may take on various forms. The most basic form is the “carbon copy” prosecution. The term was originally coined by Andrew Boutros and Markus Funk to describe successive, duplicative prosecutions by multiple sovereigns arising out of the same

³²⁸ Jay Holtmeier, “Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities” (2015) 84:2 Fordham L Rev 493 at 496.

³²⁹ Gerry Ferguson, “China’s Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End” (2017) 50:3 Intl Lawyer 503.

³³⁰ Holtmeier, *supra* note 328 at 494. See also Mariano Predo et al, “The Brazilian *Clean Company Act*: Using Institutional Multiplicity for Effective Punishment” (2015) 53:1 Osgoode Hall LJ 107.

or similar underlying conduct.³³¹ The quintessential example involves a corporation resolving bribery charges by way of an NPA, DPA or plea agreement in one jurisdiction and subsequently being subject to investigation or prosecution in another jurisdiction based on those admissions.³³²

As Holtmeier notes, “carbon copy” prosecutions offer the advantage of allowing the second enforcer to piggyback on the efforts of the original jurisdiction, which can increase enforcement overall.³³³ Oftentimes corruption occurs in countries where they do not have resources to investigate and prosecute the matter. If the country could utilize another jurisdiction’s investigation, however, it may successfully prosecute a corruption offence where it would otherwise be practically impossible.

Holtmeier identifies the TSKJ joint venture³³⁴ prosecutions as an example of “carbon copy” prosecutions. The case involved huge bribes to Nigerian officials for access to liquid natural gas reserves. In 2010, the four companies involved reached a settlement agreement with the authorities in the US for a total of \$1.5 billion. A concurrent investigation in Nigeria led to subsequent settlements of \$126 million. In addition, a court in the UK approved a civil settlement against one of the companies and all the four companies agreed to penalties imposed by the African Development Bank. Finally, an Italian court imposed fines on one of the companies.³³⁵ The “publicly available information does not suggest to what extent, if any, the penalties imposed in one jurisdiction played a role in the calculation of penalties imposed by other authorities [in other jurisdictions].”³³⁶

Not all forms of parallel proceedings are simple “carbon copies” of the first jurisdiction’s prosecution. The prosecution of a single bribe in a single country may open the door to a larger, more complex web of corruption offences spanning extended periods of time across multiple jurisdictions. In these cases, different authorities may prosecute different aspects of a bribery scheme that occurred in different places at different times.

Holtmeier provides the example of enforcement action against Siemens AG. In 2008, Siemens entered settlements with the US and Germany for \$800 million and \$569 million respectively. The US settlements involved conduct in Latin America, the Middle East, and Bangladesh, while the German charges involved corruption in Spain, Venezuela, and China. In the five years following these settlements, Siemens reached settlements with the World Bank in relation to fraud allegations in Russia (\$100 million), with Switzerland in relation to

³³¹ Andrew S Boutros & T Markus Funk, “‘Carbon Copy’ Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World” (2012) U Chicago Legal F 259 at 269.

³³² *Ibid* at 271-72.

³³³ Holtmeier, *supra* note 328 at 498.

³³⁴ TSKJ is a private limited company registered in Portugal comprised of four multi-national companies: Technip SA (of France), Snamprogetti Netherlands BV, Kellogg Brown & Root Inc (of USA) and Japanese Gasoline Corp (JGC).

³³⁵ Holtmeier, *supra* note 328 at 498-99. See also Marco Arnone & Leonardo Borlini, *Corruption: Economic Analysis and Law* (Cheltenham, UK: Edward Elgar, 2014) at 195–204.

³³⁶ Holtmeier, *ibid* at 500.

a subsidiary's actions in Russia (\$65 million), and with Nigeria (\$46.5 million) and Greece (£270 million) for corruption in those countries.³³⁷

From the perspective of the enforcing jurisdiction, the advantages of parallel proceedings are clear, irrespective of the form that it takes. Parallel proceedings can promote anti-corruption efforts overall, particularly when the second jurisdiction otherwise lacks the resources to mount a full investigation and prosecution on its own. Such resources are not limited solely to the material resources necessary to conduct a massive investigation either (although this is a significant advantage). These resources could also include the sheer institutional expertise and human resources that certain jurisdictions have developed over a longer period of time than others.

That said, obvious risks are generated by the informal character of parallel proceedings and the absence of any binding mechanism to resolve issues of overlapping jurisdiction in the OECD Convention or UNCAC. These risks are discussed in greater detail below.

7.2 Risks of Parallel Proceedings

7.2.1 Double Jeopardy

Double jeopardy—or *ne bis in idem* (not twice for the same thing)—is a principle of fundamental justice which stipulates that it is unjust for an accused to be prosecuted and convicted twice for the same offence.³³⁸ This principle is widely-accepted and uncontroversial, at least in most Western democracies. The application of the principle to the global corruption context is much less settled.

The prospect of parallel proceedings squarely gives rise to the concern regarding double jeopardy. A parallel proceeding (most obviously in the form of a “carbon copy” prosecution) arguably violates the principle of double jeopardy by imposing duplicative penalties for the same conduct.³³⁹ This raises a fundamental question: does the principle of double jeopardy protect an offender prosecuted by one country from prosecution by a different country for the same (or similar) conduct?

The answer is not straightforward. For instance, the doctrine of “dual sovereignty” has been developed by the US Supreme Court when faced with double jeopardy issues as between state governments and the federal government. This doctrine could theoretically apply to international anti-corruption enforcement, as suggested by Anthony Colangelo:

The [dual sovereignty] doctrine “is founded on the ... conception of crime as an offense against the sovereignty of the government.” It holds that “[w]hen a defendant in a single act violates the (peace and dignity) of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’” No violation of the prohibition on double jeopardy results from

³³⁷ *Ibid* at 504.

³³⁸ See generally, Martin L Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969).

³³⁹ Holtmeier, *supra* note 328 at 497-98.

successive prosecutions by different sovereigns, according to the Court, because "by one act [the defendant] has committed two offences, for each of which he is justly punishable. The defendant, in other words, is not being prosecuted twice for the same "offence," if another sovereign successively prosecutes for the same act-even if the second sovereign prosecutes using a law identical to that used in the first prosecution.³⁴⁰

However, there are difficulties with the proposition. The first is a difficulty based on principle—it appears to leave a loophole in the basic rights of the accused. The second is the practical difficulty—many corruption investigations and prosecutions depend on the voluntary disclosure and cooperation of the company or individual suspected of corrupt activity. Faced with a multiplicity of prosecutions in various countries with different sanctioning procedures, suspects may be significantly more reluctant to cooperate with enforcement bodies, which could have a deleterious effect on anti-corruption enforcement. The trend today for multinational companies is to try to negotiate a coordinated global settlement with all potential prosecuting countries at the same time (see Section 7.3.2).

A related issue is raised. The US is a global leader in terms of its enforcement capacity and efforts. The dual sovereignty doctrine appears to permit the DOJ to re-prosecute an offender for the same conduct even if a prosecution has been concluded by a foreign state. Against this backdrop, multinational corporations may reasonably conclude that the US will be the "ultimate arbiter" on the "adequacy" of criminal outcomes in other countries.³⁴¹ Therefore, they may be incentivized to negotiate first with the US DOJ and deal with their local prosecutors thereafter.³⁴²

In May 2018, the US Deputy Attorney General announced a new DOJ policy to prevent "piling on." The aim of this policy is to "discourage disproportionate enforcement of laws by multiple authorities."³⁴³ Under the policy, which has been incorporated into the US *Justice Manual*, DOJ prosecutors should:

endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign

³⁴⁰ Anthony J Colangelo, "Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory" (2009) 86:4 Washington ULR 779. See also Michael P Van Alstine, "Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA" (2012) 73:5 Ohio State LJ 1321 at 1332-34.

³⁴¹ David Vascott, "IBA Paris: US Remains the 'Ultimate Arbiter' on International Enforcement", *Global Investigations Review* (16 June 2016), online: <<https://globalinvestigationsreview.com/iba-paris-us-remains-the-ultimate-arbiter-international-enforcement>>.

³⁴² In this regard, it is worth noting that nine of the 10 largest FCPA actions based on penalties and disgorgement (as of October 26, 2020) were against non-US companies. See Harry Cassin, "Wall Street Bank Earns Top Spot on FCPA Blog Top Ten List" (26 October 2020), online (blog): *The FCPA Blog* <<https://fcpublog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/>>.

³⁴³ Rod J Rosenstein, Deputy Attorney General, "Remarks to the New York City Bar White Collar Crime Institute", Remarks delivered to the New York City Bar White Collar Crime Institute, (New York, 9 May 2018), online: <<https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>>.

enforcement authorities that are seeking to resolve a case with a company for the same misconduct.³⁴⁴

Although it is perhaps a valuable effort towards addressing the issue of overlapping jurisdiction, it is still deficient in key areas. As a policy, it is not binding. The policy also lacks concrete detail. This prevents a measure of predictability in terms of how the policy will be followed. As the Deputy Attorney General conceded in the same speech, “Sometimes, penalties that may appear duplicative really are essential to achieve justice and protect the public.”³⁴⁵

Ideally, the principle contained in Article 4.3 of the OECD Convention and in Article 42 of UNCAC would be “translated” into a more immediate and effective rule in national anti-bribery legislation. However, the exact contours of such a rule would be difficult to define. While a domestic policy or the non-binding encouragement of “consultation” contained in the conventions may not suffice in mitigating the very real risks of parallel proceedings, it is not clear that a strict double jeopardy rule is the solution.

First, there may be no principled basis for an “international double jeopardy” rule. A tenet of international law is that international conventions, such as the UNCAC and the OECD Convention, are enforceable only by implementation of the convention through domestic legislation. In this way, when countries pursue prosecution of foreign bribery offences, they are, strictly speaking, prosecuting domestic criminal offences. One may challenge, with some force, the notion that a sovereign ought to be prevented from pursuing a prosecution under their own domestic legislation because another sovereign has done so under its domestic legislation.

Beyond the more philosophical concern, a practical concern is also raised. A strict double jeopardy rule could potentially incentivize countries to be the first to secure a conviction against an offender. This could create a culture of competition with respect to enforcement, as opposed to cooperation.³⁴⁶

7.2.2 Unnecessary Deterrence

Holtmeier notes that in addition to being fundamentally unfair, multiple enforcement actions can lead to punishments that are harsher than needed for future deterrence.³⁴⁷ This can be a waste of resources for enforcement agencies and lead to increased costs of doing business. If penalties are too high, companies will spend increased amounts of money on

³⁴⁴ “§ 1-12.100 — Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings” in *Justice Manual*, *supra* note 198, online: <<https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>>.

³⁴⁵ Rosenstein, *supra* note 343.

³⁴⁶ Moreover, the potential deleterious effects of this outcome could be significant. For instance, one could easily imagine the protections of an accused being eroded in the name of a more “efficient” prosecution and conviction procedure. Alternatively, one could imagine a country that lacks investigative resources from pursuing enforcement when a country like the UK and the US, with more robust resources, is involved.

³⁴⁷ Holtmeier, *supra* note 328 at 516.

monitoring, which hinders their ability to provide competitive pricing. This could lead companies, according to Holtmeier, to pull out of a country if the risk of doing business in that country is too great.³⁴⁸ In its 2010 settlement with Panalpina World Transport (Holding) Ltd., the US DOJ noted that the company had ceased operations in one of the countries in which the corrupt behaviour occurred. In its 2015 settlement with Goodyear Tire & Rubber Company, the SEC “touted the divestiture of foreign subsidiaries.”³⁴⁹ Such withdrawal of companies from corrupt countries could be seen as both desirable and undesirable. On one hand, withdrawal from corrupt countries will prevent companies from engaging in and thus supporting bribery in those countries. On the other hand, a company’s withdrawal from a corrupt country could be detrimental to the overall economic well-being of that country.

7.2.3 Chilling Effect on Self-Reporting

Holtmeier states that a final reason to avoid duplicative enforcement actions is the chilling effect on self-reporting. The author suggests that a “company may be willing to take the risk that misconduct will remain undetected by law enforcement”³⁵⁰ and direct resources to internal investigations rather than facing the possibility of years of investigations in multiple jurisdictions.

7.3 Approaches to Multijurisdictional Enforcement

As more countries actively pursue corruption cases, the probability that companies will face concurrent prosecutions is increased. Mechanisms to avoid duplicative punishments are discussed below.

7.3.1 Offsetting Monetary Penalties

Offsetting penalties gives a company “credit” for monetary penalties that have been paid for the same or similar conduct. Holtmeier suggests that offsetting provides a partial remedy for the unfairness of duplicative penalties.³⁵¹ However, it may be difficult to determine the right amount to offset, and there is no guarantee that agencies will reduce penalties due to those previously imposed. Holtmeier notes that in its 2014 settlement with Alstom, the US DOJ did not appear to credit penalties paid to Switzerland and the World Bank for similar conduct; in fact, the DOJ pointed to these other penalties as evidence of Alstom’s repeated wrongdoing.³⁵²

7.3.2 Coordinated Actions and Settlements

Companies may enter into settlements with multiple jurisdictions at the same time. For example, in 2011, Johnson & Johnson resolved a *FCPA* violation in the US on the same day that the SFO in the UK announced a civil recovery related to the same matter. Holtmeier

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid* at 516-17.

³⁵¹ *Ibid* at 506-507.

³⁵² *Ibid* at 507.

sees this as “a step in the right direction,” but cooperation and coordination may not produce a single resolution and additional countries could always bring future charges.³⁵³

In 2017, Rolls-Royce announced that it reached agreements in principle with prosecutors in the UK, US, and Brazil to resolve multiple bribery and corruption incidents by intermediaries in a number of foreign countries. In the UK, the company has agreed to the payment of \$599 million under a DPA plus the costs of the SFO investigation. The DPA must still be approved by a court. The company further agreed to a payment of \$170 million to US DOJ and a payment of \$25.5 million to Brazil.³⁵⁴

7.3.3 Enforcement Comity and Declinations

The doctrine of comity informs international anti-corruption enforcement. Comity generally entails reciprocity and the extension of courtesies from one jurisdiction to another when the laws of both are involved. Though multiple states may legitimately exercise concurrent jurisdiction over corruption offences, the principle of comity might lead one state’s enforcement body to defer to another state’s enforcement body in the prosecution of corruption offences.³⁵⁵

Articles 42.5 and 47 of UNCAC and Article 4.3 of the OECD Convention are provisions regarding comity in enforcement actions. Both UNCAC and the OECD Convention recommend that enforcement bodies communicate with one another during investigations and state that prosecutions should take place in the most appropriate jurisdiction. It appears that enforcement comity is at least a factor in US prosecutions under the *FCPA*. In “The Twilight of Comity,” Weber Waller writes that “both the Justice Department and the Federal Trade Commission (FTC) routinely consider comity factors in exercise of their prosecutorial discretion.”³⁵⁶

According to Holtmeier, one jurisdiction may decline to prosecute a corruption offence on the basis that a company has resolved charges for the same or similar conduct elsewhere.³⁵⁷ Since a rationale for forgoing prosecution is rarely given, it is difficult to predict situations in which one jurisdiction will drop charges. Holtmeier discusses the DOJ’s decision to drop

³⁵³ *Ibid* at 508.

³⁵⁴ Richard L Cassin, “Rolls-Royce Agrees to Pay \$809 Million to Settle Bribery Allegations” (16 January 2017), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2017/1/16/rolls-royce-agrees-to-pay-809-million-to-settle-bribery-alle.html>>.

³⁵⁵ For a fulsome discussion of enforcement comity as a means of reducing parallel proceedings, see Colangelo, *supra* note 340 at 848-57.

³⁵⁶ Weber Waller, “The Twilight of Comity” (2000) 38 Colum J Transnat’l L 563 at 566.

³⁵⁷ Holtmeier, *supra* note 328 at 511. There is no precise definition of declination, which can be considered broadly as any legal scrutiny that does not lead to an enforcement action or narrowly as an instance in which an enforcement agency has concluded it could succeed in a prosecution but nonetheless decides not to pursue the prosecution. See Mike Koehler, “The Need For A Consensus ‘Declination’ Definition” (15 January 2013), online (blog): *FCPA Professor* <<http://fcpprofessor.com/the-need-for-a-consensus-declination-definition/>>; Marc Alain Bohn, “Revisiting the Definition of ‘Declinations’” (22 January 2013), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2013/1/22/revisiting-the-definition-of-declinations.html>>.

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the investigation into Dutch-based SBM Offshore following the company's \$240 million settlement with Dutch prosecutors. The DOJ's decision may have been influenced by the fact that a potential offsetting of the Dutch penalty could negate any penalty collectible in the US, as well as considerations of jurisdiction and evidence.³⁵⁸

The solution to balancing all these concerns may be to encourage greater transparency and detail in enforcement policies. While non-binding, policies are designed to encourage a consistent standard across a certain body, in this case, enforcement bodies. However, in order to give effect to a certain level of predictability for an accused corporation, policies ought to (1) particularize the criteria that would cause the country to defer to enforcement efforts in another jurisdiction and (2) better particularize the circumstances in which they would not do so.

³⁵⁸ Holtmeier, *supra* note 328 at 511-12.