# GLOBAL CORRUPTION

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

FOURTH EDITION VOLUME 1

EDITED BY GERRY FERGUSON

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**Volume 1**

Fourth Edition

Edited by

**GERRY FERGUSON**

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The **Vancouver Anti-Corruption Institute (VACI)** is an integral part of the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), an independent, international centre and member of the UNODC's Program Network of Institutes. Its mission is to promote the rule of law, democracy, human rights, and good governance in criminal law and the administration of criminal justice, domestically, regionally, and globally.

**Transparency International Canada (TI Canada)** is Canada's leading anti-corruption organization. Its mandate involves education and building awareness on the effects of corruption across the country and worldwide.

The **Canadian Bar Association (CBA)** is the largest professional association for lawyers in Canada. The CBA promotes fair justice systems, facilitates effective law reform, upholds equality and the legal profession, and is devoted to eliminating discrimination. They are the premiere provider of quality legal training and information in Canada.

UVicSpace—the **University of Victoria**'s institutional repository—preserves and provides access to the digital scholarly works published by UVic faculty, students, and staff.

# 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, Northeaster 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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## CHAPTER 7 | CRIMINAL AND CIVIL SANCTIONS AND REMEDIES

### PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

# 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 | *Arms Export Control Act* |
| 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, *Bank Secrecy Act* |
| 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, *Contract Disputes Act of 1978* |
| CED | Committee for Economic Development |
| CETA | Canada-European Union, Comprehensive Economic and Trade Agreement |
| CFT | combating the financing of terrorism |
| CFPOA | Canada, *Corruption of Foreign Public Officials Act* |
| CICA | US, *Competition in Contracting Act* |

| | |
|---|---|
| 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, *Conflict of Interest Act* |
| 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, *Dodd-Frank Wall Street Reform and Consumer Protection Act* |
| 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, *Evidence Act* |
| 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, *Ethics in Government Act* |
| EITI | Extractive Industries Transparency Initiative |
| EP | European Parliament |
| ESTMA | Canada, *Extractive Sector Transparency Measures Act* |
| EU Convention | The Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States |

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|---|---|
| EU Directive | EU Directive on Public Procurement |
| FACFOA | Canada, *Freezing Assets of Corrupt Foreign Officials Act* |
| FAIR | Canada, Federal Accountability Initiative for Reform |
| FAR | US, Federal Acquisition Regulation |
| FATF | US, Financial Action Task Force |
| FCA | US, *False Claims Act* |
| FCPA | US, *Foreign Corrupt Practices Act* |
| FDI | Foreign Direct Investment |
| FAA | Canada, *Federal Accountability Act* |
| 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, *Freedom of Information and Protection of Privacy Act* |
| 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, *Honest Leadership and Open Government Act* |
| 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 | *Interinstitutional Agreement on the Transparency Register* |

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|---|---|
| IIAs | international investment agreements |
| ISO | International Organization for Standardization |
| ITAR | *International Traffic in Arms Regulations* |
| 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, *Lobbying Act* |
| LBOs | US, Legislative Branch Officials |
| LCC | Canada, *Lobbyists' Code of Conduct* |
| LCIA | London Court of International Arbitration |
| LDA | US, *Lobbying Disclosure Act* |
| LRA | Canada, *Lobbyists Registration Act* (renamed the *Lobbying Act*) |
| 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, *Mutual Legal Assistance in Criminal Matters Act* |
| 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 |

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|---|---|
| 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, *Public Interest Disclosure Act* |
| PIM System | Public investment management system |
| POCA | UK, *Proceeds of Crime Act 2002* |
| 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, *Public Services (Social Value) Act 2012* |
| PSCs | People who have significant control over the company |
| PSDPA | Canada, *Public Servants Disclosure Protection Act* |
| 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, *Racketeering Influenced and Corrupt Organizations Act* |
| SARs | Suspicious Activity Reports |
| SBEE | UK, *Small Business Enterprise & Employment Act 2015* |
| 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 | *Special Economic Measure Act* |
| SFO | UK, Serious Fraud Office |
| SIAC | Singapore International Arbitration Center |
| SMEs | Small and Medium Sized Enterprises |
| SOCA | UK, Serious Organised Crime Agency |

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|---|---|
| SOCPA | UK, *Serious Organised Crime and Police Act* |
| SOX | US, *Sarbanes-Oxley Act of 2002* |
| 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, *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* |
| 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, *Whistleblower Protection Act* |
| WPEA | US, *Whistleblower Protection Enhancement Act* |
| 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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**Joseph Weiler** is a Professor Emeritus at the Peter A. Allard School of Law at UBC and currently serves as Vice Chair of the Board of Directors of Transparency International, Canada Chapter and Co-Director of the Anti-Corruption Law Program. While at UBC, Weiler published extensively and taught courses in labour law, criminal law, sports law and entertainment law from 1974-2020. Weiler also has extensive professional experience in labour arbitration, sports law and financial criminal law.

# 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

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# 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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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 Zulfiquar 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 billion[15] 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]

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[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]

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[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-diosaster/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

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> 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

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[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

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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-execs-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 Sarlo[34] 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 levering 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

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[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]

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[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 2030[47]), 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

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[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]

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[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://fcpablog.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

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[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.

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[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]

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[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**

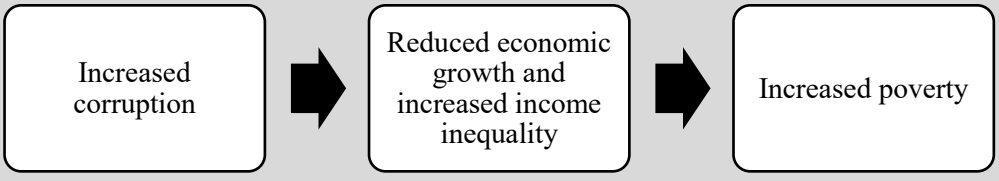
This review found that few studies examine or establish a direct relationship between corruption and poverty.[99] Corruption, by itself, does not produce poverty. Rather, corruption has direct consequences on economic and governance factors, intermediaries

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

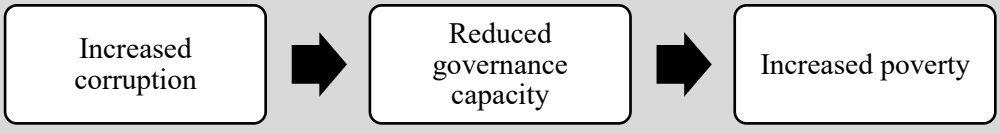
[99] [4] One group of researchers, Gupta et al (1998), found a statistically significant positive association directly between corruption and poverty. Tests for directionality showed that it appears to be corruption that increases poverty.

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 Ravillion 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]

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[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);

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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

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[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 Postocolonial [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 Postocolonial [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

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[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]

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[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

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[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 Rouseff 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 reals ($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]

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[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

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[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 Suddeutsche 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.

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[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, s*upra* 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 Atyittey 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-discipline[209] 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.

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[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

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[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 Carlson[217]

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:

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[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 by limited when necessary and provided by law to protects 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]

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> 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 Jabobsen, "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

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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* <https://datareportal.com/social-media-users#:~:text=Our%20latest%20data%20show%20that,of%20the%20total%20global%20population>.

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").

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[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 Index**[252]

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 2015-2020*[253]

| 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 Barometer**[255]

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 surveys[256] 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 Index**[259]

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-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 Project**[261]

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://anticorrp.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 Index**[268]

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).

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[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]

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[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

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[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

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[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 Pausanius 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. Pausanius 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 Kotchian, 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 bribegiver 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]

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[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.

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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

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[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.

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[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

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[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 (UNCTOC, 2000). As part of its strategy to curb organized crime, UNCTOC 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, UNCTOC, see Dimitri Vlassis, "The United

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[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); "TheAfrican 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.

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[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

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[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 Smith[328] 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-Akerman'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 Gray[342]

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 multi-lateral 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 States[347] 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

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[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/tavissmiley/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]

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[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

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[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 Ruanglikhitkul, "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 Santos[385]

**1. Emergence of ESG**

Milton Freidman 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 Freidman'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.

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[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 Institute[391]

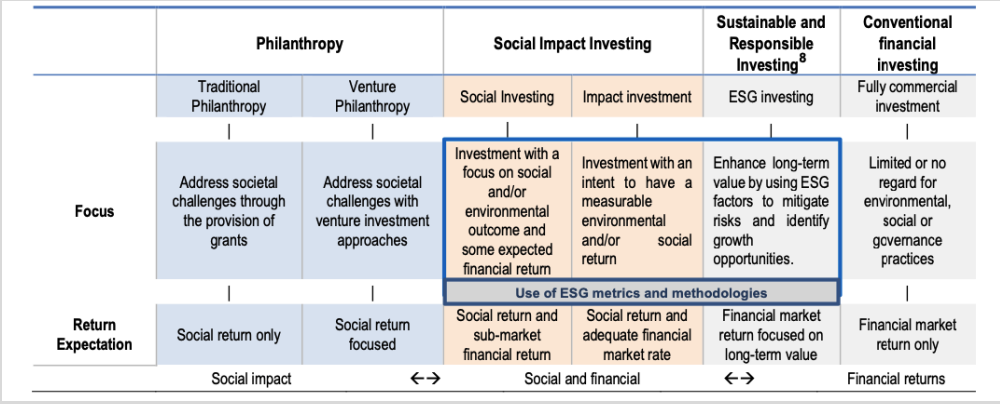
**2. How Did ESG Develop and Why Has it Risen to Prominence?**

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*




*Note.* From OECD[393]

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/>.

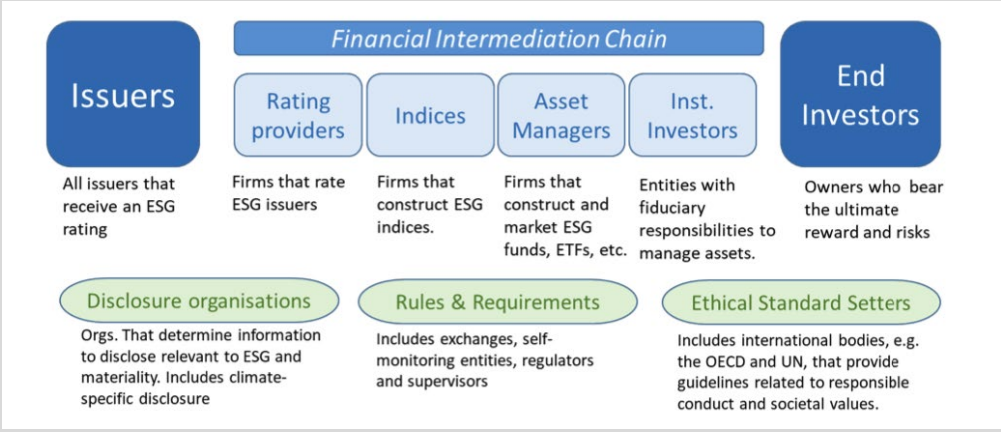
[396] "About the PRI" (last visited 12 August 2021), online: *Principles for Responsible Investment* <https://www.unpri.org/pri/about-the-pri>.

[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 OECD[400]

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 OECD[402]

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.

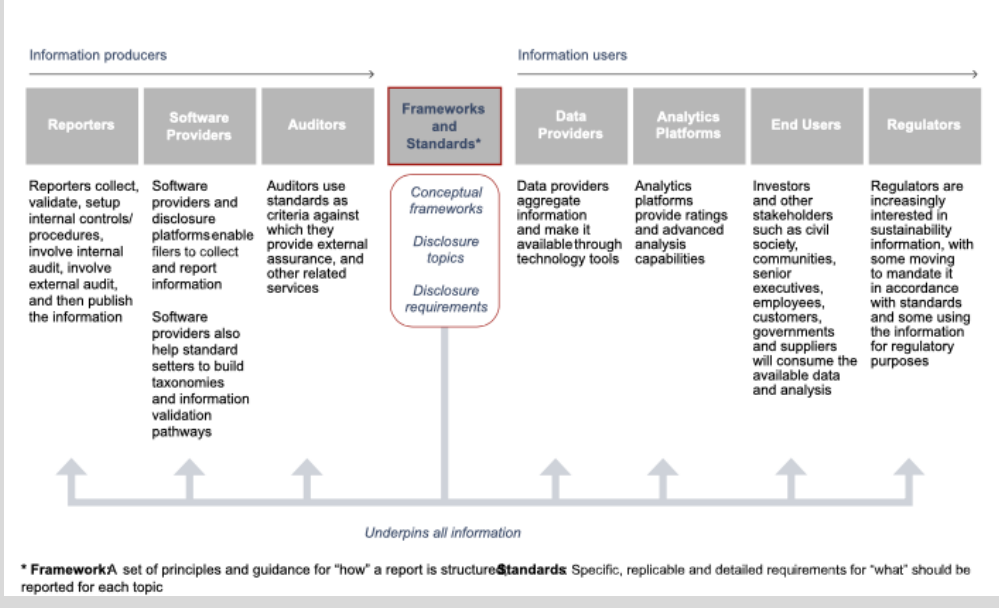
**Disclosure organizations** are also essential to the ESG ecosystem. They provide guidance and set standards and frameworks for ESG integration and disclosure. For example, the Sustainability Accounting Standards Board,[404] the Global Reporting Initiative,[405] and the Task Force on Climate-Related 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 SASB[408]

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.

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[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]

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[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, "Garter 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]

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[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.

# CONTENTS



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;

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[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]

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[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

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[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.

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[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

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[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-dojs-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-Emery 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

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[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.

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[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]

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[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.

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[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.

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[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

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[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 & Alldridge, *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

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[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_Part2_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 of 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 jurisdictions[88] 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 official[102] to demand, accept, or offer to accept from any person a loan, reward, advantage or benefit of any kind[103] 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 themself 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 government[112] to directly or indirectly pay a commission or reward to or confer an advantage or benefit of any kind[113] 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 government[118] to demand, accept or offer or agree to accept a commission, reward, advantage or benefit[119] 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 family[121], 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:

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[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 H20, 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]

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[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:

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[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]

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[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 Vandenbussche*, (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.

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> [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 official[142] 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]

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[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."

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[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 employee[149] 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 462(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

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[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 Saundercook-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.

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[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 rd 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,

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[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

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[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

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[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, F*ighting 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]

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[173] UK *Bribery Act* Guidance, *supra* note 70 at 15.

[174] Ingeborg Zerbes, "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.

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[176] OECD Commentary, *supra* note 167 at paras 7-8. Note that the OECD in *A Glossary of International Criminal Standard*s, (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 & Tomzcak'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

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[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

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[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

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[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]

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[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

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[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

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[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.

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[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.

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[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.

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[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 bribery[281]), 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

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[278] Ingeborg Zerbes 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.": Zerbes, *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]

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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): F*CPA Professor* <https://fcpaprofessor.com/reminder-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

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[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

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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://fcpaprofessor.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

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[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

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[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.

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[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.

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[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**<br>UNCAC<br>Article 15 – includes two subsections:<br>15(1) – giving a bribe – promising, offering or giving a bribe to a public officer<br>15(2) – accepting a bribe – the solicitation or acceptance of a bribe by a public officer.<br><br>OECD<br>No provisions on bribery of national public officials. | **US** | §201(b)(1) and (2), 18 USC. |
| | **UK** | Ss. 1 and 2, *Bribery Act* 2010. |
| | **Canada** | Ss. 119-125, *Criminal Code*. |
| **(2) Bribing a Foreign Public Official**<br>UNCAC<br>Article 16(1) – promising, offering or giving a bribe to a foreign public official.<br><br>OECD<br>Article 1 – promising, offering or giving a bribe to a foreign public official<br>(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 *FCPA*, 15 USC. |
| | **UK** | S. 6, *Bribery Act 2010*. |
| | **Canada** | S. 3, *CFPOA* and s. 18, *Crimes Against Humanity and War Crimes Act*. |
| **(3) Public Embezzlement**<br>UNCAC<br>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 *Bribery Act*, but "fraud by abuse of position of trust", s. 4 *Fraud Act* would apply to public embezzlement. |

| UNCAC & OECD OFFENCES | US, UK & CANADIAN EQUIVALENTS | |
|---|---|---|
| OECD<br>No comparable provision. | **Canada** | ss. 122 and 322, *Criminal Code.* |
| **(4) Money Laundering**<br>UNCAC<br>Articles 14 and 23 – laundering of proceeds of crime (including proceeds of corruption).<br><br>OECD<br>Article 7 – money laundering. | **US** | §§1956 & 1957, *Money Laundering Control Act*, 18 USC. |
| | **UK** | Ss. 327-329 and 340(11), *Proceeds of Crime Act 2002.* |
| | **Canada** | S. 462.31, *Criminal Code.* |
| **(5) Obstruction**<br>UNCAC<br>Article 25 – obstruction of justice in respect to UNCAC offences or procedures.<br><br>OECD<br>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 *Proceeds of Crime Act 2002.* |
| | **Canada** | Ss. 139(2) & (3) and 423.1(1), *Criminal Code.* |
| **(6) Liability of Legal Entities**<br>UNCAC<br>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.<br><br>OECD<br>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, *Bribery Act 2010* 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 *Criminal Code.* Criminal liability of organizations, ss. 22.1 and 22.2, *Criminal Code.* |

| UNCAC & OECD OFFENCES | US, UK & CANADIAN EQUIVALENTS | |
|---|---|---|
| **(7) Accomplices and Attempt**<br>UNCAC<br>Article 27 – establish criminal liability for participation (accomplices) in a UNCAC offence and for attempting to commit an UNCAC offence.<br><br>OECD<br>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, *Criminal Attempts Act 1981* – creates an offence to attempt to commit any indictable offence. |
| | **Canada** | Ss. 21 and 22 of the *Criminal Code* includes accomplices in participation of an offence (aiders, abettors, and counselors). S. 24 criminalizes attempting an offence. |
| **(8) Conspiracy**<br>UNCAC<br>Conspiracy is not a mandatory or optional offence except Article 23 (conspiracy to commit money laundering).<br><br>OECD<br>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), *Criminal Law Act 1977.* |
| | **Canada** | S. 465(1)(c), *Criminal Code.* |
| **(9) Books and Records Offences**<br>UNCAC<br>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 *Bribery Act*, but ss. 17-20, *Theft Act, 1968* criminalizes false accounting. |

| UNCAC & OECD OFFENCES | US, UK & CANADIAN EQUIVALENTS | |
|---|---|---|
| existent transactions, creating or using false documents, or unlawful, intentional destruction of documents.<br><br>OECD<br>Article 8 – shall provide effective civil, administrative or criminal penalties for improper books and records offences. | **Canada** | S. 4, *CFPOA* and other possible offences such as s. 361 (false pretences), s. 380 (fraud) and s. 397 (falsification of books and documents) of the *Criminal Code*, or s. 155 (financial disclosure) of the *Canada Business Corporations Act.* |

| UNCAC & OECD OFFENCES | US, UK & CANADIAN EQUIVALENTS | |
|---|---|---|
| **B. OPTIONAL OFFENCES** | | |
| **(1) Foreign Official Taking a Bribe**<br>UNCAC<br>Article 16(2) – the solicitation or acceptance of a bribe by a foreign public official.<br><br>OECD<br>No comparable provision. | **US** | The *FCPA* does not criminalize the offense of bribery committed by the foreign public official. |
| | **UK** | No comparable provision in *Bribery Act 2010.* |
| | **Canada** | No comparable provision in *CFPOA.* |
| **(2) Giving a Bribe for Influence Peddling**<br>UNCAC<br>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.<br><br>OECD<br>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, *Bribery Act 2010.* |
| | **Canada** | **S.** 121(1)(d) and (3), *Criminal Code.* |
| **(3) Accepting a Bribe for Influence Peddling**<br>UNCAC | **US** | No comparable provision in the *FCPA*, 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.<br><br>OECD<br>No comparable provision. | **UK** | S. 2, *Bribery Act 2010.* |
| | **Canada** | **S**. 121(1)(d) and (3), *Criminal Code.* |
| **(4) Abuse of Public Function to Obtain a Bribe**<br>UNCAC<br>Article 19 – abuse of public functions of the purpose of obtaining an undue advantage.<br>OECD<br>No comparable provision. | **US** | No comparable provision in *FCPA*, but can be prosecuted under §201(b)(2) of 18 USC. |
| | **UK** | S. 2, *Bribery Act 2010.* |
| | **Canada** | S. 122, *Criminal Code.* |
| **(5) Illicit Enrichment**<br>UNCAC<br>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.<br><br>OECD<br>No comparable provision. | **US** | No comparable provision. |
| | **UK** | No comparable provision. |
| | **Canada** | No comparable provision. |
| **(6) Private Sector Bribery**<br>UNCAC<br>Article 21 – bribery in the private sector for both the person making the bribe and the person receiving the bribe.<br><br>OECD<br>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 *Criminal Code* 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 *Criminal Code* might also be applied. |

| UNCAC & OECD OFFENCES | US, UK & CANADIAN EQUIVALENTS | |
|---|---|---|
| **(7) Embezzlement in the Private Sector**<br>UNCAC<br>Article 22 – embezzlement of property in the private sector.<br><br>OECD<br>No comparable provision. | **US** | Could be prosecuted under the general offense of theft/embezzlement. |
| | **UK** | S. 1 and related provisions, *Theft Act, 1968*, as amended. |
| | **Canada** | Theft under s. 322 of the *Criminal Code* or fraud under s. 380 of the *Criminal Code.* |
| **(8) Concealing Bribery Property**<br>UNCAC<br>Article 24 – the concealment or continued retention of property knowing such property is the result of an UNCAC offence.<br><br>OECD<br>No comparable provision. | **US** | §1962, 18 USC. |
| | **UK** | Ss. 329 and 340, *Proceeds of Crime Act, 2002.* |
| | **Canada** | Ss. 341 (concealing) and 354 (possessing), *Criminal Code.* |

CHAPTER 3

# JURISDICTION, CORPORATE LIABILITY, ACCOMPLICES, AND INCHOATE OFFENCES

GERRY FERGUSON AND RACHAEL CARLSON

## CONTENTS



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]

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[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

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[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.

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[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/cri/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

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[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

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[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]

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[18] *Ibid* at 312. See also Austin L Parrish, "*Kiobel,* Unilaterialism 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 Vanae?* 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

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[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

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[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.

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[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

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and the Big Picture" (28 August 2018), online (blog): *FCPA Professor* <https://fcpaprofessor.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://fcpaprofessor.com/second-circuit-rejects-dojs-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://fcpaprofessor.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 l: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]

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[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]

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[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.allenovery.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://fcpablog.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 Stribopolous, *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

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[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 Wrbka, 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

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[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

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[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

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[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

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[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]

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[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

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[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) <u>*Successor Liability:*</u> 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.

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[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

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> 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:

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[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

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[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.allenovery.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.allenovery.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.

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[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

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[155] "Issues To Consider From The World Acceptance Corp. Enforcement Action" (10 August 2020), online (blog): *FCPA Professor* <https://fcpaprofessor.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]

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[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://fcpablog.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

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[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:

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[166] Andrew Ashworth, *Principles of Criminal Law*, 9th ed (Oxford University Press, 2019) at 170.

[167] Bryan Cave Leighton Paiser, *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 Nattras*, [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 2007[170] 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

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> 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 Nattrass*. 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]

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[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

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[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

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[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

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[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

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[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

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[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]

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[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]

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[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

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[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:

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[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

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[229] Bill Steinman, "2020 has been a crazy year for the FCPA too" (22 July 2020), online (blog): *FCPA Blog* <https://fcpablog.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

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[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

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[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 Zerbes, "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

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[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]

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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]

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[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

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[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

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[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

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[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).

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[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/oncj/doc/2012/2012oncj710/2012oncj710.pdf>.
[308] *R v Hamilton*, [2005] 2 SCR 432.

CHAPTER 4

# MONEY LAUNDERING

PETER GERMAN AND GERRY FERGUSON

## CONTENTS



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]

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[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-

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[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

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[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>.

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 disbursals upon instructions from complicit PEPs. These disbursals 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 Arnoldo 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. Alfanso 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 of or 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 stockbrokering 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 Eight[54] 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.

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[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 bodies[63] 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)>].

[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)>].

*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)>.
[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 website[75] 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

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[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 Treasury[79] 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

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[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.

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[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:

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[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

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[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 US 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

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[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.

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[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

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[134] Edward Powles, "All that Glisters 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

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[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 Risks[143]

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.

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[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

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[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 counties 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*:

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[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.

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[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.

## CONTENTS



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

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[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 extradition[8] …

***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]

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[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 Team[28] investigates and litigates to recover proceeds of foreign official corruption. The US manages the Consolidated Assets Tracking System[29]—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.

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[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]

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[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>.
[36] See Richard L Cassin, "FinCEN Issues New AML Enforcement Guidance" (28 August 2020), online (blog): *The FCPA Blog* <https://fcpablog.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.

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*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]

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[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:

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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

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[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.

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[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.

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[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 c Ben Aïssa*, 2019 QCCS 465 (CanLII), <https://canlii.ca/t/hxm23> and *Groupe SNC-Lavalin inc c 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]

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[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 Alamieyeseigha*, [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 Pertambangan 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

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[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 Petrobras[94] 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]

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[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*:

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[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

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[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.

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[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]

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[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&treatynum=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&treatynum=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]

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[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

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[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:

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[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 in-formation 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]

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[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 assistance[151]…. 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.

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[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.

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[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 instruments[165] 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 scan[169] 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

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[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]

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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

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[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 agreements[188]]….
- 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#IDAJBVLC>. 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* case[192] 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 assets[195] (during a criminal investigation) and having obtained a criminal conviction in the foreign state, enforce its own recovery order in England and Wales[196]; 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

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[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 MLACM.
- 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

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[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

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[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?

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[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

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[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

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[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, Maíra 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/lbrr/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 peculation [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

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[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.

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[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://fcpablog.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]

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[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 Andreasen 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] Maíra 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 Maíra 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]

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<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://fcpablog.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]

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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

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Crime" (7 May 2018), online (blog): *The FCPA Blog* <https://fcpablog.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 Rule[287] 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

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[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

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[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://fcpablog.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 corporations[295] 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.

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[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]

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[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,

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*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-Terracino, "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

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[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).

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[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

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[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.

## CONTENTS



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

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[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;

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[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 Canadian[13] 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).

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[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

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[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.

- 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.

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.

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 Extradition[28]

**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.

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[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;

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[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

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[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

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[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/dsdsm/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. Giamattei 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 Giammettei.[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]

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[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 Guerroro, "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

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[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/archivee-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

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[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.

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[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.

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[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

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[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 SFOs 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

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[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

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[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>.

[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. <u>Investigating Past Offences</u>

The investigation normally commences with a report of corruption and the normal criminal investigation technique should apply. Much will depend on the information provided by the informant and from there, the case should be developed to obtain direct, corroborative and circumstantial evidence. The success of such investigations relies on the meticulous approach taken by the investigators to ensure that "no stone is left unturned". Areas of investigation can include detailed checking of the related bank accounts and company ledgers, obtaining information from various witnesses and sources to corroborate any meetings or corrupt transaction, etc. At the initial stage, the investigation should be covert and kept confidential. If there is no evidence discovered in this stage, the investigation should normally be curtailed and the suspects should not be interviewed. This would protect the suspects, who are often public servants, from undue harassment. When there is a reasonable suspicion or

evidence discovered in the covert stage, the investigation can enter its overt stage. Action can then be taken to interview the suspects to seek their explanation and if appropriate, the suspects' home and office can be searched for further evidence. Normally further follow-up investigation is necessary to check the suspects explanation or to go through the money trails as a result of evidence found during searches. The investigation is usually time-consuming.

2. Investigating Current Corruption Offences

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

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

**G. Investigation Techniques**

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

- Ability to identify and trace persons, companies and properties
- Interview technique
- Document examination
- Financial Investigation
- Conducting a search & arrest operation
- Surveillance and observation
- Acting as undercover agent
- Handling informers

- Conducting an entrapment operation

**H. Professional Investigative Support**

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

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

**I. Financial Investigation Section**

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

- **Witness Protection Section**

  ICAC has experienced cases where crucial witnesses were compromised, with one even murdered, before giving evidence. There should be a comprehensive system to protect crucial witnesses, including 24-hour

protection, safe housing, new identity and overseas relocation. Some of these measures require legislative backing.

**J. Conclusion and Observation**

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

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

END OF EXCERPT

## 4.5 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.

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[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 corruption[143] 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]

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[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 courts[149] 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-Frankfurter[154] 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]

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*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

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[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

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[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]

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[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

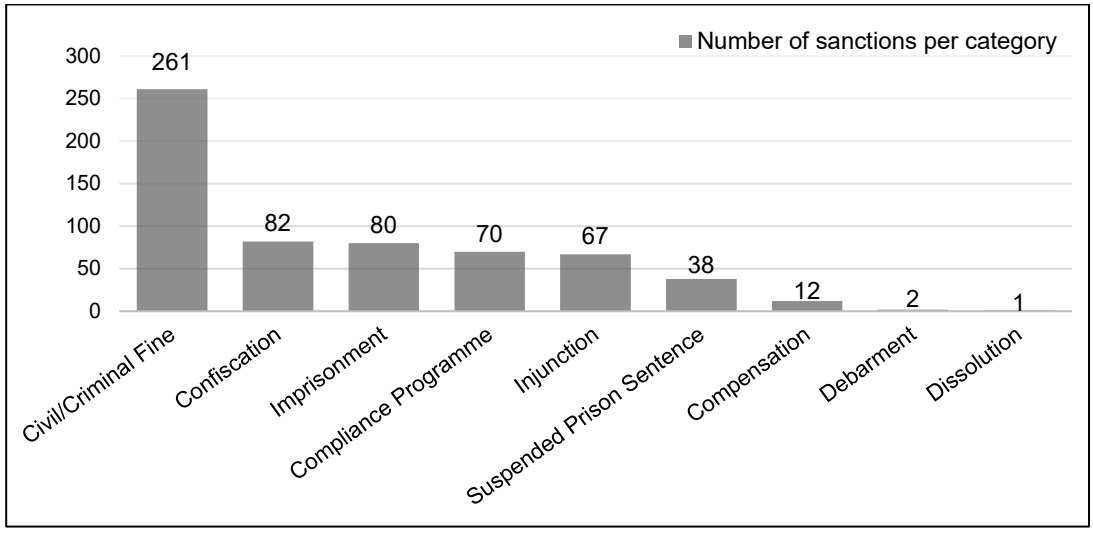
The summary of data in Figure 6.1 is based on 427 foreign bribery convictions and sanctions imposed on 263 individuals and 164 collective entities.[193]

- 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.

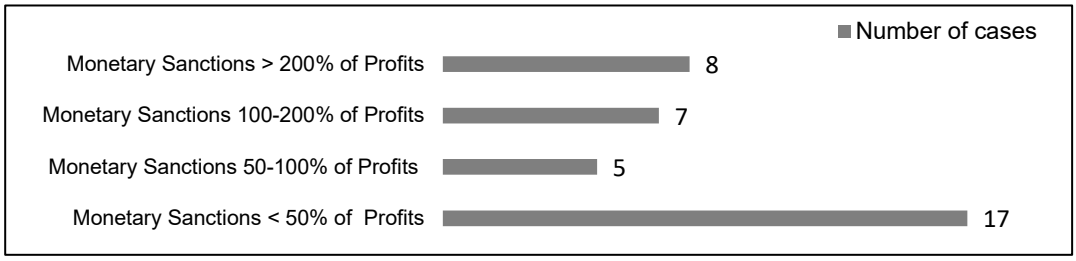
Not listed in Figure 6.1 are the substantial costs of foreign bribery enforcement actions that either cannot be quantified in monetary terms or do not constitute official sanctions, such as:

- 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]

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[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]

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[203] "s 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] "s 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] "s 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.

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[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.

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[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]

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[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

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[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

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[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

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[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

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[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]

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[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);

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[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]

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[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 & Alldridge, *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]

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[266] *Joint Prosecution Guidance*, *supra* note 248 at 1.
[267] Alldridge, *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

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[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:

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[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;

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[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;

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[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

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[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 venture[334] 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

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[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://fcpablog.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

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[344] "s 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

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[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://fcpaprofessor.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>.

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.

# GLOBAL CORRUPTION

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

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## CHAPTER 7

# CRIMINAL AND CIVIL SANCTIONS AND REMEDIES

SEAN BOYLE AND GERRY FERGUSON*

* The authors thank Connor Bilfeld for authoring Section 8 and Dmytro Galagan for authoring Section 13. The authors also wish to thank Patrick Palmer and Alison Burns, articling students at Blakes, for their invaluable assistance in updating this chapter. Parts of this chapter were drawn from the 2018 edition, which was co-written by Derek Spencer.

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

# PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

## 1. INTRODUCTION

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

## 2. UNCAC

The United Nations Convention Against Corruption (UNCAC) has very little in the way of requirements or specific guidance for sanctions and sentencing in corruption cases and does not set out any minimum or maximum sentences for corruption offences.[1] Article 30 contains the main provisions with respect to sanctions. The Article includes mandatory and non-mandatory provisions.

The mandatory provisions require each State Party to:

- Provide for sanctions that take into account the gravity of the offence (Article 30(1));
- Provide for an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting, and adjudicating offense established in accordance with the UNCAC (Article 30(2));
- Take appropriate measures to ensure that decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings (Article 30(4)); and
- Take into account the gravity of the offence concerned when considering the eventuality of early release or parole of persons convicted of such offences (Article 30(5)).

The non-mandatory provisions require each State Party to:

- Consider establishing procedures through which a public official accused of an offence established in accordance with the UNCAC may, where appropriate, be removed, suspended or reassigned by the appropriate authority (Article 30(6));
- Consider establishing procedures for the disqualification for a period of time determined by domestic law of persons convicted of offences established in

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

accordance with the UNCAC from (a) holding public office and (b) holding office in an enterprise owned in whole or in part by the State (Article 30(7)); and

- Endeavour to promote the reintegration into society of persons convicted for offences established pursuant to the UNCAC (Article 30(10)).

Additional guidance is provided in Articles 12(1), 26(4), 35, and 37(2).

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

Article 26(4) requires each State Party to "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."

Article 35 requires each State Party to take such measures as may be necessary 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.

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

## 3. OECD CONVENTION

Like the UNCAC, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)[2] does not stipulate specific penalties but sets out general guidance with respect to sanctions and sentencing for bribery of foreign public officials. Article 3 of the OECD Convention comprises the main provisions on sanctions.

Paragraph 1 of Article 3 requires that bribery of foreign officials "shall be punishable by effective, proportionate and dissuasive criminal penalties" comparable to the penalties for corruption of domestic officials. Article 8(2) has a similar penalty requirement for books and records offences.

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

[2] 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/antibribery/oecdantibriberyconvention.htm>.

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

Paragraph 3 of Article 3 requires each State Party to take necessary steps for seizure and confiscation of the proceeds of bribery.

Besides those mandatory provisions, paragraph 4 requires each State Party to "consider" imposing additional civil or administrative sanctions for the bribery of a foreign public official.

# 4. US SENTENCING

Bribery of US officials is criminalized under both state and federal criminal law. This book only deals with corruption offenses involving US federal officials under the US *Code*[3] and foreign public officials under the *Foreign Corrupt Practices Act* (*FCPA*).[4] Sentences for offenders under these laws are guided by the US Sentencing Commission's *Guidelines Manual* (*Guidelines*).[5]

## 4.1 Federal Guidelines

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

### 4.1.1 Offense Seriousness

In the *Guidelines*, each offense is assigned a "base level" of offense seriousness and that base level will then be increased or decreased depending on the existence of specified aggravating or mitigating circumstances. For example, for offering, giving, soliciting or receiving a bribe,

[3] 18 USC.

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

[5] US, United States Sentencing Commission, *Guidelines Manual* (2018) [USSG (2018)], online (pdf): <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>.

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

the offense base level is 12. If the offender is a public official, the base level is 14 and if the offense involved more than one bribe, the offense level rises to 16.

#### 4.1.2 Criminal History of the Offender

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

#### 4.1.3 Zones

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

[7] As stated in the USSG (2018), *supra* note 5 at § 4A1.2(a)(1), **"**[t]he term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense" and § 4A1.2(a)(3) "[a] conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence." Certain offenses are excluded from calculation, including offenses for which the sentence was imposed more than ten years prior to the instant offense (or five years if the prior offense was committed prior to the offender's eighteenth birthday) and certain minor offenses such as hitchhiking and public intoxication. The offender can receive a maximum of four points for sentences that do not result in incarceration for at least 60 days, whereas two points are given for each prior sentence of at least 60 days and three points for each prior sentence exceeding one year and one month.

[8] For a full description of the Criminal History and Criminal Livelihood score, see the USSG (2018), *supra* note 5 at c 4.

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

**Table 7.1** US Sentencing Table for Imprisonment[10]

**SENTENCING TABLE**
**(in months of imprisonment)**

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

[10] USSG (2018), *supra* note 5.

## 4.2 Procedure and Guiding Principles

The sentencing of a criminal offender involves three steps, which has been explained by US District Judge John Adams:

> Criminal sentencing is often described as a three-step process. A district court must begin the process by calculating the advisory guideline range suggested by the United States Sentencing Commission. *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) ("The sentencing judge … will normally begin by considering the presentence report and its interpretation of the Guidelines."). In so doing, the Court must determine the offense level for the crimes for which the defendant has been convicted and the defendant's criminal history. *See United States v. Boyd*, No. 3:07-CR-3, 2008 WL 4963198, at *14-16 (E.D.Tenn. Nov. 18, 2008).
>
> Next, the Court must determine whether a variance or departure from the advisory guideline range would be appropriate. *United States v. Collington*, 461 F.3d 805, 807 (6th Cir. 2006).
>
> Finally, a sentencing court must independently evaluate each of the factors in 18 U.S.C. § 3553(a), which details the considerations that a district court must weigh before sentencing a criminal defendant. Although the Guidelines form a starting point in the district court's analysis under 18 U.S.C. § 3553(a), a district court may not presume that the sentence suggested by the Guidelines is appropriate for an individual criminal defendant. A district court may hear arguments by prosecution or defense that the Guidelines sentence should not apply. In this way, a sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing.[11]

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

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

[11] *United States of America v Bernard K Watkins*, 2010 US Dist LEXIS 90133 (ND Ohio 2010).

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines [issued by the Sentencing Commission]—

…

(5) any pertinent policy statement [issued by the Sentencing Commission]—

…

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.[12]

## 4.3 Specific Corruption Related Guidelines

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

### 4.3.1 Seriousness of Offense

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

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

[12] 18 USC § 3553.

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.[13]

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

a) the value of the payment;

b) the benefit received or to be received in return for the payment;

c) value of anything obtained or to be obtained by a public official or others acting with a public official; or

d) the loss to the government from the offense.

Table 7.2 is a representation of how the offense level increases are calculated.

[13] USSG (2018), *supra* note 5 at § 2C1.1(b).

**Table 7.2** Specific Offense Characteristics[14]

| | LOSS (APPLY THE GREATEST) | INCREASE IN LEVEL |
|---|---|---|
| (A) | $6,500 or less | no increase |
| (B) | More than $6,500 | add **2** |
| (C) | More than $15,000 | add **4** |
| (D) | More than $40,000 | add **6** |
| (E) | More than $95,000 | add **8** |
| (F) | More than $150,000 | add **10** |
| (G) | More than $250,000 | add **12** |
| (H) | More than $550,000 | add **14** |
| (I) | More than $1,500,000 | add **16** |
| (J) | More than $3,500,000 | add **18** |
| (K) | More than $9,500,000 | add **20** |
| (L) | More than $25,000,000 | add **22** |
| (M) | More than $65,000,000 | add **24** |
| (N) | More than $150,000,000 | add **26** |
| (O) | More than $250,000,000 | add **28** |
| (P) | More than $550,000,000 | add **30** |

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

Using the greatest of the four specified measures can lead to large increases in offense level.

In *United States of America v Jeffery Edwards*,[15] an asbestos inspector, Jeffrey Edwards, was appealing his sentence of 33 months in prison for bribery and extortion. Edwards issued a permit to a contracting company to conduct asbestos abatement. He told the company that he would allow them to use a less costly abatement procedure than he believed was required by the applicable regulations if they paid him $10,000. The FBI videotaped this exchange, and he was subsequently arrested and convicted. Before the District Court, the parties agreed that § 2C1.1 of the *Guidelines* applied but disagreed on the amount of level enhancement. Edwards argued the Court should consider the value of the bribe, $10,000, and apply a two-level increase. The government argued that the less costly procedure made a difference of $200,000, corresponding to a ten-level increase. The Court found the cost difference to be $100,000 and increased the offense level by eight, making the guideline range 30-37 months. The 33-month sentence imposed by the District Court under this range was upheld on appeal.

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

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

*United States of America v William L Courtright*[18] involved the former mayor of Scranton, Pennsylvania. After a multi-year undercover investigation by the FBI, in July 2019 Courtright resigned as Mayor of Scranton and pleaded guilty to three felony public

[15] *United States of America v Jeffery Edwards*, 378 US App DC 86 (DC Cir 2007).
[16] *United States of America v Quincy Richard Sr*, 775 F (3d) 287 (5th Cir 2014).
[17] *United States of America v Charles Gary-Don Abbey*, 560 F (3d) 513 (6th Cir 2009).
[18] *United States of America v William L Courtright*, 460 F Supp (3d) 545 (MD Pa 2020).

corruption offences resulting in a multi-year conspiracy to take bribes from vendors doing business with the city.[19] Before sentencing, the final *Presentence Investigation Report* (*PSR*) prepared by the United States Probation Office determined that the base offence level for Courtright under the sentencing guidelines, as a public official, was fourteen. It then found that the following enhancements were applicable: (1) a two-level enhancement because there were multiple bribes involved; (2) a four-level enhancement because Courtright was in a "high-level decision-making or sensitive position;" (3) a four-level enhancement arising from Courtright's role as a leader or organizer of criminal activity involving five or more participants or which was otherwise extensive. Finally, although Courtright had only collected around $50,000 in cash payments (Courtright argued it was closer to $18,000), the *PSR* applied a sixteen-level enhancement because the "benefit received" in exchange for illegal payments to Courtright was between $1,500,000 and $3,500,000. Courtright's primary challenge was to this last enhancement. The offender was ultimately unsuccessful in a later decision, which determined that the sixteen-level enhancement had been correctly applied.[20] On October 2, 2020, Courtright was sentenced to seven years' imprisonment and a $25,000 fine,[21] significantly less than the recommended sentencing guideline range of 292-365 months imprisonment.

### 4.3.2 Positions of Elevated Trust

In cases of public corruption, the position of power and degree of breach of trust is considered in sentencing. As stated, under § 2C1.1 of the *Guidelines*, a four-level increase is given if the offense involves an elected public official or high-level decision-making or sensitive position, and if the resulting offense level is less than 18, it is to be increased to level 18.

In *United States of America v Bridget McCafferty*,[22] McCafferty, a former judge, was convicted of 10 counts of making false statements to FBI agents arising out of a corruption investigation of another public official. The offense level was 6, with its corresponding guideline range for sentencing from 0-6 months. The district court applied a 5-level adjustment moving the range to 8-14 months and sentenced McCafferty to 14 months. The upward departure and ultimate sentence were both upheld on appeal, with the Court stating: "For a sitting judge to knowingly lie to FBI agents after she had unethically steered negotiations in a case to benefit her associates is a shock to our system of justice and the rule of law."[23]

In one of the highest profile corruption cases in the last decade, former Illinois Governor Rod Blagojevich was sentenced to 14 years in prison following 18 corruption convictions,

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[19] The United States Attorney's Office, Middle District of Pennsylvania, News Release, "Scranton Mayor Pleads Guilty to Corruption Charges" (2 July 2019), online: *Department of Justice* <https://www.justice.gov/usao-mdpa/pr/scranton-mayor-pleads-guilty-corruption-charges>.

[20] *United States of America v William L Courtright*, 2020 US Dist LEXIS 161908 (MD Pa 2020).

[21] The United States Attorney's Office, Middle District of Pennsylvania, News Release, "Former Scranton Mayor Sentenced to Seven Years' Imprisonment On Public Corruption Charges" (2 October 2020), online: *Department of Justice* <https://www.justice.gov/usao-mdpa/pr/former-scranton-mayor-sentenced-seven-years-imprisonment-public-corruption-charges>.

[22] *United States of America v Bridget McCafferty*, 2012 US App LEXIS 11247 (6th Cir 2012).

[23] *Ibid* at VIII C.

most notably his attempt to "sell or trade" the United States Senate seat that had become vacant following Barack Obama's election in 2008. Other charges included racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion and making false statements to federal agents.[24] In sentencing Blagojevich to 14 years in prison, Judge James Zagel stated "[t]he harm here is not measured in the value of property or money. The harm is the erosion of public trust in government."[25] On appeal, the 7th Circuit Court of Appeals vacated five of the convictions on a technicality and ordered a re-sentencing; further leave to the Supreme Court was denied. Despite the reduced number of convictions, the 14-year sentence was upheld at a re-sentencing in August 2016. Blagojevich's lawyer further appealed the sentence,[26] but on April 21, 2017 the 7th Circuit Court of Appeals upheld the original sentence.[27]

*United States of America v Richard Renzi* involved the trial and sentencing of a former Arizona Congressman in respect to a $200,000 bribe payment (resulting in a 10-level enhancement).[28] Renzi was sentenced to 36 months imprisonment and his friend and business partner was sentenced to 18 months imprisonment. In affirming the sentences, the Court noted the substantial power granted to Renzi, stating:

> The Constitution and our citizenry entrust Congressmen with immense power. Former Congressman Renzi abused the trust of this Nation, and for doing so, he was convicted by a jury of his peers. After careful consideration of the evidence and legal arguments, we affirm the convictions and sentences of both Renzi and his friend and business partner, Sandlin.[29]

*United States of America v Richard McDonough*[30] involved the trial and sentencing of Richard McDonough and Salvatore DiMasi, the former Speaker of the Massachusetts House of Representatives, for bribes in relation to business transactions. DiMasi received a sentence of 96 months (8 years) imprisonment (the guideline range was 235 to 293 months) and McDonough was sentenced to 84 months (7 years) imprisonment (the guideline range was 188 to 235 months). The guideline range for DiMasi and McDonough was identical except for the enhancement given to DiMasi as a public official.

*United States of America v Joseph Paulus* involved the sentencing of Paulus, a former district attorney who accepted 22 bribes over the course of a two-year period for agreeing to

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[24] For the full indictment, see: *United States of America v Rod Blagojevich et al*, Indictment No 08 CR 888 (ND Ill 2008), online (pdf): <https://www.justice.gov/archive/usao/iln/chicago/2009/pr0402_01a.pdf>.
[25] Monica Davey, "Blagojevich Sentenced to 14 Years in Prison", *The New York Times* (7 December 2011), online: <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html?_r=0>.
[26] "Ex-Gov Rob Blagojevich to Appeal 14-Year Prison Sentence", *Chicago Tribune* (23 August 2016), online: <http://www.chicagotribune.com/news/local/breaking/ct-rod-blagojevich-appeal-prison-sentence-20160823-story.html>.
[27] Jason Meisner, "Ex-Gov Rob Blagojevich Loses Appeal as Judges Quickly Uphold 14-Year Prison Term", *Chicago Tribune* (21 April 2017), online: <https://www.chicagotribune.com/news/breaking/ct-rod-blagojevich-appeal-20170421-story.html>.
[28] *United States of America v Richard G Renzi*, 769 F (3d) 731 (9th Cir 2014).
[29] *Ibid* at IX.
[30] *United States of America v Richard McDonough*, 727 F (3d) 143 (1st Cir 2013).

favourable treatment of a defence lawyer's clients.[31] Paulus was sentenced to 58 months imprisonment (nearly 5 years), an upward departure from the guideline range of 27 to 33 months. The court justified their upward departure based on the nature of the trust breached, the number of bribes over a substantial period of time and the difficulty in detecting corruption. The Court stated:

> Bribery, by its very nature, is a difficult crime to detect. Like prostitution, it occurs only between consenting parties both of whom have a strong interest is [*sic*] concealing their actions. And often, when it involves public corruption as in this case, one of the parties occupies a position of public trust that makes him, or her, an unlikely suspect. In light of these facts, it is unusual to uncover even one instance of bribery by a public official, let alone twenty-two. This fact takes the case outside of the heartland.… That there was interference with a government function to an unusual degree and a loss of public confidence in government as a result of his offense are facts that this court has found. But the question of how to measure such impact and assign a numeric adjustment in the applicable offense level under the Guidelines is a matter of judgment. Such matters cannot be quantified, or at least easily quantified.… For these reasons, and for the reasons set forth on the record in court, the defendant is sentenced to a term of fifty-eight months.[32]

*United States of America v Robert F McDonnell*,[33] dealt with an appeal by McDonnell, the former Governor of Virginia, of his convictions for conspiracy to commit honest-services wire fraud, committing honest services wire fraud, and obtaining property under colour of official right. McDonnell accepted $175,000 in loans, gifts and other benefits from Jonnie Williams (chief executive officer of Star Scientific) while in office. Williams was invited to meetings and introduced to state employees. Williams wanted to have state universities evaluate a nutritional supplement produced by a company he owned. A successful conviction required proof that McDonnell committed (or agreed to commit) an "official act" in exchange for loans and gifts. The Supreme Court of the United States overturned McDonnell's convictions, confirming that not every action taken by a public official while in office will qualify as an "official act" for the purposes of 18 USC § 201:

> An "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." That question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition of "official act".… Because a typical meeting, call, or event is not of the same stripe as a lawsuit before a

[31] *United States of America v Joseph Paulus*, 331 F Supp (2d) 727 (ED Wis 2004).
[32] *Ibid* at paras 16, 24-25, 32.
[33] *United States of America v Robert F McDonnell*, 136 S Ct 2355 (2016).

> court, a determination before an agency, or a hearing before a committee, it does not count as a "question" or "matter" under §201(a)(3).[34]

The Supreme Court of the United States noted that, at trial, several of McDonnell's subordinates testified that he had asked them to attend a meeting but not that anything more was expected. If that was truly what McDonnell had agreed to do when he accepted the loans and gifts, then the necessary decision or action was not present. McDonnell's conviction was vacated.

*United States of America v David Johnson and Reginald T Walton*[35] involved an appeal of the sentences of David Johnson and Reginald T. Walton. Walton, Johnson and others orchestrated a scheme which allowed them to pocket money while selling the city of Indianapolis' properties through a non-profit loophole. The two were indicted and found guilty of wire fraud, honest services wire fraud and conspiracy to engage in money laundering. Walton was also convicted of receiving bribes. Walton was sentenced to 108 months in prison, below the guideline range of 135-168 months. Johnson was sentenced to 66 months, which was below the guideline range of 87-108 months. On appeal, among other things, they challenged the sentencing enhancement they received because Walton was a public official in a high-level decision-making position. The Court found no clear error in the district court's decision to apply the enhancement to both sentences. Walton, as director of the Land Bank, was in a sensitive position. He had "inordinate" discretion over transferring Land Bank properties. "Walton did not have overt influence over his superiors, but his resolutions were scarcely scrutinized, giving him de facto control over how and to whom Land Bank Properties were sold."[36] The sentences imposed by the district court were upheld.

*United States of America v Aniello Palmieri*,[37] dealt with an appeal by Aniello Palmieri of his sentence after he pleaded guilty to mail fraud. Palmieri was Director of the Division of Facilities Management for Union Country, New Jersey, and assisted in selecting vendors for building materials, tools, and other supplies. From 2006-2010, Palmieri participated in kickback schemes, verified false and inflated invoices and received a portion of vendors' wrongful profits in return. On appeal, in upholding a four-level enhancement imposed by the District Court for being a public official in a high-level decision-making or sensitive position, the Court noted that Palmieri was a countywide director earning over six figures. Palmieri could not act officially on the County's behalf, but "he exercised substantial influence through recommendations to his superiors."[38]

In *United States of America v Raushi J Conrad*,[39] the offender appealed the convictions for acceptance of bribes by a public official and conspiracy to commit bribery, as well as the sentence of 48 months in prison. Conrad, while employed at the United States Department of Commerce, had accepted hundreds of thousands of dollars in payments and renovation

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[34] *Ibid* at paras 3-5.
[35] *United States of America v David Johnson and Reginald T Walton*, 874 F (3d) 990 (7th Cir 2017).
[36] *Ibid* at para 27.
[37] *United States of America v Aniello Palmieri*, 681 Fed Appx 130 (3rd Cir 2017).
[38] *Ibid* at I B.
[39] *United States of America v Raushi J Conrad*, 760 Fed Appx 199 (4th Cir 2019).

work at his home from a James Bedford. In return, he took official acts to steer government contracts to companies owned by Bedford. One of Conrad's arguments on appeal was that the District Court erred in applying the sentencing enhancement for public officials in high-level decision-making positions. Conrad felt that he did not hold a high-level decision-making position, had simply a mid-level position within the Commerce Department, and did not have direct decision-making authority. Unfortunately for Conrad, during the investigation he specifically told a special agent that the decision to hire Bedford's company was "his decision." The Court noted that "although Appellant did not have independent authority to award the contract, the record reflects that as the official leading the data migration project, Appellant's recommendation of who should win the contract was given substantial deference…. Indeed, there [was] no evidence in the record that any of the individuals who passed along Appellant's recommendation did any research into Bedford's Images whatsoever, and instead simply relied on Appellant's recommendation since he was the project manager for the data migration project."[40]

*United States of America v Felipe Zamora*[41] dealt with an appeal by Felipe Zamora of his sentence. In jail awaiting resentencing for past offences, Zamora began paying a guard to smuggle in contraband. When he was discovered, he pleaded guilty to bribing a public official. The district court applied a four-level enhancement because the offence involved a public official in a high-level decision-making or sensitive position. Zamora was sentenced to 60 months, which was above the guideline range whether a four-level enhancement was applied or not. On appeal, Zamora argued that a prison guard is a low-level official and that he did not hold a sensitive position, making the four-level enhancement inappropriate. The Court noted that the *Guidelines*' commentary, which generally binds on issues of interpretation, indicated that those who are "similarly situated" to law enforcement officers are in a sensitive position. The Court determined that prison guards are similarly situated to law enforcement officers for the purposes of § 2C1.1 and upheld Zamora's sentence.

While § 2C1.1 deals with one of the most common corruption offenses, there are other guidelines which apply to offenses which are either directly related to corruption or have an element of corruption if they are committed by a public official.[42]

## 4.4 Imposition of Fines

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

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section [not more than the greater of twice the value of the loss caused to another by the offense or twice the value of the defendant's gain from their criminal behaviour,

[40] *Ibid* at para 27.

[41] *United States of America v Felipe Zamora*, 982 F (3d) 1080 (7th Cir 2020).

[42] For the full guideline text of these provisions, see "Offense Conduct" in USSG (2018), *supra* note 5 at 50.

unless this option would unduly complicate or lengthen the sentencing process];

(3) for a felony, not more than $250,000.[43]

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

> (a) **Factors To Be Considered —** In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553 (a)—
>
> (1) the defendant's income, earning capacity, and financial resources;
>
> (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
>
> (3) any pecuniary loss inflicted upon others as a result of the offense;
>
> (4) whether restitution is ordered or made and the amount of such restitution;
>
> (5) the need to deprive the defendant of illegally obtained gains from the offense;
>
> (6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
>
> (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
>
> (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.
>
> (b) **Fine Not to Impair Ability to Make Restitution —** If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.[44]

[43] 18 USC § 3571 (Sentence of fine).

[44] 18 USC § 3572 (Imposition of sentence of fine and related matters), online: <http://www.law.cornell.edu/uscode/text/18/3572>.

For the offense of bribery of domestic public officials and witnesses in 18 USC § 201, fines are determined by the above sections or may be up to three times the value of the thing given or offered to the official. This applies to both the bribe payer and the bribe receiver, meaning the penalty for both may be based on the amount of the bribe. Rose-Ackerman notes that this symmetry in the maximum fine fails to reflect the "asymmetries in gains between bribe payers and recipients."[45] Under subsection (2) above, the bribe payer's gains may be taken into account; however, Rose-Ackerman argues that gains should be multiplied to reflect the probability of detection in order to effectively deter bribery.

## 4.5 Sentencing Corporations and Other Organizations

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

> First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.
>
> Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.
>
> Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.
>
> Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.
>
> These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will

[45] Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 Annual Rev L & Soc Sci 217 at 225.

> assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.[46]

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

> (a) The base fine is the greatest of:
>
> (1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or
>
> (2) the pecuniary gain to the organization from the offense;[47] or
>
> (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.[48]

The *Guidelines* set out a fine of $8,500 for an offense level of 6 or less, which gradually rises to $150 million for an offense level of 38 or more. Each offense level increases the amount of the fine. For example:

**Table 7.3** Offense Level Fine Table[49]

| **Offense Level** | **Amount** |
|---|---|
| **6** or less | $8,500 |
| **8** | $15,000 |
| **15** | $200,000 |
| **22** | $2,000,000 |
| **30** | $20,000,000 |
| **36** | $80,000,000 |
| **38** or more | $150,000,000 |

Fines are also multiplied based on the organization's culpability score. The culpability score is based on a number of factors including prior criminal history, involvement of high-level

[46] "Sentencing of Organizations, Introductory Commentary" in USSG (2018), *supra* note 5 at 509.
[47] Rose-Ackerman argues that fines should be a multiple of the gain to the organization, since the chances of being caught are far below 100%. See Rose-Ackerman, *supra* note 45 at 225.
[48] USSG (2018), *supra* note 5 at § 8C2.4.
[49] *Ibid* at § 8C2.4.

officials, whether the organization had a pre-existing compliance program, and voluntary disclosure and cooperation:

**Table 7.4** Minimum and Maximum Multipliers[50]

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

## 4.6 *FCPA* Sentencing

The *FCPA* sets out the criminal penalties for corruption offenses. All *FCPA* criminal offenses are prosecuted by the Department of Justice (DOJ). The *Resource Guide to the FCPA* (DJSEC *Resource Guide*), produced by the DOJ and the Securities Exchange Commission (SEC), sets out ten factors relevant in determining whether to seek indictment or an NPA, DPA or SEC civil settlement, and in determining the terms of those dispositions. The DJSEC *Resource Guide* repeatedly emphasizes that voluntary early disclosure of possible *FCPA* violations and

[50] *Ibid*, § 8C2.7**.** For a full description of the sentencing guidelines for organizations (including a discussion of restitution, effective compliance and ethics programs, determination of fines including departures from guideline fine ranges, organizational probation, and violations of probation), see *ibid.*

cooperation in the investigation of those violations will be key factors in obtaining more lenient treatment from the DOJ or SEC. Ten factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating pleas or other agreements:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's 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 offence, 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.[51]

The following excerpt from the DJSEC *Resource Guide* discusses penalties:[52]

[51] 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), at 51 online (pdf): <https://www.justice. gov/criminal-fraud/fcpa-resource-guide>.
[52] *Ibid* at 69-71.

BEGINNING OF EXCERPT

**What Are the Potential Consequences for Violations of the FCPA?**

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

**Criminal Penalties**

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

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

**U.S. Sentencing Guidelines**

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

The Guidelines provide different penalties for the different provisions of the FCPA. The initial offense level for violations of the anti-bribery provisions is determined under § 2C1.1, while violations of the accounting provisions are assessed under § 2B1.1. For individuals, the initial offense level is modified by factors set forth in Chapters 3, 4, and 5 of the Guidelines to identify a final offense level. This final offense level, combined with other factors, is used to determine whether the Guidelines would recommend that incarceration is appropriate, the length of any term of incarceration, and the appropriate amount of any fine. For corporations, the offense level is modified by factors particular to organizations as described in Chapter 8 to determine the applicable organizational penalty.… For violations of the accounting provisions assessed under § 2B1.1, the procedure is generally the same, except that the specific offense characteristics differ. For instance, for violations of the FCPA's accounting provisions, the offense level may be increased if a substantial part of the scheme occurred outside the United States or if the

defendant was an officer or director of a publicly traded company at the time of the offense. For companies, the offense level is calculated pursuant to §§ 2C1.1 or 2B1.1 in the same way as for an individual—by starting with the base offense level and increasing it as warranted by any applicable specific offense characteristics. The organizational guidelines found in Chapter 8, however, provide the structure for determining the final advisory guideline fine range for organizations.

…

**Civil Penalties**

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

For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to $21,410 per violation. Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to $21,410 per violation, which may not be paid by their employer or principal.

For violations of the accounting provisions in district court actions, SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the nature of the violation and potential risk to investors, ranging from $9,639 to $192,768 for an individual and $96,384 to $963,837 for a company. SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings. [footnotes omitted]

END OF EXCERPT

The size of penalties for *FCPA* cases has continued to increase. Eight of the ten largest penalties have been imposed since 2017. Harry Cassin lists the top ten largest combined DOJ and SEC penalties as of October 2020 in Table 7.5:

**Table 7.5** Top Ten Largest *FCPA* Penalties[53]

| **Company** | **Amount** | **Year** |
|---|---|---|
| Goldman Sachs | **$3.3 billion**<br>(DOJ - $2.3 billion)<br>(SEC - $1.0063 billion) | 2020 |
| Airbus SE | **$2.09 billion**<br>(DOJ – $2.09 billion) | 2020 |
| Petróleo Brasileiro S.A. | **$1.78 billion**<br>(DOJ - $853.2 million)<br>(SEC - $933.5 million) | 2018 |
| Telefonaktiebolaget LM Ericsson | **$1.06 billion**<br>(DOJ - $520 million)<br>(SEC - $540 million) | 2019 |
| Telia Company AB | **$1.01 billion**<br>(DOJ – $548.6 million)<br>(SEC – $457 million) | 2017 |
| MTS | **$850 million**<br>(DOJ - $750 million)<br>(SEC - $100 million) | 2019 |
| Siemens | **$800 million**<br>(DOJ - $450 million)<br>(SEC - $350 million) | 2008 |
| VimpelCom | **$795 million**<br>(DOJ - $230.1 million)<br>(SEC - $167.5 million)<br>(Dutch prosecutors – $397.5 million) | 2016 |
| Alstom | **$772 million**<br>(DOJ - $772 million) | 2014 |
| Société Générale S.A. | **$585 million**<br>(DOJ - $585 million) | 2018 |

[53] Harry Cassin, "Wall Street Bank Earns Top Spot on FCPA Blog Top Ten List" (26 October 2020), online (blog): *The FCPA Blog* <https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/>. The list remains the same as of May 2021: Harry Cassin, "What's New of the FCPA Top Ten List?" (26 May 2021), online (blog): *The FCPA Blog* <https://fcpablog.com/2021/05/26/whats-new-on-the-fcpa-top-ten-list/>. At the time of final editing (October 5, 2021), the list has not changed.

Several of these mega-corruption cases have also led to additional penalties imposed by foreign jurisdictions. The Airbus SE case, currently ranked as the second largest *FCPA* settlement, is one example. After four years of investigation, Airbus agreed to pay $4 billion in fines to settle a four-year corruption investigation that spanned the globe. From 2004 to 2016, Airbus had bribed public officials in a number of countries to buy its satellites and planes. In addition to penalties paid to the DOJ, Airbus agreed to pay €2.1 billion to French authorities, as well a €991 million to the UK's Serious Fraud Office, to settle charges of bribery. That said, the DOJ did agree to credit Airbus anything it paid to French authorities (up to a total of $1.8 billion).[54] Concurrent enforcement and carbon copy prosecutions are discussed in Chapter 6, Section 7.

## 4.7 Comments on *FCPA* Enforcement

Bribery under the *FCPA* differs from bribery under 18 USC § 201, as confirmed recently in *United States of America v Ng Lap Seng*.[55] Ng Lap Seng paid two UN ambassadors in excess of $1 million to secure a UN commitment to use his real estate development site for an annual conference. The defendant was convicted of paying and conspiring to pay bribes and gratuities in violation of 18 USC §§ 371, 666 and *FCPA* §§ 78dd-2, 78dd-3, along with related money laundering charges. The District Court sentenced Seng to serve concurrent 48-month prison terms on each of the six counts and had to forfeit $1.5 million along with paying a $1 million fine. Seng was also ordered to pay $302,977.20 in restitution to the UN. Seng appealed the conviction based, in part, on an argument that jury instructions as to both § 666 and the *FCPA* were deficient after *McDonnell*. Seng argued that *FCPA* bribery and § 666 bribery require proof of an official act satisfying the *McDonnell* standard. The United States Court of Appeals for the Second Circuit disagreed. It distinguished the decision in *McDonnell*, holding that the *FCPA*, unlike 18 USC § 201, does not require any kind of "official act."

It is also notable that *FCPA* enforcement typically takes a different form from enforcement under the US *Code*. Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) have become the dominant method for resolving *FCPA* enforcement actions, despite the fact that "such resolution vehicles are not subjected to any meaningful judicial scrutiny."[56] Almost all *FCPA* resolutions involve a DPA or NPA. Koehler states that "nearly all corporate FCPA enforcement actions in this new era are negotiated behind closed doors in the absence of meaningful judicial scrutiny."[57] With DPAs, the DOJ calculates the

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[54] Liz Alderman, "Airbus to Pay $4 Billion to Settle Corruption Inquiry", *The New York Times* (31 January 2020), online: <https://www.nytimes.com/2020/01/31/business/airbus-corruption-settlement.html#:~:text=Still%2C%20the%20Friday%20settlement%20clears,the%20French%20prosecutor%20said%20Friday>; Harry Cassin, "Airbus Pays $4 Billion to Settle Global Bribery and Trade Offenses" (31 January 2020), online (blog): *The FCPA Blog* <https://fcpablog.com/2020/01/31/airbus-pays-4-billion-to-settle-global-bribery-and-trade-offenses/>.

[55] *United States of America v NG Lap Seng*, 934 F (3d) 110 (2nd Cir 2019).

[56] Mike Koehler, *The Foreign Corrupt Practices Act Jurisprudence of Shira Scheindlin*, (2019) 69:3 Syracuse L Rev 543 at 550, online (pdf): <https://lawreview.syr.edu/wp-content/uploads/2020/01/L-Koehler-Article-Final-Draft.pdf>.

[57] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham; Northampton: Edward Elgar Publishing, 2014) at 195.

value of the benefit allegedly received in a non-transparent way, and when resolution is via an NPA, the calculation of the fine amount is not transparent.[58]

*Dylan Tokar v US Department of Justice*[59] evidences how difficult it can be to obtain a clear view of the larger picture when a DPA is used. Dylan Tokar, a reporter for an anti-corruption publication, sought records regarding the selection of corporate compliance monitors for fifteen corporations who entered into DPAs with the DOJ to resolve *FCPA* cases. After narrowing his request following discussions with the DOJ and even submitting a second FOIA request for any objection letters filed by the relevant corporations, Mr. Tokar still had not received any productions and filed a lawsuit. The DOJ eventually provided a table with the information sought in his first response and the letters he had requested in his second, but they contained redactions. The DOJ moved for summary judgement and Tokar cross-moved for summary judgment challenging the redactions. The Court found that Mr. Tokar was entitled not only to a table containing the information he had requested, but to the relevant documents themselves. It also determined that the redaction of names/related personal identifying information of individuals nominated but not selected to be monitors, as well as their firms when those firms were small, was impermissible under either FOIA exemption 6 or 7(c). The Court held:

> The Court concludes that while DOJ has demonstrated that these individuals have more than a *de minimis* privacy interest in their anonymity, the public interest in learning these individuals' identities outweighs that privacy interest, and therefore, the individuals' names and firms must be released.[60]

In its analysis, the Court commented:

> It is true, as DOJ points out, that Mr. Tokar would have had a much easier time learning about the inner workings of the monitor selection process if DOJ had simply responded to his initial FOIA request, rather than encouraging him to narrow its scope. However, the D.C. Circuit has recognized that "a relevant public interest could exist where [a list of names] might provide leads for an investigative reporter seeking to ferret out what government is up to"…. This sort of aggregating, for the purpose of discovering what the government is up to, is precisely what Mr. Tokar intends to do here. Because Mr. Tokar has demonstrated that the release of even this small amount of information will serve the public interest, to an extent that outweighs the candidates for these lucrative positions' interest in keeping their identities secret, the Court finds the unselected candidates' names cannot be properly withheld pursuant to Exemption 6.[61]

In 2016 the DOJ introduced another form of enforcement under the *FCPA*, declination with disgorgement letter agreements. Under these agreements, the resolving company agrees

[58] *Ibid* at 183.
[59] *Dylan Tokar v US Department of Justice*, 304 F Supp (3d) 81 (D DC 2018).
[60] *Ibid* at para 25.
[61] *Ibid* at paras 31-33.

that they will disgorge money to the DOJ and in exchange, the DOJ agrees to drop its investigation of the alleged *FCPA* violations.[62] While the introduction of such declination agreements began as a pilot program, in November 2017, the DOJ announced it would add a revised *FCPA* Corporate Enforcement Policy to the US Attorney's Manual that would codify and expand on the pilot program.[63] Under this policy, if a company voluntarily self-discloses misconduct in an *FCPA* matter, fully cooperates, and remediates in a timely and appropriate manner, the 'presumption' is that the company will receive a declination, unless aggravating circumstances respecting the nature of the offence or offender come to light. The policy, updated in November 2019, clarifies what companies need to disclose and when. Among other changes, the policy now requires that a company disclose "all relevant facts known to it *at the time of the disclosure*,"[64] recognizing that a company may not know all relevant facts when it first discloses.

Koehler suggests these declinations make "the chance of judicial scrutiny of FCPA enforcement theories … even more remote." Namely, he expresses concern that such agreements are informal, and "are even more bare-bones and replete with legal conclusions compared to NPAs and DPAs as the substantive allegations are often just one paragraph."[65]

Despite these concerns, the DOJ continues to make use of declinations. On September 19, 2019, the DOJ declined to prosecute Quad/Graphics Inc. (Quad) for violations of §§ 78dd-l, *et seq*, of the *FCPA* for bribery committed by employees of Quad's subsidiaries in China and Peru. From 2011 until January 2016, Quad's Peruvian subsidiary paid or promised over $1,000,000 to third party intermediaries in order to bribe government officials to secure printing contracts and minimize penalty payments. From 2010 to 2015, Quad's subsidiary in China also paid bribes to state-owned entities to obtain printing business. The DOJ declined to prosecute based on Quad's prompt and voluntary self-disclosure, its thorough investigation, its cooperation, the nature and seriousness of the offence, Quad's lack of prior criminal history, its full remediation, including terminating the individuals involved and enhancing its compliance program, and Quad's termination of its relationship with the relevant third parties in Latin America and China. Finally, Quad had agreed to disgorge all gains to the US Securities and Exchange Commission.[66]

In August 2020, the DOJ declined to prosecute World Acceptance Corporation (World) for violations of §§ 78dd-l, *et seq*, of the *FCPA* related to bribery committed by World's employees and subsidiaries in Mexico. From 2010 until 2017, World's subsidiary paid over $4,000,000 to an intermediary to bribe Mexican union and government officials to obtain

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[62] Koehler, *supra* note 56 at 550.

[63] "New FCPA Enforcement Policy Provides Additional Certainty, but Risk Remains" (March 2018), online: *Norton Rose Fulbright* <https://www.nortonrosefulbright.com/en/knowledge/publications/70aea4c1/new-fcpa-enforcement-policy-provides-additional-certainty-but-risks-remain>.

[64] "DOJ Updates FCPA Corporate Enforcement Policy" (25 November 2019), online: *Ropes & Gray* <https://www.ropesgray.com/en/newsroom/alerts/2019/11/DOJ-Updates-FCPA-Corporate-Enforcement-Policy>.

[65] Koehler, *supra* note 56 at 550.

[66] Declination Letter from US Department of Justice Criminal Division Re Quad/Graphics Inc (19 September 2019), online (pdf): <https://www.justice.gov/criminal-fraud/file/1205341/download>.

contracts that allowed World to make loans to union members. Loan repayments came directly from the unions, which withheld the amount from paychecks of union members. In deciding not to prosecute, the DOJ took into account a number of factors: World's prompt and voluntary self-disclosure, its full and proactive cooperation, the nature and seriousness of the offence, World's full remediation, including additional training added to its compliance program, the fact that World discontinued relationships with the Mexican third parties, and the fact that World had agreed to disgorge to the US Securities and Exchange Commission the full amount of its gains.[67]

# 5. UK SENTENCING

## 5.1 General Principles

Sentencing in the UK recently went through significant changes aimed at consolidating all sentencing law into a single piece of legislation, the outcome of which was the *Sentencing Act 2020*.[68] The *Sentencing Act* came into force on December 1, 2020 and, with some exceptions, applies to all defendants convicted after that date. It is made up of 14 Parts and 29 Schedules. Parts 2 to 13 set out the Sentencing Code, a set of procedural and sentencing principles and disposals. Importantly, the Sentencing Code does not affect statutory maximum sentences, does not allow a penalty greater than what could have been imposed at the time the offence was committed, and does not extend minimum sentence provisions. The Sentencing Council's sentencing guidelines also remain largely unaffected.[69]

Chapter 1 of Part 4 of the *Sentencing Act* sets out the purposes of sentencing. Section 57(2) lists five purposes, which a court must consider, namely, punishment, reduction of crime, reform and rehabilitation, protection of the public, and reparation. Chapter 3 of Part 4 deals with the seriousness of an offence. Section 63 provides that in determining an offence's seriousness, a court must consider both the offender's culpability and the harm or risk of harm which the offence caused. Chapter 1 of Part 7 deals with the imposition of fines. Section 124 states that, before deciding on the amount of a fine, the court must inquire into the financial circumstances of the offender. Section 125 further clarifies that a fine must reflect the seriousness of the offence and take into account the circumstances of the case.

The sentencing structure for corruption-related offences specifically has also been modified significantly in recent years. The *Bribery Act 2010* introduced new penalties for corruption-related offences. As the *Bribery Act 2010* is not applied retrospectively, there are still numerous cases before the courts that fall under a previous statute. The UK Sentencing

[67] Declination Letter from US Department of Justice Criminal Division Re World Acceptance Corporation (5 August 2020), online (pdf): <https://www.justice.gov/criminal-fraud/file/1301826/download>.
[68] *Sentencing Act 2020* (UK), c 17.
[69] Clea Topolski & Libby Anderson, "The Sentencing Act 2020" (18 December 2020), online: *Crucible* <https://crucible.law/insights/the-sentencing-act-2020>.

Council also introduced sentencing guidelines for corruption-related offences.[70] These guidelines are applicable to sentences imposed on or after October 1, 2014, regardless of when the offences occurred. The UK also introduced deferred prosecution agreements (DPAs) as an alternative disposition in corruption cases.

## 5.2 Sentencing before the *Bribery Act 2010*

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

> In those corruption cases involving public officials such as police or prison officers, it has been difficult to discern guidance on sentencing. In *R v Donald* a total sentence of eleven years (the court having imposed consecutive sentences) was upheld in the case of a detective constable who pleaded guilty late to four counts of corruption for agreeing to accept £50,000 (he only received £18,000) from a defendant for disclosing confidential information and destroying surveillance logs. In *R v McGovern* a defendant charged with burglary who offered a £200 bribe to a police officer had his sentence reduced by the Court of Appeal to nine months. In *R v Oxdemir* an offender who offered a free meal or £50 to a police officer for not reporting a driving offence had his sentence reduced to three months' imprisonment. In *R v Garner* the Court of Appeal upheld sentences of eighteen months and twelve months respectively imposed on prison officers who pleaded guilty to providing luxury items to a prisoner. A sentence of two years' imprisonment was imposed in a similar case. In *R v Patel* an immigration administrator was sentenced to two years' imprisonment for accepting a £500 bribe to stamp a passport granting leave to remain, and ordered to forfeit the bribe.
>
> In *R v Hardy: Attorney General's Reference (No 1 of 2007)* the defendant, a serving police officer, pleaded guilty to misfeasance in a public office after he befriended a known criminal and despite warnings from his superiors continued to associate with him and to pass on sensitive information about two individuals whom the criminal wanted to speak with over a drugs and assault matter. A sentence of eighteen months' custody was initially imposed but this was reduced to nine months suspended for two years plus community service due to time served on remand, service of unpaid work, and other factors. [footnotes omitted][71]

[70] UK, Sentencing Council, *Fraud, Bribery and Money Laundering Offences* (2014), online: <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/about-published-guidelines/fraud-bribery-and-money-laundering/>.

[71] Colin Nicholls et al, *Corruption and Misuse of Public Office*, 3rd ed (Oxford: Oxford University Press, 2021) at 253-254.

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

> In other public official cases similar variations exist. In 1974, when the maximum sentence for an offence under the 1889 and 1906 Acts was two years, the architect, John Poulson, was sentenced to a total of seven years' imprisonment for paying bribes to members of Parliament, police officers, and health authorities to obtain building contracts. Dan Smith, the Labour leader of Newcastle-upon-Tyne, was sentenced to a total of six years' imprisonment and William Pottinger, a senior civil servant in the Scottish Office, was sentenced to a total of five years' imprisonment. In *R v Foxley* a 71-year-old Ministry of Defence employee, convicted of four counts of corruption under the 1906 Act, was sentenced to four years' imprisonment for receiving over £2 million in the placing of defence contracts. A confiscation order was made for £1,503.901.08. In *R v Dearnley and Threapleton* a council employee and supplier of security services who was convicted of misrepresenting a loan to pay off a personal debt, had his sentence reduced to twelve months' imprisonment because of strong mitigation. In *R v Allday*, a case under the 1889 Act, council employees accepted bribes from waste contractors to tip waste. They were sentenced to eight and six months' imprisonment each and the contractors were sentenced to three months each. [footnotes omitted][72]

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

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

> 11 Penalties
>
> (1) An individual guilty of an offence under section 1, 2 or 6 is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
>
> (2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
>
> (a) on summary conviction, to a fine not exceeding the statutory maximum,
>
> (b) on conviction on indictment, to a fine.

[72] *Ibid* at 254-255.

(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

(b) in its application to Northern Ireland,

as a reference to 6 months.[73]

The maximum term of imprisonment for a summary conviction offence is twelve months in England and Wales, and six months in Northern Ireland. The maximum statutory fine for a summary conviction offence is £5,000 in England and Wales or Northern Ireland, and £10,000 in Scotland. The maximum fine for an indictable offence is unlimited.

One of the first cases under the *Bribery Act 2010* stemmed from an investigation into Associated Octel Corporation, which subsequently changed its name to Innospec. As stated by the Serious Fraud Office (SFO), "Innospec itself pleaded guilty in March 2010 to bribing state officials in Indonesia and was fined $12.7 million in England with additional penalties being imposed in the USA."[74] Subsequently, in 2014, four individuals were sentenced for their role in the corruption in both Indonesia and Iraq. Two of the defendants pled guilty and two were tried and found guilty. The sentencing decision for these four individuals was released on August 4, 2014, before the sentencing guidelines on bribery came into force on October 1, 2014. The individuals and sentences were:

- Dennis Kerrison, 69, of Chertsey, Surrey, was sentenced to 4 years in prison.
- Paul Jennings, 57, of Neston, Cheshire, was sentenced to 2 years in prison.
- Miltiades Papachristos, 51 of Thessaloniki, Greece, was sentenced to 18 months in prison.
- David Turner, 59, of Newmarket, Suffolk, was sentenced to a 16-month suspended sentence with 300 hours unpaid work.[75]

In a case concerning Sustainable Agroenergy PLC, individuals received prison sentences ranging from 6-13 years. The company operated a Ponzi scheme. Charges fell under multiple statutes, including the *Bribery Act 2010*. The longest sentence was given to Chief Commercial Officer, Gary West, who was convicted by a jury of bribery under the *Bribery Act 2010* as well as offences under the *Criminal Law Act 1977* and the *Companies Act 2006*. West received

[73] *Bribery Act 2010* (UK), c 23.
[74] Serious Fraud Office (SFO), News Release, "Four Sentenced for Role in Innospec Corruption" (4 August 2014), online: <https://www.sfo.gov.uk/2014/08/04/four-sentenced-role-innospec-corruption/>.
[75] *Ibid*.

13 years imprisonment, a £52,805 confiscation order and a 15-year disqualification from acting as a company director.[76]

David Lufkin was the Global Head of Sales at Petrofac International Limited (Petrofac), which provides various services to the oil and gas production and processing industry. In this role Lufkin made significant bribes to influence contracts awarded between 2012 and 2015. The UK's SFO began investigations in 2017 and eventually charged Lufkin with 11 counts of bribery. The charges included paying $6,200,000 in bribes to secure two contracts in Iraq worth a combined $729,700,000 and paying $91,000,000 to secure contracts worth around $3,723,000,000 in Saudi Arabia.[77] Lufkin pleaded guilty to these 11 counts, but the SFO had not concluded its investigation. In January 2021, Lufkin pleaded guilty to three more counts of bribery relating to corrupt offers and payments made between 2012 and 2018 to obtain contracts in the United Arab Emirates worth around $3,300,000,000. On October 4, 2021, Lufkin was sentenced to a suspended two year jail sentence. Petrofac was charged with seven bribery-related offences and entered into a plea agreement with the SFO involving a $64 million fine and a $31 million confiscation order. As of October 22, 2021, the SFO stated that the case is still under investigation.[78]

In June 2019, Carole Hodson was sentenced to two years imprisonment, was disqualified as a director for seven years, had a confiscation order of £4,494,541.46 imposed, and was ordered to pay £478,351 in costs to the SFO. Hodson operated and was the majority owner of ALCA Fasteners Ltd. In her capacity as Managing Director, Hodson paid nearly £300,000 in bribes between 2011 and 2016 in respect of a contract worth around £12,000,000.[79]

Mr. Wylie was the Director for Lakehouse, a housing services firm that installed fire alarms in Grenfell tower. Wylie was in charge of fire safety contracts and, in that capacity, told various subcontractors that they needed to pay him bribes to secure work. In total, these bribes amounted to around £800,000. Wylie was sentenced to six years imprisonment for

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[76] "Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd" (last modified 17 May 2021), online: *SFO* <https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/>.

[77] Jonathan Middup, David Lister & Richard Abbey, *UK Bribery Digest Edition 14* (*EY*, 14 September 2020) [UK Bribery Digest], online (pdf): <https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/topics/forensic-integrity-services/uk-bribery-digest-edition-14.pdf> at 26; SFO, Case Update, "Former Senior Executive Convicted in Petrofac Investigation" (7 February 2019), online: <https://www.sfo.gov.uk/2019/02/07/former-senior-executive-convicted-in-petrofac-investigation/>.

[78] Kate Beioley & Jane Croft, "Petrofac Ordered to Pay $95m After Admitting Middle East Bribery", *The Financial Times* (4 October 2021), online: <https://www.ft.com/content/553f0f64-6f54-4ec9-92e4-a69ad9490cf9>; SFO, Statement, "SFO Statement on Petrofac Charged with Seven Separate Offences between 2011 and 2017" (24 September 2021), online: <https://www.sfo.gov.uk/2021/09/24/sfo-charges-petrofac-with-failure-to-prevent-bribery-offences/>. For updates related to the status of the case, see the SFO's case information page: "Petrofac Ltd" (last modified 22 October 2021), online: *SFO* <https://www.sfo.gov.uk/cases/petrofac/>.

[79] SFO, Case Update, "Former Company Director Sentenced for £12 Million Bribery Scheme" (27 June 2019), online: <https://www.sfo.gov.uk/2019/06/27/former-company-director-sentenced-for-12-million-bribery-scheme/>.

bribery while the various contractors who paid him bribes were sentenced to suspended sentences and ordered to pay costs.[80]

The majority of convictions under the *Bribery Act 2010* have been of individuals, rather than companies. Sweett Group PLC was the first company convicted under section 7. Media allegations led to an internal investigation, which discovered that a subsidiary made corrupt payments to help secure a contract in Abu Dhabi. The company admitted to failing to prevent bribery and was sentenced to a fine of £1.4 million, a confiscation order of £850,000 and £95,000 in costs.[81]

More recently, the prosecution of Skansen Interiors Ltd. (Skansen) represents the first contested prosecution under section 7. Skansen was a small British interior design company. As part of a tender process, Skansen paid bribes totalling £39,000 to a former project manager at a real estate company to secure an office refurbishment contract. Skansen defended itself by referring to the policies and procedures it had before the bribes occurred. These policies, one was even placed on the wall at the company's premises, made clear that staff should be open and honest. Thanks to a newly-appointed CEO, Skansen caught the final payment of £29,000 before it was paid. Skansen promptly fired the individual at fault and then reported to the police, whose investigation it complied with fully. The jury was not convinced Skansen had adequate procedures and delivered a guilty verdict. However, Skansen had been dormant since mid-2014 and had no assets, so the judge was forced to impose an absolute discharge.[82]

In February 2020, Kevin Herbert received a suspended sentence of two years imprisonment. Herbert pleaded guilty to three offences under the *Bribery Act 2010* after receiving and soliciting bribes in a former role as purchasing and supply chain manager at Williams Hybrid Power Ltd. between 2011 and 2013. Charges were also brought against two other individuals who offered bribes and Williams Hybrid Power Ltd. itself (the third prosecution for a section 7 offence). However, charges against the company and the two individuals were stayed for lack of evidence.[83]

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[80] UK Bribery Digest, *supra* note 77 at 18.

[81] Emma Gordon, Saira Choonka & Phil Taylor, "Sweett Group Sentenced After First Ever Corporate Conviction for Failing to Prevent Bribery" (2 February 2016), online: *Eversheds Sutherland* <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Fraud_and_financial_crime/Sweett_group_sentenced>. See also SFO, News Release, "Sweett Group PLC Sentenced and Ordered to Pay £2.25 Million After Bribery Act Conviction" (19 February 2016), online: <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>.

[82] Maurice Burke, Crispin Rapinet & Khushaal Ved, *Delusions of Adequacy: The Belated Tale of Adequate Procedures*, (Hogan Lovells, 2018), online (pdf): <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2018/2018_05_10_investigations_white_collar_and_fraud_alert_delusions_of_adequacy_the_belated_tale_of_adequate_procedures.pdf?la=en>; David Hamilton & Stephenson Harwood, "First Contested Prosecution Under Section 7 Bribery Act 2010", *International Bar Association* (20 August 2018), previously online at online: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7637F4B0-D9FE-49B6-9770-B157C6C38A6C>.

[83] UK Bribery Digest, *supra* note 77 at 16.

## 5.4 Guidelines for Offences by Human Offenders

The Sentencing Council published guidelines for fraud,[84] bribery[85] and money laundering[86] offences (the *Guidelines*). These guidelines are applicable to sentences imposed on or after October 1, 2014. For bribery offences, the *Guidelines* dictate sentences can range from a discharge to eight years imprisonment.[87] Money laundering offences are punishable by up to 14 years imprisonment.[88]

Each of the guidelines lays out an eight-step process for determining the sentence for human offenders:

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

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

Each of the guidelines sets out a grid for determining a sentencing range based on a combination of culpability and harm. Culpability is to be determined "by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out." Culpability is measured in three levels: A (high culpability), B (medium culpability), and C (lesser culpability).

For bribery-related offences, harm is to be "assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender. Harm is measured in four levels, listed as categories 1 (most serious) to 4 (least serious).[89]

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[84] UK, Sentencing Council, *Fraud* (effective from 1 October 2014), online: <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/>.
[85] UK, Sentencing Council, *Bribery* (effective from 1 October 2014) [*Bribery Guideline*], online: <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/bribery/>.
[86] UK, Sentencing Council, *Money Laundering* (effective from 1 October 2014) [*Money Laundering Guideline*], online: <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/money-laundering/>.
[87] *Bribery Guideline*, *supra* note 85.
[88] *Money Laundering Guideline*, *supra* note 86.
[89] *Bribery Guideline*, *supra* note 85.

The following excerpts from the *Bribery Guideline* demonstrate how sentences are calculated for natural persons:[90]

BEGINNING OF EXCERPT

## Step 1- Determining the offence category

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

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

| **Culpability demonstrated by one or more of the following** |
|---|
| **A – High culpability**<br>• A leading role where offending is part of a group activity<br>• Involvement of others through pressure, influence<br>• Abuse of position of significant power or trust or responsibility<br>• Intended corruption (directly or indirectly) of a senior official performing a public function<br>• Intended corruption (directly or indirectly) of a law enforcement officer<br>• Sophisticated nature of offence/significant planning<br>• Offending conducted over sustained period of time<br>• Motivated by expectation of substantial financial, commercial or political gain |
| **B – Medium culpability**<br>• A significant role where offending is part of a group activity<br>• Other cases that fall between categories A or C because:<br>  ◦ Factors are present in A and C which balance each other out **and/or**<br>  ◦ The offender's culpability falls between the factors as described in A and C |
| **C – Lesser culpability**<br>• Involved through coercion, intimidation or exploitation<br>• Not motivated by personal gain<br>• Peripheral role in organised activity<br>• Opportunistic 'one-off' offence; very little or no planning<br>• Limited awareness or understanding of extent of corrupt activity |

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

[90] *Ibid*.

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

**Harm**
demonstrated by one or more of the following factors:

**Category 1**

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

**Category 2**

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

**Category 3**

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

**Category 4**

- Risk of category 3 harm

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

## Step 2 – Starting point and category range

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

**Section 1 Bribery Act 2010: Bribing another person**

**Section 2 Bribery Act 2010: Being bribed**

**Section 6 Bribery Act 2010: Bribery of foreign public officials**

Maximum: 10 years' custody

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

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these or other relevant factors should result in an upward or downward adjustment from the starting point.

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

## Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors:

- Steps taken to prevent victims reporting or obtaining assistance and/or from assisting or supporting the prosecution
- Attempts to conceal/dispose of evidence
- Established evidence of community/wider impact
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration
- Failure to respond to warnings about behaviour
- Offences committed across borders
- Blame wrongly placed on others
- Pressure exerted on another party
- Offence committed to facilitate other criminal activity

## Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Little or no prospect of success
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Lapse of time since apprehension where this does not arise from the conduct of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

### Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

### Step 5 – Totality principle

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

### Step 6 – Confiscation, compensation and ancillary orders

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

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

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

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

- Ancillary orders – Magistrates' Court
- Ancillary orders – Crown Court Compendium, Part II Sentencing, s7

### Step 7 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

### Step 8 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.

END OF EXCERPT

On February 12, 2015, Nicholas and Christopher Smith, a father and son involved in a printing business, were sentenced for corruption relating to bribery of officials in Kenya.[91] The offenders were convicted under the *Prevention of Corruption Act 1906*, as the offences pre-dated the *Bribery Act 2010*. However, since the sentencing post-dated October 1, 2014, the Sentencing Council's new *Guidelines* applied. The sentencing decision provides one of the first applications of the *Guidelines*.

Nicolas Smith received three years imprisonment, while Christopher Smith received 18 months imprisonment, which was suspended for two years on condition that he commit no further offences. The suspended sentence was characterized by Higgins J as "an act of mercy."[92] Christopher was also sentenced to 250 hours unpaid work and a three-month curfew. Both offenders were disqualified from being the director of a company for six years.

[91] Barry Vitou & Richard Kovalevsky, "Opinion: It was so Easy to Avoid: Chickengate: Smith & Ouzman Sentencing Remarks in Full Under New Sentencing Guidelines" (15 February 2014), online (blog): *thebriberyact.com* <http://thebriberyact.com/2015/02/15/opinion-it-was-so-easy-to-avoid-chickengate-smith-ouzman-sentencing-remarks-in-full-under-new-sentencing-guidelines/>.
[92] *Ibid.*

Later, the company received a fine of £2.2 million. Additionally, Nicholas and Christopher were ordered to pay a confiscation order of £18,693 and £4,500 and each was ordered to pay costs of £75,000.

The Smiths' corrupt activities followed a decision to expand their business into Africa. Between 2006 and 2010, bribes were "routine and common place."[93] The bribes included a payment of £5,000 to a Kenyan government official, which was a large bribe in light of the official's salary of £40,000. Other bribes included payments of just under £400,000 to receive contracts worth £2 million. The pricing of the product was not elevated aside from the bribery uplift. However, as the product included electoral ballot papers, the bribe risked undermining the integrity of and confidence in the electoral system.

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

1. A leading role was played
2. There was intended corruption of a public official
3. The offences were of a sophisticated nature
4. The motive was for substantial financial gain[94]

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

Based on the aggravating factors, which included negative impacts on good governance, the cross-border nature of the offence, and the mitigating factors, which included good character and Christopher Smith's health and age, Higgins J found that the "terms of A(2) should be reduced."[95] Nicholas Smith's sentence of three years imprisonment fell at the bottom end of the range, while Christopher Smith's sentence fell below that range.

## 5.5 Guidelines for Corporate Offenders

The Sentencing Council's *Guidelines* are also used for sentencing corporations in respect to the offences of fraud, bribery, and money laundering. The *Guidelines* are as follows:[96]

[93] *Ibid.*

[94] *Ibid.*

[95] *Ibid.*

[96] UK, Sentencing Council, Corporate Offenders: Fraud, Bribery and Money Laundering (effective from 1 October 2014), online: <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/corporate-offenders-fraud-bribery-and-money-laundering/>.

BEGINNING OF EXCERPT

## Step 1 – Compensation

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

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

Reasons should be given if a compensation order is not made. (See sections 55 and 133-135 of the Sentencing Code)

## Step 2 – Confiscation

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation). (See Proceeds of Crime Act 2002 sections 6 and 13)

## Step 3 – Determining the offence category

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

### Culpability

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

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

**A – High culpability**

- Corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)
- Wilful obstruction of detection (for example destruction of evidence, misleading investigators, suborning employees)
- Involving others through pressure or coercion (for example employees or suppliers)
- Targeting of vulnerable victims or a large number of victims
- Corruption of local or national government officials or ministers
- Corruption of officials performing a law enforcement role
- Abuse of dominant market position or position of trust or responsibility
- Offending committed over a sustained period of time
- Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place (section 7 Bribery Act only)

**B – Medium culpability**

- Corporation plays a significant role in unlawful activity organised by others
- Activity not unlawful from the outset
- Corporation reckless in making false statement (section 72 VAT Act 1994)
- Other cases that fall between categories A or C because:
    - Factors are present in A and C which balance each other out **and/or**
    - The offending corporation's culpability falls between the factors as described in A and C

**C – Lesser culpability**

- Corporation plays a minor, peripheral role in unlawful activity organised by others
- Some effort made to put bribery prevention measures in place but insufficient to amount to a defence (section 7 Bribery Act only)
- Involvement through coercion, intimidation or exploitation

### Harm

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

| Amount obtained or intended to be obtained (or loss avoided or intended to be avoided) |
|---|
| **Fraud**<br>For offences of fraud, conspiracy to defraud, cheating the Revenue and fraudulent evasion of duty or VAT, harm will normally be the actual or intended gross gain to the offender. |
| **Bribery**<br>For offences under the Bribery Act the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences under section 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery. |
| **Money laundering**<br>For offences of money laundering the appropriate figure will normally be the amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher. |
| **General**<br>Where the actual or intended gain cannot be established, the appropriate measure will be the amount that the court considers was likely to be achieved in all the circumstances. In the absence of sufficient evidence of the amount that was likely to be obtained, 10–20 per cent of the relevant revenue (for instance between 10 and 20 per cent of the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending) **may** be an appropriate measure. There may be large cases of fraud or bribery in which the true harm is to commerce or markets generally. That may justify adopting a harm figure beyond the normal measures here set out. |

## Step 4 – Starting point and category range

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

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

| | Culpability Level | | |
|---|---|---|---|
| | A | B | C |
| Harm figure multiplier | **Starting point** 300%<br>**Category range** 250% to 400% | **Starting point** 200%<br>**Category range** 100% to 300% | **Starting point** 100%<br>**Category range** 20% to 150% |

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

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

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

**General principles to follow in setting a fine** The court should determine the appropriate level of fine in accordance with section 125 of the Sentencing Code, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

## Obtaining financial information

### Companies and bodies delivering public or charitable services

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

1. *For companies*: annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.

2. *For partnerships*: annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. If adequate accounts are not produced on request, see paragraph 1.

3. *For local authorities, fire authorities and similar public bodies*: the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.

4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.

5. *For charities*: it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

## Step 5 – Adjustment of fine

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

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

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

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

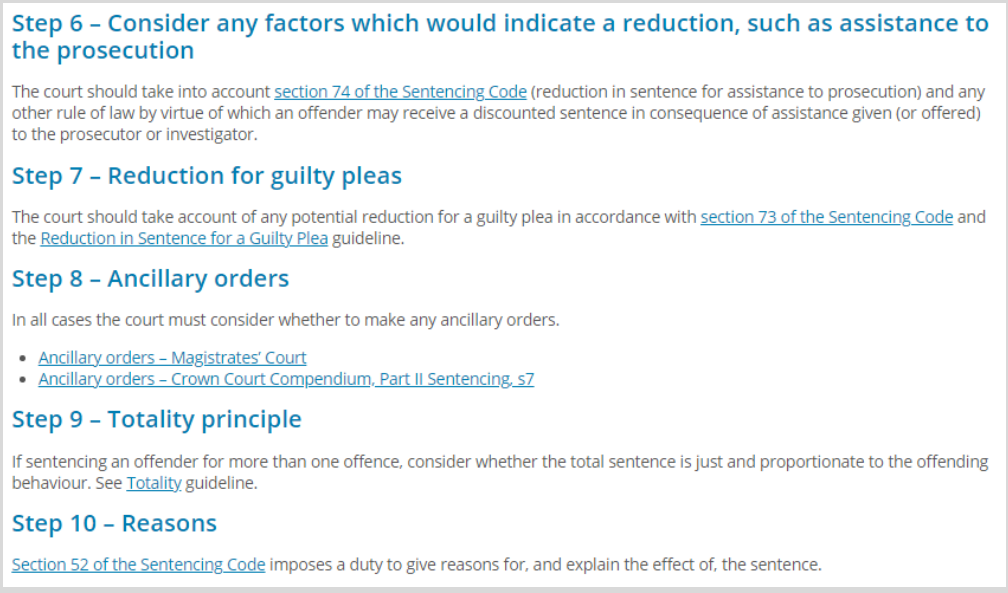
In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

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

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

### Factors to consider in adjusting the level of fine

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



### Step 6 – Consider any factors which would indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

### Step 7 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

### Step 8 – Ancillary orders

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

- Ancillary orders – Magistrates' Court
- Ancillary orders – Crown Court Compendium, Part II Sentencing, s7

### Step 9 – Totality principle

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

### Step 10 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

END OF EXCERPT

## 5.6 Deferred Prosecution Agreements

Like the US, the UK has begun utilizing DPAs as a method of disposition in corruption cases. The first DPA was entered into with Standard Bank PLC, which was indicted for failing to prevent corruption. Standard Bank agreed to pay $25.2 million to the UK and a further $7 million in compensation to the Government of Tanzania, as well as costs of £330,000.[97] The UK's second corruption-related DPA was entered into by a company that, at the time, could not be named due to ongoing related prosecutions. This second DPA involved financial orders of £6.5 million.[98] In July 2019, this company was revealed to be Sarclad Ltd., a technology company based in Rotherham.[99] For further discussion of DPAs in the US and UK, see Chapter 6, Sections 6.1 and 6.2 respectively.

[97] SFO, News 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/>.
[98] SFO, News Release, "SFO Secures Second DPA" (8 July 2016), online: <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>.
[99] Neil Blundell & Max Hobbs, "The Subject of the UK's Second DPA is Revealed" (18 July 2019), online: *Macfarlanes LLP* <https://blog.macfarlanes.com/post/102fo29/the-subject-of-the-uks-second-dpa-is-revealed>.

# 6. CANADIAN SENTENCING

## 6.1 General Principles

The purpose and principles of sentencing are codified in sections 718-718.2 of the Canadian *Criminal Code*.

Under section 718, the fundamental purpose of sentencing is to protect society and promote respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. The objectives of such sanctions include:

> (a) denouncing unlawful conduct and the harm done to victims and the community;
> (b) deterring the offender and other persons from committing offences;
> (c) separating offenders from society, where necessary;
> (d) rehabilitating offenders;
> (e) providing reparations for harm done to victims or to the community; and
> (f) promoting a sense of responsibility in offenders, and acknowledgement of the harm done to the victims and to the community.[100]

Section 718.1 sets out the fundamental principle of sentencing, namely, proportionality:

> 718.1 A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.[101]

Section 718.2 sets out several other sentencing principles:

> (1) aggravating and mitigating factors – sentences should be increased or decreased to account for aggravating or mitigating factors related to the offence or the offender;
> (2) parity – similar sentences for similar cases;
> (3) totality – where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> (4) restraint – use least restrictive sanction that is reasonable and appropriate in the circumstances.[102]

The courts have indicated that the objectives of denunciation and deterrence are usually primary in sentencing bribery and corruption-related offences. The courts have remarked

[100] *Criminal Code*, RSC 1985, c C-46, s 718.
[101] *Ibid* at s 718.1.
[102] *Ibid* at s 718.2(a)-(d).

that "[a]ll Canadians, and our society as a whole, are victims when public officials breach the trust placed in them."[103] In the context of bribery of a foreign official, our courts have further observed that "bribes, besides being an embarrassment to all Canadians, prejudice Canada's efforts to foster and promote effective governmental and commercial relations with other countries."[104]

While the effectiveness of general deterrence is seriously questioned in the literature on sentencing, courts nonetheless give considerable weight to deterrence on the basis of the choice and risk-reward calculations that corruption offences frequently embody.[105]

## 6.2 Principles for Corporations and Other Organizations

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

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

[103] *R v Serre*, 2013 ONSC 1732 at paras 28–29.
[104] *R v Griffiths Energy International*, [2013] AJ No 412 (QB).
[105] See, e.g., *R v Drabinsky*, 2011 ONCA 582 at para 158.

> (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.[106]

Corporations can be fined, placed on probation, or both, following a conviction. Section 732.1(3.1) sets out optional conditions that courts may incorporate into a probation order:

> (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
>
> (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
>
> (c) communicate those policies, standards and procedures to its representatives;
>
> (d) report to the court on the implementation of those policies, standards and procedures;
>
> (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
>
> (f) provide, in the manner specified by the court, the following information to the public, namely,
>
> (i) the offence of which the organization was convicted,
>
> (ii) the sentence imposed by the court, and
>
> (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
>
> (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.
>
> (3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.[107]

The Supreme Court of Canada recently affirmed that the constitutional protection against cruel and unusual punishment does not apply to corporations.[108] In *Quebec v 9147-0732 Québec Inc*, the accused corporation challenged the constitutionality of the mandatory minimum fine imposed against it. The corporation argued that the fine contravened the right "not to be subjected to any cruel and unusual treatment or punishment" guaranteed by section 12 of the Canadian *Charter of Rights and Freedoms*.

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[106] *Criminal Code*, *supra* note 100, s 718.21.

[107] *Ibid*, ss 732.1(3.1)-732(3.2).

[108] *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32.

The Supreme Court of Canada unanimously rejected the argument.[109] The majority and concurring opinions all observed that the jurisprudence relates section 12 to "human dignity"[110] and, therefore, human beings. The majority and concurring opinions also held that the existence of individuals behind the corporate veil is insufficient to allow a corporation to claim section 12 protection, pointing to the concept of "separate legal personality"[111] in corporate law.

The decision is significant for at least two reasons. It adds some measure of certainty to the sentencing of corporations, which relies on the imposition of fines as the primary sanction. Additionally, it preserves the fundamental corporate law principle of separate legal personality and, in doing so, removes "collateral consequences" as grounds for a corporation to challenge a sentence.

## 6.3 Appropriate Range of Sentencing

Unlike the US or the UK, Canada does not have a sentencing commission or sentencing guidelines. The type of sentence available is constrained only by statutory provisions and the "appropriate range of sentencing" established through case law. The *Criminal Code* sets out the maximum sentence for each offence. For some offences, a mandatory minimum is prescribed. Common law may also define an "appropriate range of sentencing" for some offences. These sentencing ranges are only guidelines and do not bind the court.[112]

For corruption offences, courts usually consider large bribes, bribes occurring over long periods of time, and previous related convictions as aggravating factors. The courts typically consider a guilty plea as a mitigating factor. Self-reporting, cooperating with authorities and remorse are also frequently cited as mitigating factors in corruption cases.

Corruption cases are often settled through a guilty plea. It is common for the Crown prosecutor and defence counsel to then make a joint submission on sentencing. The Supreme Court of Canada has held that sentencing judges should not depart from a joint sentencing submission "unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."[113] While this does not completely constrain judicial discretion, the sentencing judge must give counsel the opportunity to make further submissions if the judge has concerns about the joint submission.[114]

[109] *Ibid*. The majority differed from the two concurring opinions on the proper approach to constitutional interpretation in the case.
[110] *Ibid* at paras 2, 51, 140.
[111] *Ibid* at paras 2, 129. The company had argued the fine was cruel because it would bankrupt the company, and the bankruptcy would have a significant negative impact on its shareholders and employees.
[112] *R v Lacasse*, 2015 SCC 64 at para 60; *R v Nasogaluak*, 2010 SCC 6 at para 44.
[113] *R v Anthony-Cook*, 2016 SCC 43 at para 32.
[114] *Ibid* at para 58.

## 6.4 Domestic Corruption and Bribery

As discussed in Chapter 2, the *Criminal Code* establishes several offences for domestic corruption and bribery, including bribery of officers, frauds on the government, breach of trust by a public officer, and accepting secret commissions.

*Criminal Code* bribery offences are punishable by fines at the discretion of the court and maximum terms of imprisonment range from five to fourteen years. Bribery of judges, politicians, and police officers is treated as the most serious type of offence and is punishable by a maximum term of 14 years' imprisonment.[115] The other bribery and corruption offences are punishable by a maximum of five years' imprisonment.[116]

The court enjoys considerable discretion on sentencing. As discussed earlier, the court is constrained only by the statute and the general principles of sentencing. Currently, domestic bribery and corruption offences do not carry mandatory minimum penalties. There is also no defined range of sentencing established in the jurisprudence. The sentencing judge may order, with few exceptions, any sanction permitted under the *Criminal Code*.[117]

The sentencing jurisprudence is limited. However, as the cases reviewed below illustrate, these offences are invariably treated as serious and substantial penalties are imposed.

### 6.4.1 Bribery of Public Officers

In sentencing offences for the bribery of public officials, the courts have observed the significant societal consequences of such wrongdoing. As stated by the Quebec Court of Appeal, "[a]ny attempt to corrupt a police officer amounts to an attack on the integrity of an important social institution. Where the purpose of the bribe is to pervert the course of justice, especially in relation to a serious crime, the offenders must be severely punished."[118]

Bribery and attempted bribery of an officer is extremely serious, and general deterrence is paramount in sentencing.[119] A sentence of imprisonment often follows.

In *R v Kozitsyn,* the offender was found guilty of attempting to bribe a police officer. The accused had twice offered bribes to a police officer in exchange for his forbearance from issuing tickets to a massage parlour she had planned to purchase. Kozitsyn first offered to make a charitable donation on the officer's behalf, and later offered the officer a portion of the business revenues. Justice Bourque sentenced Kozitsyn to five months imprisonment, followed by a period of 24 months of probation. The judge determined a prison sentence

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[115] *Criminal Code*, *supra* note 100, ss 119-20.

[116] *Ibid*, ss 121-25, 426.

[117] The exception is for convictions of bribery of judicial officers and bribery of officers. A conditional sentencing order (i.e., house arrest) is not available for either of these offences. See *Criminal Code*, *supra* note 100, s 742.1(c).

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

[119] *R v Kozitsyn*, 2009 ONCJ 455 [*Kozitsyn*]; *R v Lam*, 2014 ONSC 5355.

was required because of the nature of the offence and its "extremely significant effects on our society."[120]

Conversely, when the accused is the officer who accepts or solicits a bribe, the breach of trust is considered highly aggravating.[121]

In *R v Morency*,[122] the accused, a Crown prosecutor, pled guilty to bribery of a judicial officer and breach of trust by a public official. The accused accepted cash bribes in exchange for dropping criminal charges. Justice Morand sentenced the accused to concurrent sentences of three years imprisonment.

Justice Morand distilled the following principles from his review of 62 corruption-related cases in which the offender was a public official such as a prosecutor, police officer or politician:

- Except in rare cases, the objectives of general deterrence and societal condemnation are predominant;
- In nearly a third of the decisions, the courts imposed conditional sentence orders for periods varying between twelve months and two years less one day, the average being around eighteen months;
- In a majority of cases, the courts ordered prison sentences ranging between three months and six years; the average was between two and a half and three years, notwithstanding the presence of numerous mitigating circumstances;
- In most cases involving attorneys practising their profession, judges insisted on the importance of using the prison sentence to clearly express the seriousness of the offence when an officer of the court who owes a duty of candour commits it.[123]

### 6.4.2 Breach of Trust by a Public Officer

The range of sentencing for breach of trust by a public officer is broad. This breadth owes to the different types of trust positions that an offender may hold and the different forms of offending conduct.

Police officers are viewed as occupying a special position of trust in the community and the administration of justice. In the absence of an exceptional mitigating factor, severe sentences are justified to honour the primary principles of denunciation and general deterrence.[124]

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[120] *Kozitsyn*, *supra* note 119 at paras 22-23.
[121] *R c Morency*, 2012 QCCQ 4556 [*Morency*], aff'd 2012 QCCA 1836; *R v David*, 2013 NSSC 83; *R v Ticne*, 2009 BCCA 191.
[122] *Morency*, *supra* note 121.
[123] *Ibid* at para 72.
[124] *R v Cook*, 2010 ONSC 5016 at paras 29, 38.

In *R c Applebaum*,[125] the accused was the interim mayor of Montréal. He accepted payments from real estate developers and engineering firms in return for political influence and favours while serving as borough mayor for a Montréal borough. He was sentenced to one year in jail and two years' probation for accepting a bribe, breach of trust by a public officer, and conspiring to commit a breach of trust by a public officer. The sentencing judge remarked that an abuse of trust by a person in authority is reprehensible behaviour which violates fundamental societal values.[126]

In *R v Granger*, the accused was sentenced to three years' imprisonment after pleading guilty to breach of trust by a public officer, accepting a secret commission, and defrauding the government.[127] The accused was an Audit Team Leader with the Canada Revenue Agency. The accused abused their position by illegally accessing tax records, generating a false audit, reporting false information to police, facilitating an improper audit, and receiving over CDN$1 million in secret commissions. The sentencing judge emphasized the need for deterrence in the circumstances.[128]

### 6.4.3 Corruptly Defrauding the Government

One form that fraud against the government can take is conferring benefits on government employees. This was the case in *R v Murray*.[129] Murray was the Director of Financial Services for the Legislature in Newfoundland and Labrador. Murray falsified expense claims for his benefit and for the benefit of certain legislators. The sentencing judge considered, as aggravating factors, that the offender had breached a high level of trust and the offence continued over a long period of time. While acknowledging "no sentence will fully satisfy the debate generated by offences of this kind,"[130] the judge accepted the joint submission on sentencing of two years imprisonment, plus a two-year probation order and a restitution order.

An example of a massive and sophisticated fraud against the government is the well-known "federal sponsorship scandal," in Canada. In 1996, the Canadian federal government established the sponsorship program, an initiative to promote federalism in the Province of Quebec. The program existed until 2004 when widespread corruption was discovered. The illicit activities included the misuse and misdirection of public funds, which were intended for government advertising in Quebec. Several individuals were charged and convicted.[131]

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[125] *R c Applebaum*, 2017 QCCQ 2522 [*Applebaum*]; *R c Béchard*, 2011 QCCQ 15649.
[126] *Applebaum*, *supra* note 125.
[127] *R v Granger*, 2014 ONCJ 408.
[128] *Ibid* at para 32.
[129] *R v Murray*, 2010 NLTD 44. See also *R v Collins*, 2010 NLTD 7. The offender pled guilty to defrauding the government and conferring a benefit on a public officer. The sentencing judge determined that the offences involved a serious breach of trust and that denunciation and deterrence required a custodial sentence. The offender was sentenced to 21 months' imprisonment for the fraud and 18 months' imprisonment for conferring a benefit on a public official, to be served concurrently. He was also ordered to pay restitution.
[130] *Ibid* at para 26.
[131] Among these individuals were Jean Lafleur, Charles Guité, Paul Coffin, and Jacques Corriveau. See *R v Lafleur*, 2007 QCCQ 6652 (guilty plea to 28 fraud charges against the federal government

On a sentencing appeal for one of the offenders, the Quebec Court of Appeal reversed the trial judge's decision and substituted a sentence of 18 months' imprisonment.[132] The Court explained the severity of the offence by remarking that the "fallacious argument that 'stealing from the government is not really stealing' cannot be used to downplay the significance of this crime…. Defrauding the government is equivalent to stealing from one's fellow citizens."[133]

## 6.5 Corruption and Bribery of Foreign Public Officials

The *CFPOA* prohibits the bribery of foreign officials. As stated in Chapter 2, amendments to the *CFPOA* in 2013 increased the maximum penalty for bribery of foreign officials from five years imprisonment to fourteen years. As a result, conditional sentence orders and conditional or absolute discharges are no longer available for the offences.[134] At present, fines for organizations convicted under the *CFPOA* have no upper limit.

To date, three corporations and four individuals have been sentenced for *CFPOA* offences. As the case law remains limited, these early decisions could be foundational in shaping later jurisprudence. Each case is briefly reviewed below.

***R v Watts (Hydro Kleen)***

The first corporation to be charged and convicted of a crime under the *CFPOA* was Hydro Kleen.[135] The company pled guilty to bribing a foreign official and was sentenced to pay a fine of CDN$25,000.[136]

As part of the bribery scheme, Hydro Kleen hired an American immigration officer as a "consultant" to facilitate easier passage of their employees into the US. Unbeknownst to the company, the officer also made it more difficult for employees of its competitors to enter the US. Under the scheme, Hydro Kleen paid CDN$28,299.98 to the officer.

The fine applied to Hydro Kleen was less than the bribe that the company paid, a point that has subjected the decision to some criticism. Commentators have criticized the decision for

totalling over CDN$1.5 million and was sentenced to 42 months' imprisonment plus restitution); *R v Guité*, 2006 QCCS 3927 (42 months' imprisonment after being convicted after trial by jury); *R v Coffin*, 2006 QCCA 471 (pled guilty to 15 counts and sentenced to 18 months' imprisonment); and *R c Corriveau*, 2017 QCCS 173 (4 years' imprisonment and CDN$1.5 million fine).

[132] *R v Coffin*, *supra* note 131.

[133] *Ibid* at para 46.

[134] Transparency International Canada has noted that this lack of availability of conditional sentences or discharges is problematic for the prosecution of less severe violations of the *CFPOA*: Transparency International Canada, *UNCAC Implementation Review: Civil Society Organization Report*, (October 2013) at 9, online (pdf): <https://transparencycanada.ca/s/20131219-UNCAC_Review_TI-Canada.pdf>.

[135] Norm Keith, *Canadian Anti-Corruption Law and Compliance*, 2nd ed (Toronto: LexisNexis Canada, 2017) at 180.

[136] *R v Watts / R v Hydro Kleen*, [2005] AJ No 568 (QB).

failing to advance the objective of general deterrence. These commentators expressed skepticism that the fine could serve as a general or specific deterrent.[137]

Hydro Kleen has not received much more favourable treatment by the courts. Only two other corporations have been convicted under the *CFPOA* following Hydro Kleen.[138] In both cases, the sentencing court alludes to Hydro Kleen but declines to consider it in any depth.[139]

***R v Niko Resources Ltd.***

The first significant *CFPOA* conviction was in *R v Niko Resources Ltd*.[140] Niko Resources pled guilty to providing improper benefits to a foreign public official in Bangladesh. Niko Bangladesh, a wholly owned subsidiary of Niko Resources, paid for and delivered a motor vehicle worth CDN$190,948 and approximately CDN$5,000 in travel expenses to Bangladesh's State Minister for Energy and Mineral Resources.

Justice Brooker accepted the joint submission and sentenced Niko Resources to pay a fine and a victim surcharge[141] totalling CDN$9.49 million.[142] In addition, Niko Resources was placed on probation for three years and was to bear the costs of the probation order.[143] In doing so, Justice Brooker expressed the gravity of the offence as follows:

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[137] OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada,* (OECD, 2011) at para 58, online (pdf): <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf>.

[138] *R v Niko Resources Ltd* (2011), 101 WCB (2d) 118 (Alta QB) [*Niko Resources*]; *R v Griffiths Energy International*, [2013] AJ No 412 (QB) [*Griffiths Energy*]. For more discussion on *Niko Resources*, see Chapters 2, 6, and 9. For further discussion of *Griffiths Energy*, see Chapter 6.

[139] That said, the same judge presided over sentencing in both cases. It remains to be seen whether the treatment of *Hydro Kleen* reflects the predilections of that particular sentencing judge or portends a general trend of dismissing *Hydro Kleen* as unpersuasive. The latter is more likely, given the broader critique of the decision.

[140] *Niko Resources*, *supra* note 138.

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

[142] Professor Poonam Puri notes that this sentence, when compared with *R v Watts*, is evidence of a "troubling lack of consistency" in enforcement of the *CFPOA*. Hydro Kleen's fine was roughly equal to the amount of its bribe, whereas Niko Resources was required to pay a $9.5 million fine for a $200,000 bribe. See Jennifer Brown, "Are Anti-Corruption Laws Really Tackling the Problem?", *Canadian Lawyer* (10 November 2014), online: <https://www.canadianlawyermag.com/news/general/are-anti-corruption-laws-really-tackling-the-problem/269591>. On the other hand, the same judge a year later in *Griffiths Energy* (discussed below) imposed a fine of approximately $10 million for a $2 million bribe.

[143] Niko Resources was required to adhere to compliance requirements in the probation order. Under s 32.1 of the *Criminal Code*, courts may order implementation of policies or procedures to prevent future crimes. Boisvert et al point out that such probation orders are underused and could provide a valuable tool in foreign bribery cases: Anne-Marie Lynda Boisvert, Peter Dent & Ophelie Brunelle Quraishi (Deloitte LLP), *Corruption in Canada: Definitions and Enforcement*, Report No 46 (Her Majesty the Queen in Right of Canada, 2014) at 47, online (pdf): <https://publications.gc.ca/site/archiveearchived.html?url=https://publications.gc.ca/collections/collection_2015/sp-ps/PS18-10-2014-eng.pdf>.

> The bribing of a foreign public official by a Canadian public corporation is a very serious crime.… It is an insult to its shareholders and it besmirches the reputation of that Canadian corporation. It tarnishes the reputation of Alberta and of Canada … [and] is an embarrassment to all Canadians.… It prejudices Canada's efforts to foster and promote effective governmental and commercial business relations with other countries.[144]

***R v Griffiths Energy International***

The second significant *CFPOA* conviction is *R v Griffiths Energy International*.[145] Griffiths Energy pled guilty to paying a bribe of over CDN$2 million to the wife of Chad's ambassador to Canada. Griffiths Energy was sentenced to pay a CDN$9,000,000 fine plus a 15% victim surcharge for a total penalty of CDN$10,350,000.

Justice Brooker, who sentenced Niko Resources Ltd., was the sentencing judge in *Griffiths Energy*. As in *Niko Resources*, he accepted the joint submission on sentencing and reiterated the severity of the offence, as well as the primary objectives of denunciation and deterrence.[146]

*Griffiths Energy* is notable for being the first case of self-reporting leading to a conviction, which was a particularly salient feature in the sentencing decision. While the size of the bribe was an aggravating factor, Justice Brooker noted "significant" countervailing mitigating circumstances.[147] The company had a new management team and when they discovered the bribe, they acted quickly and decisively to investigate the matter. They subsequently self-reported the crime.[148]

Less salient in the sentencing decision was the American authorities' submission to the court. Justice Brooker declined to give much weight to this submission despite acknowledging the lack of Canadian jurisprudence. In his view, the American authorities were not helpful "given that the sentencing regime in the U.S. is quite different and involves grids, offence levels, culpability scores and advisory ranges."[149] However, Justice Brooker took from the American authorities that self-reporting and cooperation should result in a significant reduction in penalty.[150] He concluded the proposed fine was appropriate.

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[144] *Niko Resources*, *supra* note 138 at paras 10-17.
[145] *Griffiths Energy*, *supra* note 138.
[146] *Ibid* at paras 8-9.
[147] *Ibid* at paras 14-15.
[148] *Ibid* at paras 15-20.
[149] *Ibid* at para 23.
[150] *Ibid*.

***R v Karigar***

*R v Karigar* was the first conviction of an individual under the *CFPOA* and the first conviction following a trial.[151] The accused was sentenced to three years imprisonment for conspiring to bribe foreign public officials.[152]

While acting as an agent for a Canadian company, Karigar, the accused conspired to offer bribes to Air India officials and the Indian Minister of Civil Aviation to secure a multi-million-dollar contract with Air India. Since Air India was an Indian state-owned corporation, the targeted officials were "foreign public officials" for the purposes of the *CFPOA*.

Justice Hackland recognized the limited jurisprudence under the *CFPOA*. Based on his review of the previous *CFPOA* decisions, he held that bribery of foreign officials must be viewed as a serious crime and the primary objectives of sentencing must be denunciation and deterrence.[153] He specifically cited *Griffiths Energy* and *Niko Resources* as establishing that a "substantial" penalty must be imposed for the offence.[154]

To fill the jurisprudential gap, Justice Hackland relied on the text of the OECD Convention. He referred to Article 3(1) of the OECD Convention to conclude that bribery of foreign public officials should be subject to similar sanctions as domestic bribery offences.[155]

Justice Hackland found evidence from the OECD Working Group on Bribery (WGB) and the US Sentencing Commission's *Guidelines* to be less helpful. The WGB's concerns about Canada's enforcement leniency in *Hydro Kleen*, while helpful background, were not directly relevant to sentencing.[156] Furthermore, "the evidence of U.S. sentencing guidelines based on tariffs and somewhat similar British guidelines are simply inapplicable in Canada."[157]

Justice Hackland reiterated the severity of the offence as reflected in its maximum penalty. At the time, the amendments to the *CFPOA* increasing the maximum penalty were not in force. Although the penalty could not be retroactively applied, it illustrated "Parliament's recognition of the seriousness of this offence and of Canada's obligation to implement appropriate sanctions."[158]

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[151] *R v Karigar*, 2013 ONSC 5199.
[152] *R v Karigar*, 2014 ONSC 3093 [*Karigar*], aff'd 2017 ONCA 576; leave to appeal to SCC refused, 37784 (15 March 2018).
[153] *Karigar*, *supra* note 152 at para 19.
[154] *Ibid*.
[155] *Ibid* at para 5. On appeal, Mr. Karigar argued the trial judge erred in using the OECD Convention as a guide to the interpretation of the *CFPOA*. The Court of Appeal concluded the trial judge was "clearly entitled to look to the *Convention* and the anti-corruption policy it represents as part of the context for the interpretation of the [*CFPOA*]" (*R v Karigar*, 2017 ONCA 576 at para 41).
[156] *Ibid* at para 8.
[157] *Ibid*.
[158] *Ibid* at para 6.

***R v Barra and Govindia***

*R v Barra and Govindia* arose out of the same bribery scheme in *Karigar*.[159] The offenders were each convicted of agreeing to bribe the Indian Minister of Civil Aviation.[160] Justice Smith sentenced each offender to 30 months' imprisonment.

Justice Smith accepted that the *Karigar* decision was the "benchmark" for sentencing Barra and Govindia.[161] However, he considered the offenders to have less moral blameworthiness than Karigar. For instance, while Barra authorized substantial bribes, "he did not conceive of or orchestrate the bribery and did not act with a complete sense of entitlement like Mr. Karigar."[162] While Govindia was an agent who agreed to pay substantial bribes to the Minister, "he did not conceive of or orchestrate the bribery scheme like Mr. Karigar."[163]

In addition to denunciation and deterrence, the principles of parity, proportionality, and restraint were applicable since the offenders had no criminal records.[164] Aggravating factors included the substantial amount of the bribe, the seriousness of the offence, and the offenders' motivation of financial gain.[165] Mitigating factors included that the offenders lacked criminal records, cooperated with the Crown, and suffered adverse financial consequences following the charges.[166] In all the circumstances, Justice Smith concluded that a sentence of 30 months' imprisonment was appropriate for Barra and Govindia.

***R c Bebawi***

*R c Bebawi* is the most recent conviction under the *CFPOA*.[167] The accused was found guilty following trial by jury on five counts relating to fraud, corruption of foreign officials, and laundering the proceeds of crime in relation to SNC Lavalin Inc.'s activities in Libya. Bebawi was sentenced to a concurrent sentence of eight years and six months' imprisonment.

Justice Cournoyer explained a severe penalty was required due to the presence of several aggravating factors—the sophisticated nature of the fraud, the level of premeditation required to execute it, as well as attempts to cover up sums of money from the RCMP. The judge also cited a Supreme Court of Canada decision for the proposition that the criminal law is a "system of values" and a "sentence which expresses denunciation is simply the means by which these values are communicated."[168]

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[159] *R v Barra and Govindia*, 2019 ONSC 1786 [*Barra and Govindia*}.
[160] The trial judge had acquitted the offenders for the charges relating to bribing the Air India officials. The trial judge found the offenders lacked the requisite intent or knowledge for the offence. He was unable to find that the defendants knew that the Air India employees were "foreign public officials." See *R v Barra and Govindia*, 2018 ONSC 57.
[161] *Barra and Govindia*, *supra* note 159 at para 13.
[162] *Ibid* at para 18.
[163] *Ibid* at para 20.
[164] *Ibid* at para 12.
[165] *Ibid* at paras 10-11.
[166] *Ibid* at paras 8-9.
[167] *R c Bebawi*, 2020 QCCS 22.
[168] *Ibid*, at paras 45-47. *R v M (CA)*, [1996] 1 SCR 500 at para 81.

**Conclusion**

The limited jurisprudence under the *CFPOA* makes it difficult to predict how sentencing will be determined as more convictions are obtained.[169] However, there appears to be a trend of increased enforcement and several principles are emerging.

**As substantial penalties become the norm, *Hydro Kleen* will likely be treated as an outlier.** Notwithstanding that, it was the first conviction under the *CFPOA, Hydro Kleen* has not been regarded as persuasive in later cases. There is a manifest distinction between the level of enforcement in *Hydro Kleen* and in subsequent decisions. The more recent authorities illustrate a trend of increased enforcement and substantial sanctions for foreign bribery.

**UK and American authorities are not persuasive in Canadian sentencing law.** Sentencing in Canada involves an exercise of greater discretion than in either the US or the UK. Sentencing in the US and the UK requires an application of sentencing guidelines. For that reason, authorities from those jurisdictions lack much relevance in the Canadian context.[170]

**The gravity of the offence is the paramount consideration in sentencing and the principles of denunciation and deterrence are primary.** Given the dearth of sentencing authorities under the *CFPOA*, Canadian sentencing judges have had to rely chiefly on first principles. In doing so, the nascent jurisprudence has been guided by the seriousness of the offence and the primary sentencing objectives of denunciation and general deterrence.

**For individual offenders, the severity of the offence militates in favour of imprisonment.** Far from being a "victimless" crime, the courts view the victim of bribery and corruption to be Canadian society as a whole. The courts recognize bribery offences undermine the strength and legitimacy of public institutions, which has adverse consequences. On the other hand, these crimes may not have a specific victim in a material sense. Perhaps the starkest example of this is *R v Barra and Govindia*. In that case, the bribery attempt failed, and the company went bankrupt after the unsuccessful bid. On the facts, Barra suffered the largest financial loss. That Justice Smith would sentence Barra to 30 months' imprisonment suggests the gravity of the offence is primary in sentencing this type of offence.

**Canadian sentencing judges accept guilty pleas, cooperation, and subsequent measures to improve *CFPOA* compliance as significant mitigating factors.** This mirrors the approaches taken in the US and UK. All three jurisdictions have recognized that the complexity of corruption leads to difficulty in uncovering corruption offences, as well as difficulties and costs in prosecuting these crimes.

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[169] As of writing, the RCMP recently announced charges had been laid against Damodar Arapakota for bribing a public official from Botswana. It is alleged that Arapakota, a former executive from IMEX Systems Inc., provided financial benefit for a Botswanan public official and his family. See Royal Canadian Mounted Police, News Release, "RCMP Lays Charges Under the Corruption of Foreign Public Officials Act" (12 November 2020), online: <https://www.rcmp-grc.gc.ca/en/news/2020/rcmp-lays-charges-the-corruption-foreign-public-officials-act>.

[170] *Griffiths Energy*, *supra* note 138 at para 23; *Karigar*, *supra* note 152 at para 8.

However, as discussed by Wendy Berman and Jonathan Wansbrough, the benefits of self-reporting potential violations of the *CFPOA* are unclear due to limited jurisprudence and the lack of formal guidelines on leniency and immunity for self-reporting companies and individuals.[171] Griffiths Energy self-reported and received a smaller fine in relation to its bribe than Niko Resources, which cooperated, but did not self-report. However, other mitigating factors were at play in *Griffiths Energy*, such as the company's contribution to investigation costs. In *Karigar,* the mitigating effect of self-reporting was lessened by other aggravating factors. This indicates that the benefit of self-reporting depends on the facts of each case. Because of this uncertainty and lack of assurance, companies may be reluctant to self-report breaches of the *CFPOA.* As mentioned in Section 8.6, some critics argue that the appeal of self-reporting is further reduced by Canada's relatively harsh debarment regime.[172]

## 6.6 Remediation Agreements

In 2018, amendments to the *Criminal Code* came into force establishing a DPA regime for corporate wrongdoing in Canada.[173] The Canadian legislation refers to DPAs as "remediation agreements."

To be eligible for a remediation agreement, the accused must be an organization. A remediation agreement may only be entered into for certain prescribed offences, including bribery and fraud and *CFPOA* offences.

Crown prosecutors are responsible for negotiating remediation agreements, but several preconditions must be met before doing so. As a threshold requirement, the Crown prosecutor must be satisfied that there is a reasonable prospect of conviction.[174] The Crown prosecutor must be further satisfied that (1) the impugned conduct did not cause serious bodily harm or death or injury to national defence or national security and was not committed in association with a criminal organization or terrorist group, and (2) negotiating a remediation agreement is in the public interest.[175] If the Crown prosecutor is so satisfied,

[171] Wendy Berman & Jonathan Wansbrough, *Risky Business: A Primer on Canada's Foreign Anti-Corruption Enforcement Regime*, (Toronto; Vancouver, BC: Cassels Brock & Blackwell LLP, 2014) at 25, online: <https://studylib.net/doc/11485412/risky-business-a-primer-on-canada%E2%80%99s-foreign-anti-corrupti>.
[172] John Manley, "Canada Needs New Tools to Fight Corporate Wrongdoing", *The Globe and Mail* (29 May 2015), online: <https://www.theglobeandmail.com/report-on-business/rob-commentary/canada-needs-new-tools-to-fight-corporate-wrongdoing/article24675411/>.
[173] *Criminal Code*, *supra* note 100, Part XXII.1.
[174] *Ibid*, s 715.32(1)(a).
[175] *Ibid*, s 715.32(1)(b)-(c).

they recommend to the Chief Federal Prosecutor that consent of the Attorney General be sought.[176]

The heart of the remediation agreement regime is consent from the Attorney General.[177] The Director of Public Prosecutions, on behalf of the Attorney General, makes the final decision on whether to consent to invite an organization to negotiate a remediation agreement. The decision of whether to enter settlement discussions falls within the ambit of prosecutorial discretion.[178] Where the Attorney General consents, the Director of Public Prosecutions designates a Crown prosecutor for the purpose of negotiating the remediation agreement.[179]

Negotiated remediation agreements are subject to court approval.[180] The court must approve the agreement if it is satisfied that the agreement is in the public interest and the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.[181]

Upon receiving court approval, prosecution against the accused organization is stayed, subject to satisfaction of the terms of the remediation agreement. Approved remediation agreements, including the statement of facts and admission of responsibility, are publicly available, subject to a court sealing the record, and may be admissible as evidence in other matters related to the underlying misconduct.

Most commentators and practitioners saw the introduction of a DPA regime as a welcome development in Canada. However, to date, no remediation agreements have been announced.

**SNC-Lavalin Group Inc.**

In 2019, the remediation agreement regime came under scrutiny when the efforts of SNC-Lavalin Group Inc. (SNC) to seek a remediation agreement were made public. The Canadian Director of Public Prosecutions declined to invite SNC to negotiate a remediation agreement due to its ongoing connection with the foreign bribery and fraud charges. The then-Attorney General alleged that the Prime Minister's Office attempted to interfere in the exercise of their prosecutorial discretion by advocating that they reconsider the Director of Public Prosecution's decision.

SNC-Lavalin and two of its subsidiaries, SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. (SLCI), were charged with one count each of a violation of section 3(1)(b)

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[176] The Chief Federal Prosecutor conducts their own assessment and makes a recommendation to the Deputy Director of Public Prosecutions. The Deputy Director of Public Prosecutions conducts an objective assessment of the request to determine whether negotiation of a remediation agreement will be recommended. In this role, the Deputy Director of Public Prosecutions exercises a challenge function. See "Public Prosecution Service of Canada Deskbook: 3.21 Remediation Agreements" (23 January 2020) [3.21 Remediation Agreements], online: *Public Prosecution Service of Canada* <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html>.

[177] *Criminal Code*, *supra* note 100, s 715.32(1)(d).

[178] *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282.

[179] 3.21 Remediation Agreements, *supra* note 176.

[180] *Criminal Code*, *supra* note 100, s 715.37(1).

[181] *Ibid*, s 715.37(6).

of the *CFPOA* and one count each of fraud contrary to section 380(1)(a) of the *Code*. The charges arose out of the company's dealings in Libya from 2001 until 2011 during the Gaddafi regime.

After being denied a remediation agreement, SNC settled the criminal corruption charges when its subsidiary, SLCI, pled guilty to a single charge of defrauding Libya contrary to section 380 of the *Code*. As part of the settlement, SLCI was required to pay a CDN$280 million fine over five years and to comply with a three-year probation order.

The structure of the SNC plea agreement is noteworthy for several reasons:

- SLCI pled guilty to the charge of defrauding Libya contrary to section 380 of the *Code*. A violation of section 3 of the *CFPOA* results in a mandatory debarment of at least five, and up to ten, years. In contrast, a conviction for fraud contrary to section 380 will result in debarment only if the fraud is committed against Canada. By pleading guilty to defrauding Libya, SLCI was not subject to debarment.
- SLCI, as a *subsidiary* of SNC, entered into the guilty plea and thus sanctions were imposed only on SLCI. In theory, the benefit of a subsidiary entering the guilty plea is that the parent avoids sanctions related to debarment, preserving their ability to bid on government contracts. However, as noted, the charge for which SLCI pled guilty did not result in debarment.
- The term of the probation order requires that SLCI "shall cause" SNC to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures. The legal effect of the words "shall cause," and how a subsidiary can cause their parent to maintain and strengthen its compliance program, is uncertain.
- Finally, the fine imposed on SLCI is much larger than any fine imposed under the *CFPOA* or any other domestic bribery offence, adding to the trend of increased enforcement in Canada.

Several questions arise out of the SNC plea agreement, particularly with respect to what it portends for future plea deals or the nascent remediation agreement regime. Subsidiaries entering guilty pleas on behalf of parents could become common. Subsidiaries could also enter into remediation agreements on behalf of parent companies. Neither the *Code* nor any Department of Justice policy suggests that a subsidiary is precluded from entering into a remediation agreement on behalf of a parent company. As such, one could reasonably expect that some future remediation agreements will be modelled on the SNC plea arrangement.

**Current State of Remediation Agreements**

As of writing, no remediation agreements have been concluded in Canada. Kathleen Roussel, the current Director of Public Prosecutions, nevertheless provided comments in an

interview, suggesting how remediation agreements may be utilized in the future.[182] Roussel remarked that Canada is not likely to grant remediation agreements to repeat offenders, noting it would be "very unusual" for a company to benefit twice from a remediation agreement. Instead, she viewed the prosecutorial tool as a "one-time thing," notwithstanding that such a limitation is not prescribed in the legislation. The Director of Public Prosecutions was cognizant that the first remediation agreement would inevitably be a precedent. Roussel suggested that it was not in the public interest to enter a remediation agreement with SNC given the severity and breadth of their conduct.

## 7. CRIMINAL FORFEITURE

Criminal forfeiture is introduced in a general way in Chapter 5, Section 2.4.1. The laws and procedures for criminal forfeiture under UNCAC and the OECD Convention and in the US, UK and Canada are discussed in Chapter 5, Sections 3.1, 3.2, 5.1, 5.2, and 5.3 respectively.

## 8. DEBARMENT AS A COLLATERAL CONSEQUENCE

Debarment is a sanctioning tool by which an individual or corporation convicted of a corruption offence may face a period of ineligibility from bidding on government contracts. For companies that rely on public contracts and tenders as a large portion of their business, the prospect of debarment is a significant deterrent and punishment.[183] For example, after debarment, a company may lose clients, suffer reputational damage, face insolvency or even go out of business.[184] The debarment process can be complex and multiple variables must be considered, such as the length of the debarment, whether it is automatic or discretionary, and the jurisdictions and organizations where the debarment applies.[185] Moreover, the impact of debarment can be multiplied by cross-debarment whereby departments, governments or other institutions or organizations agree to mutually enforce each other's debarment actions. One such example is a cross-debarment agreement between the Multilateral Development Banks (MDBs), consisting of the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group. As stated by the MDBs, "cross debarment creates a formidable additional deterrent to firms and individuals

[182] Robert Fife, "Prosecutor Says No Deal was Offered to SNC-Lavalin Due to Severity of Charges and Past Behaviour," *The Globe and Mail* (28 February 2020), online: <https://www.theglobeandmail.com/politics/article-top-federal-prosecutor-says-she-felt-no-political-pressure-on-snc/>.
[183] Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Farnham; Burlington: Ashgate, 2014) at 113.
[184] *Ibid* at 113.
[185] *Ibid* at 113.

engaged in fraud and corruption in MDB-financed development projects, and possibly provides an incentive for firms to clean up their operations."[186]

## 8.1 UNCAC

Article 34 of UNCAC provides as follows:

> With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.[187]

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

## 8.2 OECD Convention

Article 3 of the OECD Convention provides in part:

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

The commentary on this section reads:

> 24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; *temporary or permanent disqualification from participation in public procurement* or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order. [emphasis added][188]

[186] "Cross Debarment – Agreement for Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks" (last visited 28 September 2021), online: *Asian Development Bank* <http://lnadbg4.adb.org/oai001p.nsf/>.
[187] UNCAC, *supra* note 1, art 34.
[188] OECD Convention, *supra* note 2, art 3.

## 8.3 World Bank

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

The World Bank and the World Bank Group provide billions of dollars in loans to developing countries every year, funding large-scale infrastructure projects throughout the developing world. To preserve the integrity of these projects, the World Bank has developed its own sanctions system. Although the World Bank cannot impose criminal sanctions, debarment from bidding on World Bank-financed projects provides a powerful policy tool and is the World Bank's "baseline" sanction.[189] Such sanctions have been applied with considerable frequency. For example, between 2007 and 2017, the World Bank debarred or otherwise sanctioned 489 firms and individuals.[190] In the World Bank president's 2011 address, then-president Robert B. Zoellichk emphasized the important role that debarment and other sanctions play in deterring fraud, collusion and corruption:

> For more than 10 years, our sanctions system has played a crucial role within the Bank Group's anticorruption efforts. Sanctions protect Bank Group funds and member countries' development projects by excluding proven wrongdoers from our operations and financing. Sanctions also deter other participants or potential bidders in Bank Group-financed operations from engaging in fraud, collusion, or corruption. By holding companies and individuals accountable through a fair and robust process, the Bank Group's sanctions system promotes integrity and levels the playing field for those committed to clean business practices.
>
> Being in the forefront of antifraud and anticorruption efforts among multilateral development institutions, the Bank Group has continually explored new structures and strategies to deal most effectively with allegations of fraud and corruption. These efforts led, for instance, to the

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[189] Graham Steele, *Quebec's Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Faculty of Law, 2015) [unpublished] at 54, online: <http://dalspace.library.dal.ca/handle/10222/56272>; World Bank Group, *World Bank Group Sanctions System Annual Report FY19*, (Washington, DC: World Bank Group, 2019) at 6, online (pdf): <http://documents1.worldbank.org/curated/en/782941570732184391/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf>.

[190] The World Bank, The World Bank Office of Suspension and Debarment, *10-Year Update on Case Data & Metrics (2007–2017) – Addendum to the Second Edition*, (Washington, DC: International Bank for Reconstruction and Development/The World Bank, 2017) at 5, online (pdf): <https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/2019/may/OSDReport10YearUpdate.pdf>. The World Bank maintains a comprehensive list of ineligible firms and individuals: "Procurement – World Bank Listing of Ineligible Firms and Individuals" (last visited 28 September 2021, the list is updated every three hours), online: *The World Bank* <https://www.worldbank.org/en/projects-operations/procurement/debarred-firms>.

> establishment of the Sanctions Board in 2007 as a new and independent body providing final appellate review. Composed of a majority of external members since its establishment, the Sanctions Board has also been led by an external Chair since 2009. The Bank Group worked with the regional multilateral development banks to reach a groundbreaking agreement on cross-debarment in 2010. Those who cheat and steal from one will be debarred by all. Most recently, the Bank Group took a major step toward greater transparency and accountability by authorizing the publication of decisions in new sanctions cases initiated in 2011 and onward.[191]

The World Bank summarizes its sanctions process as follows:

> One way that the World Bank Group combats corruption is through the use of **administrative sanctions** against firms or individuals who have engaged in fraud, corruption, coercion, collusion or obstruction (referred to collectively as Sanctionable Practices) in connection with World Bank-financed projects. The sanctions regime is designed to protect the funds entrusted to the World Bank, while offering the firms and individuals involved an opportunity to respond to the allegations against them.
>
> …
>
> Allegations that a firm or individual engaged in a Sanctionable Practice are investigated by the **World Bank Group's Integrity Vice Presidency (INT)**. If INT believes there is sufficient evidence to substantiate the allegations, the case is referred to the **Office of Suspension and Debarment (OSD)***—the first tier of the Bank's two-tier administrative sanctions process.
>
> The SDO reviews the evidence submitted by INT and determines if the evidence is sufficient to support a finding that the alleged Sanctionable Practice occurred. If so, the SDO issues a Notice of Sanctions Proceedings to the firm or individual alleged to have engaged in the Sanctionable Practice (the respondent). The Notice includes the allegations, the evidence as submitted by INT, and a recommended sanction. The SDO may also recommend the imposition of sanctions on affiliates of the respondent. Upon issuance of the Notice, the SDO temporarily suspends the respondent from eligibility for new World Bank-financed contracts, pending the final outcome of the sanctions process.
>
> The respondent can choose not to contest the allegations or the recommended sanction, in which case the sanction recommended by the SDO is imposed. If the firm or individual contests the allegations or the recommended sanction, the case is referred to the **World Bank Group**

[191] The World Bank Group Sanctions Board, *Law Digest – Upholding the Rule of Law in the Fights Against Corruption and Poverty*, (Washington, DC: The World Bank, 2011) at 5, online (pdf): <https://web.archive.org/web/20170304082301/http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1342729035803/SanctionsBoardLawDigest.pdf>.

> **Sanctions Board**—the second tier of the Bank's two-tier administrative sanctions process.
>
> The Sanctions Board carries out a full *de novo* review in each contested case. It is not bound by the SDO's/EO's recommendation. An administrative hearing may be held by the Sanctions Board either upon a party's request or at the discretion of the Sanctions Board Chair. In its deliberations, the Sanctions Board considers INT's allegations and evidence as attached to the Notice of Sanctions Proceedings; the respondent's arguments and evidence submitted in response to INT's allegations and evidence; INT's reply brief; the parties' presentations at a hearing, if applicable; and any other materials contained in the record.
>
> After completing its review, the Sanctions Board determines whether it is "more likely than not" that the respondent engaged in a sanctionable practice. If so, the Sanctions Board imposes one or more … sanctions, which may extend to a respondent's affiliates, successors and assigns. The decisions of the Sanctions Board are final and non-appealable.[192]

The Sanctions Board exercises discretion in determining an appropriate sanction. The available sanctions are described in the *World Bank Sanctioning Guidelines*:

> **I. Base Sanction:** The base sanction for all misconduct is 3 year debarment with conditional release.
>
> **II. Range of Sanction**
>
> **A. Debarment with Conditional Release:** Debarment with conditional release is the 'baseline' sanction which should normally be applied absent the considerations that would justify another sanction as outlined in paragraphs B though F below. The purpose of the conditional release is to encourage the respondent's rehabilitation, to mitigate further risk to Bank-financed activities. Accordingly, the respondent will only be released from debarment after (i) the defined debarment period lapses, *and* (ii) the respondent has demonstrated that it has met the conditions set by the EO or Sanctions Board and detailed by the Integrity Compliance Officer.
>
> …
>
> Conditions imposed may include:
>
> i) Implementation or improvement of an integrity compliance program; and
>
> ii) Remedial measures to address the misconduct for which the respondent was sanctioned, including disciplinary action or termination of employee(s)/officer(s) responsible for the misconduct.

[192] "The World Bank Group's Sanctions System — Tackling Corruption Through a Two-Tier Administrative Sanctions Process" (last visited 28 September 2021), online: *The World Bank* <https://www.worldbank.org/en/about/unit/sanctions-system#2>.

The Integrity Compliance Officer verifies whether conditions have been met. Determinations of compliance by the Compliance Officer are subject to appeal to the Sanctions Board in accordance with the Sanctions Procedures.

**B. Debarment:** The Bank may apply this sanction if there would be no reasonable purpose served by imposing conditions. This would occur, for example, in cases where a sanctioned firm has already in place a robust corporate compliance program, the Sanctionable Practice involved the isolated acts of an employee or employees who have already been terminated, and the proposed debarment is for a relative short period of time (e.g., one year or less).

**C. Conditional Non-Debarment:** Generally, the Bank may apply this sanction, consistent with the Bank's fiduciary obligations and the goals of specific and general deterrence, to:

i) sanctioned parties affiliated with the respondent that are not directly involved in the Sanctionable Practice in which the respondent has engaged, but which bear some responsibility thereof, through, for example, a systemic lack of oversight; or

ii) respondents that have demonstrated that they have taken comprehensive corrective measures and that such other mitigating factors apply … so as to justify non-debarment.

The conditions imposed will likely be similar to those imposed under debarment with conditional release. In the event that the sanctioned party fails to demonstrate compliance with the conditions within the time periods established by the Sanctions Board, a debarment would automatically become effective for a period of time established by the EO and/or Sanctions Board.

**D. Letter of Reprimand:** A Letter of Reprimand should most often be used to sanction an affiliate of the Respondent that was only guilty of an isolated incident of lack of oversight.

**E. Permanent Debarment:** Permanent debarment is generally only appropriate in cases where it is believed that there are no reasonable grounds for thinking that the respondent can be rehabilitated through compliance or other conditionalities. It is anticipated that permanent debarment would most commonly be applied to natural persons, closely held companies by such persons and shell companies.

**F. Restitution and other Remedies:** Restitution, as well as financial and other remedies, may be used in exceptional circumstances, including those

> involving fraud in contract execution where there is a quantifiable amount to be restored to the client country or project.[193]

In light of the gravity of the consequences of a World Bank debarment, some lawyers, particularly defence counsel in the US, are wary of the fact that the World Bank is not required to follow any country's rules of procedure or to subscribe to American concepts of due process.[194] However, it may fairly be said that the World Bank's procedures do contain a healthy dose of due process.

## 8.4 US

Under the US *Federal Acquisition Regulations*, an individual or corporation can be debarred from federal contracts for a number of reasons, including bribery or the commission of an offence indicating a lack of business integrity. Debarment from one government agency typically results in debarment from other agencies.[195] In May 2014, the Government Accountability Office reported a dramatic increase in suspension and debarment actions, increasing from 19 in 2009 to 271 in 2013.[196] The Interagency Suspension and Debarment Committee's Fiscal Year (FY) 2019 Report noted that "the total number of suspensions, proposed debarments, and debarments in FY 2019 represents nearly double the activity level reported in FY 2009."[197]

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

> It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness

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[193] The World Bank Group, *World Bank Sanctioning Guidelines*, (The World Bank Group, 2011) at 1–2, online (pdf): <https://web.archive.org/web/20170304135341/https://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf>.

[194] Julie DiMauro, "World Bank Combats Corruption – but Questions Linger About Process" (22 May 2014), online: *The FCPA Blog* <http://www.fcpablog.com/blog/2014/5/22/world-bank-combats-corruption-but-questions-linger-about-pro.html>.

[195] United States Federal Register, "Executive Order 12549 – Debarment and Suspension" (last reviewed 15 August 2016), online: <http://www.archives.gov/federal-register/codification/executive-order/12549.html>.

[196] US, Government Accountability Office (GAO), *Federal Contracts and Grants – Agencies Have Taken Steps to Improve Suspension and Debarment Programs* (GAO-14-513) (Washington, DC: GAO, 2014), online (pdf): <http://www.gao.gov/assets/670/663359.pdf>.

[197] US, Interagency Suspension and Debarment Committee (ISDC), *FY 2019 Report on Federal Agency Suspension and Debarment Activities* (Washington, DC: ISDC, 2021) at 4, online (pdf): <https://www.acquisition.gov/sites/default/files/page_file_uploads/ISDC%20FY19%20873%20Report.pdf>.

> of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.[198]

Causes for debarment include a conviction or civil judgment for commission of fraud or a criminal offence in conjunction with obtaining, attempting to obtain or performing a public contract or sub-contract; commission of an offence indicating a lack of business integrity; and violating federal criminal law involving fraud, conflict of interest or gratuity violations.[199]

Factors considered by the debarment official include standards of conduct and internal controls, self-reporting in a timely manner, internal investigation, cooperation with external investigation, payment of any fines, disciplinary actions, and remedial measures.[200]

The regulations state that the period of debarment shall be commensurate with the seriousness of the cause(s) and generally should not exceed three years. The period can be extended if necessary to protect government interests. Contractors can request a reduction based on reasons including a reversal of a conviction or civil judgment, a bona fide change in ownership or management and elimination of other causes for which debarment was imposed.[201]

In addition to public procurement debarment, *FCPA* violations may lead to ineligibility to receive export licenses, SEC suspension, and debarment from the securities industry.[202]

## 8.5 UK

The UK "exclusion" (i.e., debarment) regime is contained in the *Public Contracts Regulations 2015*.[203] This regime includes both mandatory and discretionary exclusions, as well as "self-cleaning" provisions designed to encourage companies to take proactive measures to remedy past wrongdoings and prevent future wrongdoing.

Beginning with mandatory exclusions, Regulation 57(1) provides that contracting authorities shall exclude an "economic operator" from participation in a procurement procedure where they have established that the economic operator has been convicted of any listed offence. These include certain forms of conspiracy, corruption, bribery, fraud, money laundering, terrorism offences, drug offences, child labour and human trafficking offences, and other offences. Regulation 57(3) provides that an economic operator shall be

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[198] *Debarment – General*, 48 CFR § 9.406-1.
[199] *Causes for Debarment*, 48 CFR § 9.406-2.
[200] *Debarment – General*, *supra* note 198.
[201] *Period of Debarment*, 48 CFR § 9.406-4.
[202] 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 (Chicago: American Bar Association, 2018) at 59. For the full list of the United States Federal Acquisition Regulations, see: "FAR" (last visited 29 September 2021), online: *ACQUISITION.GOV* <http://www.acquisition.gov/far/>.
[203] *The Public Contracts Regulations 2015* (UK), SI 2015/102.

excluded when they are in breach of their obligations relating to the payment of taxes or social security contributions and that breach has been proven by a judicial or administrative decision. However, Regulation 57(6) provides that a contracting authority may disregard a mandatory exclusion "for overriding reasons relating to the public interest such as public health or protection of the environment." This exclusion might be invoked, for example, where medical supplies are required on an urgent basis, and the economic operator in question is the only one capable of providing those supplies.

Regulation 57(8) sets out discretionary exclusions, including:

- where the economic operator is bankrupt;
- where the contracting authority considers the economic operator to be guilty of "grave professional misconduct" that "renders its integrity questionable;"
- where the contracting authority has "sufficiently plausible" indications to conclude that the economic operator has entered into agreements with others aimed at distorting competition;
- where the economic operator has shown "significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract" that "led to early termination … damages or other comparable sanctions;"
- where the economic operator has been guilty of serious misrepresentation or has withheld information; or
- where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority.[204]

Some of these discretionary exclusions may be criticized as being too subjective or ambiguous (e.g., the exclusion relating to "grave professional misconduct" that "renders [the economic operator's] integrity questionable," and the exclusion relating to "sufficiently plausible" indications that the economic operator has entered into agreements to distort competition). Moreover, the Regulations do not provide guidance on the factors that should guide contracting authorities in deciding whether to exercise their discretion, nor do they require contracting authorities to provide reasons for such a decision. This may result in a lack of predictability for economic operators and/or a lack of procedural fairness. On the other hand, these concerns must be balanced against the need for flexibility, which is an important component of a sound public procurement framework.

Regulation 57(11) provides that the mandatory exclusions generally apply for five years from the date of conviction. Regulation 57(12) provides that the discretionary exclusions generally apply for three years from the date of the relevant event. The seemingly rigid nature of these provisions is moderated by the "self-cleaning" provisions discussed below.

[204] *Ibid*, Reg 57(8).

The Regulations contain "self-cleaning" provisions designed to encourage companies to take proactive measures to remedy past wrongdoing and prevent future wrongdoing. Regulation 57(13) stipulates that an economic operator may provide evidence that it has taken measures sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. Regulation 57(14) provides that if the contracting authority considers such evidence to be sufficient, it shall not exclude the economic operator from the procurement procedure. To meet this threshold, the economic operator must prove, pursuant to Regulation 57(15), that it has:

> (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
>
> (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
>
> (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.[205]

The law firm Norton Rose Fulbright suggests "[e]ffective self-cleaning measures are likely to require a company to invest a considerable amount of time and money into the process and may lead contracting public authorities to insist that companies appoint independent monitors to supervise the process."[206] The firm also suggests that the "self-cleaning" provisions may create a "credible incentive for companies to self-report."[207] Indeed, the self-cleaning provisions are a welcome development that recognizes the importance of encouraging companies to take appropriate measures to rectify past wrongs, cooperate with authorities and take proactive measures to prevent future wrongdoing.

As discussed in Chapter 12, Section 6.3, in the wake of the UK's exit from the EU, the UK government proposed an "overhaul" of the UK's public procurement regime.[208] Consequently, the provisions summarized above may be replaced by a new framework. Scholars have observed that the UK's exit from the EU provides an opportunity for the UK to develop a stronger exclusion regime.[209] For example, Sue Arrowsmith argues that "there should be centrally-administered mandatory exclusions for integrity breaches, which should cover wider grounds than current mandatory exclusions and should not be limited to cases where the supplier has a criminal conviction or other formal judgment against it."[210] Given the UK government's indication that it intends to create a new public procurement

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[205] *Ibid*, Reg 57(15).
[206] "Public Contracts Regulations 2015: The New Rules on Debarment" (October 2015), online: *Norton Rose Fulbright* <https://www.nortonrosefulbright.com/en/knowledge/publications/67f58d50/public-contracts-regulations-2015>.
[207] *Ibid*.
[208] UK, Parliamentary Secretary at the Cabinet Office, *Transforming Public Procurement* (CP 353, 2020), online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf>.
[209] See e.g., Sue Arrowsmith, "Constructing Rules on Exclusions (Debarment) Under a Post-Brexit Regime on Public Procurement: A Preliminary Analysis" (2020) Working Paper, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659909>.
[210] *Ibid* at 4.

framework as a whole, significant changes to the UK's exclusion regime may well be on the horizon.

## 8.6 Canada

Public Services and Procurement Canada (PSPC), formerly Public Works and Government Services Canada (PWGSC), is responsible for acquiring goods and services on behalf of the departments and agencies of the Government of Canada. PSPC handles a large number of contracts and manages an annual budget of over $4 billion.[211] It is also responsible for administering the federal government's debarment policies.

PSPC has developed a robust framework to support accountability and integrity in its procurement process. This framework includes policies, procedures and governance measures designed to ensure fairness, openness and transparency. The framework is not, however, free from criticism, and its history is complicated. Its history reflects a trend of increasing formality and severity, followed by attempts to introduce greater flexibility in response to criticism from businesses, NGOs and other organizations, all while maintaining a strong, predictable approach to debarment.[212]

In November 2007, PSPC began including a *Code of Conduct for Procurement* in its solicitation documents.[213] This code included provisions relating to debarment. The intent was to use debarment to ensure that government contracts are awarded only to "reliable and dependable" contractors. The primary purpose of debarment was seen as preserving the integrity of the public procurement process.

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

(a) corruption;
(b) collusion;

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[211] "About Public Services and Procurement Canada" (last modified 27 September 2021), online: *Public Services and Procurement Canada [PSPC]* <https://www.tpsgc-pwgsc.gc.ca/apropos-about/prps-bt-eng.html>.

[212] To track the evolution of Canada's debarment policies, see PSPC, *Integrity Provisions*, (Policy Notification), PN-107 (9 November 2012), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107>; PSPC, *Integrity Provisions*, (Policy Notification), PN-107U1 (1 March 2014), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>; PSPC, *New Integrity Regime,* (Policy Notification), PN-107R1 (3 July 2015), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R1>; PSPC, *Update to the Integrity Regime*, (Policy Notification), PN-107R2 (4 April 2016), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R2>; PSPC, News Release, "Canada to Enhance Its Toolkit to Address Corporate Wrongdoing" (27 March 2018), online: <https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>.

[213] The most recent version can be found online: Public Works and Government Services Canada, Code of Conduct for Procurement (effective as of 13 August 2021), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/cca-ccp-eng.html>.

(c) bid-rigging; or

(d) any other anti-competitive activity.[214]

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

(i) fraud;

(ii) money laundering;

(iii) participation in activities of criminal organizations;

(iv) income and excise tax evasion;

(v) bribing a foreign public official (e.g., contrary to Canada's *Corruption of Foreign Public Officials Act*); and

(vi) drug-related offences.[215]

In March 2014, PSPC introduced several fundamental changes to the Integrity Framework. PSPC added the following new categories of offences:

- extortion;
- bribery of judicial officers;
- bribery of officers;
- secret commissions;
- criminal breach of contract;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.[216]

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

[214] "ARCHIVED — Context and Purpose of the Code" (last modified 8 August 2021), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html>.
[215] Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: The Integrity Regime Stream Discussion Guide*, (Discussion Paper for Public Consultation), P4-74/2017E-PDF (Gatineau, QC: PSPC, 2017) [Integrity Regime Stream Discussion Guide] at 7, online (pdf): <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/examiner-review-eng.pdf>.
[216] *Ibid*.

its debarment under the "similar offences" provision of the Integrity Framework.[217] Siemens paid a $1.6 billion fine after pleading guilty to corruption-related offences in 2008 in the US and Germany.[218]

PSPC introduced a new automatic ineligibility period: all suppliers convicted of a relevant offence are automatically debarred for ten years. Once the ten-year debarment period passed, bidders are required to certify that adequate measures were established to avoid recurrence. Prime contractors are also required to apply the provisions of the Integrity Framework to their subcontractors.

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

- The strictness of the Integrity Framework could deprive the government, and the taxpaying public, of certain specialized expertise and high-quality goods and services.
- The policy's harshness and inflexibility discouraged companies from acknowledging and remediating wrongdoing. Companies were not offered strong incentives to cooperate with authorities or to seek to bring about wide-ranging cultural reforms within the corporation.
- The mandatory ten-year ineligibility period failed to provide any scope for reduction or leniency in light of the gravity of the offence or the supplier's remediation efforts. This rigid stance stood in contrast with the more flexible, forgiving position taken in the US, the EU and other jurisdictions whose procurement regimes grant credit for mitigating circumstances and remediation efforts. Notably, Transparency International Canada criticized the finality and rigidity of the ten-year debarment policy, pointing out that the World Bank's debarment policy "provides for regular third-party reviews of a company's compliance measures which provide an opportunity for the World Bank to determine if the company's debarment should be lifted."[219]
- Debarment based on the commission of "similar" foreign offences, with PSPC being the arbiter of what constitutes a "similar" foreign offence, was seen as being too subjective. In many cases, it could not be said with any certainty whether a

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

[218] *Ibid*.

[219] Letter from Transparency International Canada Inc to the Honourable Diane Finley, Minister of Public Works and Government Services (17 February 2015) at 5, online (pdf): <http://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c87b3a774003e678a7c8/5df7c87b3a774003e678a8ab/1576519803317/20150218-TI-Canada_Letter_to_Minister_Finley.pdf?format=original>.

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

- The foreign affiliates policy meant that law-abiding Canadian companies could be held responsible for a distant affiliate's criminal conduct occurring abroad in circumstances where the Canadian company had no participation or involvement. This policy came under considerable scrutiny after PSPC announced that it was investigating whether Hewlett Packard, the Government of Canada's largest computer hardware supplier, might be at risk of debarment due to the actions of an overseas affiliate.[220] In 2014, a Russian subsidiary of Hewlett Packard entered a guilty plea in the US for violating *FCPA* anti-bribery provisions.[221] Executives of the Russian subsidiary had bribed Russian government officials to secure government contracts. It soon became apparent that, in light of the Integrity Framework's provisions regarding "similar foreign offences" and affiliate responsibility, Hewlett Packard might be debarred in Canada. Although fears over Hewlett Packard's potential debarment were never realized, the notion that an important and well-respected government supplier might be debarred for ten years, with existing contracts being either terminated or continued under strict monitoring, raised eyebrows.

In November 2014, *The Globe and Mail* reported that the federal government might face a challenge from the World Trade Organization and NAFTA investor lawsuits due to the strictness of Canada's debarment rules.[222] Further concerns were expressed over the implications for trade. The severity of Canada's debarment policy gave rise to the possibility that Canadian companies could face "tit-for-tat retaliation" by countries in which major companies that had been debarred in Canada are headquartered.[223]

In response to these and other criticisms, PSPC replaced the "Integrity Framework" with a new, government-wide "Integrity Regime" on July 3, 2015.[224] The Integrity Regime emphasizes the importance of fostering ethical business practices, ensuring due process for suppliers, and upholding the public trust in the procurement process. The key elements of the current Integrity Framework are as follows:

- The Integrity Regime is administered by PSPC on behalf of the Canadian government. Other government departments and agencies may apply this regime

[220] Andy Blatchford, "Anti-Corruption Rules on Suppliers a Threat to Canadian Economy: Study", *Ottawa Citizen* (23 November 2014), online: <http://ottawacitizen.com/news/national/anti-corruption-rules-on-suppliers-a-threat-to-canadian-economy-study>.
[221] *Ibid*. Hewlett Packard's Russian subsidiary was fined $58.7 million for the *FCPA* violation.
[222] McKenna, *supra* note 217.
[223] *Ibid*.
[224] See John W Boscariol & Robert A Glasgow, "Canada Implements New Integrity Regime for Public Procurement" (5 July 2015), online: *McCarthy Tétrault* <http://www.mccarthy.ca/article_detail.aspx?id=7126>.

to their solicitations and contracts pursuant to memoranda of understanding with PSPC.

- The Integrity Regime applies government-wide to procurement and real property transactions over CDN$10,000 (as well as any other contract that incorporates the regime by reference), subject to specified exceptions.
- The following circumstances automatically lead to a determination of ineligibility:
    - the supplier has been convicted of an offence that results in a loss of capacity to contract with Her Majesty (ineligibility period: as long as the supplier lacks capacity);
    - the supplier has been convicted of any listed bribery, extortion, forgery, fraud, insider trading, falsification of books and records, money laundering, conspiracy, bid rigging, drug trafficking, lobbying or other listed offence (ineligibility period: ten years, with the possibility of a reduction of up to five years under an administrative agreement);
    - the supplier has entered into a subcontract with a first-tier subcontractor who lacks capacity to receive any benefit under a contract between Canada and any other person or is ineligible for, or suspended from, contract award under the Integrity Regime, subject to certain exceptions (ineligibility period: five years); and
    - the supplier has provided a false or misleading certification or declaration to PSPC (ineligibility period: ten years).[225]
- The following circumstances may lead to a determination of ineligibility or suspension (i.e., they are discretionary grounds):
    - the supplier has been convicted of an offence outside Canada that is "similar to" any Canadian offence for which a conviction would result in automatic ineligibility (ineligibility period: ten years, with the possibility of a reduction of up to five years under an administrative agreement);
    - the supplier's affiliate has been convicted of any Canadian offence for which a conviction would result in automatic ineligibility, or of a "similar offence" outside Canada and the supplier "directed, influenced, authorized, assented to, acquiesced in or participated in the commission of the offence" (ineligibility period: ten years, with the possibility of a reduction of up to five years under an administrative agreement);
    - the supplier has breached any term of condition of an administrative agreement with PSPC (ineligibility period: PSPC may lengthen the original period of ineligibility or re-impose a suspension); and
    - PSPC may suspend a supplier if the supplier has been charged with, or admits guilt of, any Canadian offence for which a conviction would result in automatic ineligibility, or has been charged with, or admits guilt of, a

[225] "Ineligibility and Suspension Policy" (last modified 14 July 2017), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>.

"similar offence" outside Canada (suspension period: 18 months, subject to extension pending final disposition of the charges, and subject to a stay of the suspension period under an administrative agreement).[226]

- For purposes of determining whether a foreign offence is "similar" to a listed Canadian offence, PSPC takes into account the following factors:
    - in the case of a conviction, whether the court acted within its jurisdiction;
    - whether the supplier was afforded the right to appear during the court's proceedings or to submit to the court's jurisdiction;
    - whether the court's decision was obtained by fraud; or
    - whether the supplier was entitled to present to the court every defence that the supplier would have been entitled to present had the proceeding taken place in Canada.[227]
- PSPC will not make a determination of ineligibility in respect of a listed offence if the supplier (or its affiliate, if applicable) has been granted an absolute discharge, or has been granted a conditional discharge and those conditions have been satisfied.
- Any administrative agreement may include, among other things, terms and conditions regarding separation of specific employees, implementation or extension of compliance programs, employee training, outside auditing, access by PSPC to specific information and/or records, reporting by a third party, or any other remedial or compliance measure that PSPC considers to be "in the public interest."
- A contracting authority may enter into a contract or real property agreement with an ineligible or suspended supplier if the relevant Deputy Head or equivalent considers that doing so is "in the public interest." The reasons for invoking this public interest exception may include:
    - the need to respond to an emergency where delay would be injurious to the public interest;
    - the supplier is the only person capable of performing the contract or providing the real property agreement;
    - the contract is essential to maintain sufficient emergency stocks in order to safeguard against possible shortages; or
    - not entering into the contract or real property agreement with the supplier would have a significant adverse impact on the health, national security, safety, public security or economic or financial well-being of Canadians or the functioning of any portion of the federal public administration.[228]

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[226] *Ibid*.
[227] "Guide to the *Ineligibility and Suspension Policy*" (last modified 16 December 2020), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/ci-if/guide-eng.html>.
[228] *Ibid*.

- PSPC may require a supplier to retain a third party in specified circumstances, such as where PSPC needs information with respect to foreign charges and convictions, or where a third party will monitor the supplier and report to PSPC pursuant to an administrative agreement.
- PSPC maintains a list of ineligible and suspended suppliers (which, at the time of writing, had only three suppliers listed).[229]

Some commentators applauded the Integrity Regime for moving away from punishment and retribution and towards the goal of preserving the integrity of public procurement processes. However, others observed that the new Integrity Regime is still strict in comparison to US, UK, and World Bank debarment regimes.

The debarment policies contained in the Integrity Regime are more lenient and flexible than those contained in the previous Integrity Framework in several ways. For the purposes of this section, three policy changes are particularly noteworthy.

- First, the new Integrity Regime eliminates automatic debarment of companies for an affiliate's conduct. This can be seen as a significant improvement, enhancing both the fairness and logic of the regime.
- Second, the ten-year debarment period is no longer set in stone. This period may be reduced through an administrative agreement, which would typically require the supplier to demonstrate that it has put in place measures to avoid potential future wrongdoing. (Note, however, that obtained reduction through an administrative agreement is not always available.) The possibility of receiving a shortened debarment period gives companies a compelling incentive to remedy the misconduct, cooperate with authorities and take proactive measures to prevent future wrongdoing. This new policy is more forward-looking in its orientation, rather than the retributive nature of the previous Integrity Framework.
- Third, Canadian lawyers Milos Barutciski and Matthew Kronby point out that the new regime increases transparency and fairness of the process of determining ineligibility through the addition of "due process" provisions.[230] Canadian lawyer Christopher Burkett summarized these provisions in the following terms:

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[229] "About the Integrity Regime" (last modified 16 December 2020), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>; "Ineligibility and Suspension Policy", *supra* note 226. See also "Ineligible and Suspended Suppliers Under the Integrity Regime" (last modified 16 December 2020), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html>; "Departments and Agencies That Follow the Integrity Regime" (last modified 16 December 2020), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/ci-if/pe-mou-eng.html>.

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

> Suppliers are notified of their ineligibility/suspension and provided information of the process(es) available to them. A supplier is able to come forward at any time and ask for an advanced determination. Upon a determination of ineligibility, the supplier would see their ineligibility period begin immediately. This will incent suppliers to come forward and proactively disclose wrongdoing. An administrative review process of the assessment of affiliates would be available to the supplier.
>
> This process is a step in the right direction, as it provides for proactive advance determinations and a review process for the assessment of affiliates, which will oversee the factually complex issue of control, participation or involvement. The due process provision does not appear to cover the decision as to whether the period should be reduced from 10 to five years, however.[231]

However, many commentators continue to criticize Canada's debarment regime for being too strict. Barutciski and Kronby argue that the new regime still "tilts too heavily toward punishment and retribution at the expense of promoting a fair and competitive public procurement market and value for the taxpayer."[232] The authors note that a five-year debarment "can still be a death penalty for some companies" and criticize the lack of flexibility and relief for companies that cooperate and implement remedial measures.[233] Barutciski and Kronby conclude that "[t]he new integrity regime fails to strike the right balance between punishment and deterrence of misconduct (principally the domain of criminal law) and protecting the integrity of federal procurement and taxpayer dollars (the domain of procurement rules)."[234]

Writing in 2015, John Manley, president and CEO of the Business Council of Canada and former deputy prime minister, pointed out that corporations in Canada had a strong disincentive to self-report wrongdoing or cooperate in investigations, since a guilty plea or conviction triggered the harsh debarment regime, and deferred prosecution agreements (DPAs) remained unavailable in Canada.[235] Manley advocated for the introduction of DPAs in Canada to incentivize cooperation and provide prosecutors with an additional tool for fighting corporate crime. On the other hand, Stephen Schneider, professor of sociology and criminology at Saint Mary's University, argued that DPAs were a means of allowing corporations that are "too big to fail" to escape criminal liability, which makes corporations

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[231] Christopher Burkett, "The New Integrity Regime in Canada: Revised Debarment Rules Still Too Strict?" (16 July 2015), online: *Baker McKenzie LLP* <http://www.canadianfraudlaw.com/2015/07/the-new-integrity-regime-in-canada-revised-debarment-rules-still-too-strict/>.

[232] Barutciski & Kronby, *supra* note 230. See also "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online: <http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>.

[233] Barutciski & Kronby, *supra* note 230.

[234] *Ibid*.

[235] Manley, *supra* note 172.

"more apt to behave badly."[236] For further discussion of DPAs (which have since been introduced in Canada in the form of "remediation agreements"), see Chapter 6, Section 6.3.

Some have expressed concerns that the strictness of Canada's debarment policies may leave the government unable to call upon the specialized expertise and in-depth knowledge of certain goods and services providers who have no close competitors.[237] This in turn, can result in economic losses to the government, as well as harm to Canadian taxpayers.[238] An added concern is the detrimental impact the Integrity Regime's debarment policy may have on Canadian companies and their employees. Responding to the severity of Canada's debarment policies, a report commissioned by the Canadian Council of Chief Executives emphasizes that "[d]ebarment imposes a direct cost on the debarred firms, but also on innocent parties and society at large."[239] The report suggests that a "typical" major supplier headquartered overseas would lose sales of over CDN$350 million per year and lay off 400 workers as a result of debarment, resulting in a net loss to the Canadian economy of over CDN$1 billion over the ten-year debarment period.[240] The report raises concerns over the following potential collateral effects of Canada's debarment policy:

(1) a reduction in the number of potential suppliers, which could lead to less variety, poorer quality and higher prices;

(2) supply-chain impacts, such as small- and medium-sized firms losing contracts due to suspensions of larger companies;

(3) a "chilling effect" on foreign investment in Canada by firms concerned about the stigma of being debarred in a G7 country; and

(4) the Canadian government's procurement rules being out of step with, and harsher than, those in many other countries.[241]

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

Commentators have argued that the harshness of the Integrity Regime provides a disincentive for companies to participate in the Canadian Competition Bureau's immunity

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

[237] "The 'Integrity Framework' Is Still Too Tough", *supra* note 232.

[238] Blatchford, *supra* note 220.

[239] *Ibid*.

[240] *Ibid*.

[241] *Ibid*.

and leniency programs.[242] Under the Integrity Regime, companies are automatically debarred if they are convicted of cartel offences (e.g., conspiracies and bid-rigging), and no exception or allowance is made in this regard for parties who participate in the Competition Bureau's immunity and leniency program. Since the success of the immunity and leniency program depends on cartel participants' willingness to come forward and cooperate in return for either full immunity from prosecution or a reduction in penalties, and since the Integrity Regime works against such incentives, companies may feel reluctant to cooperate with either the Competition Bureau or PSPC.

The Integrity Framework now includes a requirement that all bidders provide a complete list of all foreign criminal charges and convictions pertaining to themselves, their affiliates and their proposed first-tier subcontractors that, to the best of the entity's knowledge and belief, may be similar to one of the listed offences.[243] In submitting a bid, the bidder must certify that it has provided a complete list. If, in the opinion of PSPC, a supplier has provided a false or misleading certification or declaration, the bidder is rendered automatically ineligible for ten years. Barutciski et al. criticize the new reporting requirement in the following terms:

> the certification requirement with respect to affiliate charges and convictions, in conjunction with the severe penalty for false reporting, seems destined to create compliance nightmares for large multinational companies. Given the broad range of offences – both in Canada and abroad – that might be captured by the new provisions, and the obligation to include charges as well as convictions, this requirement will inject yet further compliance cost and uncertainty into the process for uncertain benefits from the standpoint of preserving integrity in government procurement as opposed to punishment.[244]

Against this backdrop, in September 2017, the Government of Canada launched a public consultation in relation to a proposal to "[expand] Canada's toolkit to address corporate wrongdoing."[245] A major focus of the consultation was on whether Canada should enhance its Integrity Regime by making its current suspension and debarment policies more flexible. The consultation included a discussion paper on possible enhancements to the Integrity

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[242] See Mark Katz & Alysha Manji-Knight, "Canada's Integrity Regime and Cartel Enforcement" (5 July 2016), online (blog): *Kluwer Competition Law Blog* <http://kluwercompetitionlawblog.com/2016/07/05/canadas-integrity-regimeunintended-consequences-for-canadian-cartel-enforcement/>.

[243] See "Standard Instructions – Goods or Services – Non-Competitive Requirements" at 01 Integrity Provisions—Bid, Clause 4(d), online: *PSPC* <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2004/15#integrity-provisions>. See also Milos Barutciski et al, "Changes to Canada's Integrity Regime for Public Procurement Create Onerous New Reporting Requirement" (8 April 2016), online: *Bennett Jones LLP* <https://www.bennettjones.com/Publications-Section/Updates/Changes-to-Canadas-Integrity-Regime-for-Public-Procurement-Create-Onerous-New-Reporting-Requirement>.

[244] *Ibid*.

[245] See the Government of Canada's website devoted to the consultation: "Consultation: Expanding Canada's Toolkit to Address Corporate Wrongdoing" (last modified 16 December 2020), online: *Government of Canada* <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/index-eng.html>.

Regime, setting out ten issues or considerations that should be taken into account in deciding whether and how to alter the current suspension and debarment policies.[246] In February 2018, the Canadian government published a report on its consultations.[247] The report indicates that the government received 45 online submissions on the possible adoption of a DPA scheme with 43% from business, 30% from individuals, 20% from law enforcement and other justice sectors, and 7% from NGOs.[248] Government officials also held 40 meetings with 370 participants to hear their views (some on DPAs, others on suspensions, debarments, and the Integrity Regime). On the key question related to whether more discretion in fixing periods of debarment is desirable, the report indicated that this question "garnered the most comments and strongest views."[249] On this issue, the report states:

> *Time period*
>
> The majority of participants suggested that the time periods associated with ineligibility be reduced from the current 10 years (reducible to five), which was seen as too long. The principal view was to favour full discretion in the determination of a period of ineligibility, including the ability to reduce the period to zero.
>
> Other views were for:
>
> - an ineligibility period aligned with those of Canada's major trading partners
> - a maximum period of between three and five years
>
> *Factors to determine time period*
>
> Many provided a list of factors to be taken into account when determining an appropriate ineligibility period with some noting that these should be published as part of the policy; others suggested that such factors be used as guidelines rather than be an exhaustive list. Most proposals for factors for consideration included:
>
> - the severity of the offence committed
> - self-reporting and cooperation with law enforcement
> - taking corrective action
> - establishing compliance programs
> - efforts at restitution
> - repeat offences

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[246] Integrity Regime Stream Discussion Guide, *supra* note 215.

[247] Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: What We Heard*, P4-78/2017E-PDF (PSPC, 2018), online (pdf): <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf>.

[248] *Ibid* at 7.

[249] *Ibid* at 9.

> Other factors raised were:
>
> - the consideration of the impacts on employees, the economy and government
> - the inclusion of exemptions from debarment for participants in pre-existing cooperation programs, such as the Competition Bureau's Leniency program
>
> There was a recognition that introducing a considerable amount of discretion into the Integrity Regime could pose risks of inconsistent decision making and reduced predictability in determination processes. Therefore, the importance of transparency and due process in the determination process was stressed, including:
>
> - an opportunity for suppliers to present their side / facts and submissions
> - the publication of guidelines governing the exercise of discretion
> - procedures to appeal and to reduce debarment periods
>
> The need to integrate a safe-harbour provision that would allow companies to self-disclose adverse information without being punished was identified. The possibility of a reassessment of the debarment decision after a certain amount of time was also raised.[250]

Shortly after the publication of this report, in March 2018, PSPC announced that the Integrity Regime would be "enhanced" to:

> - introduce greater flexibility in debarment decisions (rendering companies ineligible from receiving federal contracts or real property agreements)
> - increase the number of triggers that can lead to debarment
> - explore alternative measures to further mitigate the risk of doing business with organized crime
> - expand the scope of business ethics covered under the regime into key areas such as combatting human trafficking and the protection of labour rights and the environment[.][251]

The announcement also advised that the government had introduced a "made-in-Canada" version of a DPA regime, to be known as a Remediation Agreement Regime.[252]

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[250] *Ibid* at 9–10.

[251] PSPC, News Release, "Canada to Enhance Its Toolkit to Address Corporate Wrongdoing" (27 March 2018), online: <https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>.

[252] *Ibid*.

The proposed changes to the Integrity Regime were slated to come into effect on January 1, 2019. However, before that date, the government announced that, as a result of increased "public discourse regarding corporate wrongdoing and governments' responses to this type of misconduct" (an indirect reference to the SNC-Lavalin affair discussed below), it would "take additional time to assess aspects of the Policy and possible next steps regarding the Integrity Regime."[253] To date, the proposed changes have not been implemented.

The government has, however, published a draft revised *Ineligibility and Suspension Policy*.[254] Notably, this policy contemplates the following:

- the creation of a Registrar of Ineligibility and Suspension, an independent position responsible for making determinations of ineligibility and suspension, setting periods of ineligibility and suspension, and entering into administrative agreements;
- greater flexibility in setting periods of ineligibility and suspension, with a maximum, rather than mandatory, ten-year period, and discretion to set any period under this maximum based on enumerated factors to be considered (e.g., the seriousness of the conduct and the steps taken to address concerns);
- a wider set of circumstances that may trigger ineligibility or suspension, including new categories of covered offences (e.g., certain human trafficking, *Canada Elections Act*, *Canada Labour Code*, environmental and provincial offences), as well as suspension for "professional misconduct or acts or omissions of the supplier which adversely reflect on the commercial integrity of the supplier"; and
- new procedural fairness provisions and review mechanisms.[255]

The enhanced discretion and procedural protections contemplated by the draft policy will no doubt be considered a welcome development by those who consider the current regime to be unduly harsh and/or arbitrary.[256] On the other hand, industry may view the expanded triggers for ineligibility or suspension less favourably.

A key aspect of the context surrounding the recent developments in relation to the Integrity Regime and the introduction of DPAs ("remediation agreements") is the SNC-Lavalin

[253] "Integrity Regime: Annual Report—April 1, 2018, to March 31, 2019" (last modified 16 December 2020), online: *PSPC* <https://www.tpsgc-pwgsc.gc.ca/ci-if/rpri-irr-2018-2019-eng.html>.
[254] "Revised Ineligibility and Suspension Policy—Coming into Effect (Date to be Determined)" (last modified 16 December 2020), online: *Government of Canada* <https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-rev-eng.html>.
[255] *Ibid*.
[256] Christopher Naudie, Michael Fekete & Peter Franklyn, "Government of Canada Announces Significant Expansion of Integrity Regime for Federal Contracting" (29 March 2018), online: *Osler LLP* <https://www.osler.com/en/resources/regulations/2018/government-of-canada-announces-significant-expansion-of-integrity-regime-for-federal-contracting>.

affair.[257] In April 2013, SNC-Lavalin, Canada's largest engineering firm, and its affiliates were debarred for a ten-year period by the World Bank for corruption relating to the Padma Bridge project (see Chapter 1, Section 1.2).[258] After SNC-Lavalin agreed to the ten-year ban, the RCMP laid corruption and fraud charges against SNC-Lavalin and two subsidiaries over alleged bribery in Libya. The company argued that the strict Canadian debarment rules could destroy the company.[259] In December 2015, SNC-Lavalin became the first corporation to sign an administrative agreement under the new Integrity Regime, which confirmed the company's eligibility as a supplier to the Canadian government while the foreign bribery charges were pending.[260] As discussed in Chapter 12, Section 1.3, in December 2019, a construction subsidiary of SNC-Lavalin pleaded guilty to one count of fraud over CDN$5,000 under section 380 of the *Criminal Code* in connection with its activities in Libya between 2001 and 2011.[261] As part of the settlement, SNC-Lavalin agreed to pay a record fine of CDN$280 million, payable in equal instalments over five years, and to be subject to a three-year probation order. By agreeing to this outcome, SNC-Lavalin avoided automatic ineligibility under the Integrity Regime as a conviction under section 380 of the *Criminal Code* results in automatic ineligibility only if the fraud was committed against Her Majesty.[262] SNC-Lavalin may, however, be subject to debarment under other debarment regimes, though the company has indicated that it believes the guilty plea will not result in debarment.[263]

The government's consultation on potential changes to the Integrity Regime, the subsequent draft policy and political factors all point towards a revised regime that reflects greater flexibility, stronger procedural protections and a broader scope of application. Whether this

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[257] "Fixing the Bad Policy at the Root of the Trudeau Government's SNC-Lavalin Scandal", Editorial, *Globe and Mail* (20 December 2019), online: <https://www.theglobeandmail.com/opinion/editorials/article-fixing-the-bad-policy-at-the-root-of-the-trudeau-governments-snc/>.

[258] 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>.

[259] Barrie McKenna, "SNC Case Shows Downside of Ottawa's Strict Anti-Corruption Regime", *The Globe and Mail* (19 February 2015), online: <http://www.theglobeandmail.com/report-on-business/snc-case-shows-downside-of-ottawas-strict-anti-corruption-regime/article23087586/>.

[260] SNC-Lavalin, Press Release, "SNC-Lavalin Signs an Administrative Agreement under the Government of Canada's New Integrity Regime" (10 December 2015), online: <https://www.snclavalin.com/en/media/press-releases/2015/10-12-2015>.

[261] SNC-Lavalin, Press Release, "SNC-Lavalin Group Settles Federal Charges" (18 December 2019), online: <https://www.snclavalin.com/en/media/press-releases/2019/18-12-2019>; Kamila Hinkson, "SNC-Lavalin Pleads Guilty to Fraud for Past Work in Libya, Will Pay $280M Fine", *CBC News* (18 December 2019), online: <https://www.cbc.ca/news/canada/montreal/snc-lavalin-trading-court-libya-charges-1.5400542>.

[262] John W Boscariol, Andrew Matheson & Robert A Glasgow, "SNC-Lavalin Pleads Guilty in Canada's Most Significant Foreign Corruption Case to Date" (20 December 2019), online: *McCarthy Tétrault* <https://www.mccarthy.ca/en/insights/blogs/terms-trade/snc-lavalin-pleads-guilty-canadas-most-significant-foreign-corruption-case-date>.

[263] SNC-Lavalin, Press Release, "SNC-Lavalin Group Settles Federal Charges" (18 December 2019), online: <https://www.snclavalin.com/en/media/press-releases/2019/18-12-2019>.

forthcoming revised regime will better achieve the primary objective of ensuring integrity in public procurement remains to be seen.

Finally, Quebec's *Act Respecting Contracting by Public Bodies*[264] contains a debarment policy unique to the province. While a comprehensive analysis of this legislation is not possible due to space constraints, it is worth noting that Quebec's legislation provides for automatic debarment from the public sector bidding process where the corporation has been found guilty of prescribed offences—including offences under the *CFPOA*—in the preceding five years.[265]

## 9. DISQUALIFICATION AS COMPANY DIRECTOR

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

### 9.1 US

Pursuant to the US *Securities Exchange Act*,[266] the SEC can apply to a federal court for permanent or temporary injunctive relief.[267] A court can prohibit conditionally, unconditionally, or permanently any person who has violated securities laws and who demonstrates unfitness from serving as an officer or director.[268] The standard for a bar was substantially broadened with the passing of the *Sarbanes Oxley Act*,[269] which changed the standard from "substantial unfitness" to "unfitness."[270]

The SEC itself cannot impose the remedy via an administrative proceeding; it must be done by a court, although the SEC may negotiate a "voluntary" director disqualification as part of a settlement agreement or a DPA.[271] The courts have broad discretion to impose an appropriate remedy.[272] When determining the previous standard of substantial unfitness, courts looked at the non-exhaustive "*Patel* factors": "(1) the 'egregiousness' of the

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[264] *Act Respecting Contracting by Public Bodies*, CQLR c C-65.1, Chapter V.1.
[265] *Ibid*, s 21.1.
[266] *Securities Exchange Act,* 15 USC, §§ 78a-78qq (1934).
[267] *Ibid,* § 78u(d)(1); see also *Securities Act of 1933*, 15 USC §§ 77a-77mm (1933), in which a similar provision has been enacted in, § 77t(d)(1).
[268] *Securities Exchange Act, ibid,* § 78u(d)(2); See also *Securities Act of 1933*, *ibid,* § 77t(e) for a similar provision.
[269] *Sarbanes Oxley Act of 2002,* Pub L No 107-204, 116 Stat 745.
[270] *Ibid,* § 305(1).
[271] Michael Dailey, "Comment: Officer and Director Bars: Who is ~~Substantially~~ Unfit to Serve After *Sarbanes-Oxley*?" (2003) 40:3 Hous L Rev 837 at 850.
[272] *SEC v Penn*, 2020 US Dist LEXIS 46440 (SD NY 2020); *SEC v Patel*, 61 F (3d) 137 (2nd Cir 1995) [*Patel*]; *SEC v Posner*, 16 F (3d) 520 (2nd Cir 1994) [*Posner*].

underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur."[273] These factors remain relevant under the new lower standard.

Since a permanent bar may result in a "loss of livelihood and stigma,"[274] courts require more than what would be required for a non-permanent bar. In fact, Congress intended the permanent bar remedy to be used with caution.[275] A court should first consider a conditional bar.[276] The following five cases are examples of the courts' approach to these officer or director bars.

In *Posner*, the US Second Circuit Court of Appeals upheld a permanent bar imposed by a US District Court.[277] The Court focused on the high degree of scienter in violating the securities laws, several past violations (including conspiracy, tax evasion and filing false tax returns), the high likelihood of future violations, and the fact that the defendants had refused to testify (the Court inferred that the defendants' testimony would have negatively impacted their case). The Court stated that such a punishment would serve as a "sharp warning" to other violators.[278]

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

In *Selden*, the US District Court of Massachusetts imposed a two-year officer and director bar along with other monetary penalties. The Court noted that the offences were particularly serious because the defendant was a director and CEO who made misleading statements over several years and acted with a high degree of scienter. Although it was their first and only violation, there was a strong probability of reoccurrence. The Court also pointed out that the defendant had a minimal economic stake in the violation and that they cooperated with the investigation, although their acknowledgement of responsibility was "less than stellar."[279]

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

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[273] *Patel*, *ibid* at 141; see also *SEC v Boey*, 2013 US Dist LEXIS 102102 at 6-7 (D NH 2013) and *SEC v Dibella*, 2008 US Dist LEXIS 109378 at 40 (D Conn 2008) for further discussion. See also *SEC v Selden*, 632 F Supp (2d) 91 (D Mass 2009) [*Selden*] and *SEC v Chan*, 465 F Supp (3d) 18 (D Mass 2020) [*Chan*], in which the US District Court of Massachusetts expressly endorses the *Patel* factors.

[274] *Patel*, *ibid* at 142.

[275] Dailey, *supra* note 271 at 851.

[276] *Patel*, *supra* note 272; *Chan*, *supra* note 273.

[277] See *SEC v Drexel Burnham Lambert Inc*, 837 F Supp 587 (SD NY 1993) for the lower court's reasons.

[278] *Posner*, *supra* note 272 at 522.

[279] *Selden*, *supra* note 273 at 100.

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

In *Penn*, the SEC moved for summary judgment against two entities, which Lawrence Penn controlled and used to commit securities violations. Penn managed a private equity fund, Capital Acquisitions Secondary Opportunities LP (the "Fund"), from 2007 until 2014. During this time, Penn ran a scheme diverting over $9,000,000 from the Fund to entities under the defendant's control. Penn pleaded guilty to grand larceny and falsifying business records and made a number of admissions when doing so. The Court found that the undisputed facts as to Penn's conduct, knowledge and relationship with the two entities established their liability. It then considered, among other remedies, whether it was appropriate to impose a permanent injunction. The Court reinforced that the question that a court must answer, in deciding whether to issue a permanent injunction, is whether there is a reasonable likelihood that the wrong will be repeated. In determining that a permanent injunction was warranted in this case, the Court highlighted that the acts were egregious, there was a high degree of scienter, and there was substantial planning. In addition, the incident was not an isolated one and the defendants had not accepted responsibility.

## 9.2 UK

Individuals convicted of indictable offences in the management of a company face disqualification from being a director or officer of a company under the *Company Directors Disqualification Act 1986* (*CDDA*).[280] The disqualifications are mandatory in some circumstances and discretionary in other circumstances.

Section 6 of the *CDDA* provides that a court must make a disqualification order against a director or former director of a company that has become insolvent where "his conduct as a director of that company (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company."[281] A disqualification under section 6 must last for a minimum of two years and may be in place for a maximum of 15 years.[282]

More generally, section 2 of the *CDDA* provides discretion for a court to "make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management liquidation or striking off of a company with the receivership of a company's property or with his being an administrative receiver of a company." This disqualification, when made by a court of summary jurisdiction, may last for a maximum period of five years. In all other cases, the maximum period of disqualification is 15 years.[283]

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[280] *Company Directors Disqualification Act 1986* (UK), c 46 [*CDDA*].
[281] *Ibid*, s 6. See also s 9A of *ibid*, which provides for a similarly mandatory order in instances where a company has breached competition law.
[282] *Ibid*, s 6(4).
[283] *Ibid*, s 2(3).

Disqualification orders provide, in respect of the person subject to the order that for the period specified in the order:

> a) he shall not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of the court, and
>
> b) he shall not act as an insolvency practitioner.[284]

In specified circumstances, set out in sections 5A, 7, 8, 8ZC and 8ZE of the *CDDA*, the Secretary of State is also empowered to accept a disqualification undertaking from a person that, for the period of the undertaking, they will not act in a role which would be prohibited by a disqualification order.[285]

Disqualification can also occur by voluntary arrangement. In *R v Hibberd and Another*, two company directors defrauded a bank and loan company of over £1.5 million.[286] The Court declined to make a disqualification order because such an order had already been made under a voluntary arrangement with the Department of Trade and Industry.[287]

A leading case on disqualification is the 1998 case of *R v Edwards*. In *Edwards* the appellant was charged with a number of counts of conspiracy to defraud. Edwards eventually pleaded guilty to one count and, as part of the sentence, was disqualified from being a director for 10 years. On appealing the imposition of this disqualification, the Court denied the appellant's argument that no disqualification should be imposed at all, stating:

> The rationale behind the power to disqualify is the protection of the public from the activities of persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public. Frauds of the kind in this case archetypally give rise to a situation in which the exercise of the court's power is appropriate.[288]

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

> (i) the top bracket of disqualification for periods over ten years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again.

[284] *Ibid*, s 1(1).
[285] *Ibid*, s 1A(1).
[286] *R v Hibberd and Another*, [2009] EWCA Crim 652.
[287] *Ibid* at para 3.
[288] *R v Edwards,* [1998] 2 Cr App R (S) 213 (sentencing reasons of Potter LJ).

(ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is relatively not very serious.

(iii) The middle bracket of disqualification from six to ten years should apply for serious cases which do not merit the top bracket.[289]

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

In *R v Cadman*,[290] the Court of Appeal Criminal Division reviewed a number of decisions regarding disqualification orders:

> 24. … *Sevenoaks Stationers (Retail) Limited* [1991] CH 164, Court of Appeal Civil Division, dealt with an accountant who over five years with five separate companies which had all become insolvent had accrued total indebtedness of approximately £560,000. There were no audited accounts and he had traded whilst insolvent in relation to at least one company. This amounted to incompetence or negligence in a very marked degree falling short of dishonesty. His disqualification period was reduced to five years. This case is memorable for the trio of brackets it established, later to be adopted with approval in Millard (1994) 15 Cr. App. R. (S.) 445. (1) The top bracket, periods over ten years, should be reserved for particularly serious cases. These may include cases where a doctor who has already one period of disqualification imposed upon him falls to be disqualified yet again. (2) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (3) The middle bracket of disqualification, from six to ten years, should apply to serious cases which do not merit the top bracket.
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> 25. In *Millard* [1994] 15 Cr App R(S) 445 that approach was not only approved but applied so as to substitute for a 15-year disqualification one of eight years. An appellant had fraudulently traded using six company vehicles, creating a deficiency of £728,000 odd. He had been convicted and the fraudulent trading spanned nearly four years. He had three previous convictions for dishonesty. Miss Small readily accepts that what assistance that case can offer is tempered by its age.
>
> 26. *Robertson* [2006] EWCA Crim 1289 was an appellant of 49 and of good character. He was convicted of fraudulent trading during some six months. His business defrauded the DFES in respect of an ILA. The department paid his company £1.4 million. His disqualification period, which was not challenged in the Court of Appeal, was five years.

[289] *R v Millard,* [1994] 15 Crim App R 445.
[290] *R v Cadman*, [2012] EWCA Crim 611.

27. *Sukhdabe Singh More* [2007] EWCA Crim 2832 was an appellant pleading guilty to one money laundering offence. Over some two months he had allowed his business account to be used to launder £136,000. He had two previous convictions for dishonesty. The Court of Appeal reduced his disqualification to three years.

28. *Jules Paul Simpson* [2007] EWCA Crim 1919 was an appellant who had pleaded guilty to conspiracy to defraud. For the last months of his legitimate business he carried on knowing it to be insolvent. The loss to creditors was £200,000. He was disqualified for six years.

29. *Nigel Corbin* (1984) 6 Cr App R(S) 17 is even older than Robertson but Miss Small prays it in aid since it featured an appellant involved with three originally legitimate businesses. Over 18 months he admitted nine counts of deception. A criminal bankruptcy order was made in the sum of £35,000. The Court of Appeal left untouched his disqualification period of five years.

30. In *Anthony Edwards* [1998] 2 Cr App R(S) 213 the assistance to this court lies in a comment:

    "The rationale behind the power to disqualify is the protection of the public from … persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public."

31. In *Attorney General's Reference No 88 of 2006* [2006] EWCA Crim 3254 the disqualification periods were in excess of six years, more often seen in cases involving carousel frauds. Those tended to involve greater sums and greater sophistication, making the perpetrators a great risk to the public if permitted to act in the management of companies in the future. The first three appellants had caused a £20 million loss over 16 months. To the clear astonishment of the Court of Appeal no disqualification period had been imposed in the court below. On the first three appellants the court imposed an eight year disqualification. The final appellant secured a benefit of £1.5 million during one month and was disqualified for four years.

32. In *Sheikh and Sheikh* [2011] 1 Cr App R(S) 12 the court upheld a ten year period of disqualification. The case featured illegal production of pirated DVDs. The appellants were 29 and 27. They had been convicted after a lengthy trial and there was no evidence of remorse. The turnover was in excess of £6 million. The offending lasted a number of years and was very sophisticated, crossing international boundaries and exploiting vulnerable immigrants.

33. In *Brealy* [2010] EWCA Crim 1860 disqualification of a director convicted of corruption showed that for six years he had allowed a local counsellor to live rent free whilst being a director of a property business which required a number of building consents. The value of the

> nonpayment of rent was some £34,000. The disqualified appellant was of good character, but the court said that his offending struck at the very heart of a democratic government. It was an aggravating feature that the offending continued for some six years. Five years' disqualification was upheld.

The guidance set out in *Sevenoaks* remains apposite for courts determining the appropriate length of a director's disqualification. For example, more recently, in *Secretary of State for Business Innovation and Skills v Rahman*,[291] the Court reviewed the *Sevenoaks* principles. It found, with respect to length of disqualification, that "the same approach is appropriate under s.2 and s.6 and that the *Sevenoaks Stationers* principles ought to be applied under s.2 as much as under s.6," and further commented that "civil and criminal courts should be applying the same standards: the purpose of disqualification - to protect the public from the activities of persons unfit to be concerned in the management of a company - is the same in both kinds of court. That is the approach that the CACD took in *Cadman*." It agreed with commentary that:

> although s.2 and s.6 are different gateways to disqualification, with different rules at that stage of the inquiry, once the court, be it criminal or civil, is satisfied that the s.2 gateway has been passed through, it should apply the same principles to the exercise of its discretion as have been developed in the extensive jurisprudence under s.6 on the question of unfitness, unless the statute otherwise requires.[292]

An example of a statute requiring otherwise for example, would be found in the mandatory minimum two-year disqualification that must be applied under section 6 (and which is not applicable to section 2).[293]

## 9.3 Canada

Some provincial corporate statutes, including those in British Columbia[294] and New Brunswick, have a "director disqualification" rule for persons convicted of certain offences. For example, a person is not qualified to become or to continue as a director of a British Columbia company for five years after the completion of a sentence for an offence in connection with the management of a business or an offence involving fraud.[295] Nevertheless, the *Canada Business Corporations Act*,[296] the Ontario *Business Corporations Act*,[297] and most other provincial corporate statutes have no such disqualification provision.

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[291] *Secretary of State for Business Innovation and Skills v Rahman*, [2017] EWHC 2468 (Ch).
[292] *Ibid* at para 50.
[293] *Ibid*.
[294] *Business Corporations Act*, SBC 2002, c 57, s 124(2)(d).
[295] *Ibid*.
[296] See, e.g., *Canada Business Corporations Act,* 1985 RSC 1985, c C-44 [*CBCA*], s 105 (*Qualifications of directors*).
[297] See, e.g., *Business Corporations Act,* RSO 1990, c B 16, s 118 (*Qualifications of directors*).

However, disqualification can arise under provincial securities legislation. The powers of disqualification can be quite broad. For example, under section 127(1)(8) of the *Ontario Securities Act*, the Securities Commission may "in the public interest" make an order that "a person is prohibited from becoming or acting as a director or officer of any issuer [i.e., a company issuing securities under the *Ontario Securities Act*]."[298] The "public interest" is a very broad term and includes prior acts of fraud and corruption. Other provincial securities legislation confer similar disqualification powers.[299]

The "public interest" jurisdiction of the securities commissions confers on them broad powers. The commissions can make orders pursuant to "public interest" jurisdiction even where there has been no breach of securities law. The provisions are regulatory and contain administrative sanctions, meaning the commission's public interest jurisdiction is preventative and protective rather than punitive.

# 10. MONITORSHIP ORDERS

## 10.1 UNCAC and OECD

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

## 10.2 US

According to Robert Tarun and Peter Tomczak, the imposition of an independent monitor on an offending corporation is a frequent condition of a DOJ or SEC settlement.[300] Typically, the monitorship lasts for three years with the monitor filing two or three reports yearly with DOJ or SEC. The criteria for appointing monitors and the scope of their duties are set out in a DOJ policy memorandum known as the Morford Memorandum.[301] Tarun notes that "more than half of the DOJ's 2016 FCPA resolutions provided for a monitorship. The current

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[298] *Securities Act*, RSO 1990, c S5 [*OSA*], s 127(1). See also *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [2001] 2 SCR 132, 2001 SCC 3 at paras 39-45.
[299] In Alberta, *Securities Act*, RSA 2000, c S-4, s 198(1)(e); in British Columbia, *Securities Act*, RSBC 1996, c 418, s 161(1)(d); in Manitoba, *The Securities Act*, RSM 1988, c S50, s 148; in New Brunswick, *Securities Act*, SNB 2004, c S-5.5, s 184(1)(i); in Newfoundland, *Securities Act*, RSN 1990, c S-13, s 127(1)(h); in the Northwest Territories, *Securities Act*, SNWT 2008, c 10, ss 58-63; in Nunavut, *Securities Act*, SNu 2008, c 12, ss 58-63; in Nova Scotia, *Securities Act*, RSNS 1989, c 418, ss 134, 135A, 136A, 145; in Prince Edward Island, *Securities Act*, RSPEI 2007, c 17, ss 58-63; in Quebec, *Securities Act*, RSQ v-1.1, S-42.2, s 262.1; in Saskatchewan, *Securities Act*, SS 1988-99, c S-42.2, ss 134, 134.1, 135.1, 135.2; in Yukon, *Securities Act*, SY 2002, c 16, ss 58-63.
[300] Tarun & Tomczak, *supra* note 202 at 61.
[301] Memorandum from Craig S Morford, Acting Deputy Attorney General to Heads of Department Components United States Attorneys (7 March 2008), "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations", online (pdf): <https://www.justice.gov/sites/default/files/dag/legacy/2008/04/15/dag-030708.pdf>.

prevalence of appointed monitors is consistent with the DOJ's increased emphasis on companies adopting and maintaining effective compliance programs."[302]

The Morford Memorandum was recently supplemented by the Benczkowski Memorandum,[303] which "provides new and important insights into the selection of monitors and the scope of their work"[304] and, perhaps suggests a movement away from imposing monitorships. The Benczkowski Memorandum notes:

> [T]he imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor. The Morford Memorandum explained that, "[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter[,]" and set forth the two broad considerations that should guide prosecutors when assessing the need and propriety of a monitor: "(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation." The Memorandum also made clear that a monitor should never be imposed for punitive purposes.[305]

Some of the most important clarifications the Benczkowski Memorandum makes include:

(1) The Benczkowski Memorandum has expanded application. While the Morford Memorandum applies only to DPAs and NPAs, the Benczkowski Memorandum also applies to plea agreements, as long as a presiding court approves.

(2) The Morford Memorandum sets out two broad considerations guiding prosecutors when determining whether a monitor is necessary: (1) the potential benefits that employing a monitor may have for the corporation and the public and (2) the cost of a monitor and its impact on the operations of a

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[302] Tarun, *ibid* at 61.

[303] Memorandum from Brian A Benczkowski, Assistant Attorney General, to All Criminal Division Personnel (11 November 2018), "Selection of Monitors in Criminal Division Matters" [The Benczkowski Memorandum], online (pdf): <https://dlbjbjzgnk95t.cloudfront.net/1091000/1091818/selection_of_monitors_in_criminal_division_matters_memo_0.pdf>.

[304] Matthew R Hubbell & Laura A Musselman, "The Benczkowski Memorandum: DOJ's New Guidance on Corporate Monitors" (25 October 2018), originally online: *K & L Gates* <https://www.klgates.com/The-Benczkowski-Memorandum-DOJs-New-Guidance-on-Corporate-Monitors-10-24-2018>. See also Judith Seddon, Chris Stott & Andris Ivanovs, "Monitorships in the United Kingdom" in Anthony S Barkow, Neil M Barofsky & Thomas J Perrelli, eds, *The Guide to Monitorships,* 2nd ed (London, UK: Global Investigations Review, 2020) 125, online: <https://globalinvestigationsreview.com/guide/the-guide-monitorships/second-edition/article/11-monitorships-in-the-united-kingdom> at footnote 8 where Seddon, Stott and Ivanovs suggest that the Benczkowski Memorandum will, in theory, bring the United States more in line with the UK's approach.

[305] The Benczkowski Memorandum, *supra* note 303 at 2.

> corporation. The Benczkowski Memorandum elaborates on the first consideration by providing a list of non-exclusive factors to consider and elaborates on the second by "noting that Criminal Division attorneys should consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens on the business's operations."[306]

(3) It sets out a clear, step-by-step process for monitor selection.[307]

## 10.3 UK

Monitorships are assuming an increasingly important role in the UK, in particular in the context of DPAs. Judith Seddon, Chris Stott, and Andris Ivanovs note that:

> Before the introduction of deferred prosecution agreements (DPAs) to the UK legal system, monitors were appointed under negotiated settlements entered into between cooperating corporate entities and enforcement authorities, but the statutory foundations for their appointment were less solid and appointments were largely the product of prosecutorial improvisation. Monitors were perceived squarely as a feature of the US corporate crime enforcement landscape and their appointment in the United Kingdom drew significant judicial opprobrium.[308]

That said, Seddon, Stott, and Ivanovs also caution against assuming that monitorships will become as common or extensive in the UK as they are in the United States. Monitorships in the UK remain narrower and less routine.[309]

The *Crime and Courts Act* (*CCA*),[310] along with relevant guidance, allows for monitorship to be used to oversee a compliance program imposed by a DPA, but it does not prescribe or encourage such enforcement.[311] Schedule 17 of the *CCA* provides for entering into DPAs, while section 5(3)(e) of the Schedule reads:

> (3) The requirements that a DPA may impose on P include, but are not limited to, the following requirements—
>
> …
>
> > (e) to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;[312]

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[306] *Ibid*.
[307] *Ibid*.
[308] Seddon, Stott & Ivanovs, *supra* note 304.
[309] *Ibid*.
[310] *Crime and Courts Act 2013* (UK), c 22 [*CCA*].
[311] Seddon, Stott & Ivanovs, *supra* note 304.
[312] See also *CCA*, *supra* note 310, s 45.

The *CCA* is informed by the *Deferred Prosecution Agreements Code of Practice* (the *DPA Code*),[313] which must be taken into account when negotiating, applying to the court for DPAs and overseeing DPAs.[314] Sections 7.11–7.22 of the *DPA Code* deal specifically with monitors. Section 7.11 states:

> An important consideration for entering into a DPA is whether P [the organisation being considered for prosecution] already has a genuinely proactive and effective corporate compliance programme. The use of monitors should therefore be approached with care. The appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate.[315]

Recently, in October 2020, the Serious Fraud Office updated its *SFO Operational Handbook* (*Operation Handbook*) to include a chapter providing more guidance with respect to Deferred Prosecution Agreements,[316] a section of which deals specifically with those considerations that are ordinarily relevant for monitorship. That *Operation Handbook* states:

> Less onerous alternatives to a monitorship can also be considered such as an external reviewer, to be agreed by the SFO. Careful consideration will need to be given to the process of selection, in particular any conflicts of interest.[317]

There are other ways in which corporate behaviour can be monitored to prevent future criminal conduct. One such way is through a Serious Crime Prevention Order (SCPO). Such SCPOs are governed by Part 1 of the *Serious Crime Act 2007* (*SCA*).[318] When a corporate defendant is convicted of a 'serious offence' (including bribery, fraud or money laundering) a SCPO can be made against that company if there are "reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime."[319] It should be noted that SCPOs are not specifically directed towards corporate crime. They have been used to impose restrictions on individuals following conviction, but have not been used to resolve white-collar investigations. The person who is subject to such an order may have to provide documents and information to a monitor, answer questions, and cover monitor-related costs.[320]

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[313] UK, Crown Prosecution Service & Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice* (London, UK: Crown Prosecution Service & Serious Fraud Office, 2014), online (pdf): <https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf>.

[314] Seddon, Stott & Ivanovs, *supra* note 304.

[315] See also *ibid*.

[316] "Deferred Prosecution Agreements" (last visited 1 October 2021), online: *Serious Fraud Office* <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.

[317] "Deferred Prosecution Agreements - Guidance for Corporates" (last visited 1 October 2021), online: *Serious Fraud Office* <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/>.

[318] *Serious Crime Act 2007* (UK), c 27.

[319] *CCA*, *supra* note 310, s 1(b); Seddon, Stott & Ivanovs, *supra* note 304.

[320] Seddon, Stott & Ivanovs, *supra* note 304.

Another way is through a Civil Recovery Order (CRO), provided for by Part 5 of the *Proceeds of Crime Act 2002* (*POCA*).[321] CROs are civil remedies allowing enforcement authorities to recover property obtained as a result of unlawful conduct.[322] CROs were seen as an attractive way of concluding investigations through negotiation before DPAs. As Seddon, Stott, and Ivanovs note, "There is no equivalent to the DPA Code in respect of CROs and no constraints on the appointment of monitors under them (beyond those required to settle any civil proceedings, namely acceptable wording for a consent order and associated settlement documents)."[323] This can lead to CROs being negotiated with limited court influence on the contents and in a manner, which is favourable to the company involved.[324]

## 10.4 Canada

The *Canada Business Corporations Act* (*CBCA*),[325] along with those provincial corporate statutes modeled after the *CBCA*, does not contain a power to impose specifically a monitorship order on a corporation convicted of a serious crime of fraud or corruption. However, the provincial securities acts generally do have a power somewhat analogous to monitorship. For example, section 127(1)(4) of the *Ontario Securities Act* authorizes the Ontario Securities Commission to make an order in the public interest "that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Securities Commission."[326]

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

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

> (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
>
> (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
>
> (c) communicate those policies, standards and procedures to its representatives;
>
> (d) report to the court on the implementation of those policies, standards and procedures;

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[321] *Proceeds of Crime Act 2002* (UK) c 29 [*POCA*].
[322] *Ibid*, s 242.
[323] Seddon, Stott & Ivanovs, *supra* note 304.
[324] *Ibid*.
[325] *CBCA, supra* note 296.
[326] *OSA,* supra note 298, s 127(1)(4).

(e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;

(f) provide, in the manner specified by the court, the following information to the public, namely,

(i) the offence of which the organization was convicted,

(ii) the sentence imposed by the court, and

(iii) any measures that the organization is taking – including any policies, standards and procedures established under paragraph (b) – to reduce the likelihood of it committing a subsequent offence; and

(g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.[327]

Section 732.1(3.2) of the *Criminal Code* provides that before imposing the conditions in (b) above, the court "shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph."[328]

# PART B: CIVIL AND ADMINISTRATIVE ACTIONS AND REMEDIES

## 11. NON-CONVICTION BASED FORFEITURE

Non-conviction based (NCB) forfeiture is introduced in Chapter 5, Section 2.4.2. The law and procedures for NCB forfeiture under UNCAC, the OECD Convention and US, UK and Canadian law are discussed in Chapter 5, Sections 3.1, 3.2, 5.1, 5.2, and 5.3 respectively.

## 12. CIVIL ACTIONS AND REMEDIES

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

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[327] *Criminal Code*, *supra* note 100, s 732.1(3.1).

[328] *Ibid*, s 732.1(3.2).

## 13. INTERNATIONAL INVESTMENT ARBITRATION

Administrative, civil, and criminal actions and remedies against corrupt public officials, entities, and private individuals are instruments to directly combat corruption. In contrast, arbitration is a private and consensual dispute resolution mechanism where the disputants agree to submit their disputes to an independent decision-maker whose judgment (an arbitral award) will be final and binding on the parties.[329] This system of dispute settlement has a long history, which may be traced back to medieval merchant guilds and even ancient Greek mythology, and, at least at first sight, does not have much in common with the global fight against corruption.[330]

However, increasing involvement of states and state-owned enterprises in the globalized economy, as well as rising sophistication of regulatory and reporting schemes in various countries, inevitably leads to complex disputes arising out of international trade and investment transactions. For instance, the International Chamber of Commerce reported that in 20% of arbitration cases initiated in 2019, at least one of the parties was a state or parastatal entity.[331] The following sections will demonstrate that in international arbitration, private investors and sovereign states may make allegations of corruption and use them either as a "sword" to seek compensation for the losses caused by corrupt public officials, or as a "shield" to escape liability in cases arising out of contracts or investments tainted by corruption.[332] Therefore, the manner in which allegations of corruption are and should be

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[329] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford; New York: Oxford University Press, 2015), paras 1.04-1.05.

[330] Gary Born, *International Commercial Arbitration*, 3rd ed (Alphen aan den Rijn: Kluwer Law International, 2021) at 7-67.

[331] International Chamber of Commerce (ICC), *ICC Dispute Resolution 2019 Statistics,* DRS 901 ENG (ICC, 2020), online (pdf): <https://globalarbitrationnews.com/wp-content/uploads/2020/07/ICC-DR-2019-statistics.pdf> at 4, 10-11, 23. For 2020, this figure was 19.8%: see ICC, *ICC Dispute Resolution 2020 Statistics*, DRS895 ENG (ICC, 2021) at 11, online (pdf): <https://iaa-network.com/wp-content/uploads/2021/09/2020statistics_icc_disputeresolution_895.pdf>.

[332] For recent commentary on global corruption and international arbitration, see Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2015); Charles Brower & Jawad Ahmad, "The State's Corruption Defence, Prosecutorial Efforts, and Anti-corruption Norms in Investment Treaty Arbitration" in Katia Yannaca-Small, ed, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford; New York: Oxford University Press, 2018) at 455-81; Utku Cosar, "Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions" in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Alphen aan den Rijn: Kluwer Law International, 2015) at 531-56; Isuru Devendra, "State Responsibility for Corruption in International Investment Arbitration" (2019) 10:2 J Intl Disp Settlement 248; Joachim Drude, "*Fiat iustitia, ne pereat mundus*: A Novel Approach to Corruption and Investment Arbitration" (2018) 35:6 J Intl Arb 665; Emmanuel Gaillard, "The Emergence of Transnational Responses to Corruption in International Arbitration" (2019) 35:1 Arb Intl 1; Bruce Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities" (2015) 33:1 BJIL 60; Carolyn Lamm, Brody Greenwald & Kristen Young, "From *World Duty Free* to *Metal-Tech*: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption" (2014) 29:2 ICSID Rev 328; Carolyn Lamm & Andrea Menaker, "The Consequences of Corruption in Investor-State Arbitration" in Meg Kinnear et al, eds, *Building*

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

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

## 13.1 International Arbitration Explained

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

### 13.1.1 Institutional and *ad hoc* Arbitration

International arbitration exists in different forms and shapes. To begin with, arbitration can be either "institutional" or "*ad hoc*."[333] Institutional arbitrations are overseen by international organizations that may appoint members of arbitral tribunals, resolve challenges to arbitrators, designate the place of arbitration, fix the sum of the arbitrators' fees or review drafts of arbitral awards to ensure their compliance with formal requirements. Arbitral institutions do not issue judgments on the merits of the parties' dispute—that is the responsibility of the individuals selected by the parties or appointed by the institution—but ensure, within the limits of their authority, the smooth, speedy and cost-efficient conduct of the proceedings. Among the best-known arbitral institutions are the International Court of

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*International Investment Law: The First 50 Years of ICSID* (Alphen aan den Rijn: Kluwer Law International, 2015) at 433-46; Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford: Oxford University Press, 2014); Aloysius Llamzon & Anthony Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Alphen aan den Rijn: Kluwer Law International, 2015) at 451-530; Lucinda Low, "Dealing with Allegations of Corruption in International Arbitration" (2019) 113 AJIL 341; Michael Nueber, "Corruption in International Commercial Arbitration – Selected Issues" in Christian Klausegger et al, eds, *Austrian Yearbook on International Arbitration* (Vienna: Manz, 2015) at 3-13; Matthew Reeder, "Estop That! Defeating a Corrupt State's Corruption Defense to ICSID BIT Arbitration" (2016) 27:3 Am Rev Intl Arb 311; Dai Tamada, "Host States as Claimants: Corruption Allegations" in Shaheeza Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Leiden; Boston: Brill Nijhoff, 2015) at 103-22; Sergey Usoskin, "Illegal Investments and Actions Attributable to a State under International Law" in Shaheeza Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Leiden; Boston: Brill Nijhoff, 2015) at 334-49.

[333] Born, *supra* note 330 at 168–71.

Arbitration of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), which was established by the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the Permanent Court of Arbitration (PCA) in The Hague, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Center (SIAC), the Hong Kong International Arbitration Centre (HKIAC), and the Vienna International Arbitration Centre (VIAC). Where the parties agree to arbitrate their dispute at a particular arbitral institution, a set of procedural rules promulgated by such an institution applies to the proceedings.

In contrast, *ad hoc* arbitrations are not conducted under the auspices of a particular institution. Instead, the parties merely agree to arbitrate their disputes, rather than to litigate them in state courts, and may choose an appointing authority that will select the arbitrators if the parties cannot reach an agreement on this issue. The United Nations Commission on International Trade Law (UNCITRAL) has prepared a set of procedural rules that the parties may use to organize their arbitration proceedings.[334]

### 13.1.2 Commercial and Investment Arbitration

International arbitration is usually divided into "investment" arbitration, which may be either contract-based or treaty-based, and "commercial" arbitration. The boundary between these two categories sometimes gets blurry and largely depends on the definition of what constitutes an investment. In general, arbitration is deemed commercial if it concerns a dispute arising out of a purely commercial transaction, such as a contract for the sale of goods, and where the parties' consent to arbitration is expressed in an arbitration clause contained in their contract. On the other hand, the subject matter of the dispute in international investment arbitration is an "expenditure to acquire property or assets to produce revenue; a capital outlay."[335] Consent to arbitrate disputes with foreign investors may be found in an international treaty concluded between the investor's "home state" and the "host state" where the investment was made (hence "treaty-based international investment arbitration"), in the host state's domestic law on foreign investment, or in an investment contract between the foreign investor and the host state or its instrument, such as a ministry or a state-owned enterprise (hence "contract-based international investment arbitration").

The backbone of the international investment treaty-based arbitration system is a web of over 3,300 international investment agreements (IIAs), including 2,943 bilateral investment treaties (BITs) and 417 treaties with investment provisions (TIPs), such as the Canada-United States-Mexico Agreement (CUSMA), which replaced the North American Free Trade Agreement (NAFTA), or the Energy Charter Treaty (ECT).[336] Another important element of the investment protection regime is the ICSID Convention, which established the

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[334] "UNCITRAL Arbitration Rules" (last visited 1 October 2021), online: *United National Commission on International Trade Law* <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.
[335] Bryan A Garner, ed, *Black's Law Dictionary*, 10th ed (St Paul, MN: Thomson Reuters, 2014), "investment".
[336] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2021,* UNCTAD/WIR/2021 (New York: United Nations Publications, 2021) [World Investment Report 2021] at 123.

International Centre for Settlement of Investment Disputes (ICSID), a specialized arbitral institution that is part of the World Bank Group, together with the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA).[337] The US, UK, and Canada are parties to the ICSID Convention, which entered into force for those countries on October 14, 1966, January 18, 1967, and December 1, 2013, respectively.[338] The US is party to 47 BITs and 70 TIPs, the UK is party to 110 BITs and 29 TIPs, and Canada is party to 45 BITs and 22 TIPs.[339]

International commercial and contract-based investment arbitration, and international treaty-based investment arbitration, both have a lot in common when one views how proceedings are conducted, how the evidence is admitted and how the tribunals issue procedural orders and awards.[340] Furthermore, the same experienced commercial lawyers may act either as the arbitrators or the parties' counsel in different arbitration cases, and arbitration proceedings are governed by the same rules promulgated by the UNCITRAL or various arbitral institutions.

However, while the procedure and the personalities involved may be the same, contract-based and treaty-based arbitration are different in several significant ways. To begin with, parties to commercial transactions typically insert a clause into their contract agreeing to refer to arbitration any dispute arising out of or in connection with the contract. By contrast, the host state's consent to arbitration in an IIA is usually expressed as an open offer to arbitrate any future dispute with any investor-national of the counterparty state to the IIA, and such an offer is deemed to be accepted and becomes a binding arbitration agreement when the investor commences arbitration against the host state.[341] For instance, the 2012 US Model BIT and the 2004 Canadian Model FIPA provide that a foreign investor may submit to arbitration a claim that the host state has breached an obligation under the treaty and the investor has thus incurred loss or damage,[342] and the claimant may choose between submitting the claim for resolution under:

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[337] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [ICSID Convention].
[338] "Database of ICSID Member States" (last visited 1 October 2021), online: *ICSID* <https://icsid.worldbank.org/about/member-states/database-of-member-states>.
[339] "International Investment Agreements Navigator" (last visited 1 October 2021), online: *UNCTAD Investment Policy Hub* <https://investmentpolicy.unctad.org/international-investment-agreements>.
[340] Llamzon (2014), *supra* note 332 at paras 5.06-5.07.
[341] *Ibid* at para 5.11.
[342] *2004 Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA)* [2004 Model FIPA], arts 22-23; Note that Canada recently published an update for its model FIPA: see Global Affairs Canada, *2021 Model FIPA*, (Global Affairs Canada, 2021) art 27, online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng>. US, *2012 United States Model Bilateral Investment Treaty* [US Model BIT], art 24(1), online: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

(i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (if both the host state and the investor's home state are parties to the ICSID Convention),

(ii) the ICSID Additional Facility Rules (if either the home state or the host state is a party to the ICSID Convention),

(iii) the UNCITRAL Arbitration Rules, or

(iv) any other arbitration rules agreed on between the investor and the host state.[343]

This distinction has important implications as to the rules of law applicable to the merits of the dispute. In a purely commercial setting, the arbitral tribunal will resolve the parties' dispute in accordance with the national law applicable to the contract concluded by the parties. The parties may either agree on the applicable law themselves or, in the absence of such agreement, the arbitral tribunal will apply the law determined by the conflict-of-laws rules that the tribunal considers applicable.[344] In contrast, in a treaty-based arbitration, a tribunal applies the relevant BIT or TIP and the relevant rules and principles of public international law. A typical BIT requires each state party to accord to investors of the other state party and their investments treatment no less favorable than the treatment it accords, in like circumstances, to its own investors and investments ("national treatment"). Similar treatment is accorded to investors of other state parties and their investments ("most-favored-nation treatment"), while treating foreign investments fairly and equitably, and with full protection and security.[345] Furthermore, BITs prohibit either state party from nationalizing or expropriating an investment, either directly or indirectly through measures equivalent to expropriation or nationalization, unless the expropriation or nationalization is effected for a public purpose, in accordance with due process of law, in a non-discriminatory manner and with prompt, adequate and effective compensation.[346]

## 13.2 Why Parties Agree to Arbitrate

There are several reasons why arbitration has become the primary means for settling international commercial and investment disputes.[347] In general, this is because arbitration is often perceived as a "neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions."[348] This subsection concentrates on three distinct characteristics of international arbitration: (i) neutrality and flexibility, (ii)

[343] 2004 Model FIPA, *ibid,* art 27; US Model BIT, *ibid,* art 24(3).
[344] UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration*, (Vienna: UNCITRAL, 1985) [UNCITRAL Model Law], art 28, online (pdf): <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf>.
[345] 2004 Model FIPA, *supra* note 342, arts 3-5; 2012 US Model BIT, *supra* note 342 arts 3-5.
[346] 2004 Model FIPA, *ibid,* art 13; US Model BIT, *ibid,* art 6.
[347] Blackaby et al, *supra* note 329, paras 1.94-1.107; Born, *supra* note 330 at 73–93.
[348] Born, *ibid* at 73.

enforceability of arbitration agreements, and (iii) the final and binding nature of arbitral awards.

### 13.2.1 Neutrality and Flexibility

To begin with, international arbitration is neutral and flexible. Naturally, a party to a transaction may be hesitant to agree to litigate its disputes in the domestic courts of a state where the other party resides or has its place of business, as the party will face litigation in foreign courts, before foreign judges, in a foreign language and with the assistance of foreign legal counsel. This is particularly true in cases where one of the parties is located in a country with high corruption risk or is itself a sovereign state or state entity.

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

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

### 13.2.2 Enforceability of Arbitration Agreements

Another important characteristic of international arbitration is the enforceability of arbitration agreements. Article II(3) of the New York Convention, which is in force in some 168 jurisdictions,[349] requires the courts to refer the parties to arbitration if one of them commences litigation in respect of a matter subject to an arbitration agreement.[350] In the same manner, the US *Federal Arbitration Act*[351] stipulates that court proceedings must be stayed where the matter in dispute is referable to arbitration. Similarly, the *Arbitration Act*[352] in the UK provides for a stay of proceedings.

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[349] "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (last visited 2 October 2021) [New York Convention Status], online: *UNCITRAL* <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>.

[350] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739 (entered into force 7 June 1959) [*New York Convention*].

[351] *Federal Arbitration Act*, 9 USC § 3.

[352] *Arbitration Act 1996* (UK), c 23, s 9.

In Canada, arbitration legislation adopted at federal, provincial and territorial levels is based on the UNCITRAL Model Law on International Commercial Arbitration,[353] which states that:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[354]

In conclusion, if a claim which is subject to an arbitration agreement is brought before the court in the US, UK or Canada, the court will stay the proceedings and refer the parties to arbitration, as long as the arbitration agreement is not null and void, inoperative or incapable of being performed. Furthermore, it is a well-established principle that an arbitration clause is deemed to be separate from the contract of which it forms a part and, as such, it survives the termination or invalidation of that contract.[355]

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

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.[356]

The UNCITRAL Model Law has a similar provision:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.[357]

The principle of separability prevents parties from frustrating an arbitration agreement by attempting to terminate or invalidate the contract in which the arbitration clause appears. For instance, if a high-ranking public official solicits a bribe by threatening to terminate a

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[353] See Canada *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp); British Columbia *International Commercial Arbitration Act*, RSBC 1996, c 233; Ontario *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5; Alberta *International Commercial Arbitration Act*, RSA 2000, c I-5; UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* [UNCITRAL Model Law Status], online <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[354] UNCITRAL Model Law, *supra* note 344, art 8(1).

[355] Blackaby et al, *supra* note 329 at para 2.101.

[356] *Arbitration Act 1996* (UK), *supra* note 352, s 7.

[357] UNCITRAL Model Law, *supra* note 344, art 16(1).

procurement contract and the party refuses to comply, the arbitration clause in the contract remains valid. Independent and impartial arbitrators will settle the dispute rather than courts in the public official's state. However, if the arbitration agreement itself is procured by corruption, the state courts would recognize it as null and void and thus refuse to refer the matter to arbitration.

#### 13.2.3 Arbitral Awards Are Final and Binding

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

##### 13.2.3.1 New York Convention

The New York Convention requires Contracting States to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[358] Article V(1) of the New York Convention provides that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked if that party furnishes proof that:

> (a) the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid;
>
> (b) the party against whom the award is invoked was not given proper notice or was otherwise unable to present their case;
>
> (c) the award contains decisions on matters beyond the scope of the submission to arbitration;
>
> (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
>
> (e) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority.[359]

Furthermore, recognition and enforcement of an arbitral award may also be refused pursuant to Article V(2) of the New York Convention, if the competent court in the country where recognition and enforcement is sought finds that: (a) the subject matter of the dispute

[358] *New York Convention*, *supra* note 350, art III.
[359] *Ibid*, art V(1).

is not capable of settlement by arbitration under the law of that country or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

If an award is based on a contract tainted by bribery or corruption, the courts may deny its enforcement on public policy grounds.[360] For instance, the High Court of England and Wales refused to enforce an arbitral award ordering the respondent to pay commission to a public official because the Court found that the commission was effectively a bribe to be paid in exchange for the official procuring a contract between the respondent and a government entity.[361] Similarly, the Paris Court of Appeal denied enforcement of an award where the defendant used part of the commission fee to bribe Iranian officials.[362] The Court noted that a "contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community."[363]

#### 13.2.3.2 ICSID Convention

The ICSID Convention requires each contracting state to "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[364] An award rendered by an ICSID tribunal will be governed by the laws concerning the execution of judgments in the state where execution is sought.[365]

ICSID awards are binding on the parties and may not be subject to any appeal.[366] The ICSID Convention also does not provide for the possibility of arbitral awards to be set aside by national courts, but instead creates a self-contained annulment mechanism. Within 120 days after the date on which the award was rendered, a party may submit an application to the ICSID Secretary-General requesting annulment of the award.[367] An *ad hoc* committee of three persons will be formed,[368] and may annul an award only on the basis of the following grounds:

(a) that the tribunal was not properly constituted;

(b) that the tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

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[360] Born, *supra* note 330 at 3673-74; Dirk Otto & Omaia Elwan, "Article V(2)" in Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn: Kluwer Law International, 2010) at 372-73.
[361] *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*, [1988] 1 QB 448 (Comm).
[362] Cour d'Appel, Paris, 30 September 1993, *European Gas Turbines SA v Westman International Ltd*, XX YB Comm Arb 198 (1995).
[363] *Ibid* at 202, para 6.
[364] ICSID Convention, *supra* note 337, art 54(1).
[365] *Ibid*, art 54(3).
[366] *Ibid*, art 53(1).
[367] *Ibid*, art 51(1) & (2).
[368] *Ibid*, art 52(3).

(e) that the award has failed to state the reasons on which it is based.[369]

#### 13.2.3.3 US

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

(1) the award was procured by corruption, fraud, or undue means;

(2) there was evident partiality or corruption in the arbitrators, or either of them;

(3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or

(4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[370]

Within three years after an arbitral award under the New York Convention is made, a party to the arbitration may apply for an order confirming the award as against any other party to the arbitration.[371] Federal district courts have original jurisdiction in proceedings for recognition and enforcement of foreign arbitral awards.[372] The court will confirm the award unless it finds one of the grounds for refusal of recognition or enforcement specified in Article V of the New York Convention,[373] which has been in force in the US since 29 December 1970.[374]

#### 13.2.3.4 UK

In the UK, a party to arbitration proceedings may apply to a court to challenge the award of an arbitral tribunal as to its substantive jurisdiction, on the grounds of a serious irregularity affecting the tribunal, the proceedings or the award.[375] In this context, "serious irregularity" means any of the following, if the court considers that such an irregularity has caused or will cause substantial injustice to the applicant:

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);

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[369] *Ibid*, art 52(1).
[370] *Federal Arbitration Act*, *supra* note 351, § 10(a).
[371] *Ibid*, § 207.
[372] *Ibid*, § 203.
[373] *Ibid*, § 207.
[374] New York Convention Status, *supra* note 349.
[375] *Arbitration Act 1996* (UK), *supra* note 352, ss 67(1) & 68(1).

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.[376]

Also, unlike many other jurisdictions, the *Arbitration Act 1996* provides a party to arbitration proceedings with an opportunity to appeal to the court on a question of law arising out of an award made in the proceedings.[377] An appeal may be brought only (a) with the agreement of all the other parties to the proceedings or (b) with the leave of the court.[378] Leave to appeal will be given only if the court is satisfied that:

(a) the determination of the question will substantially affect the rights of one or more of the parties,

(b) the question is one which the tribunal was asked to determine,

(c) on the basis of the findings of fact in the award

(i) the decision of the tribunal on the question is obviously wrong or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.[379]

Any application or appeal must be brought within 28 days of the date of the award and may not be brought unless the applicant or appellant has already exhausted any available arbitral process of appeal or review.[380]

[376] *Ibid*, s 68(2).
[377] *Ibid*, s 69(1).
[378] *Ibid*, s 69(2).
[379] *Ibid*, s 69(3).
[380] *Ibid*, ss 70(3) & 70(2)(a).

The *Arbitration Act 1996* provides that a New York Convention award (i.e., an arbitral award made in the territory of a state which is a party to the New York Convention) is binding on the persons as between whom it was made and may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.[381] Recognition or enforcement of an award may be refused only on the grounds enumerated in Article V of the New York Convention,[382] which has been in force in the UK since December 23, 1975.[383]

#### 13.2.3.5 Canada

Under the UNCITRAL Model Law, adopted in Canada at the federal, provincial and territorial levels, recourse to a court to challenge an arbitral award is only available through an application for setting aside.[384] The grounds for setting aside an arbitral award are enumerated in Article 34(2) of the UNCITRAL Model Law and mirror the grounds for refusal of recognition or enforcement of arbitral awards in Article V of the New York Convention.[385] An application for setting aside must be made within three months after the date on which the party making the application received the award.[386]

An arbitral award, irrespective of the country in which it was made, must be recognized as binding and will be enforced upon application in writing to the competent court.[387] The grounds for refusal of recognition or enforcement of arbitral awards, enumerated in Article 35(1) of the UNCITRAL Model Law, mirror those listed in Article V of the New York Convention, which has been in force in Canada since August 10, 1986.[388]

## 13.3 Treatment of Allegations in International Investment Arbitration

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

### 13.3.1 Claimant Allegations

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

[381] *Ibid*, ss 100(1) & 101(1)-(2).
[382] *Ibid*, ss 103(1)-(4).
[383] UNCITRAL Model Law Status, *supra* note 353.
[384] *Ibid*; UNCITRAL Model Law, *supra* note 344, art 34(1).
[385] New York Convention, *supra* note 350, arts V(1)(a)-(d) & V(2).
[386] UNCITRAL Model Law, *supra* note 344, art 34(3).
[387] *Ibid*, art 35(1).
[388] New York Convention Status, *supra* note 349.

*v Romania*[389]) or were corruptly influenced by the investors' competitors (*Methanex v United States*,[390] *Oostergetel v Slovakia*,[391] and *ECE and PANTA v Czech Republic*[392]).

#### 13.3.1.1 *Methanex v United States*

In *Methanex v United States*, the claimant initiated arbitration proceedings under Chapter 11 of NAFTA seeking compensation from the US for $970 million in losses caused by the State of California's ban on the sale and use of the gasoline additive MTBE, a key ingredient of which is methanol.[393] Methanex, a Canadian producer of methanol, alleged that the then-California Governor Grays' decision to issue the ban on MTBE was motivated by corruption, as the Governor received more than $200,000 in political campaign contributions from ADM, the principal US producer of ethanol.[394]

The tribunal ultimately found that it did not have jurisdiction over some of the claimant's claims and dismissed all other claims on their merits.[395] The importance of this case is its approach to evaluating the evidence of corruption.[396] Methanex invited the tribunal to base the finding of corruption on the totality of factual inferences and interpretations:

> Counsel for Methanex's description of this methodology can be summarised, colloquially, as one of inviting the Tribunal to "connect the dots," i.e., while individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events, which will support Methanex's claims.[397]

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

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

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[389] *EDF (Services) Ltd v Romania* (2009), ICSID Case No ARB/05/13 (ICSID) (Arbitrators: Piero Bernardini, Arthur W Rovine, Yves Derains) [*EDF (Services) Ltd*].
[390] *Methanex Corporation v United States of America* (2005), Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL) (Arbitrators: V V Veeder, J William F Rowley, W Michael Reisman) [*Methanex*].
[391] *Jan Oostergetel and Theodora Laurentius v The Slovak Republic* (2012), (UNCITRAL) (Arbitrators: Gabrielle Kaufmann-Kohler, Mikhail Wladimiroff, Vojtěch Trapl) [*Oostergetel*].
[392] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic* (2013), PCA Case No 2010-5 (UNCITRAL) (Arbitrators: Sir Franklin Berman, Andreas Bucher, J Christopher Thomas) [*ECE Projektmanagement International GmbH*].
[393] *Methanex*, *supra* note 390, Part I at para 1.
[394] *Ibid,* Part I at para 5.
[395] *Ibid,* Part VI at para 1.
[396] Llamzon (2014), *supra* note 332 at para 6.106.
[397] *Methanex*, *supra* note 390, Part III, Chapter B at para 2.

> self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened. Accordingly, the Tribunal will consider the various "dots" which Methanex has adduced — one-by-one and then together with certain key events (essentially additional, noteworthy dots) which Methanex does not adduce — in order to reach a conclusion about the factual assertions which Methanex has made. Some of Methanex's proposed dots emerge as significant; others, as will be seen, do not qualify as such. In the end, the Tribunal finds it impossible plausibly to connect these dots in such a way as to support the claims set forth by Methanex.[398]

In particular, the tribunal observed that in the US, political campaigns at the federal and state level may accept private financial contributions, and "no rule of international law was suggested as evidence that the US and other nations which allow private financial contributions in electoral campaigns are thereby in violation of international law."[399] The tribunal also rejected Methanex's suggestion that the fact that ADM hosted a "secret" dinner for Mr. Davis confirms an intent to favor ethanol and thus injure methanol producers (including Methanex).[400] While the contribution of campaign funds, if made under circumstances that suggest a deal or a *quid pro quo*, could be unlawful and amount to a breach of NAFTA's provisions on national treatment, minimum standard of treatment, and expropriation, Methanex itself acknowledged that it was unable to prove any *quid pro quo* or handshake deal.[401]

#### 13.3.1.2 *EDF v Romania*

In *EDF v Romania*, a UK company that formed two joint ventures with Romanian state-owned entities claimed that Romania failed to accord fair and equitable treatment to EDF's investment. EDF claimed that the revocation of its duty-free store licenses and non-renewal of its lease agreements resulted from EDF's refusal to pay $2.5 million in bribes allegedly solicited by the Prime Minister of Romania and other senior public officials.[402] The respondent denied the allegations of corruption and noted that the claimant did not provide "reliable evidence" that the numerous decision-makers involved in the process of deciding whether to extend the contract or to approve the act governing duty-free licenses "were even aware of, let alone influenced by, alleged bribes solicited by the Prime Minister's staff members."[403] The claimant did not report the alleged bribe solicitations when they occurred in August and October of 2001, but published them in a German newspaper in November 2002, following which an investigation was opened by the Romanian Anti-Corruption Authority (DNA).[404] The DNA has twice investigated the claimant's allegations of bribery solicitation and twice (in 2003 and 2006) rejected them, and the criminal courts in Romania

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[398] *Ibid*, Part III, Chapter B at para 3.
[399] *Ibid*, Part III, Chapter B at para 17.
[400] *Ibid*, Part III, Chapter B at paras 34-46.
[401] *Ibid*, Part III, Chapter B at paras 37-38.
[402] *EDF (Services) Ltd, supra* note 389 at paras 1, 46, 101-106, 221-222.
[403] *Ibid* at para 144.
[404] *Ibid* at para 222.

have twice reviewed and affirmed the DNA's findings that the claimant's allegations are groundless.[405]

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

> The Tribunal shares the Claimant's view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that "exercising a State's discretion on the basis of corruption is a … fundamental breach of transparency and legitimate expectations"…. Respondent flatly denies that such a request for a corrupt payment was made. In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.[406]

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

> The burden of proof lies with the Claimant as the party alleging solicitation of a bribe. Clear and convincing evidence should have been produced by the Claimant showing not only that a bribe had been requested from Mr. Weil [the CEO of EDF], but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect. In the absence of such evidence, the Tribunal is compelled to draw the conclusion that Claimant did not sustain its burden of proof. [407]

#### 13.3.1.3 *Oostergetel v Slovakia*

In *Oostergetel v Slovakia*, the claimants contended that the bankruptcy proceedings of BCT, their investment vehicle, were conducted in an illegitimate manner.[408] They alleged that, possibly due to corruption, the state officials involved in the bankruptcy proceedings (tax

[405] *Ibid* at para 228.
[406] *Ibid* at para 221 (internal quotations omitted).
[407] *Ibid* at para 232.
[408] *Oostergetel*, *supra* note 391 at para 88.

authorities, ministers, judges, and trustees) supported the so-called "Slovak financial mafia" in depriving the claimants of their real estate.[409]

With regard to the claimants' allegation that they were denied justice in the Slovak courts, the tribunal observed that despite the seriousness of the allegations of corruption and conspiracy to ruin the claimants' investment, the investors "made no serious attempt to establish that the adjudication of the bankruptcy of BCT by the Slovak Courts was so bereft of a basis in law that the judgment was in effect arbitrary or malicious."[410] The claimants appealed the adjudication of bankruptcy only on procedural grounds (and did not contest the substantive reasons for the bankruptcy), and the claimants' own legal expert largely supported the correctness of the proceedings.[411] Accordingly, the tribunal rejected the claimants' allegations of a denial of justice:

> 296. In light of these statements, it is clear that a claim for denial of justice must fail. The Claimants failed to provide sufficient proof of the alleged missteps of the bankruptcy proceedings. As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.
>
> 297. Even accepting that irregularities did occur in the course of the proceedings, the record shows that the bankruptcy of BCT was the lawful consequence of the Claimants' persistent default on their tax debts, and no proof was found that the State organs conspired with the so-called "financial" or "bankruptcy mafia" against the investors or their investment in the Slovak Republic.[412]

The tribunal was also not convinced by the claimants' suggestion that bribery was a possible explanation for the alleged conduct of the relevant public officials. The claimants relied on general reports about corruption in Slovak courts, local news clippings concerning irregularities in bankruptcy proceedings handled by the Regional Court of Bratislava, and reports by the European Union and US, which mentioned that bribery is widespread in Slovak courts:

> While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial

[409] *Ibid* at paras 92-93, 178.
[410] *Ibid* at para 292.
[411] *Ibid*.
[412] *Ibid* at paras 296-97.

> evidence. In the present case, both are entirely lacking. Mere insinuations cannot meet the burden of proof which rests on the Claimants.[413]

#### 13.3.1.4 *ECE and PANTA v Czech Republic*

In *ECE and PANTA v Czech Republic*, the dispute arose out of an unsuccessful real estate project attempted by two German investors in the Czech Republic.[414] The claimants alleged that the conduct of the Czech authorities with respect to permits required for the construction of a shopping center resulted in excessive delays and ultimately left the claimants no choice but to abandon their investment.[415] The claimants thus sought compensation for the alleged breaches of their treaty rights to fair and equitable treatment, admission of lawful investments, non-discrimination and protection against arbitrary measures, as well as for expropriation.[416] The investors admitted that they had no direct proof that a competitor bribed officials to halt their permit applications, but presented what they believed to be "numerous serious indices that leave no other option but to conclude that a corruption scheme exists."[417] The claimants cited several NGO reports on systematic corruption in the Czech Republic generally and the city in which the proposed project was located.[418] The claimants also relied on the testimony of a Czech lawyer who was involved in advising ECE on the permit proceedings. She testified that local officials admitted to her that they had been instructed to obstruct the permit proceedings.[419]

The tribunal noted that it "cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof"[420] and accepted that it had to "examine with care the facts alleged to prove corruption."[421] However, as in *Methanex v United States*, the "dots" did not connect for the claimants who alleged corruption:

> 4.876 When considering the Claimants' evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to "connect the dots". At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level

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[413] *Ibid* at paras 302-303 (internal quotations omitted).
[414] *ECE Projektmanagement International GmbH, supra* note 392 at paras 1.1-1.4, 1.9-1.15.
[415] *Ibid* at paras 1.13, 4.1–4.7.
[416] *Ibid* at paras 1.14, 4.8–4.22.
[417] *Ibid* at para 4.394.
[418] *Ibid* at paras 4.846–4.847.
[419] *Ibid* at paras 4.848–4.849.
[420] *Ibid* at para 4.871.
[421] *Ibid* at para 4.873.

> of seriousness to be advanced without either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof. [422]
>
> …
>
> 4.879 The Tribunal must begin by stating that it finds to be deeply unattractive an argument to the effect that 'everyone knows that the Czech Republic is corrupt; therefore, there was corruption in this case…. The Tribunal acknowledges that some effort was made to adduce specific evidence of corruption, but it did feel that there was a strain of the 'everyone knows' argument in the overall case, for example in the reliance on reports of NGOs as to the general presence of corruption within the Czech Republic. The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to 'poison the well' in the hopes of making up for a lack of direct proof. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. Nor do allegations of this kind, however seriously advanced, give rise to a burden on the Respondent to 'disprove' the existence of corruption. While the present Tribunal is therefore willing to "connect the dots", if that is appropriate, the dots have to exist and they must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.[423]

Therefore, after reviewing the evidence, the tribunal found no substantial evidence of corruption, be it in respect to individual acts or in respect to an alleged "scheme" of corruption.[424]

### 13.3.2 Respondent Allegations of Corruption

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

[422] *Ibid* at para 4.876.
[423] *Ibid* at para 4.879.
[424] *Ibid* at para 4.932.

#### 13.3.2.1 *World Duty Free v Kenya*

The importance of the tribunal's decision in *World Duty Free v Kenya*[425] lies in the fact that it was the first contract-based investment arbitration case in which a tribunal made a determinative finding of corruption.[426] In 2000, World Duty Free (WDF) filed a claim at the ICSID pursuant to the arbitration clause in a 1989 contract (governed by English and Kenyan law) for construction and operation of duty free complexes at two international airports.[427] WDF alleged that Kenya, through its executive, judiciary, and agents, improperly used WDF in election campaign finance fraud, illegally expropriated the company, wrongfully placed it in receivership, caused damage through mismanagement in receivership, refused to protect WDF from crime and unlawfully deported its CEO.[428] Subsequently, the owner and CEO of WDF acknowledged that, in order to be able to engage in business in Kenya, WDF was required to make a "personal donation" in the amount of $2 million to the then-President of Kenya in March 1989.[429] In response, Kenya submitted an application alleging that the 1989 contract was unenforceable because the contract was procured by paying a bribe and requesting dismissal of WDF's claims in their entirety.[430]

The tribunal held that payments made by WDF's owner and CEO were bribes rather than a "personal donation for public purposes," because they were made not only in order to obtain an audience with the President, but "above all to obtain during that audience the agreement of the President on the contemplated investment."[431] The arbitrators noted that "bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries,"[432] including Kenya. The tribunal reviewed several international anti-corruption treaties, court decisions and arbitral awards[433] and concluded that even though in some countries or economic sectors bribery is "a common practice without which the award of a contract is difficult – or even impossible," arbitrators "always refused to condone such practices,"[434] and thus contracts based on corruption may not be upheld in arbitration:

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

[425] *World Duty Free Company Limited v Republic of Kenya* (2006), 46 ILM 339 at para 6.01 (ICSID) [*World Duty Free*].
[426] Llamzon (2014), *supra* note 332.
[427] *World Duty Free, supra* note 425 at paras 62, 75.
[428] *Ibid* at paras 68-74.
[429] *Ibid* at para 66.
[430] *Ibid* at para 105.
[431] *Ibid* at para 136.
[432] *Ibid* at para 142.
[433] *Ibid* at paras 143-156.
[434] *Ibid* at para 156.

> corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[435]

The tribunal, therefore, found that Kenya was legally entitled to avoid the contract tainted by corruption, and WDF was "not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract's applicable laws."[436]

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

> It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings.[437]

Nevertheless, the tribunal ruled that "the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world,"[438] and thus refrained from imposing a duty to prosecute upon the responding state as a precondition to successfully raising the corruption defence.

#### 13.3.2.2 *Metal-Tech v Uzbekistan*

*Metal-Tech v Uzbekistan*[439] was the first investment *treaty* arbitration case where the tribunal decided that it did not have jurisdiction because the investment was tainted by corruption.[440] Metal-Tech, an Israeli company, commenced ICSID proceedings alleging that Uzbekistan failed to accord fair and equitable treatment and protection and security to the company. Metal-Tech also alleged that Uzbekistan had expropriated Metal-Tech's investment in Uzmetal, a joint venture formed with two Uzbek state-owned companies.[441]

In November 2011, Uzbekistan informed the tribunal that it had recently become aware of the details of a criminal investigation by the Prosecutor General's Office into questionable payments to Uzbek public officials and individuals affiliated with Metal-Tech and

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[435] *Ibid* at para 157.
[436] *Ibid* at para 188.
[437] *Ibid* at para 180.
[438] *Ibid* at para 181.
[439] *Metal-Tech Ltd v The Republic of Uzbekistan* (2013), ICSID Case No ARB/10/3 at para 6.43 (ICSID) (Arbitrators: Gabrielle Kaufmann-Kohler, John M Townsend, Claus von Wobeser) [*Metal-Tech Ltd*].
[440] Llamzon (2014), *supra* note 332.
[441] *Metal-Tech Ltd*, *supra* note 439 at paras 1, 3, 7, 19, 55.

Uzmetal.[442] Uzbekistan alleged that several consulting agreements, which Metal-Tech entered into between 2000 and 2005, were a sham designed to cover illegal payments to Uzbek public officials or their close affiliates.[443] Metal-Tech's CEO admitted that about $4 million had been paid to consultants who were "primarily engaged in 'lobbying' activities."[444] Therefore, the tribunal concluded that it lacked jurisdiction over the investor's claims because Metal-Tech breached both the Uzbek *Criminal Code* and the legality requirement under the Israel-Uzbekistan BIT by making payments to a governmental official and a close relative of a high-ranked public official for the purpose of influence peddling.[445]

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

> The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.[446]

Although the claimant's insistence that "there is no evidence that [the claimant's consultant] is being investigated or has been arrested for any crime"[447] and that "no official was charged with unlawful conduct in connection with its project"[448] did not preclude the tribunal from refusing to hear the investor's claims, the arbitrators found it necessary to state:

> While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.[449]

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[442] *Ibid* at para 76.
[443] *Ibid* at paras 28-30.
[444] *Ibid* at para 240.
[445] *Ibid* at paras 325, 327, 337, 351-52, 389.
[446] *Ibid* at para 422.
[447] *Ibid* at para 308.
[448] *Ibid* at para 336.
[449] *Ibid* at para 389.

#### 13.3.2.3 *Niko Resources v Bangladesh*

In a contract-based investment arbitration arising out of the 2003 Joint Venture Agreement (JVA) and the 2006 Gas Purchase and Sales Agreement (GPSA), Niko Resources and state-owned companies Bapex and Petrobangla, Niko Resources claimed $35.71 million, alleging it had not been paid for deliveries of gas.[450]

During negotiations for the GPSA, the claimant delivered a car to the Bangladeshi State Minister for Energy and Mineral Resources, while the claimant's Canadian parent company provided the Minister with an all-expenses-paid trip to an exposition in Calgary.[451] Following an investigation in Canada, Niko Canada, on the basis of an agreed statement of facts, was convicted of bribery in 2011 and ordered to pay about CDN$9.5 million in fines.[452] The respondents objected to the tribunal's jurisdiction, arguing that the claimant "has violated the principles of good faith and international public policy" and the tribunal was thus "empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law."[453] The tribunal noted that the question, therefore, was "whether any instance of bribery and corruption in which the Claimant has been or may have been involved deprives the Claimant from having its claims considered and ruled upon by the present Tribunal."[454]

The arbitrators confirmed that bribery is contrary to international public policy,[455] but made a distinction between contracts *of* corruption and contracts *obtained by* corruption:

> There is indeed a fundamental difference between the two types of situations. In contracts of corruption, the object of the contract is the corruption of a civil servant and this object is intended by both parties to the contract. In contracts obtained by corruption, one of the parties normally is aware of the corruption and intends to obtain the contract by these means. But this is not necessarily the case for the other side. As explained in the *World Duty Free* award, bribes normally are covert. In that case the bribe was received not by the Government or another public entity but by an individual, the then President of the country. As the World Duty Free tribunal held, the receipt of the bribe is "*not legally imputed to Kenya itself. If it were otherwise, the payment would not be a bribe.*"[456]

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[450] *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (2013), ICSID Case No ARB/10/11 & ARB/10/18, Decision on Jurisdiction at paras 1-7, 45, 88 (ICSID) (Arbitrators: Michael E Schneider, Campbell McLachlan, Jan Paulsson) [*Niko Resources v Bangladesh*].

[451] *Ibid* at para 6.

[452] *Ibid*. See *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (QB) discussed in Section 6.5, and in Chapter 2, Section 3.5.1.

[453] *Ibid* at paras 374, 376.

[454] *Ibid* at para 380.

[455] *Ibid* at paras 432-433.

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

While the tribunal observed that contracts of corruption were found void or unenforceable and denied effect by international arbitrators,[457] in the case of covert bribes, the side innocent of corruption may have a justifiable interest in preserving the contract.[458] In the present case, the contracts giving rise to the investor's claims had a legitimate object (the development of a gas field)[459] and there was no causal link between the corruption and conclusion of the agreements (the JVA was concluded before the acts of corruption and the GPSA was concluded 18 months after the Minister resigned).[460] In addition, the respondents did not seek to avoid the agreements or to declare them void *ab initio*.[461]

Instead, the respondents asserted that, because the act of bribery linked to the investment and for which the investor's parent company was convicted in Canada, ICSID jurisdiction should be denied to the claimant.[462] The respondents invoked three arguments:

(a) ICSID arbitration applies only to investments made in good faith;

(b) accepting jurisdiction would jeopardize the integrity of the ICSID dispute settlement mechanism; and

(c) the doctrine of clean hands.[463]

With respect to the first argument, the tribunal ruled that in a contractual dispute, "alleged or established lack of good faith in the investment does not justify the denial of jurisdiction but must be considered as part of the merits of the dispute."[464] Secondly, the integrity of the investment arbitration system is "protected by the resolution of the contentions made (including allegations of violation of public policy) rather than by avoiding them."[465] Finally, in response to the third objection, the arbitrators stated that Petrobangla and Bapex, with the approval of the Bangladesh Government, entered into the GPSA even after the corruption scandal and resignation of the Minister, so that even if the claimant and Niko Canada had unclean hands, the respondents disregarded this situation and may no longer rely on these events to deny jurisdiction under an arbitration agreement which they then accepted.[466] The tribunal thus held that Niko Canada's corruption conviction in Canada could not be used as grounds to refuse jurisdiction over the merits of a dispute which the parties to the JVA and GPSA had agreed to submit to ICSID arbitration.[467]

*Niko Resources v Bangladesh* is thus a rare case where corruption was found to exist but did not determine the outcome, as the tribunal rejected the respondents' objection to jurisdiction despite the claimant's admissions of wrongdoing.[468] In 2014, the tribunal ordered

[457] *Ibid* at paras 434-436.
[458] *Ibid* at para 444.
[459] *Ibid* at para 438.
[460] *Ibid* at para 453-455.
[461] *Ibid* at para 456.
[462] *Ibid* at para 465.
[463] *Ibid* at para 466.
[464] *Ibid* at para 471.
[465] *Ibid* at para 474.
[466] *Ibid* at para 484.
[467] *Ibid* at para 485.
[468] Llamzon (2014), *supra* note 332 at para 6.289.

Petrobangla to pay Niko $25.5 million for gas delivered from November 2004 to April 2010.[469] However, in March 2016, the respondents submitted a new request seeking declarations that the JVA and the GPSA had been procured through corruption and the claimant was thus not entitled to use international arbitration to pursue its claims or, alternatively, that the JVA and the GPSA were void.[470] The tribunal affirmed that it was "conscious of the seriousness of corruption offenses" and, being "[m]indful of [the tribunal's] responsibility for upholding international public policy,"[471] decided it would examine circumstances surrounding the negotiation and conclusion of the JVA and the GPSA to determine whether they were procured by corruption.

In a 587-page decision issued in February 2019, the tribunal rejected the respondents' objections to the tribunal's jurisdiction and concluded that the JVA and the GPSA were not procured by corruption.[472] The evidence presented by the respondents did not contain any indication of corruption in the proposal and acceptance of the arbitration clauses,[473] and the object of the JVA and the GPSA, that is for Niko to develop the gas fields and sell the gas to Petrobangla, was lawful; the question whether Niko was lawfully granted governmental authority to do so was one concerning the merits, not the jurisdiction.[474] As to the merits of the respondents' corruption allegations, the tribunal found it "difficult to identify an invariable rule on the standard of proof" and did not "find much assistance in terms such as 'preponderance of evidence' and 'heightened standard of proof.'"[475] Ultimately, the question was simply "whether the Tribunals are persuaded that the JVA and GPSA were procured by corruption or not,"[476] and the arbitrators rejected the respondents' allegations as unfounded.[477]

#### 13.3.2.4 *MOL v Croatia*

Another case in which a host state's allegations of corruption may be determinative is currently in the making. In *MOL v Croatia*,[478] the investor alleges that Croatia breached its obligations under the Energy Charter Treaty in connection with MOL's investments in INA,

[469] *Niko Resources v Bangladesh*, *supra* note 450, Decision on the Payment Claim (2014) at para 292(1).
[470] *Niko Resources v Bangladesh*, *supra* note 450, Procedural Order No 13 Concerning the Further Procedure Regarding the Corruption Issue and Related Issues (2016) at paras 1-3.
[471] *Ibid* at paras 2, 7.
[472] *Niko Resources v Bangladesh*, *supra* note 450, Decision on the Corruption Claim (2019) at para 2010.
[473] *Ibid* at para 576.
[474] *Ibid* at para 580.
[475] *Ibid* at paras 803-805.
[476] *Ibid* at para 806.
[477] *Ibid* at paras 1970-2009.
[478] *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* (2014), ICSID Case No ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) (ICSID) (Arbitrators: Sir Franklin Berman, William W Park, Brigitte Stern) [*MOL v Republic of Croatia*].

an oil company.[479] In 2003, following the Croatian government's decision to privatize INA, MOL acquired a 25%+1 share in INA while the government remained the majority shareholder. Further negotiations culminated in two agreements which allowed MOL to increase its stake in INA to 49% (the 2009 Agreements). Whereas Croatia alleges the 2009 Agreements were procured by MOL's CEO through bribery of then-Prime Minister of Croatia Ivo Sanader, the investor points out that neither MOL nor its CEO has been convicted of any crime in relation to the 2009 Agreements, and alleges that criminal charges against MOL's CEO are "baseless" and represent an attempt by Croatia to take control of INA.[480] In addition, the investor asserts that allegations of bribery constitute an "illegal effort to harass and intimidate MOL."[481] Croatia maintains that initiation of the ICSID proceedings was "just another attempt [made by the investor's CEO] to evade justice."[482]

In November 2012, Ivo Sanader was convicted in Croatia for accepting €5 million bribe from MOL in exchange for facilitating the conclusion of the 2009 Agreements. However, in July 2015, Croatia's Constitutional Court annulled the conviction and ordered a retrial, which began in September of 2015. Croatian law enforcement authorities also issued an indictment against MOL's CEO and chairman Zsolt Hernádi, but Hungarian authorities declined Croatia's requests to question him.

On December 2, 2014, the ICSID tribunal declined Croatia's application to dismiss the investor's claims on a summary basis and decided that consideration of the objections put forward by the respondent should be postponed to a later stage of the proceedings.[483] Meanwhile, Croatia initiated a contract-based arbitration against MOL. However, in its December 23, 2016 award, the tribunal refused to declare the 2009 Agreements null and void as it arrived at a "confident conclusion" that Croatia had not proven that MOL bribed Mr. Sanader to secure the impugned contracts.[484] As the ICSID arbitration is still pending, it remains to be seen how the ICSID tribunal will approach the issue of corruption and what

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

[480] *MOL v Republic of Croatia*, *supra* note 478 at para 17.

[481] *Ibid* at para 19.

[482] *Ibid* at para 39.

[483] *Ibid* at paras 46, 52.

[484] Luke Eric Peterson, "Kaplan-Paulsson-Barbic Award Surfaces, Illuminating why Tribunal Rejected Croatia's Allegation that Favourable Outcomes were Procured through Bribery of Prime Minister", *Investment Arbitration Reporter* (7 November 2017), online: <https://www.iareporter.com/articles/kaplan-paulsson-barbic-award-surfaces-illuminating-why-tribunal-rejected-croatias-allegation-that-favourable-energy-deals-were-procured-through-bribery-of-prime-minister/>.

effect, if any, the allegations of corruption by the host state will have on the outcome of the case.

## 13.4 International Investment Arbitration and the Global Fight against Corruption

International arbitration is, by nature, a private and consensual procedure. Its neutrality and flexibility, as well as the enforceability of arbitration agreements and final and binding character of arbitral awards, make international arbitration the primary mechanism for the settlement of disputes arising out of international commercial and investment transactions. However, the global nature of modern business, increasing involvement of states and state-owned enterprises in international investment, and rising sophistication of regulatory and reporting schemes in various countries inevitably result in a corresponding surge in the number of investment disputes. In 2020, investors initiated 68 publicly-known treaty-based international investment arbitrations, and the respondent was a developing country or a transition economy in around 75% of these cases.[485] As of 2021, 124 countries and one economic grouping have been named as respondents in one or several known treaty-based investment arbitration disputes.[486]

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

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

[485] World Investment Report 2021, *supra* note 336 at 129.
[486] *Ibid*.

CHAPTER 8

# THE LAWYER'S ETHICAL AND PROFESSIONAL DUTIES

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* Gerry Ferguson thanks Erin Halma for her research and writing assistance on the previous version of this chapter.

## CONTENTS



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

# 1. INTRODUCTION

All lawyers owe certain legal, professional, and ethical duties to their clients. This chapter focuses on four of those duties, which are most relevant when lawyers provide advice to their business clients for the purpose of assisting their clients in pursuit of the client's business objectives. Those duties are:

- Duty to avoid Conflicts of Interest
- Duty not to Advise or Assist in Violation of Law
- Duty of Confidentiality and
- Duty to preserve Lawyer/Client Privilege

This chapter is an important prelude to the next chapter that focuses on the seminal role that lawyers play in the context of anti-corruption policies, risk assessments, and due diligence practices in modern multi-national business transactions.

# 2. LAWYERS AND BUSINESS CLIENTS

## 2.1 Multiple Roles of Lawyers

In the context of business law, lawyers have an increasingly large role to play in anti-corruption compliance. Lawyers provide legal, and often business, advice to their clients. We will address the critical distinction between legal and business advice later in this chapter.

In providing legal advice, lawyers are "transaction facilitators." They are expected to construct transactions in a way that complies with relevant laws, including laws prohibiting the offering or paying of bribes.[1] In addition to providing legal advice, lawyers educate their clients on the law and on how to comply with the law while achieving business objectives.[2] Lawyers may act as internal or external investigators if there is an allegation of corruption against a client.[3] They will frequently have to conduct or oversee due diligence investigations prior to closing certain transactions. Lawyers may act as compliance officers or ethics officers by creating, enforcing and reviewing their client's compliance program.[4] Lawyers may act as assurance practitioners and conduct an assurance engagement on the effectiveness of the organization's control procedures.[5] In an increasingly technology-enabled practice environment, the use of technology for information storage, retrieval, and exchange, document preparation, and communication increases, and lawyers are required

[1] Sarah Helene Duggin, "The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility" (2006-2007) 51 St Louis ULJ 1004 at 1006 (HeinOnline). Duggin's article provides an examination of the different roles in-house counsel play in a corporation.

[2] *Ibid* at 1005.

[3] *Ibid* at 1008. Dealt with more fully in Chapter 6, Section 4.2.

[4] *Ibid* at 1011-12.

[5] Discussed more fully in Chapter 9, Section 3.1.3 (item 6) and Section 3.1.4.

to address privacy, confidentiality and privilege protection, and to act as privacy and technology risk management advisors. Finally, some lawyers may be in the position of a gatekeeper in the sense that, by advising their client on the illegality or potential illegality of a proposed transaction and refusing to do the necessary legal work for the transaction, they may prevent their client from breaching the law. In each of these roles, the lawyer may come face to face with issues of corruption and have to consider the ethical and professional obligations that may guide and constrain their conduct and advice.[6]

## 2.2 Who is the Client?

Lawyers owe various duties to their clients. To fulfill those duties, the lawyer must of course know who their client is. In many forms of legal practice, the client is a physical person and their identity is self-evident. However, in the business world, the client is usually an organization. Businesses are usually conducted under one of the many forms of business organizations, which include:

- Incorporated companies (both for-profit and not-for-profit and including special corporate structures such as universities, hospitals, municipalities and unions);
- Unincorporated associations or societies;
- Sole proprietorships;
- Partnerships; and
- Trusts (e.g., pension fund trusts, mutual trusts, and real estate investment fund trusts).

In this chapter, we will focus primarily on incorporated companies, both for simplicity and because incorporated companies are the prevalent business form for most commercial entities of any significant size.

In common law countries (and some civil law countries), a corporation is a separate legal entity. While treating the corporation as a person is a legal fiction, it nonetheless means the corporation can act as a legal entity. For example, it can own property, enter into contracts for goods and services, hire and fire employees, and sue or be sued by others. Most importantly, it also means the corporation has limited liability; if the corporation fails financially, the individual owners and/or shareholders are not personally liable for the debts of the corporation. The legal authority for the actions of a corporation is vested in the board of directors. Thus, when a lawyer is hired by a corporation, the lawyer's client is the corporation whose authority and ultimate directions come from the board of directors. While a lawyer may operationally receive instructions from and interact with senior management, including Chief Executive Officers (CEOs), Chief Financial Officers (CFOs) and Chief Operating Officers (COOs), the lawyer's client is still the corporation (i.e., the corporate entity that speaks through its board). Thus, the lawyer must always be satisfied that they are receiving instructions from someone who is authorized to give them. The

[6] There is a more expansive discussion of the lawyer as "gatekeeper" in Section 2.4.

lawyer owes their professional duties to the corporation, not to senior management, the chair of the board, or individual owners or shareholders.[7]

## 2.3 In-House and External Counsel

A lawyer may have one of two primary relationships with their business client: in-house counsel or external counsel. External counsels are not employees of the client; they operate independently and normally have multiple clients. The employment of lawyers as in-house counsel has largely developed over the past 75 to 100 years.[8] More than forty years ago, Lord Denning described the position of in-house counsel in the legal profession as follows:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority…. In every case these legal advisers do legal work for their employer and for no-one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer…. They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act

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[7] American Bar Association (ABA), *Model Rules of Professional Conduct*, 2020 ed, ABA, Centre for Professional Responsibility, 2020 [ABA Model Rules (2020)], Rule 1.13(a), online: <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/>;
Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct*, (as amended October 19 2019) Ottawa: FLSC, 2019 [FLSC Model Code, (2019)], Rule 3.2-3, online (pdf): <https://flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf>.
In discussing the duties to clients and ethical obligations that a lawyer owes to clients in the US context, this chapter will refer to the ABA *Model Rules of Professional Conduct*. In the Canadian context, it will refer to the FLSC *Model Code of Professional Conduct*. These are model codes and are not the specific code that applies in any given jurisdiction in the United States (for the ABA *Model Rules* (2020)) or in Canada (for the FLSC *Model Code* (2019)). Each of these model codes includes a comprehensive assessment of the general rule by which lawyers in the US or Canada, as the case may be, are expected to abide. These model codes, while intended to help provide rules that are consistent in the common law jurisdictions of their respective countries, are not consistently adopted in their entirety by each jurisdiction. Courts and state bar authorities in the US, and Law Societies in common law jurisdictions in Canada review provisions of the applicable model code, and consider whether to incorporate them into their state, provincial or territorial codes. There remain variations or departures from model code provisions in the codes of conduct of a number of state, provincial and territorial jurisdictions. It is therefore important to check the rules in the code of every jurisdiction that is under consideration. (The FLSC publishes and updates an *Interactive Model Code* that allows the user to cross check the rules of a provincial Law Society against the comparable rules and commentary in the model code. FLSC, *Interactive Model Code of Professional Conduct* (as updated to November 2020) (FLSC, 2020) [Interactive Model], online: <https://flsc.ca/interactivecode/>. Provincial and Territorial Law Society websites can be accessed for detailed information on each province's code of professional conduct.)

[8] "Legal Profession" (1985) 11 Commonwealth L Bull 962 at 974 (HeinOnline). See also John C Coffee, *Gatekeepers: The Role of the Professions in Corporate Governance* (New York: Oxford University Press, 2006) at 194.

> for one client only and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidence. They and their clients have the same privileges.[9]

This description of in-house counsel remains generally accurate. The number of in-house counsel compared to external counsel continues to grow as the use of "insourcing" is preferred to the generally more expensive alternative of retaining external counsel.[10] In-house counsel constitute 15 to 20 percent of practicing lawyers. They have two active professional associations in Canada: the Canadian Corporate Counsel Association[11] and the Association of Corporate Counsel of Canada.[12] The former is an organization within the Canadian Bar Association that focuses on the interests of corporate counsel. It has sections in most jurisdictions in Canada, and offers specialized training and certification for in-house counsel, as well as regular programming on issues relevant to corporate and business practice. The latter represents more than 1,400 members in 500 corporations across Canada. They have chapters in Alberta, British Columbia, Ontario, and Quebec and hold programs every month on topics like compliance, ethics, intellectual property, legal risk management, project management, career development, and more.[13]

While many corporations have in-house counsel, a corporation will often turn to external counsel for highly specialized legal areas or for litigation. Some smaller corporations have no in-house counsel. They refer all their legal work to one or more external law firms. While the balance of work between in-house and external lawyers is often in flux, Woolley et al. describe some attractions for retaining in-house counsel:

> Companies have found it valuable to have dedicated legal expertise resident within their walls, with professionals who know both the law and the organization intimately. Hiring corporate counsel can also be far more cost-efficient than hiring outside law firms on a case-by-case basis. For many lawyers, in-house practice can offer the combined attractions of interesting work, a lifestyle often perceived as more accommodating than that offered by private practice, greater job security, and significant financial reward through both substantial salaries and the chance to

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[9] Crompton Amusement Machines Ltd v Commission of Customs and Excise (No 2), [1972] 2 QB 102, 2 All ER 353 at 376 (CA).

[10] See Deloitte, *Canadian Legal Landscape 2019: Issues and trends facing in-house counsel in Canada* (2019) at 3, online (pdf): *Deloitte Touche Tohmatsu Limited* <https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-deloitte-legal-industry-report-2019-en-aoda.pdf>.

[11] "Canadian Corporate Counsel Association" (last visited July 2021), online: *CCAA-AAJE* <http://www.ccca-accje.org/>. The "CCCA" is part of the Canadian Bar Association.

[12] "Association of Corporate Counsel of Canada: Chapters and Networks, Canada" (last visited July 2021), online: *AAC* <https://www.acc.com/chapters-networks/chapters/canada>. It is an affiliate of the global Association of Corporate Counsel organization.

[13] *Ibid*.

> participate in the success of the company through compensation plans that include stock options.[14]

While in-house lawyers have the same general duties as external lawyers, their status as an employee of the corporate client can raise professional issues requiring careful consideration. In particular, the need to distinguish between legal advice and advice related to business and business strategy is critical for example, to preserve privilege (discussed below).

Further, in-house counsel are often dependent on the CEO of the corporation. This makes it essential for them to do careful due diligence on both the CEO and the company itself to ensure they are not entering an environment without a "culture of integrity."[15] They must be aware of their role as not only legal counsel, but also revenue-generators for the corporation.[16]

Difficult issues around solicitor-client privilege and conflict of interest may arise more frequently for in-house counsel than external counsel. For example, a member of the upper management in a company may seek out the advice of in-house counsel on a matter of corporate business.[17] That person may mistakenly believe there is a degree of confidentiality covering the conversation. However, the in-house counsel may feel duty-bound to immediately disclose those seemingly confidential conversations to the board of directors. In addition, the role of in-house counsel may involve advising the board of directors or audit committee on acts or omissions of the officers and upper managers of the organization with whom the lawyer works and from whom the lawyer regularly receives directions.[18] Legally and ethically, in-house counsel's client is the corporation, but as a practical matter, in-house counsel are hired by and receive legal advice requests from officers or upper management. Reporting on some or all matters to the Board of Directors may greatly strain the relationship between the lawyer and company officers.[19]

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[14] Alice Woolley et al, *Lawyers' Ethics and Professional Regulation*, 3rd ed (LexisNexis Canada, 2017) at 547.

[15] Ben W Heineman Jr, "Resolving the Partner-Guardian Tension: The Key to General Counsel Independence" (2019) 42:1 Del J Corp L 149 at 179-180, online (pdf): <https://www.djcl.org/wp-content/uploads/2019/08/42.1.A5.pdf>.

[16] Henrik Aro, *The Role of General Counsel in Corporate Decision-Making* (Master's Thesis, Hanken School of Economics, 2018) at 81, online: <https://helda.helsinki.fi/dhanken/bitstream/handle/123456789/207883/Aro.pdf>.

[17] Out of 70 general counsel surveyed by Deloitte across Canada, 68% indicated that members of legal department in their organization are required to spend time with business units or in the front line of the business. See Deloitte, *Spotlight on General Counsel* (2015), at 4-5, online (pdf): *Deloitte Touche Tohmatsu Limited* <https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-EN-fa-2015-General-Counsel-Survey-AODA.pdf>.

[18] Duggin, *supra* note 1 at 1004.

[19] William Alan Nelson II, "Attorney Liability under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions" (2008-2009) 39 U Mem L Rev 255 at 273 (HeinOnline).

Another concern for in-house counsel in respect to faithfully fulfilling their professional legal duties and in particular their duty to act objectively and independently, has been referred to as the problem of "cognitive dissonance." Woolley et al. explain as follows:

> Finally, in-house lawyers have to be especially aware of the challenges to their independence, and the phenomenon described as "cognitive dissonance." As many legal ethics experts have noted, in cases of client misconduct, lawyers' professional norms of client loyalty often conflict with personal norms of honesty and integrity. To reduce the "cognitive dissonance," lawyers will often unconsciously dismiss or discount evidence of misconduct and its impact on third parties. This becomes even more of a problem when lawyers bond socially and professionally with other employees, including senior management. The more a lawyer blends into insider culture, the greater the pressures to conform to the organization's cultural norms. That can in turn lead lawyers to underestimate risk and to suppress compromising information in order to preserve internal solidarity. In the long run, this dynamic can create problems for everyone: clients lose access to disinterested advice; lawyers lose capacity for independent judgment and moral autonomy; and the public loses protection from organizational misconduct. While this is a problem for all lawyers, the challenge is especially strong for corporate counsel. Although the financial and other consequences of terminating a relationship with a major client can be significant for lawyers in law firms, they pale in comparison to the consequences faced by an in-house counsel who is in essence walking away from their job and their financial security. The pressures – personal and professional – are enormous.[20]

## 2.4 Lawyer as a Corporate Gatekeeper

The term gatekeeper in the world of business generally refers to an outside or independent monitor or watchdog.[21] A corporate gatekeeper is someone who "screen[s] out flaws or defects or who verifies compliance with standards or procedures."[22] A corporate gatekeeper will normally have at least one of two roles: (1) prevention of a corporate client's wrongdoing by withholding their legal approval from actions that appear illegal and/or disclosing such actions if the client does not desist from those actions and (2) acting as a "reputational intermediary" who assures investors of the quality of the message or signal sent out by the corporation.[23] Coffee suggests there are four elements involved in gatekeepers' responsibilities:

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[20] Woolley et al, *supra* note 14 at 549. See also Deborah Rhode & Paul Paton, "Lawyers, Ethics, and Enron" (2002-2003) 8 Stan JL Bus & Fin 9 at 20 (HeinOnline). This article uses the Enron scandal as an example of how counsel reviewing its own work could have been viewed as contrary to professional ethics. However, no action was taken against the firm for breach of ethical duties.

[21] Coffee, *supra* note 8 at 2.

[22] *Ibid*.

[23] *Ibid*.

(1) independence from the client;

(2) professional skepticism of the client's representations;

(3) a duty to the public investor; and

(4) a duty to resign when the [gatekeeper's] integrity would otherwise be compromised.[24]

Gatekeeping is "premised on the ability of professionals to monitor and control their client's conduct."[25] Failure to do so can result in gatekeeper liability. Some scholars consider auditors, lawyers, and securities analysts to be the primary gatekeeping professions. However, the legal profession generally seeks to distance itself from the view that lawyers are gatekeepers, promoting instead the view that the lawyer's role is to facilitate transactions.[26] Being a gatekeeper, with the attached obligation of protecting the public from potential harm caused by clients, runs contrary to the traditional role of the lawyer as a committed and loyal advocate for the client's interests and a guardian of the confidentiality between lawyer and client. Business and securities regulators and the legal profession disagree over whether lawyers should play a gatekeeping role in certain large corporate affairs. On the one hand, the government has an obligation to regulate the corporate arena to prevent widespread public harm and, on the other hand, the legal profession has an interest in upholding the legal duties of confidentiality and loyalty to their clients.

Nonetheless, in some contexts lawyers are considered gatekeepers. The strongest argument for the lawyer's role as a gatekeeper has arisen in the context of the securities and banking sectors in the US, in which lawyers facilitated the questionable or illegal behaviour that lead to major stock market collapses and harm to the economy and public. The US Congress described lawyers as gatekeepers in the sense of "[p]rivate intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives."[27] If corporate lawyers are seen as transaction engineers rather than advocates for their clients, this strengthens the argument that (some) corporate lawyers may have a gatekeeping role.[28] Litigators are not generally in the same position; they are approached on an *ex post* basis, i.e., after trouble has arisen, and are by definition advocates for their clients. However, corporate lawyers that provide services on an *ex ante* basis are described as "wise counselors who gently guide their clients toward law compliance."[29] In that sense, they may be seen as having a role to play in ensuring that all transactions they assist with and advise on comply with the law.

The key debate centers on the question of whether corporate lawyers have or should have a duty to report their client or employer to market regulators when that client or employer

[24] John C Coffee Jr, "The Attorney as Gatekeeper: An Agenda for the SEC" (2003) 103 Colum L Rev 1296 at 1299 (HeinOnline). These four elements also define the responsibilities of securities lawyers practicing in front of the SEC.
[25] Andrew F Turch, "Multiple Gatekeepers" (2010) 96 Va L Rev 1583 at 1584 (HeinOnline).
[26] Coffee, *supra* note 8 at 3.
[27] Sung Hui Kim, "Naked Self-Interest – Why the Legal Profession Resists Gatekeeping" (2011) 63 Fla L Rev 131 at 131 (HeinOnline).
[28] Coffee, *supra* note 8 at 192.
[29] *Ibid*.

refuses to comply with the law. As noted, the primary arguments against assigning lawyers the role of corporate gatekeeper (i.e., requiring disclosure of client wrongdoing) are that (1) the role of gatekeeper destroys the duty of confidentiality and loyalty owed by a lawyer to their client and (2) it will tend to have a chilling effect on full and open solicitor-client communications.[30] These risks exist where gatekeepers must report wrongdoing externally rather than simply withhold their consent and withdraw from representation. Critics of the imposition of gatekeeper obligations on lawyers also oppose the idea that lawyers owe a duty to anyone aside from their clients and the courts, since additional duties may be at odds with the interests of clients.[31] In acting as a gatekeeper, the lawyer is put in a potentially adversarial position with their client. This diminishes the lawyer's ability to effectively fulfill their essential role of "promoting the corporation's compliance with law."[32] The American Bar Association Task Force on Corporate Responsibility found that lawyers are not gatekeepers in the same way that auditors are:

> Accounting firms' responsibilities require them to express a formal public opinion, based upon an independent audit, that the corporation's financial statements fairly present the corporation's financial condition and results of operations in conformity with generally accepted accounting principles. The auditor is subject to standards designed to assure an arm's length perspective relative to the firms they audit. In contrast … corporate lawyers are first and foremost counselors to their clients.[33]

The American Bar Association (ABA) also asserts that lawyers do not have an obligation or a right to disclose reasonable doubts concerning their clients' disclosures to the Securities and Exchange Commission (SEC).[34]

If corporate lawyers are considered gatekeepers, or at least partial gatekeepers, it should be recognized that the extent of influence they can or will practically exert on a corporation can vary. The "cognitive dissonance" noted above in the employment relationship between in-house counsel and their client dampens the lawyer's independence from their client. The practical ability of in-house counsel to give unwelcome but objective advice may be lessened by the existence of internal reviews of counsel and pressure from senior managers, as well as reprisals, if lawyers refuse to provide legal approval for a transaction.[35] Since the legality of certain conduct may be grey, rather than black or white, in-house counsel may tend to consciously or unconsciously approve grey areas in circumstances where an external counsel may not.

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[30] Coffee, *supra* note 24 at 1296.
[31] Kim, *supra* note 27.
[32] American Bar Association, "Report of the American Bar Association Task Force on Corporate Responsibility" (2003-2004) 59 Bus L 156 at 156 (HeinOnline).
[33] *Ibid*.
[34] American Bar Association, "Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission" (1975) 31 Bus L 543 at 545.
[35] *Ibid*.

However, external counsel may also feel pressure to approve grey-area transactions due to the desire to maintain the corporation as a client, especially if that corporation comprises a significant portion of their billing. Additionally, as the role of in-house counsel expands and less transactional business goes through external counsel, external counsel may have less opportunity to discover and put a stop to corrupt or unlawful practices. Although in-house counsel arguably have less professional independence than external counsel does, they may be able to exert greater influence over corporate officers and directors because of their working relationship and the ability of corporations to shop for another law firm if unhappy with the advice or lack of cooperation of their current external law firm.[36]

A different aspect of a gatekeeper's role is the use of their reputation to assure the marketplace that the corporation is abiding by various rules and regulations. External law firms are arguably better suited to this role than in-house counsel. In-house counsel will generally have less credibility in acting as a reputational intermediary, since they are seen as too closely associated with their company to provide an objective and impartial assurance to the marketplace.[37]

At present, it seems that corporate lawyers in the US, UK, and Canada are not gatekeepers in the same way auditors are, since lawyers generally do not have a duty to report a client's past wrongdoing or a duty to report a client's planned crimes unless death or serious bodily harm to others is reasonably imminent. (These disclosure exceptions are discussed in more detail in Section 3.3).

The focus of the discussion of lawyers in a gatekeeper role is the question of the lawyer's duty, if any, to disclose wrongdoing to external regulators and public stakeholders. They do have, however, a duty not to be complicit in any wrongdoing and a duty not to assist a corporation in breaching the law. If asked to engage in illegal transactions, they are under a duty to withdraw as counsel. This is discussed in detail in Section 3.2.

Even if lawyers are not gatekeepers in the sense that auditors are, counsel often have the influence and ability to alter an organization's direction and propose a plan of action that achieves a client's objective without illegality.[38] While both in-house and external counsel must say no to illegal methods of achieving the client's objectives, they are entitled and expected to attempt to accomplish the client's objectives through alternative legal means.

## 3. LEGAL AND ETHICAL DUTIES

As already noted, all lawyers owe certain duties to their clients. In the case of a corporate client, fulfilling those duties may sometimes be challenging. Although the corporate entity has the legal status of a person, it acts through its officers, employees, directors, agents and shareholders. A corporate lawyer works with any number of these individuals, but the lawyer's ultimate duty is to the corporation itself. While this is true for both in-house, and

[36] Duggin, *supra* note 1 at 1004.
[37] Coffee, *supra* note 8 at 195.
[38] Duggin, *supra* note 1.

external counsel, in-house counsel have the added complication of duties as an employee to their corporate employer but also duties to their corporate client as the client's lawyer.

In the most general sense, a lawyer's duties to a client involve integrity and competence. Integrity broadly includes honesty, trustworthiness, candor, loyalty, civility, adherence to rules of confidentiality and avoidance of conflicts of interest while vigorously serving the client's stated interests within the limits of the law. In this context of integrity, this part of the chapter briefly discusses four areas of legal and ethical duties that lawyers, whether in-house or external, owe to their clients and how those duties can come into play in the context of corporate corruption.

## 3.1 Duty to Avoid Conflicts of Interest

A conflict of interest results from the existence of a factor(s) that materially and adversely affects the lawyer's ability to act in the best interests of their client.[39] Generally, there are two main categories of conflicts of interest: client conflict and own interest conflict. Client conflict occurs when two of the lawyer's clients have interests that are at odds with each other. Client conflict will normally only arise with external counsel, not in-house counsel. Of course, in-house counsel may raise the issue if they think that the external lawyer acting for the company has a client conflict. Own interest conflicts occur when a lawyer's interests are at odds with that of a client. This latter genre of conflicts of interest requires a lawyer to avoid placing their own interests before the interests of their clients. In order to avoid the appearance of a conflict of interest, lawyers must avoid taking or keeping clients whose interests are adverse, or potentially adverse, to their own.

The rationale for a lawyer's duty not to proceed with a case in the face of a conflict of interest is often explained by reference to a broader duty—the lawyer's duty of loyalty to a client. As Proulx and Layton state, "The leitmotif of conflict of interest is the broader duty of loyalty. Where the lawyer's duty of loyalty is compromised by a competing interest, a conflict of interest will exist."[40] In addition, as Graham notes:

> Lawyers have an overriding duty to be loyal to their clients, and this duty of loyalty is undermined where lawyers act in cases that involve undisclosed conflicts of interests. As a result, lawyers are generally prohibited from acting in cases involving undisclosed conflicts of interest.
>
> If the basis of the rules regarding conflicts of interest can truly be explained by reference to an overriding duty of loyalty, it should be noted that the word "loyalty," when used in the context of lawyer's conflicts of interest, bears an unusual meaning … [A] lawyer need not agree with his or her client's position, nor even hope that the client succeeds in achieving his or her legal objectives…. The lawyer may represent a client whose position the lawyer abhors, or a client whose specific legal project the lawyer considers

[39] FLCS Model Code (2019), *supra* note 7, Rule 1.1-1; *R v Neil*, 2002 SCC 70 at para 31, [2002] 3 SCR 631.

[40] Michel Proulx & David Layton, *Ethics and Canadian Criminal Law,* 2nd ed (Toronto: Irwin Law, 2001) at 264.

> immoral.… As a result, the lawyer may be unlikely to characterize his or her feelings toward the client as feelings of "loyalty."
>
> Such cases reveal that the lawyer's duty of loyalty does not truly imply loyalty to the client, or even loyalty to the client's legal objectives. Instead, the lawyer is loyal to his or her position as the client's legal adviser. If the lawyer fulfills the role of legal counsel, the lawyer will act as though he or she is loyal to the client. In reality, however, the lawyer's loyalty is to the job of lawyering. The lawyer's loyalty to his or her profession can be explained by reference to the lawyer's interests in (1) promoting access to justice by fulfilling a social role that the lawyer believes to be important; (2) promoting his or her own professional reputation as a skilled and zealous advocate; and (3) receiving legal fees for services rendered.[41]

The application of conflict of interest principles can be extremely difficult and frustrating for lawyers. The complexity of business transactions in a corporate context, including the fact that these may involve multiple parties across many jurisdictions complicates enormously the analysis of conflict and the duty of loyalty in any particular transaction.[42]

Conflicts of interest may arise for corporate lawyers in many aspects of their practice unrelated to concerns of corporate corruption. However, when an allegation or discovery of corruption in a client's business first arises, there is potential for a conflict of interest. For example, if a lawyer is working for two corporations, both of whom are alleged to have been involved in the same corrupt scheme, the two companies' best interests may be in conflict with one another (e.g., one company may agree to cooperate with the prosecution and testify against the other company). In such circumstances, the lawyer cannot continue to act for both client companies.[43]

The restriction against acting for two or more clients with opposing interests also restricts lawyers from acting for a corporation while acting personally for the CEO or other senior official connected to the corporation. A somewhat related ethical duty for corporate counsel arises when there is an allegation of corruption in respect to a corporate client. The corporate lawyer's client is the corporation. The corporation's best interests may be in conflict with the interests of senior officers of the company if those officers are allegedly involved in the corruption in some active or passive way. Any admissions made by senior officers to corporate counsel are not privileged nor confidential. It would be unethical for a corporate lawyer to allow a senior officer to make statements damaging to that officer without first warning the officer that the lawyer is not, and cannot be, the officer's lawyer and that any statements to the lawyer are not confidential or privileged and may subsequently be used against the officer.

Because a corporation can only act through its officers and employees, the conflict between advising the corporation and acting for senior officers creates difficulties. The corporation

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[41] Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation,* 3rd ed (Toronto: Edmond Montgomery Publications, 2014) at 321-322.
[42] Alice Woolley, *Understanding Lawyers' Ethics in Canada,* 2nd ed (Toronto: LexisNexis, 2016) at 241.
[43] FLSC Model Code (2019), *supra* note 7, Rule 3.4-5(c).

and its counsel are disadvantaged in determining the facts of a case if its corporate actors (the senior officers) do not cooperate in supplying information. It may be possible to mitigate this problem through various means. For example, the corporation could agree to indemnify the officer for his or her independent and separate legal fees in exchange for cooperation.

Other concerns may arise in regard to "own interest conflicts," especially for in-house counsel due to the very nature of their employment relationship with their corporate client. As in-house counsel are employees of the organization, they may benefit financially from any lucrative deals the organization makes.[44] Here again, the problem of 'cognitive dissonance' can be a factor. In-house counsel may fear being seen as obstructionist if they vigorously oppose business activities on legal grounds (especially when those grounds leave room for differing interpretations). In-house counsel work daily with senior management and this can affect their ability to be fearlessly objective in delivering legal advice that may be unwelcome to their client's management. In-house counsel have to be especially aware of these types of challenges to their professional duty to act objectively and independently.

Many corporate business relationships involve related party transactions, in which the principals, shareholders, officers, and directors of different public corporate entities that are involved in a transaction can be some of the same individuals. A Law Society of Upper Canada Appeal Tribunal considered this in a 2015 decision and described the concerns that arise:

> When a dominant figure such as an executive, controlling shareholder or another company they control stands to profit from a transaction in a manner different from public shareholders, there is a "commercial tension" between the dominant figure and the public shareholders. This type of transaction is considered a "related party transaction" because of the differing interest of the dominant figure. Without a mechanism to ensure that such transactions are fair to the public company, there is a risk that the dominant figure will influence the transaction's terms at the expense of public shareholders.[45]

In those circumstances, the Tribunal determined that the analysis of whether a lawyer advising on related party transactions was in a conflict of interest and had to be considered on a transaction-by-transaction basis, and is entirely context driven. It stipulated that:

> The principles relating to conflict of interest under the Rules are the same whether the client is an individual, a small corporation or a large public corporation. The analysis, however, must be grounded in the context, which in this case is work on particular retainers for sophisticated corporate clients. None of the allegations in this case falls under the "bright line rule" which prohibits acting, without informed consent, for two current clients whose immediate legal interests are directly adverse. Whether there was a conflict under the Rules in these circumstances must be determined by an analysis, in relation to each transaction of (i) the clients for whom they acted

[44] Nelson, *supra* note 19 at 276.

[45] Law Society of Upper Canada v DeMerchant and Sukonick, 2015 ONLSTA 6 at 7.

> on a particular transaction; (ii) the nature of the legal work they were retained to do and did; and (iii) whether there were conflicting or diverging interests in relation to that legal work that posed a serious risk of adversely affecting the representation of their client or former client.[46]

Finally, although not specifically related to corruption and conflicts of interest, it is worth noting that conflicts of interest can arise when a lawyer or their firm acts for a corporation and the lawyer serves as a director of the corporation.[47] Conflicts may occur in this situation because the dual roles may (1) affect the lawyer's independent judgment and fiduciary obligations (2) make it difficult to distinguish between legal and business advice (3) threaten solicitor-client privilege, and (4) potentially disqualify the lawyer or law firm from acting for the organization.[48]

#### 3.1.1 US

The American Bar Association's *Model Rules of Professional Conduct* contain rules regarding conflicts of interest. Rule 1.7 of the ABA's model rules states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) The representation is not prohibited by law;
>
> (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal; and
>
> (4) Each affected client gives informed consent, confirmed in writing.[49]

[46] *Ibid* at 6.
[47] FLSC Model Code (2019), *supra* note 7, Commentary to Rule 3.4-1, para 11(e).
[48] *Ibid*.
[49] ABA Model Rules (2020), *supra* note 7, Rule 1.7.

### 3.1.2 UK

The UK Solicitors Regulation Authority *Code of Conduct* (SRA *Code*) restricts lawyers from acting when there is "a conflict, or a significant risk of conflict, between you and your client."[50] Further, "if there is a conflict, or significant risk of conflict, between two or more current clients,"[51] lawyers are restricted from acting for all of the clients, subject to a few exceptions. The SRA *Code* applies the same rules to firms.[52]

Conflict of interest also arises in the SRA rules on confidentiality and disclosure. Under those provisions, solicitors may not act for a client in a matter if that client has an interest adverse to the interest of another current or former client, for whom the solicitor or the solicitor's business or employer holds confidential information material to the matter, unless

- effective measures are taken or result in no real risk of disclosure or,
- the current or former client whose information the solicitor or business or employer holds has given informed consent, evidenced in writing, including consent to the measures taken.[53]

### 3.1.3 Canada

In Canada, the general rule on conflicts of interests is set out in the Federation of Law Society's *Model Code of Professional Conduct* (FLSC *Model Code*), rule 3.4-1:

> A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.[54]

Rule 1.1-1 in the FLSC *Model Code* defines "conflict of interest" as:

> the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.[55]

Paragraphs 1 and 2 of commentary to rule 3.4-1 provide guidance to this definition as follows:

> **[1]** Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule

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[50] UK, Solicitors Regulation Authority, *SRA Code of Conduct for Solicitors, RELs and RFLs,* (updated to November 2019) UK, 2019 [SRA Code of Conduct (2019)], s 6, online: <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>.
[51] *Ibid* at para 6.2.
[52] UK, Solicitors Regulation Authority, *SRA Code of Conduct for Firms,* (updated to November 2019) UK, 2019 [SRA Code of Conduct for Firms (2019)], s 6, online: <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/>.
[53] SRA Code of Conduct (2019), *supra* note 50, Rule 6.5.
[54] FLSC Model Code (2019), *supra* note 7, Rule 3.4-1.
[55] *Ibid*, Rule 1.1-1.

> as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].
>
> **[2]** In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.[56]

The *Model Code* Rule 3.4-2 permits acting where a conflict of interest exists if the lawyer has consent from all of their affected clients. Consent must be fully informed and voluntary after the conflict or potential conflict has been disclosed. The rule provides that it can be inferred when dealing with governments, publicly traded companies, or entities with in-house counsel, provided the other conditions set out in the rule are met.[57]

## 3.2 Duty to Not Advise or Assist in a Violation of the Law

Lawyers have a duty to not advise or assist in the violation of the law. Professional obligations generally require lawyers to resign as counsel if they are in a situation where, after explaining to their client that the proposed course of conduct is illegal and that they cannot participate in that conduct, the client continues to instruct them to engage in or facilitate the illegal act.[58] Most codes of conduct expressly forbid lawyers from implementing corporate instructions that would involve the commission of a crime, a fraud, or a breach of professional ethics.[59]

Lawyers who advise or assist in the violation of the criminal law are also subject to prosecution under criminal law for conspiring, aiding, abetting, or counselling a breach of the law.

Lawyers can advise clients on how to achieve a business objective in compliance with the law. For example, a business development contract without certain limiting instructions might lead to a high probability of bribes being paid by company agents; ignoring that risk can constitute assisting in that bribery and therefore would be a violation of the lawyer's legal and ethical duties. However, properly documenting the nature of the work to be

[56] *Ibid*, Commentary to Rule 3.4-1, para 2.
[57] *Ibid*, Rule 3.4-2 and commentary.
[58] *Ibid*, Rule 3.2-8; ABA Model Rules (2020), *supra* note 7, Rule 1.16.
[59] FLSC Model Code (2019), *supra* note 7, Rules 3.2-7 and 3.2-8 and commentaries.

performed and the identity of those performing the work, along with prohibiting contact by the agent with government officials without specific company approval, can mitigate the potential misuse of the contract in an unlawful scenario.

Another factor that confuses the issue is the definition of "law." Advising on "hard law," like the *Corruption of Foreign Public Officials Act* (*CFPOA*), *Criminal Code*, or *Foreign Corrupt Practices Act* (*FCPA*), is often (though not always) relatively easy. What can be more difficult is advising on the stance to be taken toward "soft law," such as unratified treaty obligations or guidelines from multinational organizations like the United Nations. Strictly speaking, the law means hard law; however, it is advisable to at least alert clients to potential soft law concerns, as a client's level of adherence to these soft law obligations may affect public perceptions and prosecutorial positions.

#### 3.2.1 US

The American Bar Association model rules prohibit lawyers from counselling or assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. The rules allow the lawyer to discuss the legal consequences of proposed conduct and to "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[60]

#### 3.2.2 UK

The SRA *Code of Conduct* provides that as a solicitor,

> You do not mislead or attempt to mislead your *clients* the *court* or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your *client*).[61]

The Solicitors Regulation Authority provides specific guidance on money laundering. The introduction to its *Solicitors Regulation Authority Topic Guide on Money Laundering* sets out the priority that it attaches to enforcement of its rules in the money laundering context. It stipulates that:

> Money laundering is a priority risk for us. The credibility of law firms makes them an obvious target for criminals. The overwhelming majority of solicitors want to do the right thing. Yet that alone is not enough. Weak processes or undertrained staff can leave the door open for criminals.[62]

[60] ABA Model Rules (2020), *supra* note 7, Rule 1.2(d).
[61] SRA Code of Conduct (2019), *supra* note 50, Rule 1.4. The same applies to firms. See SRA Code of Conduct for Firms (2019), *supra* note 52, Rule 1.4.
[62] "Topic Guide: Anti-Money Laundering" (3 April 2020), online: *Solicitors Regulation Authority* <https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/enforcement-practice/anti-money-laundering/>.

### 3.2.3 Canada

The FLSC *Model Code* prohibits lawyers from knowingly assisting in or encouraging dishonesty, fraud, crime or illegal conduct:

> 3.2-7 A lawyer must never:
>
> (a) knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct
>
> (b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime or illegal conduct by a client or others, or
>
> (c) instruct a client or others on how to violated the law and avoid punishment.[63]

The commentary to the FLSC *Model Code* further elaborates on the lawyer's duty not to assist in fraud or money laundering:

> A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
>
> Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.[64]

### 3.2.4 Duty to Report

In most jurisdictions, lawyers, even if not directly involved in wrongdoing, have a duty to report it if they become aware of wrongdoing on the part of one of the corporations' directors, officers, employees or agents. This reporting usually requires the lawyer to bring the matter to a more senior individual in the corporation. This is discussed more fully in Section 3.3.1.

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[63] FLSC Model Code (2019), *supra* note 7, Rule 3.2-7.

[64] *Ibid*, Commentary to Rule 3.2-7, at paras 2-3.

### 3.2.5 Criminal Sanctions

In addition to the professional obligations listed above, a lawyer can be subject to criminal penalties for assisting a client in wrongdoing. For example, in Canada the *Criminal Code* provisions on conspiracy, aiding, abetting, and counselling criminalize the conduct of anyone, including a lawyer, who knowingly assists their client in the commission of a crime.

## 3.3 Duty of Confidentiality and Lawyer/Client Privilege

Both the duty of confidentiality and lawyer/client privilege restrict lawyers from disclosing information about their client without client permission. These concepts are important to a corporate lawyer working on corruption and anti-corruption issues. For example, providing assistance in developing, implementing, reviewing and assessing a client's anti-corruption compliance programs may reveal corporate information that is "secret" or "private" or may involve privileged advice about a company's past or future risk areas or wrongdoing. A fundamental purpose of the duty of confidentiality and solicitor client privilege is to encourage full disclosure from clients to their lawyer, so the lawyer can best represent their client's interests. As the information disclosed may be harmful or embarrassing to the client's interests, providing protection from disclosure ensures that clients feel safe in making disclosures. A lawyer cannot assist in preventing or addressing corruption if the client is afraid that if they divulge information, the lawyer will share this information with others. The protection belongs to the client. The lawyer cannot unilaterally disclose otherwise privileged or confidential information without the client's permission unless a legally recognized exception, discussed below, applies.

### 3.3.1 Duty of Confidentiality

The duty of confidentiality requires lawyers to hold "in strict confidence" all information concerning the affairs of their client acquired throughout the professional relationship. A breach of this duty, if not otherwise authorized, is a breach of the lawyer's professional and fiduciary obligations and may result in the lawyer being subject to fines, civil liability, or disbarment.[65] The rationale for the duty is described by Proulx and Layton as:

> [T]he client who is assured of complete secrecy is more likely to reveal to his or her counsel all information pertaining to the case. The lawyer who is in possession of all relevant information is better able to advise the client and hence provide competent service, furthering both the client's legal rights and the truth-finding function of the adversarial system. [footnotes omitted][66]

The duty of confidentiality prevents both the use of confidential information as well as disclosure of confidential information. This protects the client's confidential business information and prevents a lawyer from using this information to their advantage or the client's detriment. This may arise in the corruption context, for example, through disclosure

[65] Graham, *supra* note 41 at 192.

[66] Proulx & Layton, *supra* note 40 at 158.

of due diligence procedures for preventing or finding violations of the company's policies, which are considered confidential and proprietary information by the company. A lawyer assisting or assessing a client's corruption compliance program may be restricted from using any information learned through that process when later assisting a second client on a similar project.

Duties of confidentiality originate in, and are defined by the ethical rules that apply to lawyers in their jurisdictions of practice. Each jurisdiction has regulators who enforce these duties.

#### 3.3.1.1 US

The duty of confidentiality is set out in the ABA's *Model Rules of Professional Conduct* at rule 1.6:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent reasonably certain death or substantial bodily harm;
>
> (2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) To secure legal advice about the lawyer's compliance with these Rules;
>
> (5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) To comply with other law or court order; [or]
>
> (7) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[67]

Note that the *Model Rules* allow, but do not require, disclosure under any of the circumstances in Rule 1.6(b).

#### 3.3.1.2 UK

The UK Solicitors Regulation Authority's *Code of Conduct* (SRA *Code of Conduct*) requires that as a solicitor:

> You keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents.[68]
>
> Where you are acting for a client on a matter, you make the client aware of all information material to the matter to which you have knowledge, except when:
>
> (a) the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;
>
> (b) your client gives informed consent, given or evidenced in writing, to the information not being disclosed to them.
>
> (c) you have reason to believe that serious physical or mental injury will be caused to your client or another if the information is disclosed; or
>
> (d) the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed.[69]

The SRA *Code of Conduct* also prohibits a solicitor from acting for a client, if that client has an interest adverse to the interest of another current or former client, for whom the solicitor or the solicitor's business or employer holds confidential information material to the matter, unless steps are taken to prevent disclosure of that information, and the other or former client consents.[70]

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[67] ABA Model Rules (2020), *supra* note 7, Rule 1.6.
[68] SRA Code of Conduct (2019), *supra* note 50, Rule 6.3. The same applies to firms. See SRA Code of Conduct for Firms (2019), *supra* note 52, Rule 6.3.
[69] SRA Code of Conduct (2019), *supra* note 50, Rule 6.4. The SRA Code of Conduct for Firms (2019), *supra* note 52, Rule 6.4 stipulates that "Any individual acting for a client on a matter" must comply with the same provisions.
[70] SRA Code of Conduct (2019), *supra* note 50, Rule 6.5 (see also discussion of the same provision in Section 3.1.2).

#### 3.3.1.3 Canada

The duty of confidentiality is codified in the following rules set out in Rule 3.3 of the FLSC *Model Code*:

> A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
>
> (a) expressly or impliedly authorized by the client;
>
> (b) required by law or a court to do so;
>
> (c) required to deliver the information to the Law Society; or
>
> (d) otherwise permitted by this rule.[71]
>
> A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.[72]
>
> A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.[73]
>
> If it is alleged that a lawyer or the lawyer's associates or employees:
>
> (a) have committed a criminal offence involving a client's affairs;
>
> (b) are civilly liable with respect to a matter involving a client's affairs;
>
> (c) have committed acts of professional negligence; or
>
> (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,
>
> the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.[74]
>
> A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.[75]

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[71] FLSC Model Code (2019), *supra* note 7, Rule 3.3-1.

[72] *Ibid*, Rule 3.3-2.

[73] *Ibid*, Rule 3.3-3. Note that in New Brunswick, this provision extends to permit disclosure, when the lawyer believes on reasonable grounds that there is an imminent risk of substantial ***financial*** injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury [emphasis added]: The Law Society of New Brunswick, *Code of Professional Conduct,* (as amended January 1 2020) Fredericton: LSNB, 2020, Rule 3.3-3B.

[74] FLSC Model Code (2019), *supra* note 7, Rule 3.3-4.

[75] *Ibid*, Rule 3.3-5.

> A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.[76]
>
> A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.[77]

### 3.3.2 Lawyer/Client Privilege

**Legal Professional Privilege; Solicitor/Client Privilege; Attorney/Client Privilege**

Although often unfortunately conflated in discussion, the duties of confidentiality and the law associated with the privilege that attaches to legal advice are distinct, and not identical. They differ in scope, and origin.

(Though the properties of the privilege that attaches to legal advice are similar from jurisdiction to jurisdiction in common law countries, the descriptor applied to it varies. In Canada it is most often called "solicitor/client privilege"; in the US, it is "attorney/client privilege," and in the UK the reference is most often "legal professional privilege." In this chapter, we shall use the term lawyer/client privilege to describe the general privilege. When referring to a text or court decision that uses one of the other terms, we will preserve the reference to the term from the decision or text.)

The scope of the duty of confidentiality is much broader that the scope of lawyer/client privilege. The duty of confidentiality encompasses all communications between the lawyer and client, including the fact that the client has approached and hired the lawyer for assistance with a legal issue. By contrast, lawyer/client privilege applies only to communications for the purpose of obtaining or providing legal advice.

The duty of confidentiality is an ethical duty, whereas lawyer/client privilege is a substantive common law rule of evidence and is in Canada "a principle of fundamental importance to the administration of justice."[78]

As Proulx and Layton note:

> [C]rucial distinctions exist between a lawyer's ethical duty of confidentiality and solicitor-client privilege. First, the privilege encompasses only matters communicated in confidence by the client. The duty of confidentiality is broader, covering all information acquired by counsel whatever its source. Second, the privilege applies to the communication itself, does not bar the adduction of evidence pertaining to the facts communicated if gleaned from another source, and is often lost where other parties are present during the communication. In contrast, the ethical duty of confidentiality usually

[76] *Ibid*, Rule 3.3-6.
[77] *Ibid*, Rule 3.3-7.
[78] *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.

> persists even where outside parties know the information in question or where the communication was made in the presence of others. Third, the application of an exception to solicitor-client privilege does not necessarily mean that information is exempt from the ethical duty of confidentiality. A comparable or some other exception to the ethical duty must apply before the lawyer can reveal the information.[79]

Lawyer client privilege arises:

> where legal advice of any kind is sought for a professional legal adviser, in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at this instance permanently protected from disclosure by himself or by the legal adviser, except the privilege be waived.[80]

#### 3.3.2.1 Canada

Legislative bodies from time to time try to limit the scope of lawyer/client privilege and the duty of confidentiality in cases where there appears to be a compelling public benefit in the disclosure of otherwise confidential information. These attempts have generally occurred where the lawyer holds information relevant to the question of whether or not the client has committed an offence. However, the courts in Canada tend to guard fiercely the duty of confidentiality and the protection of solicitor client privilege. In 2002, in *Lavallée, Rackel and Heintz v Canada*,[81] the Supreme Court of Canada struck down the *Criminal Code* provision (s. 488.1) that allowed police to obtain a warrant to search a lawyer's office and seize documents that may be privileged. The Court held that solicitor/client privilege is a principle of fundamental justice and must be held to be as close to absolute as possible to protect its relevance. In this instance, particularly because solicitor/client privilege could be compromised without the client's knowledge, it had not been protected, and thus subjected lawyers and their clients to unreasonable search and seizure, contrary to section 8 of the Canadian *Charter of Rights and Freedoms*.[82]

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[79] Proulx & Layton, *supra* note 40 at 160.

[80] Adam M Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis Canada, 2014) at 1ii, citing John T McNaughton, rev, *Wigmore on Evidence,* vol 8, revised ed (Boston: Little, Brown, 1961) at s 2292.

[81] *Lavallée, Rackel & Heintz v Canada (Attorney General)*; *White, Ottenheimer & Baker v Canada (Attorney General)*; *R v Fink*, [2002] SCJ No 61, [2002] 3 SCR 209.

[82] According to D Watt & M Fuerst in *The 2021 Annotated Tremeear's Criminal Code* (Toronto: Carswell, 2016) at 967-968:

> The principal constitutional flaws in the regime created by s. 488.1 have to do with the *potential breach* of the privilege *without* the client's knowledge, let alone consent, and the *absence* of judicial *discretion* in the determination of an asserted claim of privilege. *Reasonableness* requires that the courts retain a *discretion* to decide whether materials seized in a lawyer's office should remain inaccessible to the state as privileged if and when it is in the interests of justice to do so. No search warrant can be issued for documents *known* to be protected by solicitor-client privilege. All documents must be sealed before being examined or removed from a lawyer's office, except where the

In 2015, the Supreme Court of Canada struck down parts of a legislative scheme of the Government of Canada[83] that was directed at detecting or preventing money laundering. The legislation requires financial intermediaries, including lawyers, to collect, record, and retain material, including information verifying the identity of those on whose behalf they paid or received money. It permitted the federal compliance authority, the Financial Transactions and Reports Analysis Centre of Canada, to conduct searches of lawyers' offices without warrant, and to seize material. It imposed fines and penal consequences for non-compliance.

The Federation of Law Societies of Canada challenged these provisions. The Court in *Canada v Federation of Law Societies of Canada*[84] held that these provisions, as they applied to lawyers, are inconsistent with the Constitution of Canada. The majority, applying the *Lavallée* decision above, reiterated that solicitor/client privilege must remain as absolute as possible, and that a lawyer's duty of commitment to their client's cause, of which solicitor/client privilege is an integral part, was a principle of fundamental justice with which the state could not interfere without justification.

#### 3.3.2.2 Business Context

Although the duty of confidentiality extends to all communications between a lawyer and their client, lawyer/client privilege only exists where the advice is "legal advice." As we have noted, many corporate lawyers serve as officers or directors for a company and in that "dual capacity," they may provide business advice alongside legal advice.[85] Even if not a director or officer, as a trusted advisor to businesses, a lawyer is often asked to advise on business strategy and related issues. This raises issues that require assessment to determine whether privilege exists; it is sometimes difficult for lawyers or courts to separate legal and business advice. Each jurisdiction takes a slightly different view in interpreting the difference

> warrant specifically authorizes the immediate examination, copying and seizure of an identified document. Every effort must be made to contact the lawyer and the client at the time of execution of the warrant. If the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents. All potential privilege holders should be contacted by the police and should have a reasonable opportunity to assert a claim of privilege and to have it judicially decided. If such notification is not possible, the lawyer who had possession of the documents, or another lawyer appointed by the Law Society or the court, should examine the documents to determine whether a claim of privilege should be asserted. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents unless it is determined by a judge that the documents are not privileged. Documents found to be privileged are to be returned immediately to the holder of the privilege, or to a person designated by the court. Documents found *not* to be privileged may be used in the investigation.

[83] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184.
[84] *Canada (Attorney General) v Federation of Law Societies of Canada*, [2015] SCJ No 7, [2015] 1 SCR 401 (SCC).
[85] Nelson, *supra* note 19 at 274.

between legal and business advice and the application of, and exceptions to, legal advice privilege.

American courts take two differing approaches to determining whether advice is business or legal. The first approach is to determine whether the person is acting as a lawyer or a businessperson and treat all advice provided by that person accordingly.[86] A businessperson will be found to only give business advice and a lawyer will be found to only give legal advice. Under the second method, the court will determine whether the advice is business or legal on an ad hoc basis and provide privilege only for legal advice.[87] This involves looking at individual communications to determine the purpose and nature of the communication.

UK legal advice privilege requires that the advice given is legal in nature, in the sense that there is a relevant legal context. As Lord Denning stated:

> It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps an executive capacity. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction.[88]

As such, the court must make the determination of whether the advice was business or legal.

In Canada, the Supreme Court stated:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.[89]

However, the courts have generally interpreted "legal advice" broadly. The following excerpts show that the line between business and legal advice is fuzzy:

> [Legal advice privilege] is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.
>
> Whether communications are made to the lawyer himself or employees, and whether they deal with matters of an administrative nature such as

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[86] Robert J Wilczek, "Corporate Confidentiality: Problems and Dilemmas of Corporate Counsel" (1982) 7 Del J Corp L 221 at 240.

[87] *Ibid*.

[88] *Crompton Amusement Machines Ltd v Commission of Customs and Excise (No 2),* [1972] 2 QB 102, 2 All ER 353 at 376 (CA). As discussed by John S Logan & Michael Dew, *Overview of Privilege and Confidentiality* (Paper, Continuing Legal Education Society of British Columbia, 2011) [unpublished] at 1.1.7.

[89] *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20, [2004] 1 SCR 809.

> financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.
>
> I am satisfied that a communication which does not make specific reference to legal advice is nevertheless privileged if it falls within the continuum of communication within which the legal advice is sought or offered: see *Manes and Silver*, *supra*, p. 26. If the rule were otherwise, a disclosure of such documents would tend in many cases to permit the opposing side to infer the nature and extent of the legal advice from the tenor of the documents falling within this continuum. Thus, the intent of the rule would be frustrated.[90]

Although specifically referencing in-house counsel, this would apply to all lawyers who provide business advice in addition to legal advice.

Despite the willingness of Courts to construe "legal advice" broadly, the prudent lawyer will want to avoid as much as possible any potential ambiguity on the nature of the advice or the lawyer's role in providing it. When providing legal as opposed to business advice to a client, a lawyer should strive to be clear about their role in advising, and as much as possible indicate explicitly when they are providing legal advice.

The American Bar Association Business Law section provides the following guidance:

> These principles highlight the need for the attorney to be aware of the role he or she is playing – the privilege may exist as to one conversation when donning the hat of legal advisor and disappear in the next, where business advice is sought. To ensure privilege is maintained, the attorney should try to keep the roles from overlapping by offering legal advice and business advice separately when possible, be clear when legal advice is being rendered, and make sure the client understands that simply forwarding confidential information to the attorney does not make it privileged. If the client needs a contract to be reviewed for business concerns (e.g., financial analysis) as well as legal implications, advise the client to send separate e-mails to the finance team and the legal team rather than sending a general request for review to everyone in a single e-mail. The more explicit the request and rendering of legal advice, the easier it will be to assert the privilege.[91]

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[90] In order from top: *Samson Indian Nation and Band v Canada*, [1995] 2 FCR 762 at para 8, 125 DLR (4th) 294 (CA); *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 876, 141 DLR (3d) 590; *No 1 Collision Repair & Painting (1982) Ltd v Insurance Corp of B*, 18 BCLR (3d) 150, 1996 CanLII 2311 at para 5 (SC). As discussed by Logan & Dew, *supra* note 88 at 1.1.7.

[91] Jackie Unger, "Maintaining the Privilege, A Refresher on Important Aspects of the Attorney-Client Privilege" (31 October 2013), online: *American Bar Association: Business Law Today* <https://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/>.

### 3.3.3 Confidentiality, Lawyer Client Privilege, and Reporting Wrongdoing

Lawyers are under a duty to protect the interests of their client. In business contexts, the client is often a corporate entity. As the following discussion indicates, a lawyer that notices wrongdoing on the part of one of the corporations' directors, officers, employees or agents has an obligation to report that wrongdoing within the corporation. This reporting usually requires the lawyer to bring the matter to a more senior individual in the corporation, particularly if an individual to whom the lawyer normally reports commits the wrongdoing. This is often referred to as an "up the ladder" reporting obligation. As lawyers have a duty of confidentiality, reporting of wrongdoing must be internal, except in rare circumstances. It is not a violation of solicitor-client privilege because the communication is still with the client.

Some jurisdictions allow for external reporting when a lawyer believes that a serious crime is about to be committed.[92] Where the client has not waived privilege, this is a violation of solicitor/client privilege, and as such, any confidential information that is reported should be the minimum necessary to prevent the crime.

#### 3.3.3.1 US

Following the Enron scandal, the US implemented the *Sarbanes-Oxley Act of 2002* (*SOX*). A primary objective of *SOX* was to address major corporate and accounting scandals and promote lagging investor confidence in the stock market. Section 307 of the *SOX* requires lawyers to internally report up the ladder (to the CEO or even the board of directors or audit committee) evidence of material violations of federal and state securities laws and other fraudulent acts.[93]

The ABA Model Rules of Professional Conduct state that lawyers have a duty to protect the corporation's interests:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including,

[92] Both the US and Canada allow lawyers to divulge otherwise privileged information in order to prevent a serious crime. The UK does not have a similar exception to allow for a breach of solicitor-client privilege. The US and Canadian rules permitting this are set out and discussed specifically in Section 3.3.1.

[93] Woolley et al, *supra* note 14 at 566.

> if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if
>
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
>
> then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
>
> (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
>
> (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.[94]

There is *no professional duty to report* wrongdoing outside of the corporation; rather, a lawyer *may* report wrongdoing externally:

> [T]o prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.[95]

In the wake of the Enron scandal, the SEC attempted to *require* lawyers who practice before it to report knowledge of their client's wrongdoing. The American Bar Association and many others vehemently opposed this stance, claiming solicitor/client privilege must prevail.[96] As a result, of the resounding opposition to the SEC's proposed requirements for external

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[94] ABA Model Rules (2020), *supra* note 7, Rule 1.13.

[95] *Ibid*, Rule 1.6.

[96] US, Securities Exchange Commission, *Final Rule: Implementation of Standards of Professional Conduct for Attorneys,* (RIN 3235-AI72) (Securities Exchange Commission, 2003), online: <https://www.sec.gov/rules/final/33-8185.htm>.

reporting, the SEC implemented provisions that allow, but do not require, lawyers to report material violations of the SEC rules to them.[97] The SEC also included a provision that requires subordinate lawyers to report evidence of a material violation of the SEC rules to their supervising attorney.[98]

It is important to note that the SEC Rules apply only to practice before the Securities and Exchange Commission. The rules are not the same as the American Bar Association Rules, for example, the SEC's "up the ladder" rule is more stringent than the American Bar Association's. Under the ABA rule, attorneys have an "out" if they conclude that a referral would not be in the best interests of the organization. This is not provided for in the SEC Rules. The ABA rule, moreover, applies only when an attorney "knows" of an actual or intended violation. The SEC rule does not require knowledge of facts or conclusions of law, but only "evidence of a material violation."[99]

#### 3.3.3.2 UK

While there are no explicit rules that permit or require lawyers to report wrongdoing in the corporate context, lawyers in the UK may have a common law duty to their client to report wrongdoing "up the ladder" to a higher ranking official or to the board of directors.[100] If the board of directors are the wrongdoers, the lawyer may be obligated to report to the general meeting of the shareholders.[101] However, although there have been cases about how directors are liable for failing to prevent co-directors from breach of fiduciary duty or other wrongdoing, the courts have not specifically addressed the lawyer's obligation to disclose wrongdoing of executives and directors.[102]

The UK House of Lords, in *Three Rivers Council and others v Governor and Company of the Bank of England* (*Three Rivers*), explains that if legal professional privilege exists, it is absolute and cannot be overridden for public policy concerns; the only way around it is if the client (or individual entitled to it) waives the privilege or it is overridden by statute.[103] The court has found that a balancing act between legal professional privilege and the public interest is not required because legal professional privilege is the "dominant public interest" and "the

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[97] *Ibid*, 17 CFR § 205.5.
[98] *Ibid*.
[99] *Ibid*, §205.2(e).
[100] Joan Loughrey, *Corporate Lawyers and Corporate Governance* (New York: Cambridge University Press, 2011) at 119.
[101] *Ibid*. This stems from the principle established in *Barron v Potter*, [1914] 1 Ch 895, and *Foster v Foster*, [1916] 1 Ch 532, that the general meeting of shareholders has the ability to act when the board of directors is unable or incapable of acting. In *Foster v Foster*, the board of directors was unable to act due to conflict of interest.
[102] Loughrey, *supra* note 100 at 120.
[103] *Three Rivers District Council and others v Governor and Company of the Bank of England*, [2004] UKHL 48 at paras 10 and 25, [2005] 4 All ER 948. Note that in-house counsel in the UK maintain legal professional privilege with their client. This is, however, contrary to the EU Rule. As per the European Court of Justice decision in *Akzo Nobel Chemicals Limited & anor v European Commission* (Case C-550/07 P), solicitor-client privilege does not extend to in-house counsel and their client.

balance must always come down in favour of upholding the privilege."[104] The court's strict interpretation of the scope of legal professional privilege does not allow for the disclosure of otherwise privileged communications in order to prevent a crime from being committed. Under the rule in *Bullivant v Att-Gen of Victoria,* legal professional privilege extends to information given to a client on how to avoid committing a crime.[105] Legal professional privilege also extends to communications informing a client that their actions may result in prosecution, as per *Butler v Board of Trade.*[106] However, legal professional privilege may not extend to documents, which form part of the crime itself or to communication that occurs in order to obtain advice with the intent of committing an offence.[107] In order to disclose otherwise privileged communications, lawyers must show they have prima facie evidence their client is involving them in a fraud without their consent.[108]

In 2002, the UK passed the *Proceeds of Crime Act* (*POCA*).[109] *POCA* created criminal penalties for certain regulated sectors, including lawyers, who do not act on their knowledge or suspicion that their client is engaged in money laundering. It requires lawyers to disclose their suspicion to the National Crime Agency without indicating to their client that the disclosure has been made.[110] There are similar reporting provisions in the United Kingdom *Terrorism Act*.[111]

The required disclosure under *POCA* likely prevails over any broad duty of confidentiality that a lawyer may have. However, they do not prevail over legal professional privilege. Lawyers are not required to disclose information that would be privileged under legal professional (legal advice or litigation) privilege, or information acquired in "privileged circumstances" as defined in the legislation. While the definition of "privileged circumstances" overlaps considerably with legal professional privilege, they are not identical, and care should be taken to consider both.

#### 3.3.3.3 Canada

The Canadian rules vary slightly from province to province. However, the Federation of Law Societies *Model Code* contains a version of an "up the ladder rule" in Rule 3.2-8. This applies to lawyers in jurisdictions that have adopted it in their codes of conduct:

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[104] *R v Derby Magistrates' Court*, [1995] 4 All ER 526, [1995] 3 WLR 681. The SCC came to the same conclusion in *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.

[105] *Bullivant v Att-Gen of Victoria,* [1901] AC 196. This is different than giving advice on how to avoid getting caught after committing a crime: UK, The Law Society, "Responding to a financial crime investigation" (22 January 2020), online: <https://www.lawsociety.org.uk/topics/anti-money-laundering/responding-to-a-financial-crime-investigation>.

[106] *Butler v Board of Trade,* [1971] Ch 680, [1970] 3 WLR 822.

[107] *R v Cox & Railton* (1884), 14 QBD 153.

[108] *O'Rourke v Darbishire,* [1920] UKHL 730, [1920] AC 581.

[109] *Proceeds of Crime Act* (UK), 2002, c 29 [POCA], online: <https://www.legislation.gov.uk/ukpga/2002/29/contents>.

[110] POCA, *ibid*, ss 330 and 333.

[111] *Terrorism Act* (UK), 2000, c 11, s 19, online: <https://www.legislation.gov.uk/ukpga/2000/11/section/19>.

> **3.2-8** A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7:
>
> (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
>
> (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
>
> (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.[112]

The Supreme Court of Canada differs from the UK's traditional and more absolute judicial approach to applying legal professional privilege. The SCC has allowed for limited exceptions to its application. Where an exception exists, the scope of the privileged communication to be disclosed is to be interpreted as narrowly as reasonably possible. Where a former client alleges misconduct by their former lawyer, the privilege may be set aside to protect the lawyer's self-interest.[113] If a client seeks legal advice for an unlawful purpose, privilege will not exist.[114] Where privilege may be set aside, no requirement has been placed on the lawyer to disclose the confidential information. Rather, a permissive "may disclose" allows the lawyer to exercise his or her discretion in the matter.

In *Smith v Jones*, the Supreme Court of Canada provided guidance on where solicitor/client privilege may be overridden for public policy concerns.[115] The Court advised that an exception to the privilege be allowed where "public safety is involved and death or serious bodily harm is imminent."[116] The test from *Smith v Jones* was that (1) the harm had to be targeted at an identifiable group, (2) the risk was of serious bodily harm or death, and (3) the harm was imminent.[117] In *Smith v Jones,* solicitor/client privilege was claimed for a

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[112] FLSC Model Code (2020), *supra* note 7, Rule 3.2.-8.

[113] *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).

[114] *R v McClure*, 2001 SCC 14 at para 36, [2001] 1 SCR 445. See also *Descoteaux v Mierzwinksi*, [1982] SCJ No 43, [1982] 1 SCR 860, 141 DLR (3d) 590.

[115] *Smith v Jones,* [1999] 1 SCR 455, 169 DLR (4th) 385.

[116] *Ibid* at para 35.

[117] Although serious economic harm is not included in this test, law societies will allow lawyers to disclose aspects of otherwise confidential or privileged information if the lawyer is at risk (i.e., when the lawyer faces allegations of misconduct or is not getting paid, etc.).

doctor's report that was completed for the purpose of assisting in the preparation of the defence or with sentencing submissions. The psychiatrist felt that the accused was likely to commit further crimes based on the assessment, and sought to have the report considered by the Court in sentencing. As the report was cloaked by solicitor/client privilege, the Court set out a test for where solicitor/client privilege may be overridden for public policy concerns.

The Supreme Court of Canada has also allowed solicitor/client privilege to be set aside where an accused's innocence is at stake.[118] Additionally, there are limited exceptions to solicitor/client privilege where the interests of the lawyer are at stake; this may occur where the lawyer is collecting fees or is defending against a client's claim of professional misconduct,[119] for example, in the anti-corruption context.[120]

### 3.3.4 Litigation Privilege

Litigation privilege as it is called in Canada and the United Kingdom has evolved from lawyer/client privilege. In the United States, a similar evolution occurred in what the US Supreme Court recognized as the "work product doctrine."[121] This privilege or doctrine protects all records created for the purpose of litigation that is pending or reasonably anticipated. While the focus of lawyer/client privilege is to protect *communications* for the purpose of obtaining or providing legal advice, litigation privilege extends to protect *documents* or records, defined broadly. There need be no communication between lawyer and client. The classic example, a lawyer's litigation brief may never have been seen by the lawyer's client, or anyone but the lawyer.

Litigation privilege, applies to communications or documents created primarily for the purpose of current or anticipated litigation. It extends to communications beyond just the lawyer and client, and encompasses any experts the lawyer may retain to learn about the issues as well as other third parties who may assist in preparing for litigation. It may arise for a corporate lawyer where the company has been charged or where litigation is pending in regards to their own alleged corrupt acts or the corruption of another company (for example, a civil suit for loss of a contract). A corporate lawyer may have to assist the litigation team by sending documents or informing them of the company's anti-corruption compliance program. Although the corporate lawyer would not be the litigator in charge of the litigation, their communications to the litigation team would be protected under the

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[118] *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445.

[119] Graham, *supra* note 41 at 272-274; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed (Thomson Carswell, 2006) at 3-15 – 3-19. See e.g. *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).

[120] For US law on this topic see: 17 CFR § 240.10b-5 (1951), 15 USC § 78t(e), *Sarbanes-Oxley Act of 2002*, 15 USC 7201, 116 Stat 745 § 307 (2002), 17 CFR § 205, and Securities Exchange Commission, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans*, (Securities Exchange Commission, 2006), § 102(e) online: <https://www.sec.gov>. For more information on UK Securities Regulation, see Loughrey, *supra* note 100. For more information on Canadian securities regulation, see David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (LexisNexis, 2014) and Mark Gillen, *Securities Regulation in Canada*, 4th ed (Toronto: Thomson Reuters, 2019). Note that Canada's securities law varies provincially.

[121] *Hickman v Taylor*, 329 US 516, (1946).

litigation privilege. Equally important, the litigation team may need various expert reports. Those reports will also be protected by the litigation privilege.

The litigation privilege also extends to documents prepared or communicated between the client and third parties. This sets it apart from the duty of confidentiality, and lawyer/client privilege, as both of these require a lawyer/client relationship.

In Canada, as the discussion in Section 3.3.2 indicates, lawyer/client privilege has evolved from a rule of evidence to a substantive rule of law protected in the Canadian *Charter of Rights and Freedoms.* However, litigation privilege remains a rule of evidence. Thus, while lawyer/client privilege can only be breached in circumstances that pass *Charter* scrutiny, litigation privilege can be subject to change and limitation by rules of discovery in a particular jurisdiction.[122]

[122] *Blank v Canada (Minister of Justice),* 2006 SCC 39, [2006] SCR 319 at paras 60-61.

CHAPTER 9

# COMPLIANCE PROGRAMS, RISK ASSESSMENTS, AND DUE DILIGENCE

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

# 1. INTRODUCTION

Lawyers play an essential role in facilitating both national and international business transactions. As noted in Chapter 8, in doing so lawyers must comply with a number of legal, professional, and ethical responsibilities. This includes ensuring that their business clients are advised as to how to comply with the laws and regulations to avoid corruption in their business transactions. A lawyer has a duty to undertake risk assessments to determine the potential for corrupt behaviours, although it does not always need to be a full systemic risk assessment, as outlined in Section 4.

Corruption, or a real risk of corruption, may arise in a multitude of circumstances. Lawyers must be aware of those circumstances and be careful not to assist their client, wittingly or unwittingly, in the violation of these anti-corruption laws. Although corruption may arise in virtually any situation or transaction, there are a number of specific areas where the risk of corruption is greater. Some of these areas are addressed in separate chapters of this book. For example,

- Public procurement and public-private partnerships (P3s): Chapter 12
- Clients' lobbying of public officials: Chapter 11
- Political and campaign contributions: Chapter 14
- Conflicts of interest: Chapter 10
- Facilitation payments: Chapter 2
- Money laundering in business transactions[1] including real estate[2] and luxury items: Chapter 4.

Other special risk areas for corruption include:

- Transactions in extractive industries, aeronautics and defence industry, public infrastructure (e.g., roads, bridges, etc.), pharmaceuticals, foreign aid and development assistance, art markets, sports governing bodies, etc.
- In acquisitions and mergers, it is critical to determine whether the target of an acquisition has engaged in corrupt practices in the past, as the acquiring corporation may be liable for past acts of corruption after a merger.

[1] The Law Society of British Columbia has incorporated new rules for lawyers when dealing with trust funds and private loans to help stem money laundering in the province and to prevent lawyers from becoming "collateral damage": Law Society of British Columbia, *Law Society Rules*, Vancouver: LSBC, 2021, Division 11, 3-100 - 3-110, online: <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/>.

[2] Lawyers involved in real estate must be extra-vigilant: real estate transactions are commonly used to launder money, particularly in hot housing markets. Solicitors in particular can play a large role in interrupting the cycle, through acting as gatekeepers and verifying the identity of the client: "Three Ways to Stop Money Laundering through Real Estate" (6 September 2019), online: *Transparency International* <https://www.transparency.org/news/feature/three_ways_to_stop_money_laundering_through_real_estate>.

- The use of third-party agents, especially in global transactions.
- Transactions that involve gifts, entertainment, travel expenses, vague consulting agreements, foreign subsidiaries and joint ventures.

With so many risks of corruption arising in business transactions, it is not surprising that corporations and other commercial organizations develop: (1) anti-corruption compliance programs, which are dependent in part on (2) corruption risk assessments, and (3) require due diligence standards and practices to avoid the risks of corruption. The next three sections of this chapter will focus on these three essential anti-corruption tools.

## 2. RELATIONSHIP BETWEEN DUE DILIGENCE, COMPLIANCE PROGRAMS, AND RISK ASSESSMENTS

Due diligence, anti-corruption compliance programs, and risk assessments are distinct but interrelated concepts. "Due diligence" can be viewed as a generic legal concept. It means using reasonable care and taking into account all the surrounding circumstances to avoid breaking the law or causing harm to others in carrying out one's business. It is relevant in criminal law, regulatory law, and civil liability. Due diligence by an accused is not a substantive defence to the commission of a subjective *mens rea* offence such as bribery, but it is a relevant mitigating factor that can affect the nature of the charge and the sentence or sanction.[3] For strict liability regulatory offences in Canada[4] and the UK[5] (including section 7 of the UK *Bribery Act, 2010*), due diligence provides a defence. However, due diligence is not a defence to regulatory offences in the US and liability can be found even where companies have implemented compliance programs to prevent regulatory offences from occurring.[6] Due diligence is also a defence to civil actions based on negligence or malpractice.

In the context of assisting a client to avoid the commission of corruption offences, careful creation and implementation of an anti-corruption compliance program that is geared to the size and nature of the business has quickly become the expected norm of due diligence. Due diligence or reasonable care must be used in designing an anti-corruption program, and due diligence must be used in ensuring that the program is implemented, monitored and evaluated from time to time. In this context, due diligence requires compliance with a number of steps and safeguards specific to the particular business activity in question.

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[3] Due diligence acts as a substantive defence in the UK under section 7 of the *Bribery Act*. In Canada and the US, due diligence is not a substantive defence to charges of bribery or corruption.

[4] *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161.

[5] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, [1971] 2 All ER 127. Note that in the UK the defence of due diligence must be included in the statutory scheme to be available to the defendant charged with a regulatory offence.

[6] See Mark Pieth & Radha Ivory, "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in Mark Pieth & Radha Ivory, eds, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (New York: Springer, 2011) 3 at 22-23.

An anti-corruption compliance program will set out the steps that are reasonably required to avoid corruption in the course of one's business. Those reasonable steps will be based on the actual risk of corruption arising in the client's business transactions. Thus, the first step in developing an effective anti-corruption compliance program is to conduct a thorough risk assessment. To achieve the standard of due diligence, the risk assessment must be designed and carried out with reasonable care based on all the circumstances including the risk of corruption occurring, the nature and extent of harm if it does occur, and the cost and effectiveness of procedures to minimize or eliminate that risk.

As enforcement against corrupt conduct becomes more frequent and the penalties sought increase in amount, the cost of any corrupt act has greatly increased. As such, companies seek guidance on complying with the law in order to avoid prosecution and fines. Two differing approaches on the type of guidance or regulations governments exist: rules-based theory and principles-based theory.[7] The rules-based theory suggests that governments and enforcement agencies should set out the rules that companies need to play by.[8] This would effectively set a minimum standard for organizations to comply with and would provide certainty for companies. A significant issue with this approach is that such rules tend to be inflexible and unable to address changing situations as they arise. In addition, this approach can result in creative interpretations of the rules that ignore the spirit of the rules and allow individuals to bend them in their favour. The principles-based theory focuses on principles that governments would like to see corporations uphold.[9] This provides more flexibility in a court's interpretation of whether or not the company was in compliance, but provides less certainty to the corporation as to whether their compliance program is adequate to avoid criminal or regulatory liability.[10]

## 3. COMPLIANCE PROGRAMS

An increasing global expectation exists for companies to create and enforce an anti-corruption compliance program within their company. Although such programs are often not a legislative requirement, they are becoming a standard factor that enforcement bodies and courts consider when deciding whether to charge a company, or if charges are laid, in setting the penalty for a convicted organization. Under section 7(2) of the UK *Bribery Act 2010*, the implementation of "adequate procedures" provides a substantive defence for the corporation to a charge under section 7(1) (see Chapter 2, Section 2.4.3(i)). The courts and enforcement agencies consider whether there is a program in place and evaluate its effectiveness in preventing corrupt acts. These programs are seen as critical to ensuring that

[7] See generally, Todd Archibald & Kenneth Jull, *Profiting from Risk Management and Compliance* (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2020).
[8] *Ibid*.
[9] *Ibid*.
[10] For more information on rules-based versus principles-based regulation, see Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55 McGill LJ 257, and Cristie Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45 Am Bus LJ 1. These papers do not address corruption directly, but some of the points addressed provide insight into the debate between rules-based and principles-based regulation.

corporations are complying with anti-corruption and anti-bribery laws. The primary purpose of these programs is to reduce the risk of corrupt acts taking place in an organization.

Developing internal controls to address the risk of corruption within a corporation is key. These controls must involve the board of directors, they must contribute to the development of a company-wide culture of compliance, and they must include internal policies and enforcement mechanisms.[11] Diversity of membership on the board is also vital, as it can better respond to the diverse cultural, social, and regulatory factors that operate within corrupt transactions.[12]

In light of the legal ramifications of creating and enforcing a sound anti-corruption program, lawyers advising business clients have an important role to play in informing clients of the practical utility of having such programs and ensuring that the client's program is up to date and meets minimum international standards. Enforcement agencies and courts have repeatedly advised that anti-corruption efforts should be custom-designed for the organization and should consider the particular risks to that organization. The United Nations Office on Drugs and Crime (UNODC) has produced a guide on compliance programs that states "an ounce of prevention is worth a pound of cure, and for business organizations, this is achieved through an effective internal programme for preventing and detecting violations."[13] A strong, effective program protects the company and the shareholders from directors, managers, or employees who are in a position to put the organization at risk. Although an effective compliance program cannot protect against all corrupt acts, largely due to *respondeat superior* (the vicarious liability of companies for the acts of their employees in the course of business) and the risk of hiring rogue employees, it can help to effectively manage and minimize risk.[14] For more information on the relevance of compliance programs in sentencing, refer to Chapter 7, Sections 4 to 6.

There are two approaches to corporate responsibility for self-regulation under anti-corruption law. The first is for the state to place a legal requirement on organizations to develop a compliance program and then enforce any breaches. An alternative is for the state to publicize best practices with notice to organizations that they may have to justify any departures from those practices.[15] The US, UK, and Canada have yet to specifically make the absence of a compliance program a crime or regulatory offence; however, compliance programs are effectively necessary due to the enforcement of anti-corruption legislation, the

[11] Poonam Puri & Andrew Nichol, "The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices" (2015) 53 Osgoode Hall LJ 164.
[12] *Ibid*.
[13] UNODC, *A Resource Guide on State Measures for Strengthening Corporate Integrity* (New York: UN, 2013) at 1, online (pdf): <https://www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strengthening_Corporate_Integrity.pdf>.
[14] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham: Edward Elgar Publishing, 2014) at 304.
[15] Archibald & Jull, *supra* note 7.

consideration of compliance programs in sentencing and, in the case of the UK, the substantive defence of adequate due diligence.

## 3.1 International Frameworks

### 3.1.1 UNCAC

As previously noted, the United Nations Convention Against Corruption (UNCAC) came into force on December 14, 2005, and is the broadest and most widely agreed to anti-corruption measure.[16] As of February 6, 2020, UNCAC has been ratified by 187 member states.[17] UNCAC does not specifically require its ratifying parties to provide guidelines on anti-corruption compliance programs. Instead, Article 12 states that "each party shall take measures ... to prevent corruption involving the private sector" and lists possible measures, including:

> 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.[18]

While not specifically requiring State Parties to provide guidance to businesses on what constitutes an effective anti-corruption compliance program, it does encourage parties to promote the use of good commercial practices. UNODC published a *Resource Guide on State Measures for Strengthening Corporate Integrity* (*Integrity Guide*), which indicates that governments should consider providing guidance to the private sector on legal compliance responsibilities.[19] It suggests that the core elements of an effective anti-corruption compliance program include: executive leadership, anti-corruption policies and procedures, training and education, advice and reporting channels, effective responses to problems, a risk-based approach, and continuous improvement via periodic testing and review.[20]

UNODC has also published a guidance document for parties to utilize in filling out their self-assessment checklists for the implementation of Chapters II (preventative measures) and V (asset recovery). The document encourages countries to report on whether they are in

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[16] "United Nations Convention Against Corruption" (last visited 16 July 2021), online: *UNODC* <https://www.unodc.org/unodc/en/corruption/uncac.html>.
[17] "Signature and Ratification Status" (updated to 6 February 2020), online: *UNODC* <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.
[18] *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, art 12 s 2(b) (entered into force 14 December 2005) [UNCAC], online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.
[19] UNODC, *supra* note 13 at 1.
[20] *Ibid* at 13-14.

compliance, what anti-corruption measures they have undertaken, what measures have been effective, how they have been implemented, and much more.[21]

### 3.1.2 OECD Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which came into force on February 15, 1999, has been ratified by 35 OECD countries and 8 non-member countries (Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Lithuania, Russia, and South Africa).[22] It does not place any requirements on State Parties to provide guidance on key aspects of effective compliance programs for the private sector. Furthermore, it does not require states to implement laws that require organizations to implement effective compliance programs. However, in 2009, the OECD Recommendations for Further Combating Bribery of Foreign Public Officials (OECD Recommendations) were adopted by all 41 states that had ratified the OECD Convention. Recommendation III requests that its members encourage companies to develop and implement adequate internal controls and compliance programs, and provides companies with *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.[23]

### 3.1.3 Key Elements of Compliance Guidelines

The international community has created various tools to guide companies in the prevention of corruption within their organizations. These tools recognize the complexity of identifying and combatting corruption and address the need for a multi-faceted approach with the involvement of the entire organization. To aid companies in their anti-corruption policies, the following organizations have published guidelines to assist companies in the implementation of effective compliance programs:[24]

- The Asia-Pacific Economic Cooperation (APEC) has released the *Anti-Corruption Code of Conduct for Business*.[25]

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[21] UNODC, *Guidance to filling in the revised draft self-assessment checklist on the implementation of chapters II (Preventive measures) and V (Asset recovery) of the United Nations Convention against Corruption* (2016), online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/20-24June2016/V1603598e.pdf>.

[22] *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>.

[23] OECD, Working Group on Bribery, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online (pdf): <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

[24] See OECD, UNODC & World Bank, *Anti-Corruption Ethics and Compliance Handbook for Business*, (2013), online (pdf): <https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf> for an overview of the principles in the various compliance programs and guidelines for implementing a successful anti-corruption compliance program.

[25] Asia-Pacific Economic Cooperation, SOM Steering Committee on Economic and Technical Cooperation (SCE), Anti-Corruption and Transparency Working Group (ACTWG), *APEC Code of*

- Transparency International (TI) has released *Business Principles for Countering Bribery*.[26]
- Transparency International-Canada (TI Canada) has released the *Anti-Corruption Compliance Checklist*.[27]
- The Organisation for Economic Co-operation and Development (OECD) has produced the *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.[28]
- The World Bank created the *Integrity Compliance Guidelines*[29] and the *Anti-Corruption Ethics and Compliance Handbook for Business*.[30]
- The World Economic Forum Partnering Against Corruption Initiative (PACI) created the *Principles for Countering Bribery*.[31]
- The International Chamber of Commerce (ICC) has produced the *Rules on Combating Corruption*.[32]
- The International Organization for Standardization (ISO) has developed and published ISO 37001 anti-bribery management system (ABMS) standard for organizations.[33]

These guidelines and principles provide organizations with suggestions on how to create and maintain anti-corruption programs that fall within expectations under the OECD Convention and UNCAC. Lawyers who are assisting a client in drafting or amending its compliance program should familiarize themselves with these guidelines. For in-house

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*Conduct for Business,* APEC# 213-AC-01.1 (September 2012), online: <https://www.apec.org/Publications/2013/01/Implementing-the-APEC-Anti-Corruption-Code-of-Conduct-for-Business>.

[26] Transparency International, *Business Principles for Countering Bribery,* 3d ed (October 2013), online: <http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery>.

[27] Transparency International Canada, *Anti-Corruption Compliance Checklist*, 3rd ed (2014), online (pdf): <https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5e3b0cb565c5eb6706d398d2/1580928184625/2014-TI-Canada_Anti-Corruption_Compliance_Checklist-Third_Edition-20140506.pdf>.

[28] OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance,* (18 February 2010), online (pdf): <http://www.oecd.org/daf/anti-bribery/44884389.pdf>.

[29] World Bank, *Integrity Compliance Guidelines,* (2010), online (pdf): <https://wallensteinlawgroup.com/wp-content/uploads/2017/12/WBG-Integrity-Compliance-Guidelines-full.pdf>.

[30] OECD, *supra* note 24,

[31] World Economic Forum, Partnering Against Corruption Initiative, *Global Principles for Countering Corruption,* Industry Agenda (2016), online (pdf): <http://www3.weforum.org/docs/WEF_PACI_Global_Principles_for_Countering_Corruption.pdf>.

[32] International Chamber of Commerce, Commission on Corporate Responsibility and Anti-Corruption, *ICC Rules on Combating Corruption,* (2011), online (pdf): <https://cdn.iccwbo.org/content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf>.

[33] "ISO 37001 – Anti-bribery management systems" (last visited 16 July 2021), online: *International Organization for Standardization* <http://www.iso.org/iso/iso37001>.

lawyers, the Association of Corporate Counsel (ACC) has prepared a *How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program*.[34]

Organizations in the public, private, and voluntary sectors may obtain independent certification of compliance of their ABMS with the ISO 37001 standard and require their major contractors, suppliers and consultants to provide evidence of compliance.[35] In relation to the organization's activities, this standard addresses:

- bribery in the public, private and not-for-profit sectors;
- bribery by the organization;
- bribery by the organization's personnel acting on the organization's behalf or for its benefit;
- bribery by the organization's business associates acting on the organization's behalf or for its benefit;
- bribery of the organization;
- bribery of the organization's personnel in relation to the organization's activities;
- bribery of the organization's business associates in relation to the organization's activities;
- direct and indirect bribery (for instance, a bribe offered or accepted through or by a third party).[36]

To help prevent, detect and deal with bribery, ISO 37001 requires the organization to:

1. Implement the anti-bribery policy and supporting anti-bribery procedures (ABMS);
2. Ensure that the organization's top management has overall responsibility for the implementation and effectiveness of the anti-bribery policy and ABMS, and provides the appropriate commitment and leadership in this regard;
3. Ensure that responsibilities for ensuring compliance with the anti-bribery policy and ABMS are effectively allocated and communicated throughout the organization;

[34] Kristen Collier Wright, Wally Dietz & Lindsey Fetzer, "How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program" (2015) 33:5 ACC Docket 38, online (pdf): <https://www.bassberry.com/wp-content/uploads/ACC-Docket-June-2015.pdf>.
[35] "International Standard ISO 37001 Anti-bribery Management Systems Standard" (last visited 16 July 2021), online: *Global Infrastructure Anti-Corruption Centre* <http://www.giaccentre.org/ISO37001.php>.
[36] International Organization for Standardization, *ISO 37001:2016(en) Anti-bribery management systems — Requirements with guidance for use*, s 1 (Scope), online: <https://www.iso.org/obp/ui/#iso:std:iso:37001:ed-1:v1:en>.

4. Appoint a person(s) with responsibility for overseeing anti-bribery compliance by the organization (compliance function);
5. Ensure that controls are in place over the making of decisions in relation to more than low bribery risk transactions. The decision process and the level of authority of the decision-maker(s) must be appropriate to the level of bribery risk and be free of actual or potential conflicts of interest;
6. Ensure that resources (personnel, equipment and financial) are made available as necessary for the effective implementation of the ABMS;
7. Implement appropriate vetting and controls over the organization's personnel designed to ensure that they are competent, and will comply with the anti-bribery policy and ABMS, and can be disciplined if they do not comply;
8. Provide appropriate anti-bribery training and/or guidance to personnel on the anti-bribery policy and ABMS;
9. Produce and retain appropriate documentation in relation to the design and implementation of the anti-bribery policy and ABMS;
10. Undertake periodic bribery risk assessments and appropriate due diligence on transactions and business associates;
11. Implement appropriate financial controls to reduce bribery risk (e.g. two signatures on payments, restricting use of cash, etc.);
12. Implement appropriate procurement, commercial and other non-financial controls to reduce bribery risk (e.g. separation of functions, two signatures on work approvals, etc.);
13. Ensure that all other organizations over which it has control implement anti-bribery measures which are reasonable and proportionate to the nature and extent of bribery risks which the controlled organization faces;
14. Require, where it is practicable to do so, and would help mitigate the bribery risk, any business associate which poses more than a low bribery risk to the organization to implement anti-bribery controls which manage the relevant bribery risk;
15. Ensure, where practicable, that appropriate anti-bribery commitments are obtained from business associates which pose more than a low bribery risk to the organization;
16. Implement controls over gifts, hospitality, donations and similar benefits to prevent them from being used for bribery purposes;
17. Ensure that the organization does not participate in, or withdraws from, any transaction where it cannot appropriately manage the bribery risk;

18. Implement reporting (whistle-blowing) procedures which encourage and enable persons to report suspected bribery, or any violation of or weakness in the ABMS, to the compliance function or to appropriate personnel;
19. Implement procedures to investigate and deal appropriately with any suspected or actual bribery or violation of the ABMS;
20. Monitor, measure and evaluate the effectiveness of the ABMS procedures;
21. Undertake internal audits at planned intervals which assess whether the ABMS conforms to the requirements of ISO 37001 and is being effectively implemented;
22. Undertake periodic reviews of the effectiveness of the ABMS by the compliance function and top management;
23. Rectify any identified problem with the ABMS, and improve the ABMS as necessary.[37]

In general, the keys to success promoted by various anti-corruption compliance guidelines tend to fall within the following six categories: (1) clear policy from the top (2) communication and training (3) developing and implementing an anti-corruption program (4) incentivizing and promoting compliance (5) detecting and reporting violations, and (6) continual testing and improvement.[38] We will briefly comment on each of these categories.

**(1) Clear policy from the top**

An effective compliance program requires commitment from the top level of the organization. A strong program may be prone to failure if senior management is not committed to its implementation. Senior management establish the culture of ethics for the organization, and without a zero tolerance policy on corruption, it is unlikely that the program will be effective in combatting corrupt transactions. The policy should be clear and spoken from one voice, so there is no confusion about the company's expectations and definition of corruption. Senior management's support and commitment to the program should be an "ongoing demonstration of the company's norms and values."[39] They must make it clear that the company's zeal for more business and profit does not mean getting more business by the use of bribery.

[37] Global Infrastructure Anti-Corruption Centre, *supra* note 35.

[38] TI Canada suggests that a corporate anti-corruption compliance program may be developed and implemented in the following six steps: (1) commit to the anti-corruption program from the top (2) assess the current status and risk environment (3) plan the anti-corruption program (4) act on the plan (5) monitor controls and progress, and (6) report internally and externally on the program. See Transparency International Canada, *supra* note 27, at 5-6.

[39] OECD, *supra* note 24. For more information on the importance of corporate culture in combatting corruption, see David Hess & Cristie Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem" (2008) 41 Cornell Intl LJ 301.

Commitment from the "top" includes adequate funding and staffing. Adequate resources not only ensure that the compliance program has teeth, but that management's supportive words about the compliance program are backed by meaningful action.[40] While the sufficiency of resources will depend on the size, structure, and risk profile of the particular company, a large organization is generally expected to devote more resources to their compliance program than smaller ones.[41] In assessing adequacy, human resources, financial resources, and access resources should be considered.[42]

**(2) Communication and training**

Communication and training are among the most important and most visible aspects of compliance. Without proper communication and training, an organization's compliance is likely only a "paper program."[43] Companies are required to communicate and train their employees on their compliance programs and on anti-corruption laws.

Training must be appropriately tailored to the particular compliance risks a company faces and easily accessible in order to be effective. Different business units and different employee circumstances may require different training. Companies should tailor training to the position of the employee: different aspects of corruption law will apply to employees in accounting versus employees in sales, which means different controls to prevent and report corruption will be required for each group.[44] Training should also consider the level of the employee, as higher-level managers, who often set the tone for the office or department, may require more extensive training and knowledge of anti-corruption initiatives than lower level employees.

Training should account for linguistic and other barriers, including with respect to access to technology.[45] For example, communication and training must be in the local language of the employee in order to be effective. Orthofix International was targeted by the DOJ for failing to adequately communicate compliance programs with its employees. In its enforcement action against the company, the DOJ stated "Orthofix International, … failed to engage in any serious form of corruption-related diligence before it purchased [the subsidiary]. Although Orthofix International promulgated its own anti-corruption policy, that policy

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[40] Peter Brady and John Boscariol, "Anti-corruption Compliance Program Structures: Making Pre-Fab Requirements for your Own" in Global Compact Network Canada ed, *Designing an Anti-Corruption Compliance Program*, 22 at 25.

[41] US Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (updated June 2020) at 10, online: *Department of Justice* <https://www.justice.gov/criminal-fraud/page/file/937501/download>; International Organization for Standardization, *supra* note 36 at A.6.1.

[42] International Organization for Standardization, *supra* note 33 at ch A.7: Resources and A.6.2; US Department of Justice, *supra* note 41 at 10; Brady & Boscariol, *supra* note 40 at 25.

[43] Ray Haywood, "The Importance of Training to Your Anti-Bribery and Corruption Program" in Global Compact Network Canada ed, *Designing an Anti-Corruption Compliance Program*, 90 at 94.

[44] Asia-Pacific Economic Cooperation, *supra* note 25, s 4(h); World Economic Forum Partnering against Corruption Initiative, *supra* note 31, s 5.4.1; World Bank, *supra* note 29, s 7; US Department of Justice, *supra* note 41 at 4-5.

[45] US Department of Justice, *supra* note 41 at 4-5.

was neither translated into Spanish nor implemented at [the subsidiary]."[46] The extent of live training (as compared to passive training through e-learning or online delivery systems) may be used as a direct measure to test whether a corporation is serious about its program, or if it is merely a "paper program."

In addition, training should include references to the various controls and policies to familiarize employees with these policies and procedures. Training should be required on an ongoing basis (with periodic repeat training sessions) for all employees, officers, directors, and, where appropriate, agents and business partners.[47]

**(3) Developing and implementing programs**

An effective anti-corruption program should be specifically tailored to the risks the company faces. Controls should be in place to reduce, to a reasonable level, the chance that corrupt transactions occur and to ensure that employees are not given unreasonable opportunities to participate in corrupt acts.[48] Characteristics of a well-designed compliance program include consistency with applicable laws, adaptation to specific requirements, participation of stakeholders, shared responsibility, accessibility, readability, promotion of a trust-based internal culture, applicability, continuity, and efficiency.[49]

TI's *Business Principles for Countering Bribery* state that the Board of Directors, or equivalent body, is responsible for implementing and overseeing the compliance program.[50] The CEO is responsible for the implementation and adherence to the program.[51] The Board of Directors and/or CEO should enlist various experts, such as lawyers, accountants and compliance officers, to design and implement the program. Additionally, managers and staff, particularly those faced with bribery demands or forms of corruption, may provide assistance in the development of the program. In medium-sized or large companies, the Board of Directors, or similar governing body, should create a special internal unit to develop and implement the compliance program.[52]

A primary aspect of a company's compliance program is that it implements adequate financial controls and follows generally accepted accounting standards. The complexity of these features will depend on the risk level and size of the company. Payments of a certain

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[46] Koehler, *supra* note 14. See also: *United States v Orthofix International*, NV, 4:12-CR-00150-RAS-DDB-1, online: <https://www.justice.gov/criminal-fraud/case/united-states-v-orthofix-international-nv-court-docket-number-412-cr-00150-ras>.

[47] International Chamber of Commerce, *supra* note 32, art 10(j); Transparency International, *supra* note 26, s 6.6.2; OECD, *supra* note 28, s 8.

[48] This section will address several areas that compliance programs should cover. Depending on the company, the compliance program will be expanded or reduced to suit the risks it faces and the types of transactions it enters into.

[49] UNODC, *supra* note 13 at 28-29. The *Guide* describes each of these characteristics in more detail.

[50] *Ibid* at 29; Transparency International, *supra* note 26, s 6.1.

[51] *Ibid*.

[52] Stefania Giavazzi, Francesca Cottone & Michele De Rosa, "The ABC Program: An Anti-Bribery Compliance Program Recommended to Corporations Operating in a Multinational Environment" in Stefano Manacorda, Francesco Centonze & Gabrio Forti, eds, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer International Publishing, 2014), 125 at 140 [ebook].

type, or over a certain amount, could require multiple authorizations to ensure that they are in line with company policies. Procedures must prohibit and prevent actions such as the creation of off-the-book accounts, the making of inadequately identified transactions, the recording of non-existent expenditures, the use of false documents, the recording of liabilities with incorrect identification and the intentional and unlawful destruction of bookkeeping records.[53] Accounting controls should not only prevent wrongful transactions and other forms of wrongdoing, but should also assist in bringing wrongdoing to light through regular audits.[54]

Compliance programs should also address gifts and entertainment expenses, particularly for government officials. Company policy should outline appropriate levels for gift or entertainment expenses, as well as any exceptions for allowable expenses. These expenses may require multiple levels of approval and increased disclosure as the size and nature of the gift reasonably dictates. Suggested best practice requires prior written approval by the direct supervisor for receipt or offer of gifts, with consideration of the aggregate amount of gifts or promotional expenses provided to or received from the public official in the recent past.[55] A company should not only accurately record in a transparent manner any gifts or other benefits provided or received, but also gifts offered but not accepted.[56]

Charitable and political donations should also be addressed in the compliance program. The company may wish to set out various approval levels; for example, greater donations might require approval from a more senior individual within the company. Public disclosure is suggested for both charitable and political donations (unless secrecy or confidentiality is legally required under local law).[57] Any political donations must be carried out in accordance with applicable laws, which vary greatly from jurisdiction to jurisdiction. Preliminary checks are suggested for charitable donations to ensure the charity is legitimate and not affiliated with public officials with whom the company deals.[58] Suggested minimum standards for charitable donations include:

- All contributions must be approved by senior management, with evidence provided of the nature and scope of the individual contribution.
- The beneficiary must show that it has all relevant certifications and has satisfied all requirements for operating in compliance with applicable laws.
- An adequate due diligence review on the beneficiary entity must be carried out.

[53] UNCAC, *supra* note 18, art 12.3.
[54] World Bank, *supra* note 29, s 6.1.
[55] Giavazzi, Cottone & De Rosa, *supra* note 52 at 151.
[56] *Ibid.*
[57] Transparency International, *supra* note 26 at 5.3.2 & 5.4.2.
[58] Giavazzi, Cottone & De Rosa, *supra* note 52 at 159.

- Contributions shall be made only in favor of well-known, reliable entities with outstanding reputations for honesty and correct business practices, and which have not been recently incorporated.
- There should be no donations to charities "suggested" by a public official and no donations to charities controlled by public officials.
- Contributions must be properly and transparently recorded in the company's books and records.
- The beneficiary entity shall guarantee that contributions received are recorded properly and transparently in its own books and records.[59]

The compliance program must also address contracts for services and procurement policies. Contracts should include "express contractual obligations, remedies, and/or penalties in relation to misconduct."[60] Additionally, various approval levels may be needed for contracts with third parties depending on the size or nature of the contract. Higher risk areas or contracts for large amounts should normally require more approvals than standard low-value contracts. Project financing should normally require additional safeguards to ensure that all applicable laws are complied with.

Conflicts of interest should be addressed by the compliance program:

> The enterprise should establish policies and procedures to identify, monitor and manage conflicts of interest which may give rise to a risk of bribery – actual, potential or perceived. These policies and procedures should apply to directors, officers, employees and contracted parties such as agents, lobbyists and other intermediaries.[61]

Human resource policies and practices, concerning hiring, remuneration, and incentivizing employees need to be considered as an aspect of the compliance program. It is particularly important to include a policy that "no employee will suffer demotion, penalty, or other adverse consequences for refusing to pay bribes even if such refusal may result in the enterprise losing business."[62]

**(4) Incentivizing and promoting compliance**

Compliance with anti-corruption programs should be adequately incentivized and promoted in order to ensure that employees are more likely than not to avoid corrupt transactions. Employees carrying out compliance functions with a high degree of diligence should be recognized, and employees reporting policy breaches should be rewarded.[63] As part of the compliance culture, human resource departments should encourage ethical

[59] *Ibid* at 159-160.
[60] World Bank, *supra* note 29, s 6.2.
[61] Transparency International, *supra* note 26 at 5.1.
[62] *Ibid* at 6.3.3.
[63] World Bank, *supra* note 29, s 8.1; US DOJ, *supra* note 41 at 12, 2(c).

hiring and promotion techniques and measures.[64] This area requires careful implementation because incentivizing employees often results in adverse effects for anti-corruption (e.g., rewards for high sales or punishment for low sales may incentivize employees to reach sales targets, regardless of the means employed). Companies should ensure that they are complying with local law in structuring their incentive schemes. They also should test their program to ensure that it does not promote corrupt behaviour.

Discipline for non-compliance is equally essential to a comprehensive compliance program. To demonstrate a compliance program has 'teeth,' there should be discipline for non-compliance, which is proportionate with the misconduct, including the possibility of termination.[65] Misconduct at all levels of the company (including officers and directors) must be met by appropriate measures, and discipline should be enforced consistently across the organization, and seen to be enforced.[66]

**(5) Detecting, reporting, and investigating violations**

A compliance program is more effective if it also works to detect and report violations. Employees will not be properly incentivized to stop their corrupt behaviour if an organization is not actively seeking to detect violations. As corrupt individuals will be able to find a way around any scheme, the compliance program must include active detection and reporting of violations to deter engagement in corrupt practices.

Compliance advice should be available to employees, and mechanisms should be put in place to allow employees and business partners to seek preliminary consultation as to whether certain practices conform with the policies.

An effective compliance program includes measures to encourage employees to report potential violations of policy, and ensures they feel able to report repercussions without reprisals. Confidential reporting and independent, effective investigation processes are essential. Employees must be confident in anonymous reporting mechanisms as well as the ability of the organization to protect them from retaliation.[67] All reported misconduct and violations of the compliance program should be investigated.[68] Investigations of compliance breaches should be conducted in an independent, timely and objective manner, by personnel with relevant experience to ensure they are properly scoped and pursued. They must also be conducted throughout the company, including at management and executive levels, and consider systemic issues and root causes in its analysis, while making recommendations at all levels.[69]

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[64] World Bank, *supra* note 29, s 2; International Chamber of Commerce, *supra* note 32, art 8; Transparency International, *supra* note 26, s 6.3.1; World Economic Forum Partnering against Corruption Initiative, *supra* note 31, s 5.3.1.

[65] World Bank, *supra* note 29, s 8.2; OECD, *supra* note 28, s 10.

[66] World Bank, *supra* note 29, s 8.2.

[67] Transparency International, *supra* note 29, s 6.5.1; World Economic Forum Partnering against Corruption Initiative, *supra* note 31, s 5.5.2; World Bank, *supra* note 29, s 9.3.

[68] World Bank, *supra* note 29, s 10.1.

[69] World Bank, *supra* note 29, s 8.2.

**(6) Continual testing and improvement**

Compliance programs should evolve with companies and their work environments. Without continually testing the program for effectiveness and improving any weaknesses, a company's compliance program can quickly become outdated. For example, the use of technology and the Internet has completely changed what an effective compliance program should look like. Additionally, the company's area of business may change and require new mechanisms for preventing, detecting, and reporting corrupt acts.

An anti-corruption compliance program may be evaluated in two ways: (1) the suitability of the program design and (2) the operational effectiveness of the controls in place.[70] External counsel may have to undertake more due diligence when performing tests of a compliance system, since they may be less aware of the actual operating practices of the company. External counsel may also be accused of trying to gold plate compliance systems by making them more complex than necessary. On the other hand, internal counsel must be aware of the problem of cognitive dissonance and its tendency to promote assumptions that the status quo is effective.

### 3.1.4 TI's *Assurance Framework*

In 2012, TI published an *Assurance Framework* aimed at assisting enterprises in receiving "independent assurance of their anti-bribery programmes."[71] In its guidelines on the *Bribery Act 2010*, the UK Ministry of Justice recommends the use of external verification or independent assurance to achieve the measures necessary to prevent bribery.[72] Independent assurance, defined by the AA1000 Assurance Standard 2008, is

> the methods and processes employed by an assurance practitioner to evaluate an organization's public disclosures about its performance as well as underlying systems, data and processes against suitable criteria and standards in order to increase the results of the assurance process in an assurance statement credibility of public disclosure.[73]

Benefits of conducting independent assurance of anti-corruption compliance programs include the following:

- Strengthening its programme by identifying areas for improvement;
- Providing confidence to the board and management of the adequacy of its anti-bribery programme;

[70] Jermyn Brooks, Susan Côté-Freeman & Peter Wilkinson, *Assurance Framework for Corporate Anti-Bribery Programmes*, (Transparency International, 2012) at 9.
[71] *Ibid* at 5.
[72] 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 31.
[73] Brooks, Côté-Freeman & Wilkinson, *supra* note 70 at 6.

- Increasing the credibility of its public reporting on its anti-bribery programme;
- Maintaining and/or enhancing its reputation as an enterprise committed to high standards of integrity and transparency;
- Contributing to a case for mitigation of sentencing in the event of a bribery incident in jurisdictions where this applies;
- Helping restore market confidence following the discovery of a bribery incident; and
- Meeting any future pre-qualification requirements.[74]

Lawyers may serve as assurance practitioners to oversee the assurance process. In this capacity, they are able to test and review the effectiveness of the anti-corruption compliance program and assist the company in identifying any risks that still need addressing.

## 3.2 US Framework

### 3.2.1 *FCPA*

The *Foreign Corrupt Practices Act* (*FCPA*) does not explicitly require companies to have an anti-corruption compliance program. Even though there is no affirmative defense for having an active and effective anti-corruption compliance program under the *FCPA*, enforcement agencies consider compliance programs to be a necessary mechanism and, as explained more fully in Chapter 6, Section 6.1.5.2 and Chapter 7, Section 6, will treat companies that follow a reasonable compliance program far more leniently.

### 3.2.2 Guidelines and Interpretation

The DOJ often sets specific requirements for compliance programs in companies that have agreed to a resolution under the *FCPA*. These resolutions provide further illustration as to what the DOJ considers reasonable standards for company compliance. Concerning DPAs and NPAs,[75] the DOJ has stated:

> DPAs and NPAs benefit the public and industries by providing guidance on what constitutes improper conduct.… Because the agreements typically provide a recitation of the improper conduct at issue, the agreements can serve as an educational tool for other companies in a particular industry.[76]

[74] *Ibid* at 7.
[75] DPA refers to deferred prosecution agreement. NPA refers to non-prosecution agreement.
[76] Koehler, *supra* note 14 at 313. For more information on the use of DPAs and NPAs, see: US Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* (GA-10-110) (US Government Accountability Office, 2009).

Though these settlement agreements are related to potential *FCPA* charges against specific companies, they can, however, be useful in tailoring a compliance program to the specific needs of other organizations and to keep them abreast of new DOJ requirements.

SEC enforcement orders provide another resource for companies charged under the *FCPA*. These orders indicate areas of a business or industry where the SEC has pursued charges in the past and may continue to do so in the future. For example, in 2014 Avon Products Inc. (Avon) was charged with violating the *FCPA* because it failed to implement controls to prevent and detect bribe payments in the form of gifts at its Chinese subsidiary.[77] In addition to a $135 million fine for SEC violations and criminal charges, Avon was required to have its compliance program reviewed by an independent compliance monitor for 18 months and self-report on its compliance efforts for an additional 18 months.[78] In September 2016, Och-Ziff Capital Management Group agreed to a nearly $200 million settlement with the SEC for paying bribes to secure mining rights and corruptly influencing public officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo.[79] The SEC order found that Och-Ziff failed, in particular, to devise and maintain an adequate system of internal controls to prevent corrupt payments to foreign government officials.[80] As part of the settlement, Och-Ziff agreed to implement enhanced internal accounting controls and policies, designate a Chief Compliance Officer who, for a period of five years, would not simultaneously hold any other officer position at Och-Ziff, and to retain an independent monitor for a period of no less than 36 month.[81] The SEC's enforcement actions against Avon and Och-Ziff speak to the importance of implementing an effective compliance program.

### 3.2.3 DOJ and SEC *Resource Guide*

The DOJ and SEC view a corporate compliance program as essential to ensuring compliance with the *FCPA*, as the program will assist in detection and prevention of violations. The DOJ and SEC have recently updated and expanded their *A Resource Guide to the US Foreign Corrupt Practices Act* (*Resource Guide*),[82] released in 2012, to assist organizations in their compliance with the *FCPA*. The *Resource Guide* provides information for all sizes and types of businesses on implementing effective anti-corruption programs within their organization.

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[77] US Securities Exchange Commission, Press Release, 2014-285, "SEC Charges Avon with *FCPA* Violations" (17 December 2014), online: <http://www.sec.gov/news/pressrelease/2014-285.html>.
[78] *Ibid*.
[79] US Securities and Exchange Commission, Press Release, 2016-203, "Och-Ziff Hedge Fund Settles FCPA Charges" (29 September 2016), online: <https://www.sec.gov/news/pressrelease/2016-203.html>.
[80] US Securities and Exchange Commission, *Order Instituting Administrative and Cease-and-Desist Proceedings pursuant to Section 21C of the Securities Exchange Act of 1934, and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order, and Notice of Hearing* (Administrative Proceeding File No. 3-17595), at 5, online (pdf): <https://www.sec.gov/litigation/admin/2016/34-78989.pdf>.
[81] *Ibid* at 32-33, 36-44.
[82] US, Department of Justice & Securities Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed (US Government Printing Office, 2020) [DJSEC Resource Guide (2020)], online (pdf): <https://fcpablog.com/wp-content/uploads/2020/07/fcpa-guide-2020_final.pdf>.

New sections added in the updated *Resource Guide* focus on the development and implementation of compliance programs, including:

- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review, Investigation, Analysis
- Investigation, Analysis, and Remediation of Misconduct
- Evaluation of Corporate Compliance Programs
- Other Guidance on Compliance and International Best Practices.

The *Resource Guide* also indicates that companies with adequate compliance programs will fare better even if they, despite their compliance program, somehow violate the *FCPA*. The implementation and enforcement of an adequate compliance program is a major factor in encouraging the DOJ and SEC to resolve charges through a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).[83] As noted, having an effective compliance program will also influence (1) whether a DPA or NPA is made, (2) the terms of the corporate probation and (3) the amount of the fine.[84] The DOJ and SEC look for three basic requirements when evaluating a compliance program: (1) effective design of the program (2) good faith application of the program (including with respect to adequate resourcing), and (3) actual effectiveness in practice.[85] At the time of sentencing, a culpability score is assigned to the company.[86] This score is multiplied against the original fine determination and can reduce the fine to 5% of the original fine or increase it by four times the original fine. One aspect for determining the culpability score is the organization's compliance program (see Chapter 7, Sections 4.5 and 4.6).

According to the *Resource Guide*, "effective compliance programs are tailored to the company's specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change."[87] When implemented throughout the entire organization, a program that is carefully calculated to address the specific risks faced by the business will help "prevent, detect, remediate, and report misconduct, including *FCPA* violations."[88] The *Resource Guide* stresses the importance of tailoring the compliance program to fit the needs of the organization:

> One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to

[83] *Ibid* at 57.
[84] *Ibid* at 57.
[85] *Ibid* at 57.
[86] *Ibid* at 70.
[87] *Ibid* at 56.
[88] *Ibid* at 57.

> resellers and distributors may indicate that a company's compliance program is ineffective.[89]

Implementing an effective compliance program requires an assessment of the types of risks a company faces and an analysis of the best use of compliance dollars to prevent corruption in the organization. The *Resource Guide* stresses the importance of the following aspects in an effective compliance program:

- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advice
- Incentives and Disciplinary Measures
- Third Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration
- Investigation, Analysis, and Remediation of Misconduct.[90]

Additionally, the *Resource Guide* alerts companies to the international organizations' guidelines previously discussed.

#### 3.2.4 DOJ Evaluation of Corporate Compliance Programs

In April 2019, the DOJ released an updated document to assist prosecutors in making informed decisions as to whether an organization's compliance program was effective at the time of the offense and/or at the time of a charging decision/resolution. The document will assist the prosecution in determining the appropriate course of action, which could include prosecution, monetary penalties, or compliance obligations to be included in a corporate criminal resolution. The document also details three fundamental questions a prosecutor must ask when evaluating an organization:

1) Is the corporation's compliance program well designed?
2) Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively? and
3) "Does the corporation's compliance program work" in practice?

[89] *Ibid* at 60.
[90] *Ibid* at 58-67.

The document goes on to list various factors to be considered under each question, including training, communication, policies and procedures, risk management programs, and more.[91]

### 3.2.5 DOJ *Sentencing Guidelines*

The US Sentencing Commission's *Guidelines Manual* (the *Guidelines*) set out seven minimum standards for complying with due diligence requirements and promoting an ethical organizational culture. As these are the DOJ's own guidelines and not legislation or regulations, they are not binding; however, the DOJ frowns upon deviation from these guidelines absent a very good reason to do so. The *Guidelines* specify that the organizations must:

- establish standards and procedures to prevent and detect criminal conduct;
- ensure that the compliance program is coming from the top down throughout the organization;
- make reasonable efforts to ensure that personnel with substantial authority are not known to have engaged in illegal activities;
- make reasonable efforts to communicate standards and procedures to personnel with substantial authority and the governing body;
- take reasonable steps to monitor compliance with the program and audit the program for effectiveness;
- promote and enforce the program throughout the organization and appropriately incentivize compliance; and
- respond appropriately when criminal conduct is detected, including making any necessary modifications to the compliance program.[92]

The *Guidelines* are a starting point for organizations to determine what is required for an adequate compliance program, including: (i) industry practice and government regulation (ii) an organization's size, and (iii) similar misconduct.[93] The *Guidelines* were created to guide prosecutors in seeking the appropriate punishment for corporations, and have become an important benchmark for US corporations in crafting corporate governance standards and avoiding prosecution. These guidelines constitute a minimum requirement and thus do not necessarily reflect best practices. More information about these guidelines can be found in Chapter 7, Section 4.

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[91] US Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (updated June 2020), online: <https://www.justice.gov/criminal-fraud/page/file/937501/download>.
[92] United States Sentencing Commission, *Guidelines Manual* (2016), c 8, §8B2.1, online: <http://www.ussc.gov/guidelines/2016-guidelines-manual>.
[93] *Ibid*, c 8, Commentary to §8B2.1, para 4(B).

## 3.3 UK Framework

### 3.3.1 *Bribery Act 2010*

Section 7(1) of the *Bribery Act* creates a strict liability offence if an organization fails to prevent bribery by a person associated with it, while section 7(2) provides a complete defence to this offence if the organization has "adequate procedures" in place. Section 7 provides:

> (1) A relevant commercial organization (C) is guilty of an offence under this section if a person associated (A) 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.
>
> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.[94]

Under section 7, "businesses who fail to have adequate procedures in place and whose 'associated persons' commit bribery are at risk of being prosecuted."[95] The effect of this provision is that anti-bribery compliance programs are mandatory for all "relevant commercial organizations" if they want to avoid liability for bribery offences committed by persons associated with the organization. Section 9 of the *Bribery Act* requires the Secretary of State to "publish guidance about procedures that relevant commercial organizations can put in place to prevent persons associated with them from committing bribery."[96] The guidelines were published in April 2011.

In December 2016, Sweett Group PLC pleaded guilty to failing to prevent an act of bribery committed by its subsidiary, Cyril Sweett International Limited, in order to secure a contract with Al Ain Ahlia Insurance Company (AAAI) for the building of the Rotana Hotel in Abu Dhabi.[97] In February 2016, Sweett Group PLC was sentenced and ordered to pay £2.25 million, thus becoming the first company to be fined under section 7 of the *Bribery Act*.[98] The SFO's successful prosecution of Sweett Group speaks to the importance of implementing an adequate anti-corruption compliance program.

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[94] *Bribery Act 2010* (UK), c 23, s 7.

[95] Colin Nicholls et al, *Corruption and Misuse of Public Office*, 3rd ed (New York: Oxford University Press, 2017) at 78-79.

[96] *Bribery Act, supra* note 94, s 9.

[97] UK Serious Fraud Office, News Release, "Sweett Group PLC pleads guilty to bribery offence" (18 December 2015), online: *SFO News Releases* <https://www.sfo.gov.uk/2015/12/18/sweett-group-plc-pleads-guilty-to-bribery-offence/>.

[98] UK Serious Fraud Office, News Release, "Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction" (19 February 2016), online: *SFO News Releases* <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>.

### 3.3.2 Guidelines and Interpretation

UK case law provides insight on the interpretation of the phrase "carries on business" in section 7. The courts have found that a singular transaction, if essential to the carrying on of business or carried out in the course of business, can constitute carrying on business under section 7.[99] The courts have also found a business is carried on in the case of a company engaged only in collecting debts owed and paying off creditors.[100]

On March 30, 2011, the Ministry of Justice (MOJ) published statutory *Guidance*, which came into force on July 1, 2011.[101] On the same day, the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) published the *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP* (*Joint Prosecution Guidance*) to ensure consistency in prosecutions.[102]

### 3.3.3 *Bribery Act 2010*: *Guidance*

The MOJ *Guidance* provides insight into the objectives of the *Bribery Act 2010*, particularly in regard to section 7:

> The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.[103]

The MOJ *Guidance* sets out six principles to inform the evaluation of a company's compliance program: (1) proportionate procedures (2) top level commitment (3) risk assessment (4) due diligence (5) communication, and (6) monitoring and review.[104] The principles are intended to focus on the outcome of preventing bribery and corruption and should be applied flexibly, as commercial organizations encounter a wide variety of circumstances that place them at risk.[105]

**(1) Proportionate Procedures**

This principle requires that the organization's anti-bribery procedures be proportionate to the bribery risks the organization faces and proportionate to the "nature, scale and complexity of the commercial organization's activities."[106] The use of the term "procedure"

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[99] *Morphitis v Bernasconi*, [2003] EWCA Civ 289 at paras 42-49, [2003] 2 WLR 1521.
[100] *Re Sarflax Ltd* [1979] Ch 592 (Ch D) 993, 1 All ER 529.
[101] UK Min J Guidance (2012), *supra* note 72.
[102] Nicholls et al, *supra* note 95 at 130.
[103] UK Min J Guidance (2012), *supra* note 72 at 8.
[104] *Ibid* at 20.
[105] *Ibid*.
[106] *Ibid* at 21.

encompasses both the organization's policies and the implementing procedures for those policies. The level of risk the organization faces may be affected by factors such as the size of the organization, and the type and nature of the persons associated with it.[107] In the commentary to the *Guidance*, the MOJ suggests topics that will normally be included in anti-bribery policies, as well as procedures that could be implemented to prevent bribery.

**(2) Top Level Commitment**

This principle requires commitment by the board of directors or equal top-level management of the organization to the prevention of bribery by persons within or working with their organization.[108] It also states that top-level management should "foster a culture within the organization in which bribery is never acceptable."[109]

**(3) Risk Assessment**

This principle requires the organization to conduct periodic assessments of the internal and external risks that the organization faces.[110] These assessments should be informed and documented.[111] Risk assessments will be discussed more fully in Section 4.

**(4) Due Diligence**

This principle requires the organization to apply appropriate due diligence procedures when its employees and agents are performing services for or on behalf of the organization.[112] Due diligence will be discussed more fully later in Section 5.

**(5) Communication (including training)**

This principle requires the organization to ensure that its anti-corruption policies and procedures are known and understood throughout the organization.[113] Internal and external communications and training are required.[114] External communications are suggested in order to assure people outside the organization of the organization's commitment to compliance with anti-bribery laws, as well as to discourage people intending to engage in bribery from approaching the organization.[115] Training is necessary to inform employees of what bribery is and should be tailored to the risks involved in the employee's position.[116]

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[107] *Ibid*.
[108] *Ibid* at 23.
[109] *Ibid*.
[110] *Ibid* at 25.
[111] *Ibid*.
[112] *Ibid* at 27.
[113] *Ibid* at 29.
[114] *Ibid*.
[115] *Ibid* at 29-30.
[116] *Ibid* at 30.

**(6) Monitoring and Review**

This principle requires the organization to monitor and review its procedures so that it can make any necessary changes.[117] The MOJ *Guidance* suggests that organizations may want to involve external verification or assurance of the effectiveness of their compliance procedures.[118]

### 3.3.4 *Bribery Act 2010*: *Joint Prosecution Guidance*

The SFO and the CPS developed the *Joint Prosecution Guidance* to ensure consistent enforcement of the *Act* across jurisdictions. The *Joint Prosecution Guidance* sets out factors that weigh against or in favour of prosecution. For example, prosecution will be favoured if a company has "clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed."[119] Non-prosecution will be favoured if these same procedures and policies have been followed.[120]

The *Joint Prosecution Guidance* addresses defences to section 7 offences. The defendant organization must show the existence of adequate procedures on a balance of probabilities. The courts will consider the adequacy of a company's procedures on a case-by-case basis because adequate procedures are entirely dependent on the risks faced by and the nature and size of each company. Prosecutors are required to take into account the MOJ *Guidance* when assessing whether the organization's anti-corruption procedures are adequate.

### 3.3.5 *Bribery Act 2010*: *SFO Operational Handbook*

In January 2020, the SFO published new guidance on how it assesses the effectiveness of compliance programs. There are various stages where the SFO will review a company's compliance, including at the time of the alleged offending, when a decision is being made on whether to charge the company, and in the future when introducing and maintaining an effective compliance program.

When assessing the effectiveness of an organization's compliance program, the SFO will attempt to answer the following questions:

1) If the prosecution is in the public interest;
2) If the organization should be invited into DPA negotiations, and if so, what conditions should be included;
3) If the organization has a defence of "adequate procedures" against a charge under section 7 of the *Bribery Act*; and

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[117] *Ibid* at 31.
[118] *Ibid*.
[119] UK, *Bribery Act 2010: Joint prosecution guidance of the Director of the Serious Fraud Office and Director of Public Prosecutions* (London: Her Majesty's Stationary Office, 2011) at 9.
[120] *Ibid*.

4) If the existence and nature of the compliance programme is a relevant factor for sentencing considerations.

The guidance goes into detail on the six principles laid out in the former, 2011 guidance, including the importance of proportionate procedures, top-level commitment, risk assessment, due diligence, communication and training and monitoring and review.[121]

## 3.4 Canadian Framework

### 3.4.1 *CFPOA*

The *Corruption of Foreign Public Officials Act* (*CFPOA*) does not create a legal requirement for organizations to implement an anti-corruption compliance program. Nevertheless, many organizations are looking for guidance from the government on how to comply with the *CFPOA*.[122] The Canadian government's guidance on the *CFPOA* is, however, brief and general, and does not address the creation of adequate compliance programs.[123] Unlike the US and UK, there is no meaningful prosecutorial guidance on either the content or prosecutorial impact of reasonable anti-corruption compliance programs (see Chapter 6, Section 6.3). At this time, Canadian companies have to rely on the courts' interpretation of the legislation in order to determine Canadian standards for implementing effective anti-corruption programs. However, to date, there is only one case (*Niko Resources*) where a Canadian court has indicated what a reasonable compliance program would look like for a mining company carrying on business in Bangladesh.

Global Compact Network Canada has published a resource guide for Canadian businesses on designing anti-corruption compliance programs.[124] The document sets out a list of "requirements" for business, developed through a review of relevant government documents, judicial cases, and other resources, both Canadian and American.[125]

The requirements include board level oversight and senior-level personnel assigned for oversight and implementation of anti-corruption programs. To ensure the effectiveness of these requirements, the relevant compliance officers must be senior members of the organization, independent, and well resourced.[126]

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[121] Serious Fraud Office, *SFO Operational Handbook: Evaluating a Compliance Programme* (2020), online (pdf): <https://www.willkie.com/-/media/pwa/articles/latest-attachments/2-2020/01-january/20200123-sfo-handbook-compliance-programme-guide.pdf>.
[122] Norm Keith, *Canadian Anti-Corruption Law and Compliance*, 2nd ed (Toronto: LexisNexis, 2017) at 268.
[123] Department of Justice, *The Corruption of Foreign Public Officials Act: A Guide* (Ottawa: Department of Justice, 1999), online (pdf): <http://publications.gc.ca/collections/Collection/J2-161-1999E.pdf>.
[124] Global Compact Network Canada, "Designing an anti-corruption compliance program", online (pdf): <https://globalcompact.ca/designing-an-anti-corruption-compliance-program-a-guide-for-canadian-businesses/>. *please note: the link to these chapters are currently broken. They may be repaired in the future*
[125] *Ibid* at 22.
[126] *Ibid* at 22-25.

### 3.4.2 Judicial Guidance

In 2011, Niko Resources Ltd. was charged with bribery under the *CFPOA* after a six-year investigation. The company pled guilty, was fined CDN$9.5 million, placed on probation for three years, and required to undertake independent audits and undergo court supervision. In its probation order, the Alberta Court of Queen's Bench worked with the US DOJ in drafting the terms of the probation order, particularly the compliance program requirements. It provides some guidance on how Canadian courts may view an effective anti-corruption compliance program. Although it is a trial level decision and therefore has limited binding effect, courts will examine the decision in the future when deciding what constitutes an adequate anti-corruption compliance program. Clearly, the Court in *Niko Resources* relied to some degree on US standards for compliance programs, as it adopted terminology found in US DPAs in relation to compliance programs. The Alberta Court of Queen's Bench required the following from Niko Resources as part of its probation order:

- internal accounting controls for maintaining fair and accurate books and records;
- a rigorous anti-corruption compliance code designed to detect and deter violations of *CFPOA* and other anti-corruption laws, which includes:
  - a clearly articulated written policy against violations of the *CFPOA* and other anti-bribery laws;
  - strong, explicit and visible support from senior management;
  - compliance standards and procedures that apply to all directors, officers, employees, and outside parties acting on behalf of the company; and
  - policies governing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments and solicitation and extortion.
- conducting risk assessment in order to develop these standards and procedures based on specific bribery risks facing the company and taking into account a number of specified factors, including the company's geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, and involvement in joint venture agreements;
- reviewing and updating anti-corruption compliance measures at least annually;
- assigning anti-corruption compliance responsibility to senior corporate executive(s) with direct reporting to independent monitoring bodies, such as internal audit or the Board of Directors;

- a system of financial and accounting procedures designed to ensure fair and accurate books and records and that they cannot be used to effect or conceal bribery;
- periodic training and annual certification of directors, officers employees, agents and business partners;
- systems for providing anti-corruption guidance and advice within the company and to business partners, confidential reporting of possible contraventions, protection against retaliation, and responding to reports and taking appropriate action;
- disciplinary procedures for violations of anti-corruption laws and policies;
- due diligence and compliance requirements for the retention and oversight of agents and business partners, including the documentation of such due diligence, ensuring they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments;
- standard provisions in agreements with agents and business partners to prevent anti-corruption violations – representations and undertakings, the right to audit books and records of agents and business partners, and termination rights in the event of any breach of anti-corruption law or policy; and
- periodic review and testing of anti-corruption compliance systems.[127]

In early 2015, SNC-Lavalin and two of its subsidiaries, SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. were each charged with one count of corruption under section 3(1)(b) of the *CFPOA* and one count of fraud under section 380(1)(a) of the *Criminal Code*. These charges arose out of its 2001-2011 dealings in Libya during the reign of the Gaddafi regime.

In late 2019, SNC-Lavalin Construction Inc. pled guilty to the section 280(1) *Criminal Code* charge. As part of the plea arrangement, the remainder of the charges against it and the other SNC-Lavalin entries were dropped and a Probation Order including requirements for anti-corruption compliance measures was imposed. The Probation Order was effective for three years from the date of its issuance (December 18, 2019),

Although the guilty plea and conviction was in respect of fraud under section 380 of the *Criminal Cod*e rather than an offence under *CFPOA*, the conditions of the Probation Order mirror those in *Niko Resources*, discussed previously. This is an indication that the approach followed by the Crown in *Niko Resources* almost a decade ago, in consultation with the US authorities, remains highly relevant today. The Niko Resources and SNC-Lavalin orders together provide helpful guidance for companies on the expectations of Canadian

[127] John Boscariol, "A Deeper Dive Into Canada's First Significant Foreign Bribery Case: *Niko Resources Ltd*", Case Comment (2011), online: *McCarthy Tetrault* <http://mccarthy.ca/article_detail.aspx?id=5640>.

enforcement authorities regarding appropriate measures for compliance with anti-corruption laws.

The Probation Order requires, among other things, the following key internal controls and procedures:

- reviews of the company's existing internal controls, policies and procedures on a no less than annual basis, with updates as appropriate;
- a system of internal financial and accounting controls and procedures sufficient to keep fair and accurate books, records and accounts to ensure that bribery is not concealed;
- a rigorous anti-corruption compliance code, standards and procedures to detect and deter violations of anti-corruption laws covering both the company's personnel and its business partners (agents, intermediaries, consultants, and other representatives) involved in sales, business development, marketing or other customer interfaces, or government relations, and governing:
    - gifts, hospitality, entertainment and expenses;
    - customer travel;
    - political contributions;
    - charitable donations and sponsorships;
    - facilitation payments; and
    - solicitation and extortion;
- conducting risk assessments in order to develop anti-corruption standards and procedures based on specific bribery risks facing the company and taking into account a number of factors, including:
    - geographical organization;
    - interactions with various types and levels of government officials;
    - industrial sectors of operation;
    - involvement in joint venture agreements;
    - importance of licenses and permits in its operations;
    - degree of governmental oversight and inspection; and
    - volume and importance of goods and personnel clearing through customs and immigration.
- mechanisms to ensure effective communication of the company's anti-corruption policies, standards and procedures to all directors, officers, employees, agents and business partners, including periodic training and annual certifications;

- providing guidance and advice to directors, officers, employees, agents and business partners on anti-corruption compliance, including urgent advice and advice in foreign jurisdictions;
- system of confidential reporting and protection against retaliation for reporting;
- effective oversight of agents and business partners, including proper documentation of risk-based due diligence on retention and oversight of these third parties, as well as measures to ensure they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments;
- standard provisions in agreements with agents and business partners to prevent violations of the anti-corruption laws, including anti-corruption representations and undertakings, rights to conduct audits of books and records, and termination rights in the event of any breach of anti-corruption law or policy; and
- periodic review and testing of anti-corruption compliance code, systems and procedures designed to evaluate and improve their effectiveness, taking into account relevant developments.[128]

In addition, the Probation Order requires the appointment of an independent monitor, at SNC-Lavalin Construction Inc.'s expense, who is required to report on the company's compliance and remediation progress during the three-year period of the Probation Order.

In other cases involving offences under the *CFPOA*, Canadian courts have not imposed corporate compliance programs as part of their sentences. The best guidelines for Canadian companies in relation to adequate compliance programs are found in Niko and in the SNC Probation Order. However, it is unclear how compliance programs will impact prosecutorial decisions and sentence mitigation. For more information about Canadian cases involving the *CFPOA*, see Chapter 7, Section 6.

#### 3.4.3 Remediation Agreement Regime

In 2018, Canada amended the *Criminal Code* to provide for a process whereby a corporation may be able to avoid prosecution for certain economic crimes, including bribery and accounting offences under *CFPOA*, by entering a remediation agreement (RA), which is broadly similar to the deferred prosecution agreements available in other jurisdictions.

A prosecutor may enter into negotiations for an RA if:

- there is a reasonable prospect of conviction for the alleged offence;
- the alleged offence is one for which an RA may be negotiated; and

[128] John Boscariol, Andrew Matheson & Oksana Migitko, "SNC-Lavalin Probation Order Sets Out Key Anti-Corruption Compliance Measures," Case Comment (2020), online: *McCarthy Tetrault* <https://www.mccarthy.ca/en/insights/blogs/terms-trade/snc-lavalin-probation-order-sets-out-key-anti-corruption-compliance-measures>.

- it is in the public interest and appropriate in the circumstances to issue an invitation to negotiate an RA, rather than proceed with a traditional prosecution.[129]

A full law enforcement investigation must be undertaken in order to assess whether the threshold of a reasonable prospect of conviction has been met. In particular, internal or private investigations are not sufficient.[130]

Certain mandatory clauses are required in an RA, including:

- a statement of facts and undertaking by the organization not to make or condone any public statement contradicting those facts;
- the organization's admission of responsibility;
- disclosure obligations in respect of related wrongdoings and persons involved;
- an obligation to cooperate in investigations and prosecutions in Canada, or elsewhere if the prosecutor "considers it appropriate";
- a deadline to meet the terms of the agreement;
- sanctions, including a non-tax-deductible penalty, a victim surcharge equivalent to 30% of the penalty (inapplicable in respect of foreign corruption offences), forfeiture of any property, benefit, or advantage obtained directly or indirectly from the commission of the offence, and reparations to victims, if applicable;
- an indication of the use that can be made of information obtained as a result of the agreement; and
- notice of the prosecutor's right to vary or terminate the agreement with the approval of the court.[131]

In addition, the RA may contain optional clauses requiring the organization to implement or improve compliance measures, the reimbursement of costs incurred by the prosecutor in administering the RA, and/or the appointment of an independent monitor to report on the performance of the RA.[132]

As Canada has not yet entered into any RAs, the precise implementation of these requirements and structure of an RA in practice remain unclear.

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[129] *Criminal Code*, RSC 1985 c C-46, ss 715.32 (1)-(3); Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook: Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act, Section 3.21 Remediation Agreements,* (23 January 2020), online: *Public Prosecution Service of Canada* <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html>.

[130] Public Prosecution Service of Canada, *supra* note 129.

[131] *Criminal Code*, *supra* note 129, s 715.34 (1).

[132] *Ibid*, s 715.34 (3).

### 3.4.4 Critiques of Compliance Programs

As guidelines and frameworks to prevent corruption are becoming more prevalent, there is criticism that increased enforcement is resulting in wasteful over-compliance. Instead of investing in efficient compliance programs, companies are implementing programs intended only to impress prosecutors.[133] US Senators Amy Klobuchar and Christopher Coons argue that over-compliance can negatively impact the economy through decreasing product development, export production, and expansion of the workforce.[134]

Another criticism is that the US's over enforcement of the *FCPA* has caused compliance fatigue:

> Rules and controls and training programs are essential in any organization but at some point, the burdens imposed by intricate matrices of rules, complete reporting and approval processes, and seemingly never-ending training requirements become a net drag on the business.... A system that is overly-controlled, that has passed its optimal point of compliance activities, will engender backlash and bewilderment from those who are being controlled. Managers and other employees will balk at the sclerotic network of rules and processes, and they won't – and in many instances may not be able to – comply. Rules and signoffs will be overlooked and training courses never taken.[135]

As governments seek compliance with their laws, attention must be directed to the question of whether laws and enforcement actions are having their intended effect: are they actually reducing the prevalence of global corruption? Continual analysis of the most effective ways to prevent corruption is required to ensure that governments are not using excessive enforcement orders to serve a political agenda. The United States' zealous enforcement practices under the *FCPA* may be achieving the opposite result than was intended; putting excessive pressure on companies to settle, through non-prosecution or deferred prosecution agreements, resulting in very little case law. This creates a state of legal uncertainty which, in turn, pressures companies to settle rather than pursue litigation. Maintaining an adversarial relationship between government and businesses may be counter-productive, as both need to work together to combat global corruption.[136]

A further problem with anti-corruption compliance programs is the issue of program design: the program designers tend to be "external to the context of deployment and use."[137] "Disciplinary externality" occurs when the designer is not the person who will be implementing the program and has a different work background than those who will be

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[133] Miriam Baer, "Insuring Corporate Crime" (2008) 83 Indiana LJ 1035 at 1036.
[134] Koehler, *supra* note 14 at 331.
[135] Mike Koehler, "Compliance Fatigue?" (19 July 2013), online (blog): *FCPA Professor* <https://fcpaprofessor.com/compliance-fatigue/>.
[136] Steven R Salbu, "Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense" (2018) 55:3 Am Bus LJ 475.
[137] Richard Heeks & Harald Mathisen, "Understanding success and failure of anti-corruption initiatives" (2012) 58 Crime L & Soc Change 533 at 543.

implementing the program.[138] Work background includes factors like the educational background, departmental culture and "language" spoken by the designer and implementer.[139] "Country externality" occurs when a program designer is from a different country than those implementing and using the program, and may result in incompatibility with the political, social, and economic conditions of the country of implementation.[140]

Finally, the over-emphasis on "transparency" may be ineffective. It is notable that transparency measures may lead to the diffusion of responsibility, where those disclosing their bias feel they are free to act on it once it has been disclosed. Further, a phenomenon called "moral licensing" may cause people to become more likely to act on their biases, as a director may use one 'good' act to justify increased bad behaviour. These two phenomena highlight the fact that transparency is not an end in itself. More follow-up work will need to be done following disclosures.[141]

## 4. RISK ASSESSMENTS

Risk assessments are premised on the concept that "[p]reventing and fighting corruption effectively, and proportionately, requires an understanding of the risks an enterprise may face."[142] Risk assessment is a necessary starting point for all anti-corruption compliance programs, as well as a way to review the success of an existing program and assess where changes are needed. Risk assessments examine an organization's exposure to internal and external risks of corruption and bribery.[143] An overview of risk areas allows the company to determine necessary compliance measures and target high-risk business sectors or countries. Robert Tarun and Peter Tomczak describe how organizations can use risk assessments as a tool:

> A risk assessment is designed to among other things evaluate the compliance roles and activities of the board of directors, the chief executive officer, chief financial officer, general counsel, and the internal audit staff and the company as a whole; review international operations and contracts, anti-corruption training, and due diligence in hiring and mergers and acquisitions; and then weigh the multinational company's country risks,

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[138] *Ibid*.
[139] *Ibid*.
[140] *Ibid*.
[141] Vera Cherepanova, "Uh oh. Transparency can cause more corporate crime" (14 January 2020), online (blog): *The FCPA Blog* <https://fcpablog.com/2020/01/14/uh-oh-transparency-can-cause-more-corporate-crime/>.
[142] United Nations Global Compact, Anti-Corruption Risk Assessment Taskforce, *A Guide for Anti-Corruption Risk Assessment*, (New York: UN Global Compact, 2013) at 10, online (pdf): <https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FAnti-Corruption%2FRiskAssessmentGuide.pdf>.
[143] UK Min J Guidance (2012), *supra* note 72 at 25.

> regional and/or in-country management weaknesses, and prior enforcement history issues.[144]

A risk assessment seeks to promote informed decision-making.[145] Effective risk assessments are seen to fulfill four goals:

> (1) Identify areas of business and activities that are at risk of corruption;
>
> (2) Evaluate and analyze the risks identified and prioritize all relevant risks of corruption;
>
> (3) Carry out a gap analysis of the current internal standard of procedures, systems, and controls; and
>
> (4) Undertake a root cause analysis of internal and external causes.[146]

Risk assessments not only provide the company with an overview of risks in order to prevent those risks from materializing, but also demonstrate to law enforcement personnel that the company is proactively seeking to comply with the law.[147] As with an anti-corruption compliance program, the nature and scope of the risk assessment should be proportionate to the size, activities, customers and markets of the organization. A risk assessment will help determine the scope and nature of the company's anti-corruption compliance program, ensuring that resources are allocated to major risk areas and spent where they produce the greatest benefit. As enforcement agencies do not look fondly on "cookie cutter" compliance programs or compliance programs that are only found on paper, it is important that any investments made in a compliance program produce effective results while consuming resources that match the benefit gained. Effective anti-corruption compliance programs require an up-to-date and accurate understanding of the risks the company encounters. Risk assessments should not be a one-time event; regular reviews should be made to ensure that resources are properly deployed to deal with evolving risks.[148] Not only does a corporation's business evolve, but the external environment evolves as governments and laws change. The OECD Recommendations provide guidance on the use of risk assessments for companies:

> Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as

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[144] 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) at 152-153.
[145] OECD, *supra* note 24 at 10.
[146] Giavazzi, Cottone & De Rosa, *supra* note 52 at 129.
[147] Jeffrey Harfenist & Saul Pilchen, "Anti-Corruption Risk Assessments: A Primer for General Counsels, Internal Auditors, and Other Compliance Personnel" (2010) 2 Fin Fraud LR 771 at 773.
[148] United Nations Global Compact, *supra* note 142.

necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.[149]

## 4.1 What Risk Areas Are Being Assessed?

According to the UK MOJ *Guidance*, there are ten types of risk that fall into two broad categories: external risk and internal risk. The external risks that should be assessed during the risk assessment are: country risk, sectoral risk, transaction risk, business opportunity risk, and business partnership risk.[150] Country risk is affected by such factors as government structure, the role of the media and whether the country has implemented and enforced effective anti-corruption legislation.[151] Sectoral risk recognizes that different sectors or industries are at a higher risk of corruption than others are. For example, corruption is more prevalent in extractive industries. Certain types of transactions also entail higher risks of corruption. Campaign donations and charitable donations are transactions that have traditionally been prone to corruption. Business opportunity risk is heightened when working with a multitude of contractors or intermediaries on projects that do not have clear objectives. Business partnership risk refers to the increased risk that comes with working with intermediaries or partners, especially when utilizing the connections they have. This risk is especially high when their connections are with prominent public officials. These external risks require risk assessments when companies engage in business in a new country or acquire another company. Risk assessments may also be appropriate prior to starting a large-scale project.

The UK MOJ has also identified a number of internal risk factors: (1) deficiencies in employee training, skills and knowledge (2) a bonus culture that rewards excessive risk taking (3) lack of clarity in policies on hospitality and promotional expenditures and political or charitable contributions (4) lack of clear financial controls, and (5) lack of a clear anti-bribery message from top-level management.[152] When conducting a risk assessment, these risks may be rated by their probability of occurrence and the potential impact if the risk were to come to fruition (this is called inherent risk). Companies should then assess the controls required to reduce these risks.

Tarun and Tomczak's *Foreign Corrupt Practices Act Handbook* outlines 15 key risk factors that should be considered in a risk assessment prior to the acquisition and merger of another company. These are:

(1) A presence in a BRIC country and other countries where corruption risk is high;

(2) An industry that has been the subject of recent anti-bribery or FCPA investigations;

[149] OECD, *supra* note 23 at Annex II.
[150] UK Min J Guidance (2012), *supra* note 72.
[151] For more information on countries' risks of corruption, see Transparency International's rating system.
[152] UK Min J Guidance (2012), *supra* note 72 at 26.

(3) Significant use of third party agents;

(4) Significant contracts with a foreign government or instrumentality;

(5) Significant revenue from a foreign government or instrumentality;

(6) Substantial projected revenue growth in a foreign country;

(7) High amount or frequency of claimed discounts, rebates, or refunds in a foreign country;

(8) Substantial system of regulatory approvals in a foreign country;

(9) History of prior government anti-bribery or FCPA investigations or prosecutions;

(10) Poor or no anti-bribery or FCPA training;

(11) Weak corporate compliance program and culture, in particular from legal, sales, and finance perspectives at the parent level or in foreign country operations;

(12) Significant issues in past FCPA audits;

(13) The degree of competition in the foreign country;

(14) Weak internal controls at the parent or in foreign country operations; and

(15) In-country managers who appear indifferent or uncommitted to US laws, the FCPA, and/or anti-bribery laws.[153]

The International Chamber of Commerce's guide on anti-corruption third party due diligence for small and medium-size enterprises considers the following five factors necessary in risk assessments:

(1) whether the third party is an entity owned or controlled by the government or a public official, or whether the third party will be interacting with public officials in order to perform the contract;

(2) the country the third party is based in and the country where the services are being performed;

(3) the industry the third party operates in;

(4) the value of the contract; and

(5) the nature of the work or services to be performed.[154]

[153] Tarun & Tomczak, *supra* note 144 at 199.

[154] International Chamber of Commerce, *ICC Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises,* Document 195-64 Rev2 (2015), at 8-9, online: <https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/>.

## 4.2 Conducting an Effective Risk Assessment

At its most basic, a risk assessment involves determining the risks a company is willing to live with, as elimination of all risks is impossible. It then involves valuing the risks faced by the company based on probability of occurrence and the consequences of the risk being realized. This process reveals a company's inherent risk. A risk assessment should then evaluate what actions can be taken to mitigate those risks, and the costs associated with doing so. The company will then consider the residual risk (inherent risk less the mitigated risk), which will likely never reach zero. If the company's residual risk is higher than the risk the company is willing to tolerate, the company will need to add additional protections or reconsider the protections it has in place.[155]

When assessing risks, companies should consult a variety of sources to ensure that risk areas are not overlooked. UNODC has suggested five ways to determine the risks a company faces.[156] The first is to determine the legal requirements applicable to the company's operations, remembering that highly bureaucratic processes entail greater risks of corruption, particularly with regard to bribery and/or facilitation payments.[157] Second, the company should consult with its internal and external stakeholders, such as employees and business partners.[158] These stakeholders are likely able to identify risks of corruption that may have been initially overlooked, and may provide valuable insight on ways to mitigate the risk. Third, the company should consider previous corruption cases to see where other companies failed or had weaknesses.[159] Fourthly, a company may wish to hire external consultants; these consultants can provide a fresh set of eyes and point out risks that have been overlooked by internal controls and reviews.[160] Lastly, companies should review risk assessment guidelines to incorporate best practices into their assessments.[161]

When assessing risks involving third parties, Ernst & Young advises that organizations understand the qualifications and associations of the third party, analyze the business rationale for including a third party, monitor all relationships with third parties once they begin, perform continual background investigations of new and existing third parties, and be alert about companies that have minimal public information.[162]

Companies may consider engaging external experts and consultants to conduct an effective risk assessment. For instance, TRACE International, a non-profit business association founded in 2001 by in-house anti-bribery compliance experts, provides its members with anti-bribery compliance support, and TRACE Incorporated offers risk-based due diligence,

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[155] For more information on conducting a risk assessment, see the *Anti-Corruption Ethics and Compliance Handbook for Business*, *supra* note 24, published by the OECD, UNODC and The World Bank.

[156] UNODC, *supra* note 13 at 10.

[157] *Ibid* at 10.

[158] *Ibid* at 11.

[159] *Ibid*.

[160] *Ibid*.

[161] *Ibid*.

[162] Dinesh Moudgil, "Assessing third party risks in a shrinking world" (2015). *please note: this article published originally by EY is no longer available online*

anti-bribery training and advisory services to both members and non-members.[163] In collaboration with the RAND Corporation, TRACE International developed the TRACE Matrix, a global business bribery risk index for compliance professionals. The index scores 199 countries in four domains—business interactions with the government, anti-bribery laws and enforcement, government and civil service transparency, and capacity for civil society oversight—and may be used by businesses to understand the risks of business bribery in a particular country.[164]

## 4.3 US

The DOJ and SEC see risk assessments as an essential component of an effective anti-corruption compliance program.[165] Both organizations stress the importance of implementing a risk-based compliance program and risk-based due diligence.

The SEC published its guidance on their examination priorities in 2020. They emphasized the importance of strong compliance programs and identified potential risk factors, including products and services offered, compensation and funding arrangements, prior examination observations and conduct, disciplinary history of associated individuals and companies, changes in firm leadership or personnel, and access to investor assets.[166]

## 4.4 UK

Principle 3 of the UK MOJ's *Guidance* provides insight into what constitutes an "adequate process" for risk assessment in order to form a full defence to strict liability under section 7 of the *Bribery Act*:

> The commercial organization 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.[167]

The *Guidance* suggests that a common sense approach should be taken to this principle to ensure that efforts are proportionate.[168] In order to comply with the principle, assessments for multinational firms should be performed, at a minimum, annually. To be informed, assessments require top-level management oversight and the input of various legal, compliance, financial, audit, sales, and country managers. Documentation is required to prove that the risk assessment took place, particularly if the adequacy of the risk assessment

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[163] "About TRACE" (last visited 21 July 2021), online: *TRACE* <https://www.traceinternational.org/about-trace>.
[164] "TRACE Bribery Risk Matrix" (last visited 21 July 2021), online: *TRACE* <https://www.traceinternational.org/trace-matrix>.
[165] DJSEC Resource Guide (2020), *supra* note 82 at 58.
[166] US Securities and Exchange Commission, Office of Compliance Inspections and Examinations, *2020 Examination Priorities* (Washington, DC: US Securities and Exchange Commission, 2020), online (pdf): <https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf>.
[167] UK Min J Guidance (2012), *supra* note 72 at 25.
[168] Nicholls et al, *supra* note 95 at 134.

comes into question. The *Guidance* goes on to say that risk assessment procedures will generally include the following characteristics:

- oversight of the risk assessment by top-level management;
- appropriate resourcing – this should reflect the scale of the organization's business and the need to identify and prioritize all relevant risks;
- identification of the internal and external information sources that will enable risk to be assessed and reviewed;
- due diligence inquiries; and
- accurate and appropriate documentation of the risk assessment and its conclusions.[169]

Transparency International UK has published a *Global Anti-Bribery Guidance*. The section on risk assessment advises corporations to focus on three key elements: the highest risk areas, to evaluate bribery risks realistically, and to ensure that risk assessment is a repeated process. In their view, a best practice risk assessment procedure gives a company a systematic and objective view of bribery risks. This guidance identifies six stages of risk assessment:

1) Ensure top level commitment and oversight;
2) Plan, scope, and mobilise, including appointing the project lead, defining stakeholders, allocating team responsibilities, and identifying information sources;
3) Gather information on inherent bribery risks that the company could be exposed to;
4) Identify the activities and risk factors that could increase the company's exposure to bribery risk;
5) Evaluate and prioritize the risks; and
6) Use the output of risk assessment to review the company's anti-bribery programme and the extent to which modifications need to be made.[170]

## 4.5 Canada

The Court in *Niko Resources* required the company to complete a risk assessment:

> The company will develop these compliance standards and procedures, including internal controls, ethics and compliance programs, on the basis of a risk assessment addressing the individual circumstances of the company, in particular foreign bribery risks facing the company, including, but not limited to, its geographical organization, interactions with various types

[169] UK Min J Guidance (2012), *supra* note 72 at 25.
[170] Transparency International UK, "Global Anti-Bribery Guidance – Risk Assessment" (last visited 21 July 2021), online: <https://www.antibriberyguidance.org/guidance/4-risk-assessment/guidance#body>.

> and levels of government officials, industrial sectors of operation, involvement in joint venture agreements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.[171]

Canadian legislation and Canadian courts have not provided any guidelines on implementing risk assessments as part of a compliance program; however, *Niko Resources* shows the Court's inclination to assess the compliance procedures in place on the basis of the risk assessment the company is expected to complete. *Niko Resources* demonstrates that Canadian prosecutors may work with the US DOJ and use standard aspects of American orders to make recommendations to the courts regarding ways companies can be directed to comply with *CFPOA*.[172]

A guidance document created by Global Compact Network Canada goes into more detail on what effective compliance programs in Canada can look like. They suggest that Canadian organizations begin their assessment by conducting a baseline risk assessment, including the following: the level of risk associated with the country where the organization is located, the extent of contact with government officials, the company's area of business, the current state of the business, and the level of control the company has over their operations/assets (for example, are they involved in joint ventures or do they rely heavily on third parties or intermediaries?), etc. Next, companies should conduct interviews and document reviews to determine their greatest areas of risk and do follow up work to implement preventative measures.[173]

## 5. DUE DILIGENCE REQUIREMENTS

As already noted, a risk assessment is one of the first steps to take in fulfilling due diligence requirements for various transactions. The risk assessment will help focus the due diligence procedures efficiently and effectively. Risk-based due diligence, the process of assessing the level of risk posed to determine the level of due diligence requirements,[174] should be conducted at a minimum during mergers and acquisitions and when working with third-party intermediaries.[175]

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[171] John Boscariol, "Canada: Anti-Corruption Compliance Message Received? Risk Assessment is Your Next Step" (12 August 2012), online: *McCarthy Tetrault* <https://www.mccarthy.ca/article_detail.aspx?id=5985>.

[172] Boscariol, *supra* note 127.

[173] Global Compact Network Canada, *supra* note 124.

[174] *Ibid*.

[175] This is not to suggest that due diligence should only be conducted in these scenarios. Investments, contracts with governments and large sales or service contracts also may require due diligence procedures.

## 5.1 Third Party Intermediaries

Companies often use third parties to conceal corrupt acts, particularly bribes to foreign officials.[176] Because many countries make companies liable for the acts of their agents, it is important to conduct adequate due diligence on third party intermediaries, particularly when working in high risk environments or on high-risk transactions. The essential purpose of due diligence in relation to third party intermediaries is to increase knowledge of the third party.[177] The DOJ and SEC guidelines indicate three criteria in undergoing due diligence on third party intermediaries. First, companies need to understand "the qualifications and associations of its third party partners" and particularly, any relationship with foreign officials. Second, companies should understand the business rationale for including a third party intermediary in the transaction and define the role the third party will serve. Third, a company should conduct ongoing monitoring of its third party relationships. The World Economic Forum suggests four steps in conducting risk-based due diligence on third parties. The first is to understand third parties and determine which ones should be subject to due diligence procedures; the second is to assess the level of risk associated with the third party; the third is to conduct the due diligence; and lastly, the process should be managed to identify and mitigate risks.[178]

The International Chamber of Commerce suggests that, for small and medium sized entities, anti-corruption third party due diligence may be conducted without the use of external consultants.[179] It lists the following six "pillars" upon which background information should be sought: (1) beneficial ownership (2) financial background and payment of contract (3) competency of third party (4) history of corruption and adverse news (from public records resources) (5) reputation (consulting third party's commercial references), and (6) approach to ethics and compliance.[180] In particular, to establish competency of the third party, a company should ask whether the third party has

(1) experience in the industry and the country where the services are to be provided;

(2) the necessary qualifications and experience to provide the services;

(3) provided a competitive estimate for the services to be provided;

(4) a business presence in the country where the services are to be provided;

(5) been recommended by a public official;

(6) requested urgent payments or unusually high commissions;

(7) requested payments to be made in cash, to a third party, or to a different country;

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[176] DJSEC *Resource Guide* (2020), *supra* note 82 at 60.

[177] World Economic Forum, Partnering Against Corruption Initiative, *Good Practice Guidelines on Conducting Third-Party Due Diligence*, (Geneva: World Economic Forum, 2013) at 7, online (pdf): <http://www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf>.

[178] *Ibid*.

[179] International Chamber of Commerce, *supra* note 154 at 8-9.

[180] *Ibid* at 14.

(8) suggested they know the "right people" to secure the contract; and

(9) has been selected in a transparent way.[181]

Some benefits to an effective third-party management framework can include the ability to manage risks, early detection of issues, deterrence, minimizing costs, maintaining standardization, preserving third party due diligence information, enhancing transparency, offering flexibility, and driving compliance.[182]

## 5.2 Transparency Reporting Requirements in Extractive Industries

### 5.2.1 Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative (EITI)[183] is a "global standard to promote the open and accountable management of oil, gas and mineral resources."[184] The standard requires implementing countries to disclose certain information regarding the governance of oil, gas, and mining revenues because poor natural resource governance has frequently led to corruption and conflict.[185] The EITI is an international multi-stakeholder initiative involving representatives from governments, companies, local civil society groups, and international NGOs.[186] The aim of the EITI is to "strengthen government and company systems, inform public debate and promote understanding."[187]

In order to be an EITI member, a country must fulfill the seven requirements of EITI, briefly summarized as follows:[188]

**1. Oversight by a multi-stakeholder group**

The multi-stakeholder group must involve the country's government and companies as well as "the full, independent, active and effective participation of civil society." The multi-stakeholder group must agree to and maintain a work plan that includes clear objectives for EITI implementation and a timetable that meets the deadlines established by the EITI Board.[189]

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[181] *Ibid* at 17.
[182] Dinesh Moudgil, "Managing third party risks through enhanced due diligence" (2017). *Please note: this article originally published by EY is no longer available online*
[183] The full EITI standard can be found at "EIE Standard 2019" (February 2019), online: *EITI* <https://eiti.org/document/standard>.
[184] "What we do" (last visited 21 July 2021), online: *EITI* <https://eiti.org/About>.
[185] Christina Berger, ed, *2019 Progress Report,* (Oslo, Norway: EITI, 2019) online (pdf): <https://eiti.org/files/documents/eiti_progress_report_2019_en.pdf>.
[186] EITI International Secretariat, *EITI Board Manual,* (Oslo, Norway: EITI International Secretariat, 2020) at 2, online (pdf): <https://eiti.org/files/documents/eiti_board_manual_updated_16_march_2020.pdf>.
[187] "What we do", *supra* note 184.
[188] *The EITI Standard 2019,* 2nd ed (Oslo, Norway: EITI International Secretariat, 2019), online (pdf): <https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf>.
[189] *Ibid* at 10-14.

**2. Legal and institutional framework, including allocation of contracts and licenses**

An implementing country must disclose information about the legal framework and fiscal regime relating to its extractive industries. It must also disclose information relating to licences, contracts, beneficial ownership of companies, and state participation in the extractive industries. Implementing countries must maintain a publicly accessible register for licenses awarded to companies involved in the extractive industries.[190]

An important development in the EITI Standards after the leaking of the Panama Papers in 2016 is the disclosure of beneficial ownership. According to the *2019 Progress Report*, "the 52 EITI countries are making progress towards the January 1, 2020 deadline for publishing beneficial ownership information for oil, gas and mining activities."[191] Disclosure of beneficial ownership for all companies, regardless of what sectors of the economy they operate in, is discussed in more detail in Chapter 5, Section 6.1.2.

**3. Exploration and production**

The third EITI requirement stipulates that implementing countries must report on the exploration for and production of oil, gas, and mineral resources.[192]

**4. Revenue collection**

This requirement necessitates the disclosure of government revenue from the extractive industries as well as material payments to the government by companies involved in the extractive industries. A credible Independent Administrator must then reconcile these revenues and payments. Implementing countries must produce their first EITI report within 18 months of becoming a Candidate and must produce subsequent reports annually.[193]

**5. Revenue allocations**

Requirement 5 provides for disclosure of the allocation of revenue generated by the extractive industries.[194]

**6. Social and economic spending**

Implementing countries are required to disclose certain relevant information when companies involved in the extractive industries must make material social expenditures because of legal or contractual obligations. Implementing countries

[190] *Ibid* at 15-20.
[191] Berger, *supra* note 185 at 30.
[192] The EITI Standard 2019*, supra* note 188 at 21.
[193] *Ibid* at 22-26.
[194] *Ibid* at 27-28.

must also disclose information relating to quasi-fiscal expenditures and the impact of the extractive industries on the economy.[195]

**7. Outcomes and impact**

Requirement 7 seeks to promote public awareness and understanding of the extractive industry data. It also encourages public debate about the effective use of resource revenues. This section sets out requirements for the form, accessibility, and promotion of the information set out in the EITI reports of implementing countries. It also mandates a review of the outcome and impact of EITI implementation.[196]

**Compliance and deadlines for implementing countries**

This final requirement sets out in detail the timeframes set out by the EITI Board for the completion of the various actions required by the EITI, such as the publication of EITI Reports.[197]

When a country pledges to adhere to the EITI standard, it will be deemed a "Candidate" and have 2.5 years in order to meet all seven EITI requirements. The country will then be evaluated independently. If the country has met all requirements, it will be deemed "Compliant," and from then on, it will be re-evaluated every three years.[198]

As of June 2016, fifty-one countries, including the US and UK, had implemented the EITI Standard. However, only 31 countries were deemed EITI compliant at that time.[199] Canada has not signed on to become an EITI Candidate, but it is an EITI "supporting country."[200] Canada's legislation mandating reporting by the extractive industries, described in Section 5.5, provides a similar level of reporting to the EITI standards.

## 5.3 US

In the United States, section 1504 of the 2010 *Dodd-Frank Act* added section 13(q) to the 1934 *Securities Exchange Act*, which now requires "resource extraction issuers" (all US and foreign companies engaged in the commercial development of oil, natural gas or minerals) to include in their annual reports to the SEC, information relating to any payment made by them, their subsidiary or an entity under their control, to the United States federal government or any foreign government for the purpose of the commercial development of oil, natural gas or minerals.[201] The reports must specify the type and total amount of such payments made (i) for each project and (ii) to each government.

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[195] *Ibid* at 29-30.
[196] *Ibid* at 31-33.
[197] *Ibid* at 34-40.
[198] EITI, *Fact Sheet* (2018), online: <https://eiti.org/publication-types-public/fact-sheets>.
[199] *Ibid*.
[200] *Ibid*.
[201] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, HR 4173, s 1504, online (pdf): <https://www.govinfo.gov/content/pkg/COMPS-9515/pdf/COMPS-9515.pdf>.

The SEC first adopted the rules implementing section 13(q) in August 2012, but the US District Court for the District of Columbia vacated them in July 2013. The SEC adopted the revised version of the rules on June 27, 2016.[202] Under the rules, resource extraction issuers are required to disclose payments that are:

(i) made to further the commercial development (exploration, extraction, processing, export or acquisition of a license for any such activity) of oil, natural gas or minerals;

(ii) not *de minimis* (i.e. any payment, whether made as a single payment or a series of related payments, which equals or exceeds $100,000 during the same fiscal year); and

(iii) within the types of payments specified in the rules, namely:

  (a) taxes;

  (b) royalties;

  (c) fees (including license fees);

  (d) production entitlements;

  (e) bonuses;

  (f) dividends;

  (g) payments for infrastructure improvements; and

  (h) community and social responsibility payments, if required by law or contract.[203]

Resource extraction issuers are required to comply with the new SEC rules starting with their fiscal year ending no earlier than September 30, 2018.[204]

## 5.4 UK

The United Kingdom's Extractive Industries Transparency Initiative Multi Stakeholder Group (MSG) is charged with implementing the EITI in the UK. The UK has no legislation requiring companies to disclose payments, making the UK EITI a voluntary process. Her Majesty's Revenue and Customs department can only disclose information from extractive companies who give their consent. A total of 41 oil and gas companies and 17 mining and quarrying companies participated in compiling the UK EITI's third report, published in

[202] US Securities and Exchange Commission, *Disclosure of Payments by Resource Extraction Issuers*, 17 CFR Parts 240 and 249b, Release No 34-78167, File No S7-25-15, online (pdf): <https://www.sec.gov/rules/final/2016/34-78167.pdf>. See also US Securities and Exchange Commission, Press Release, "SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act" (27 June 2016), online: <https://www.sec.gov/news/pressrelease/2016-132.html>.
[203] US Securities and Exchange Commission, *Disclosure of Payments, supra* note 202 at 25-28.
[204] *Ibid* at 28.

2018.[205] The report included detailed information about revenues received by UK Government Agencies from extractive companies in 2016. An independent administrator has been able to reconcile all material differences between extractive industry payments to and repayments by UK Government agencies in 2016.[206]

## 5.5 Canada

In Canada, the *Extractive Sector Transparency Measures Act* (*ESTMA*), which came into force on June 1, 2015, requires specified companies involved in the extractive sector to report payments made to domestic and foreign governments.[207] The stated purpose of the *ESTMA* is:

> to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the *Criminal Code* and sections 3 and 4 of the *Corruption of Foreign Public Officials Act*.[208]

The *ESTMA* applies to a corporation, trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals, either directly or through a controlled organization. Each corporate entity is also (1) listed on a stock exchange in Canada or (2) has a place of business in Canada, does business in Canada or has assets in Canada, and based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (a) it has at least $20 million in assets, (b) it has generated at least $40 million in revenue, and (c) it employs an average of at least 250 employees.[209] Thus, an entity that has its shares listed on any stock exchange in Canada will be subject to the *ESTMA* reporting requirements even if it does not do business, does not have assets in Canada or does not meet the size-related criteria.

An entity must report every payment, whether monetary or in kind, that is made to a single payee in relation to the commercial development of oil, gas or minerals and that totals, as a single or multiple payments, CDN$100,000 or more within one of the following categories:

(1) Taxes (other than consumption taxes and personal income taxes);

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[205] United Kingdom Extractive Industries Transparency Initiative (UK EITI), *UK EITI Report for 2016*, (2018), at 10, online (pdf): <https://eiti.org/sites/default/files/documents/uk-eiti-payments-report-2016.pdf>.

[206] *Ibid*.

[207] *Extractive Sector Transparency Measures Act*, SC 2014, c 39, [ESTMA] s 376, online: <http://laws-lois.justice.gc.ca/eng/acts/E-22.7/FullText.html>.

[208] *Ibid*, s 6.

[209] *Ibid*, ss 2 "entity", 8(1).

(2) Royalties;

(3) Fees (including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions);

(4) Production entitlements;

(5) Bonuses (including signature, discovery and production bonuses);

(6) Dividends (other than dividends paid to payees as ordinary shareholders); and

(7) Infrastructure improvement payments.[210]

The term "payee" in the *ESTMA* includes:

(a) any government in Canada or in a foreign state;

(b) a body that is established by two or more governments; or

(c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (a) or a body referred to in paragraph (b).[211]

Reports are due within 150 days after the end of the financial year and must include an attestation made by a director or officer of the entity, or an independent auditor or accountant, that the information in the report is true, accurate and complete.[212] An entity must keep records of its payments for a seven-year period from the day on which it provides the report.[213]

Non-compliance with the *ESTMA* and its reporting and record-keeping obligations is punishable on summary conviction by a fine of up to CDN$250,000.[214] As each day of non-compliance forms a new offence, an unreported payment could result in a multimillion-dollar liability. However, section 26(b) of the *ESTMA* creates a defence to liability if the person or entity "establishes that they exercised due diligence" to prevent the commission of the offence.

In 2018, the Ministry of Natural Resources released a *Guidance*[215] and *Technical Reporting Specifications*[216] to the *ESTMA*. Since the *ESTMA* came into force in 2015 it has not required

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[210] *Ibid*, ss 2 "payment", 9(2).
[211] *Ibid*, s 2 "payee".
[212] *Ibid*, ss 9(1), (4).
[213] *Ibid*, s 13.
[214] *Ibid*, s 24.
[215] Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Guidance* (2016), online (pdf): <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/estma/pdf/ESTMA%20Guidance%20-%20Version%202_1%252C%20July%202018.pdf>.
[216] Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Technical Reporting Specifications,* v 2, Cat No. M34-28/1-2018E-PDF (2018), online (pdf): <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/Technical%20Reporting%20Specifications%20-%20Version%202.pdf>.

companies to provide reports with respect to the financial year in progress on that day or any previous financial year, and the companies are expected to submit their first *ESTMA* reports no later than 2017.[217] The provisions of the *ESTMA* also do not apply to the payments made to Aboriginal governments in Canada before June 1, 2017.[218]

While the *ESTMA* has a similar purpose to that of the EITI, it is unlikely that some of the reporting requirements in the *ESTMA* meet the more stringent requirements of the EITI. As mentioned earlier, Canada has never, however, pledged to adhere to EITI. Given that *ESTMA*'s reporting requirements are mandatory at the firm or entity level, and that EITI is voluntary and implementing countries often lack domestic enabling legislation making its requirements enforceable at entity level, in certain respects the *ESTMA* regime may be more stringent.

The Canadian government has also published a Corporate Social Responsibility Checklist for Canadian mining companies.[219] The document provides comprehensive guidance to companies on conducting an initial assessment, developing programs on land access, in-migration, community health, environmental impacts, cultural heritage, social investment, land procurement, human rights concerns, and more. The document also outlines how companies can self-evaluate to determine if their programs are working.

Natural Resources Canada also has a Sale Questions Checklist, available online, to assist companies in identifying suspicious sales transactions.[220] Some questions include: if the customer fits the usual profile, if the transaction is unusually large or small, and if the mode of payment is consistent with typical practice.

## 5.6 Mergers and Acquisitions

Due diligence (DD) is widely recognized as an important factor in any merger or acquisition (M&A) transaction.[221] When conducting anti-corruption due diligence, a core aim is to determine the extent to which operations and revenues of the target business have been

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[217] *ESTMA, supra* note 207, s 30.

[218] *Ibid*, s 29.

[219] "Corporate Social Responsibility (CSR) Checklist for Canadian Mining Companies Working Abroad" (14 January 2019), online: *Natural Resources Canada* <https://www.nrcan.gc.ca/science-data/science-research/earth-sciences/earth-sciences-resources/earth-sciences-federal-programs/corporate-social-responsibility-csr-checklist-canadian-mining-companies-working-abroad/17152>.

[220] "Sales Questions Checklist" (10 October 2017), online: *Natural Resources Canada* <https://www.nrcan.gc.ca/explosives/resources/brochures/9953>.

[221] Peter Wilkinson, *Anti-Bribery Due Diligence for Transactions: Guidance for Anti-Bribery Due Diligence in Mergers, Acquisitions and Investments*, ed by Robert Barrington (London: Transparency International UK, 2012) at 14, online (pdf): <https://www.transparency.org.uk/sites/default/files/pdf/publications/Anti-Bribery_Due_Diligence_for_Transactions_1_0.pdf>. This guide by Transparency International provides details on each stage in the due diligence process. The checklist provides non-comprehensive guidance to companies in conducting adequate anti-bribery due diligence in the context of mergers and acquisitions.

distorted by bribery and to flag any corruption risks the successor may be liable for.[222] A further aim is to mitigate potential risks and to begin a monitoring program for the target to ensure the acquisition's compliance with anti-corruption laws.[223] Transparency International outlines the following ten good practice principles for anti-bribery due diligence in mergers, acquisitions and investments:

1. The purchaser (or investor) has a public anti-bribery policy;
2. The purchaser ensures it has an adequate anti-bribery program that is compatible with the *Business Principles for Countering Bribery* or an equivalent international code or standard;
3. Anti-bribery due diligence is considered on a proportionate basis for all investments;
4. The level of anti-bribery due diligence for the transaction is commensurate with the bribery risks;
5. Anti-bribery due diligence starts sufficiently early in the due diligence process to allow adequate due diligence to be carried out and for the findings to influence the outcome of the negotiations or stimulate further review if necessary;
6. The partners or board provide commitment and oversight to the due diligence reviews;
7. Information gained during the anti-bribery due diligence is passed on efficiently and effectively to the company's management once the investment has been made;
8. The purchaser starts to conduct due diligence on a proportionate basis immediately after purchase to determine if there is any current bribery and if so, takes immediate remedial action;
9. The purchaser ensures that the target has or adopts an adequate anti-bribery program equivalent to its own; and
10. Bribery detected through due diligence is reported to the authorities.[224]

The six stages to the due diligence process are: (1) initiating the process (2) initial screening (3) detailed analysis (4) decision (5) post-acquisition due diligence, and (6) post-acquisition integration and monitoring.[225] Transparency International's *Anti-Bribery Due Diligence for Transactions: Guidance for Anti-Bribery Due Diligence in Mergers, Acquisitions and Investments*, also provides the following checklist of 59 indicators to be used as an aid in anti-bribery due diligence at 14-18:

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[222] *Ibid* at 6.
[223] *Ibid*.
[224] *Ibid* at iv.
[225] *Ibid* at 8.

BEGINNING OF EXCERPT

**Bribery due diligence process**

1. Is the bribery DD integrated into the DD process from the start?
2. Have milestones been set for the bribery DD?
3. Is the timetable adequate for effective anti-bribery DD?
4. Have the deal and DD teams been trained in their company's anti-bribery programme including the significance of relevant legislation?
5. Have the deal and DD teams been trained in anti-bribery DD?
6. Is there a process implemented for co-ordination across functions?
7. Has legal privilege been established with use of general counsel and external legal advisers?
8. Is there a process for dealing with any bribery discovered during the DD?
9. Is the person responsible for anti-bribery due diligence at a sufficiently senior level to influence the transaction's decision-makers?

…

**Geographical and sectoral risks**

10. Is the target dependent on operations in countries where corruption is prevalent?
11. Does the target operate in sectors known to be prone to high risk of bribery?
12. Are competitors suspected to be actively using bribery in the target's markets?

…

**Business model risks**

13. Does the organizational structure of the target foster an effective anti-bribery programme or present risks?
14. Is the target dependent on large contracts or critical licenses?
15. Does the target implement an adequate anti-bribery programme in its subsidiaries?
16. Is the target reliant on agents or other intermediaries?
17. Has the target been assessed for its exposure to use of intermediaries that operate in countries and sectors prone to corruption risks?

18. Does it have policies and effective systems to counter risks related to intermediaries?
19. Does the target require contractual anti-bribery standards of its suppliers?
20. Does the target's organizational structure present bribery risks – e.g. diversified structure?
21. Is the target reliant on outsourcing and if so do the contracted outsourcers show evidence of commitment and effective implementation of the target's anti-bribery programme?

…

**Legislative footprint**

22. Is the target subject to the UK Bribery Act and/or the US FCPA?
23. Are there equivalent laws from other jurisdictions that are relevant?

…

**Organisational**

24. Does the target's board and leadership show commitment to embedding anti-bribery in their company?
25. Does the target exhibit a culture of commitment to ethical business conduct? (Use evidence such as results of employee surveys)
26. Has the senior management of the target carried out an assessment of bribery risk in the business?
27. Have there been any corruption allegations or convictions related to members of the target's board or management?
28. Have the main shareholders or investors in the target had a history of activism related to the integrity of the target?
29. Have there been any corruption allegations or convictions related to the main shareholders or investors in the target?
30. Does the target have an active audit committee that oversees anti-corruption effectively?

…

**Anti-bribery programme**

31. Does the target have an anti-bribery programme that matches that recommended by Transparency International UK?

32. Is the anti-bribery programme based on an adequate risk-based approach?
33. Is the anti-bribery programme implemented and effective?

…

**Key bribery risks**

34. Has the target been assessed for its exposure to risk of paying large bribes in public contracts or to kickbacks?
35. Has the target been assessed for risks attached to hospitality and gifts?
36. Has the target been assessed for risks attached to travel expenses?
37. Has the target been assessed for risks attached to political contributions?
38. Has the target been assessed for risks attached to charitable donations and sponsorships?
39. Has the target been assessed for risks attached to facilitation payments?

**(Foreign) public officials (FPOs)**

40. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
41. Have any FPOs been identified that are associated with intermediaries, customers and prospects?
42. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
43. Have any FPOs been identified that present particular risk?
44. Is there evidence or suspicion that subsidiaries or intermediaries are being used to disguise or channel corrupt payments to FPOs or others?

**Financial and ledger analysis**

45. Have the financial tests listed on page 11 [of this Transparency International's "Anti-Bribery Due Diligence for Transactions" Guidance] been carried out?
46. Are the beneficiaries of banking payments clearly identifiable?
47. Is there evidence of payments being made to intermediaries in countries different to where the intermediary is located and if so are the payments valid?

48. Is there evidence of regular orders being placed in batches just below the approval level?
49. Are payments rounded, especially in currencies with large denominations?
50. Are suppliers appointed for valid reasons?
51. Is there evidence of suppliers created for bribery e.g. just appointed for the transaction, no VAT registration?
52. Is there evidence of special purpose vehicles created to act as channels for bribery?

…

**Incidents**

53. Has a schedule and description been provided of pending or threatened government, regulatory or administrative proceedings, inquiries or investigations or litigation related to bribery and other corruption?
54. Has the target provided a schedule of any internal investigations over the past five years into bribery allegations?
55. Has the target been involved in any bribery incidents or investigations not reported by the target?
56. Has the target sanctioned any employees or directors in the past five years for violations related to bribery?
57. Has the target sanctioned any business partners in the past five years for violations related to bribery?
58. Is there an implemented policy and process for reporting bribery when discovered during due diligence?

**Audit reports**

59. Has the target provided any reviews, reports or audits, internal and external, carried out on the implementation of its anti-bribery programme? [footnotes omitted]

END OF EXCERPT

Failure to conduct adequate due diligence when purchasing a company may result in charges under anti-corruption legislation. In February 2015, the SEC announced charges against Goodyear Tire & Rubber Company for violations of the *FCPA* by subsidiaries in Kenya and Angola. The SEC Order indicates that Goodyear did not conduct adequate due diligence when it purchased its Kenyan subsidiary and did not implement adequate anti-corruption controls after the acquisition:

> Goodyear did not detect or prevent these improper payments because it failed to conduct adequate due diligence when it acquired Treadsetters, and failed to implement adequate FCPA compliance training and controls after the acquisition.[226]

Pre-acquisition due diligence is not always possible, particularly in hostile takeovers. The DOJ has indicated that companies who are unable to perform adequate pre-acquisition due diligence may still be rewarded for due diligence efforts conducted post-acquisition.[227] Investigating for corruption prior to acquisition is not sufficient to be in compliance with the *FCPA*. The DOJ and SEC have indicated they will also evaluate the extent the acquiring company integrated internal controls into the acquired company.[228]

The UK MOJ *Guidance*, in Principle 4 on Due Diligence, states:

> The commercial organization 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 organization, in order to mitigate identified bribery risks.[229]

The MOJ encourages companies to carefully consider the bribery risks that transactions pose to the company and assess the requisite due diligence procedures for ensuring that the company is aware of the risks and has a plan to deal with any risks that materialize.

## 5.7 Economic Sanctions and Due Diligence

As discussed in Chapter 5, there is a close connection between anti-corruption efforts and economic sanctions laws. Canada, the United States, the United Kingdom, the European Union and a number of others have adopted sanctions laws that enable them to target those involved in acts of corruption.

In October of 2017, Canada amended its sanctions laws to significantly broaden the circumstances in which the government could implement sanctions against other countries, organizations, and individuals associated with those countries. These new grounds are (i) gross and systematic human rights violations in a foreign state and (ii) acts of significant corruption.

Anti-bribery and economic sanctions due diligence frequently go hand-in-hand when assessing a proposed transaction such as acquiring another company, making a private equity investment, engaging in debt financing, or entering into a joint venture with a business partner. In these circumstances, especially when the operations or assets are located

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[226] US Securities and Exchange Commission, *USA before the SEC in the Matter of Goodyear Tire & Rubber Company*, no 74356, Feb 24, 2015, at 3, online (pdf): <https://www.sec.gov/litigation/admin/2015/34-74356.pdf>.

[227] DJSEC Resource Guide (2020), *supra* note 82 at 62.

[228] *Ibid*.

[229] UK Min J Guidance (2012), *supra* note 72 at 27.

abroad, it is prudent to carefully scrutinize potential exposure under these sanctions measures.

At the present time, Canada imposes economic sanctions measures of varying degrees on activities directly or indirectly involving the following countries as well as individuals or entities based in such countries:

> Belarus, Burma (Myanmar), Central African Republic, China, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Libya, Mali, Nicaragua, North Korea, Russia, Saudi Arabia, Somalia, South Sudan, Sudan, Syria, Ukraine, Tunisia, Venezuela, Yemen, and Zimbabwe.

Canada also imposes sanctions against listed terrorist entities, including Al-Qaida, ISIL (Da'esh), and the Taliban. Although in most cases, individuals and entities that are listed under these sanctions and anti-terrorism measures are located outside Canada, in some instances these can include persons located in Canada, as is the case regarding the recent listing of the Proud Boys.

Any involvement of these countries or any person that has been listed or designated under these sanctions measures (or any entity owned or controlled by them), in proposed transactions or other activities of the Company should raise a red flag for further investigation to ensure compliance.

Global Affairs Canada administers these sanctions measures and is responsible for processing applications for permits to allow activities otherwise prohibited under these economic sanctions programs to proceed. The Royal Canadian Mounted Police and the Canada Border Services are responsible for the enforcement of these sanctions programs. Violations are subject to criminal prosecution and fines and/or imprisonment.

Given their broad extraterritorial reach, US economic sanctions compliance is frequently an important part of any due diligence review, even if the principal parties are Canadian or other companies from non-US jurisdictions. The US Treasury Department's Office of Foreign Assets Control, along with other US agencies such as the US Department of Justice, administer and enforce US sanctions on both a civil and criminal basis. They have a significant enforcement record of settlements and prosecutions involving multi-million dollar penalties.

### 5.7.1 Canadian Sanctions Legislation

The prohibitions and obligations under these economic sanctions generally apply to persons in Canada and Canadians outside Canada and are set out in the following statutes and regulations issued thereunder:

- *United Nations Act* – used by Canada to implement into its domestic law economic sanctions mandated by the United Nations Security Council (Central African Republic, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Yemen, Al-Qaida and Taliban, Suppression of Terrorism);

- *Special Economic Measures Act* – autonomous economic sanctions imposed by Canada (Belarus, Burma (Myanmar), China, Iran, Libya, Nicaragua, North Korea, Russia, South Sudan, Syria, Ukraine, Venezuela, and Zimbabwe);
- *Freezing Assets of Corrupt Foreign Officials Act* – imposes prohibitions on dealings with listed former leaders and senior officials, and their associates and family members, suspected of misappropriating state funds or obtaining property inappropriately (Ukraine, Tunisia);
- *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* - prohibits dealings with listed individuals involved in gross violations of internationally recognized human rights or acts of significant corruption (Russia, Venezuela, Saudi Arabia, Myanmar, South Sudan); and
- Part II.1 of the *Criminal Code* – prohibits activities associated with terrorism, including dealings involving listed terrorist organizations and entities.

Depending upon the sanctioned country, entity or individual involved, the measures can restrict the import, export, and transfer of goods and technology, as well as the movement of people and money, the provision or acquisition of financial or other services, and investment.

### 5.7.2 Monitoring and Reporting Obligations

Certain sanctions measures require banks and other financial services companies to monitor—i.e., "determine on a continuing basis"—whether they are in possession or control of property that is owned, held or controlled by or on behalf of a listed person. These include banks, insurance companies, loan and trust companies as well as entities authorized under provincial legislation to engage in the business of dealing in securities or to provide portfolio management or investment counselling services. In certain circumstances, these firms are also required to report sanctions screening results on a monthly basis to their Canadian or provincial regulators.

Separately, all persons in Canada and Canadians outside Canada must disclose, without delay to the Royal Canadian Mounted Police or the Director of the Canadian Security Intelligence Service: (i) the existence of any property in their possession or control that they have reason to believe is owned, held or controlled by or on behalf of a listed or designated person, and (ii) any information about a transaction or proposed transaction in respect of such property.

### 5.7.3 Economic Sanctions Due Diligence

Some key questions that should be addressed for economic sanctions due diligence on transactions with another company or target include the following:

1. What measures are in place to ensure that the Target (including all entities owned or controlled by it) and its employees, officers, directors and agents comply with economic sanctions laws? The Target should provide copies

of all relevant codes of conduct, compliance policies, procedures, guidelines and internal controls.

2. Does the Target engage in any activities involving, directly or indirectly, parties located in or connected with countries, individuals or entities that are listed, designated or otherwise targeted under economic sanctions laws?
3. What process is in place at the Target for screening individuals and entities (whether vendors, customers, suppliers, joint venture partners, consultants, brokers, agents or other business partners of the Target, and entities that own or control them) against the lists of individuals and entities designated or listed under economic sanctions laws?
4. What is the training process for employees, officers, directors and agents on compliance with economic sanctions laws and related policies, including frequency of training, most recent sessions, certification, etc.? The Target should provide copies of training materials used for these purposes.
5. Have any of the Target's employees, officers, directors or agents ever been disciplined, including up to termination, for actual or suspected violations of economic sanctions laws or the Company's policies or procedures in respect of the same? If so, the Target should provide details.
6. What are the Target's whistleblowing mechanisms that allow employees, officers, directors and agents to report suspected violations of economic sanctions and related policies on a confidential and non-retaliatory basis. The Target should describe and provide any relevant documentation pertaining to all such reports that it has received.
7. What, if any, suits, actions, reviews, investigations, inquiries, litigation, enforcement, penalties or proceedings by or before any governmental authority, customer, business partner or any arbitrator, or any internal investigations, are there involving the Target or any of its directors, officers, employees or agents regarding compliance with economic sanctions laws and policies, including any, to the knowledge of the Target, that are pending or threatened? The Target should provide copies of any reports or other written communication issued to or by the Target, including any disclosures to governmental authorities, in respect of actual or potential violations of economic sanctions laws or policies, and any related investigations and proceedings.

## 5.8 Internal Investigation of Corruption

When senior officials or the board of a company suspect that the company may have been involved in corruption in one or more of its transactions, they may choose to conduct an internal investigation. As noted in Chapter 6 (on investigation and prosecution of corruption), there are various reasons to conduct an internal investigation:

- To convince enforcement bodies to use prosecutorial discretion not to bring charges;
- To gather evidence and prepare a defence or negotiation strategy for prosecutions, enforcement actions and/or litigation with shareholders;
- To fulfill management's fiduciary duty to the company's shareholders and satisfy shareholder concerns;
- To assess the effectiveness of internal accounting procedures.

To the extent that the internal investigation results will be handed over to the relevant enforcement body as part of a company's attempts to negotiate a favourable resolution with the prosecutor, it is strongly advisable to hire an experienced and respected external lawyer to conduct or manage the internal investigation. An external counsel's investigation will be given far greater credibility by the relevant law enforcement agencies than a similar investigation conducted by in-house counsel or the company's regular external counsel.

Chapter 6, Section 4.2 sets out five basic steps to follow when counsel is advising the board on undertaking an internal investigation in cases of alleged corruption.

## 6. POTENTIAL LIABILITY OF LAWYERS

Lawyers may be liable civilly, criminally or administratively for their acts or omissions concerning a client's business activities. Criminal provisions on conspiracy, aiding, abetting, and counselling apply to lawyers assisting their clients in illegal transactions. Accessory liability is also applicable in private law actions in tort and contract.[230] Furthermore, legal malpractice is a tort available to individuals injured by the acts or omissions of their lawyers. Civil liability may arise for economic loss due to a lawyer's intentional or negligent involvement in corrupt transactions. Lastly, regulatory agencies, such as securities commissions, of other securities regulators have a variety of possible responses for lawyers' participation in regulatory violations related to corrupt transactions that include: a warning or caution, an imposition of conditions on the practitioners' continued work in the field, an order to resign or a fine for violation of an applicable regulatory rule.

### 6.1 Criminal Liability

As discussed in Chapter 3, the US, UK, and Canada have criminal provisions that could result in a lawyer being criminally liable for membership or participation in a conspiracy to commit an offence of corruption for aiding, abetting or counselling a crime committed by a client. For instance, when the former Nigerian State governor James Ibori pleaded guilty in the United Kingdom to conspiracy to defraud and money-laundering offences, his London solicitor Bhadresh Gohil was also convicted of money laundering. To divert funds from the sale of shares in a state-owned telecommunications company, Ibori's lawyer established

[230] Paul Davies, *Accessory Liability* (Portland, Oregon: Hart Publishing, 2015).

Africa Development Finance consulting company. Since both the consultancy and the solicitor charged fees for fictitious services, $37 million in proceeds were diverted to them.

The judge, who sentenced Mr. Gohil to 10 years of imprisonment, described him as the architect of this scheme.[231]

## 6.2 Accessory Liability in Civil Actions

Accessory or assistance liability in tort law may result in civil liability for lawyers who assist clients in committing a tort in relation to a corrupt transaction.[232] The client and lawyer are referred to as joint tortfeasors. This concept originated alongside accessory liability in criminal proceedings, but the criminal and civil actions have since diverged.[233] Accessory liability is a subset of joint tortfeasor law and is divided into its own subsets.[234] This section provides only a brief overview of the topic.

### 6.2.1 US

A leading case in the US on accessory liability is *Halberstam v Welch.*[235] The US Supreme Court described it as being a "comprehensive opinion on the subject."[236] Other leading cases applying this doctrine tend to be statutory securities cases.[237] Generally, accessory liability in the US requires that the accessory "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other."[238]

### 6.2.2 UK

A leading UK case, *Sea Shephard UK v Fish & Fish Ltd*, sets out the test for finding a defendant liable as a joint tortfeasor where the defendant:

(1) Has assisted in the commission of the tort by another person;

(2) The tort is pursuant to a common design; and

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[231] UNODC, *Digest of Asset Recovery Cases*, (New York: United Nations, 2015), at 11, 22, online (pdf): <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf>.

[232] *Ibid.* For more details about civil actions for compensation of damages in tort in the context of asset recovery, see Chapter 5, Section 2.4.5.1(a).

[233] Paul Davies, "Accessory Liability for Assisting Torts" (2011) 70:2 Cambridge LJ 353 at 353.

[234] For a general overview on various subsets of Accessory Civil Liability, see Martin Kenney, "British Virgin Islands: Accessory Civil Liability," (11 November 2008), online: *Mondaq* <https://www.mondaq.com/wealth-management/63836/accessory-civil-liability>.

[235] *Halberstam v Welch*, 705 F2d 472, 489 (DC Cir 1983).

[236] *Central Bank of Denver, NA v First Interstate Bank of Denver*, NA, 511 US 164 (1994) at 181.

[237] *Ibid.*

[238] Restatement (Second) of Torts §876(b) (1977). For additional material on this topic, see W Keeton et al, eds, *Law of Torts,* 5th ed (West Group, 1984).

(3) An act is done that is tortious.[239]

Lord Sumpton noted:

> In both England and the United States, the principles [of joint tortfeasorship] have been worked out mainly in the context of allegations of accessory liability for the tortious infringement of intellectual property rights.[240]

Civil law has tended to require procurement as an element to establish accessory liability.[241] In *CBS Songs v Amstrad Consumer Electronics plc*, a UK Court found that procurement was more than merely "inducement, incitement, or persuasion." Advice alone would not result in a finding of accessory liability; more active participation would be required.[242]

#### 6.2.3 Canada

Canadian courts have adopted and applied the English definition of joint tortfeasors. They have not defined the minimum "degree of participation" required for the secondary tortfeasor to be liable for the primary tort.[243] However, Canadian courts have said that a "concerted action to a common end"[244] is required. Although this has not been defined by the courts either, the statement suggests that some act must be committed to put the tort in motion or to substantially assist in its commission, as it did in England. Additionally, a new nominate tort based on the failure to exercise human rights due diligence may result in civil liability for lawyers who assist clients in committing a tort in relation to a corrupt transaction.[245] This would apply if the corrupt transaction involves the violation of human rights.

## 6.3 Tort of Legal Malpractice

Legal malpractice actions are an option for dissatisfied clients or third parties seeking private redress for harm attributable to a lawyer's violation of his or her duties to a client or the legal profession.[246] The tort may occur when a lawyer is professionally negligent, breaches a contract and/or breaches his or her fiduciary duty to a client. Legal malpractice requires a

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[239] Sarah Johnson & Alastair Shaw, "UK Supreme Court confirms test for joint liability in tort" (3 April 2015), online: <https://www.lexology.com/library/detail.aspx?g=de836eb8-3c22-4a20-a6c5-8f5b9cc3e3ba>.

[240] *Sea Shepherd UK v Fish & Fish Ltd*, [2015] UKSC 10, [2015] WLR 694 at para 40.

[241] Davies, *supra* note 233.

[242] *CBS Songs v Amstrad Consumer Electronics plc,* [1988] AC 1013, [1988] UKHL 15. For additional materials on this topic, see Hazel Carty, "Joint Tortfeasance and Assistance Liability" (1999) 19 Leg Stud 494.

[243] John Fleming, *Law of Torts,* 5th ed (Sydney: Law Book Company, 1977) at 237-38.

[244] *Ibid.* See also Philip H Osborne, *Law of Torts,* 6th ed (Toronto: Irwin Law, 2020) at 63-64.

[245] For more information on the potential creation of a new nominate tort see the excerpt in Chapter 5 on *Nevsun* and Section 6.5 of this chapter.

[246] R Bruce Anderson, *Encyclopedia of White-Collar and Corporate Crime,* 2nd ed by Lawrence Salinger (Sage Publications, 2013) *sub verdo* "legal malpractice."

harmed party with standing to show that malpractice occurred, and that as a result of that malpractice, the harmed party suffered damages.[247] In doing so, the harmed party must show that but for the lawyer's malpractice, the harm would not have occurred or would have been less. As stated in *Hummer v Pulley, Watson, King & Lischer, PA*, "[i]n a legal malpractice case, a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney."[248]

Professional negligence is a common action in the category of legal malpractice. The UK case *Ross v Cauters* states that solicitors owe a duty of care to their clients and to third parties who could reasonably be expected to suffer loss or damage.[249] This has generally been accepted in the US and Canada. This duty could apply to a lawyer who negligently advises that the client's conduct does not constitute an offence of corruption when in fact, it does, or that a client's anti-corruption compliance program and its implementation are adequate, when they clearly are not. Malpractice actions may also be possible if a lawyer fails to disclose the actual or planned corrupt conduct of an employee, agent or officer to more senior officers or the board of directors. In-house counsel in particular may have clauses in their employment contracts requiring certain actions if they encounter corruption in the organization. Failure to act in the way outlined in their employment contract on uncovering corruption may result in a breach of contract claim against the lawyer. The Supreme Court of Canada in *Central Trust Co v Rafuse*[250] held that the standard of care for solicitors is that of "the reasonably competent solicitor, ordinarily competent solicitor and the ordinarily prudent solicitor."[251] This follows the English authorities, which state that the standard of care is one of "reasonable competence and diligence."[252]

## 6.4 Shareholders' or Beneficial Owners' Actions Against the Corporation's Lawyer

### 6.4.1 US

In *Stichting Ter Behartigin Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, the Court of Appeal for the Second Circuit allowed the shareholders of the defendant company to maintain an action for legal malpractice against the company's legal counsel.[253] The company had been found criminally liable under the *FCPA* for paying a bribe after counsel advised that the bribe could be paid through the company's subsidiary to avoid liability under the *FCPA*. The defendant argued that no such cause of action existed

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[247] *Ibid*.

[248] *Hummer v Pulley, Watson, King & Lischer, PA*, 157 NC App 60, 577 SE 2d 918 (2003).

[249] *Ross v Caunters,* [1979] 3 All ER 580, [1979] 3 WLR 605.

[250] *Central Trust Co v Rafuse,* [1986] SCJ No 52, [1986] 2 SCR 147.

[251] *Ibid* at para 48.

[252] For more information, see: Halsbury's Laws of Canada (online), *Legal Profession,* (IV(5)(2)(a)) (2013 reissue). English authorities include *Fletcher & Son v Jubb, Booth & Helliwell*, [1920] 1 KB 275 (CA); *Groom v Crocker*, [1939] 1 KB 194, [1938] 2 All ER 394 (CA).

[253] *Stichting Ter Behartigin Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, 327 F (3d) 173 (2d Cir 2003). For more details about civil actions based on the *FCPA* violations in the context of asset recovery see Chapter 5, Section 2.4.5.3(a).

in law, but the Court rejected that argument in a pre-trial motion and allowed the shareholders to continue their action against the lawyer defendant.

#### 6.4.2 UK

In the UK, Zambia's Attorney General launched a private law claim against two UK lawyers and their firms for their participation in "allegedly giving dishonest assistance in the misappropriation" of public funds.[254] This claim was for "dishonest assistance" and conspiring in corrupt acts; it was not a claim for professional negligence. The Attorney General alleged that the lawyers had assisted the former president of Zambia, Frederick Chiluba, in corrupt acts and the misappropriation of public funds. The Attorney General of Zambia was successful at the lower court level, but on appeal the action failed because the court found that the lawyers had not crossed the line from incompetence to dishonesty.[255] The test applied is known as the "fool or knave test" and is a difficult test to meet when trying to prove legal malpractice. Despite the Court of Appeals decision, Chiluba's lawyer, Mohammed Iqbal Meer, was suspended from the practice of law for three years for failure to uphold professional standards.[256]

In contrast, in the Kuwaiti Investment Organization (KIO) case, Spanish attorney Juan Jose Folchi Bonafonte, was held civilly liable for assisting to divert funds from the KIO's subsidiary, Grupo Torras (GT). Sheikh Fahad, a member of the Kuwaiti royal family of Al-Sabah and the chairman of the KIO between 1984 and 1992, made a number of questionable investments causing a loss of $4 billion to the KIO, of which $1.2 billion were attributable to fraud, embezzlement, and misappropriation.[257] The England and Wales Court of Appeal commented on Mr. Folchi's involvement in this matter as a lawyer in the following manner:

> The [trial] judge was not prepared to hold that Mr Folchi was a conspirator. But his findings of fact about what Mr. Folchi did know, or shut his eyes to, take his conclusion out of the sphere of hypothesis. The assistance that Mr. Folchi gave in all the transactions was crucial and without it they could not have taken place as they did. He was just as much a linchpin in giving dishonest assistance as he would have been if he was a conspirator. It was the obvious duty of an honest lawyer to make more enquiries as to why very large sums of money were being dealt with in highly questionable ways, and to stop the transactions if he did not receive satisfactory explanations. Mr. Folchi repeatedly failed in his duty and in consequence GT suffered losses.[258]

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[254] Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets,* (Washington, DC: World Bank Publications, 2014) at 122-3. See also *Zambia v Meer Care & Desai (a firm) & Ors,* [2007] EWHC 952 (Ch) and *Zambia v Meer Care & Desai (a firm) & Ors,* [2008] EWCA Civ 1007.

[255] *Ibid* at 124.

[256] UNODC, *supra* note 231 at 21.

[257] *Ibid* at 9, 21-22.

[258] *Khaled Naser Hamoud Al-Sabah and Juan Jose Folchi Bonafonte v Grupo Torras SA*, [2000] EWCA Civ J 1102-9.

### 6.4.3 Canada

The common law in Canada provides some limited avenues of redress against lawyers for aggrieved investors. Lawyers may be liable to their corporate clients for misrepresentations or negligence. As stated by Mark Gillen:

> If the client is found liable for a misrepresentation in the prospectus, the client could sue the lawyer for negligent advice or assistance in the preparation of the prospectus. The lawyer may also have a duty to the public requiring the lawyer to discourage the client from distributing securities under a misleading prospectus and possibly requiring the lawyer to disclose, or "blow the whistle", where a client persists with the use of a misleading prospectus.[259]

However, often a corporation is unable or unwilling to pursue its lawyers for unlawful or negligent acts or omissions, particularly if the board of directors is involved in them. Shareholders who wish to pursue corporate lawyers for the torts committed against the company have an additional hurdle in seeking to hold the corporate lawyer liable; they must first establish that a duty of care is owed by the corporate lawyer to the shareholder, rather than just to the corporate client. After establishing the duty of care, they must show that the lawyer breached that duty.

This duty of care is difficult to establish because lawyers owe an overriding duty to their client, and any duty to a third party may come into conflict with their duty to their client. Policy reasons, such as the fear of liability to an indeterminate class for an indeterminate amount, may prevent the court from finding a duty to shareholders. Even if the duty is established, Canadian courts rarely find a breach of the duty of care on the part of lawyers. Generally, the court finds that the lawyer took reasonable care to fulfill the duty or that the circumstances did not give rise to reasonable suspicion, which would require increased due diligence on the part of the lawyer.

In *CC&L Dedicated Enterprise Fund v Fisherman*, an Ontario court found that "a *prima facie* duty of care exists when a lawyer makes representations to the investing public for the purpose of furthering the investments in their client."[260] In *Filipovic v Upshall*, the Court found that the lawyer "stood in a sufficient relationship of proximity with the plaintiffs to engender a duty of care on their part."[261] In *Filipovic*, the shareholders confirmed the corporate solicitors' appointments to the corporation, knew the solicitors from previous dealings, and wrote their cheques directly to the solicitors on the instructions of the promoters of the investment. The court found that the duty of care "flowed through the company to the shareholders, but did not arise independent of the company itself."[262] However, in *Filipovic*, the court found that the solicitors discharged their duty in a

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[259] Mark Gillen, *Securities Regulation in Canada*, 4th ed (Toronto: Thomson Reuters, 2019)
[260] *CC&L Dedicated Enterprise Fund v Fisherman* (2001), 18 BLR (3d) 240, 2001 CanLII 28387 (Ont Sup Ct).
[261] *Filipovic v Upshall* (1998), 19 RPR (3d) 88 (Ont Ct J (Gen Div)), affirmed by the CA at [2000] OJ No 2291.
[262] *Ibid* at para 64.

"reasonably competent and professional manner."[263] In coming to this decision, the court considered the fact that the solicitors had worked with the principals before with no history of dishonesty and that the solicitors took instructions from the principals of the company, who would reasonably have the authority claimed. The court also found a lack of circumstances that would reasonably raise the solicitors' suspicions.

## 6.5 Case for a New Nominate Tort

**A Conflict of Laws Approach for a New Nominate Tort**

by Joannie Fu

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The current state of law and interaction with various private international law factors demonstrate the imperative need for a new nominate tort, which would provide better consolidation and efficacy for plaintiff-victims bringing forward a claim against a Canadian legal entity, including lawyers who assist clients in committing a tort in relation to a corrupt transaction.[264]

The biggest hurdle to overcome in private international law without the creation of a new nominate tort is choice of law. Choice of law considers which jurisdiction's law would be applied. In tort cases, the principle *lex loci delicti* would be applied, or "law of the place of the wrong". This may present difficulties for the claimant, especially if the law of the place of the wrong may be unfavourable towards them. However, *lex loci delicti* is not absolute in the international realm for tortious cases. There is a narrow door open for *lex fori*, or the "law of the forum", in an international context per *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*.[265] In writing for the majority, Justice La Forest notes that *lex loci delicti* is the governing law within Canada, however in the context of international claims this "could give rise to injustice" thus "in certain circumstances [La Forest] is not averse to retaining a discretion in the court to apply [Canada's] own law to deal with such circumstances".[266] Through that narrow door of discretion, the common-law may be pushed. Thus, a policy argument would be that because a Canadian company is conducting business abroad, there should be a corresponding application of Canadian values abroad. It would be a poor reflection of Canada's public image if its corporations and the lawyers working for them are not held liable for flagrant violations of human rights. Another way to impose responsibility is to advance an argument that the CORE and *CUSMA* imposed a legal duty on Canadian legal entities to act with due diligence when conducting activities abroad. Thus, a local defendant, who could potentially be a

[263] *Ibid* at para 67.

[264] Recent jurisprudence suggests that there is a move towards holding Canadian entities responsible for actions committed abroad: see for example, *Garcia v Tahoe Resources Inc*, 2017 BCCA 39. A lawyer who was an accessory in assisting in the commitment of a tort abroad could potentially also be held liable.

[265] *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022.

[266] *Ibid*.

corporate lawyer, would become a "concurrent tortfeasor" through the lack of human rights due diligence.[267] Thus, even without a new nominate tort based on customary international law (CIL), there are strong arguments that choice of law should be *lex fori.*

If actual evidence can be found that the local defendant conspired, facilitated, or arranged the violation abroad, the plaintiff could use *lex loci delicti* and make an argument that the wrong occurred in Canada. In this case, the corporate lawyer would become a "joint tortfeasor" in principal violation or vicariously liable.[268] The Court may focus on the actions of a lawyer based in Canada through an analysis of its actions and whether they were sufficiently diligent in avoiding the violation of human rights. For example, using *Moran v Pyle National*,[269] a victim could argue that the violation of human rights can occur at the place of acting, and the corporate lawyer acted in British Columbia by facilitating the violation of human rights abroad. Establishing a standard of care to be imposed on Canadian legal entities that operate abroad (and the lawyers that help facilitate operations) creates a causative link. Subsequently, it would support the approach of *lex loci delicti,* as the wrong can be placed in British Columbia. Additionally, if the plaintiffs can establish a duty of due diligence that establishes a legal standard of care, they would have a stronger argument to apply Canadian law, as the tort occurred in a failure to exercise the due diligence required by Canadian law.[270]

*Jurisdiction simpliciter* considers whether the laws of a particular jurisdiction allow the jurisdiction to hear the case. As an example, in British Columbia, sections 3 and 10 of the *Court Jurisdiction Proceedings and Transfer Act* (*CJPTA*) address the territorial competence of a court to hear a case, relying on a real and substantial connection between the facts and British Columbia. The factor of *jurisdiction simpliciter* would be simple to fulfill, as the tort addresses actions of Canadian entities and the laws of Canada would allow the case to be heard as there is a real and substantial connection.

*Forum non conveniens* considers whether a more convenient forum exists elsewhere. This is a matter of discretion and requires courts to consider and conclude whether a more appropriate jurisdiction exists elsewhere. This may be a more difficult area for plaintiffs to overcome, as there may be another equally competent jurisdiction with an equally strong real and substantial connection. For example, in *Bil'in (Village Council) v Green Park*

[267] The case of *Rutter v Allen*, 2012 BCSC 135, might be considered by way of analogy. In this case, a vehicular chain collision involving multiple defendants happened resulting in the injury of the plaintiff. Applying the law to the facts of a corporation who was negligent, it may be argued that the lack of due diligence (arguably a duty imposed by the CORE) caused the injuries abroad, thus, the Canadian legal entity should be included as a concurrent tortfeasor. A causal link must also be established.

[268] A plaintiff may argue that the Canadian legal entity was either vicariously liable (if their employees caused the harm as the facts illustrate in *Garcia v Tahoe Resources Inc,* 2017 BCCA 39) or that the Canadian legal entity was acting in concert with another joint tortfeasor to harm the plaintiff.

[269] *Moran v Pyle National (Canada) Ltd.,* [1975] 1 SCR 393.

[270] Note that an issue the plaintiff may run into is *The Queen v Saskatchewan Wheat Pool,* [1983] 1 SCR 205, which rejected the tort of breach of statutory duty. Thus, this signals the imperative need for a new nominate tort to be created and outlined by the Courts.

*International Ltd.*,[271] the village of Bil'in filed a civil action in Canada against the Canadian companies and their director for building new neighbourhoods on Bil'in's land. However, the Quebec Superior Court dismissed the case on the grounds of *forum non conveniens*. Nevertheless, the case was significant in that, for the first time in Canada, a court found that a war crime can constitute a civil wrong in Canadian domestic law.[272] However, as the recent case Garcia suggests, *forum non conveniens* can be overcome by plaintiffs if they can demonstrate that there is a real risk that the alternate forum cannot provide justice.

Another consideration is whether the case would fall under provincial or federal jurisdiction. The case would likely fall under provincial jurisdiction per section 92(13) of the *Constitution*.[273] While the creation of the CORE suggests that there is a federal system of regulation in relation to certain circumstances, the tort would likely fall under provincial powers because the nature of the claims would fall under property and civil rights. Nevertheless, the division of powers may be tricky to navigate especially with the overlap of issues. If Bill S-211[274] were passed as legislation, although it falls under federal jurisdiction, it would still be relevant for the purposes of claims as it can be used to establish a legal duty of due diligence.

Finally, another consideration would be whether there is a real and substantial connection with the forum. In BC, one would have to turn to the *CJPTA*, which states that a real and substantial connection is presumed if it concerns a tort committed in BC or if it concerns a business carried on in BC or if the ordinary residence of the business is in BC.[275] There would be a strong argument that because the business was carried on BC and because they were subject to CIL, there was a real and substantial connection. A lawyer who commits a tort extraterritorially may be held responsible if it can be established that based on CIL there was a legal duty of due diligence in ensuring there are no violations of human rights, establishing a standard of care and thus creating a causative link between the lawyer's action (or lack thereof) within the province of BC.

## 6.6 Lawyers' Civil Liability Under Securities Acts

Lawyers' liability under securities legislation is important in the corruption context because corporate lawyers often work with publicly traded corporations. In addition, the SEC is a major enforcer of the *FCPA*. Violations of anti-corruption and anti-bribery laws may result in additional violations of securities regulations, as the corporation may fail to disclose accurately their financial position and potential liabilities to the financial market. An investor who purchases a share shortly before a company is investigated, for or charged with corruption offences, could see the value of their investment fall drastically in a short period due to negative public perception of the company or because of the massive fines

[271] *Bil'in (Village Council) v Green Park International Ltd*, 2009 QCCS 4151.
[272] *Ibid* at paras 175-176.
[273] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 92(13).
[274] Bill S-211, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*, 1st sess, 43rd Parl, 2019-2020.
[275] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (g)(h).

imposed on the company upon conviction or settlement. As disclosure and investigation of corruption and bribery may have a significant impact on the value of a company's shares, securities law is applicable in the anti-corruption context.[276]

[276] For US law on this topic see: 17 CFR § 240.10b-5 (1951), 15 USC § 78t(e), *Sarbanes-Oxley Act of 2002,* 15 USC 7201, 116 Stat 745 § 307 (2002), 17 CFR § 205, and US Securities Exchange Commission, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans*, 2006, § 102(e). For more information on UK Securities Regulation, see Joan Loughery, *Corporate Lawyers and Corporate Governance* (New York: Cambridge University Press, 2011). For more information on Canadian securities regulation, see David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation,* 5th ed (LexisNexis, 2014) and Gillen, *supra* note 259. Note that Canada's securities law varies provincially.

CHAPTER 10

# PUBLIC OFFICIALS AND CONFLICTS OF INTEREST

IAN STEDMAN

## CONTENTS



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

# 1. INTRODUCTION

How members of the public perceive the ethical conduct of elected officials, members of the executive, and members of the public service plays an important role in whether they trust their government. High levels of trust lead to greater civic engagement, which tends to give rise to better social and economic outcomes within a society.[1] This is, of course, all desirable. Corruption, on the other hand, has the opposite effect. When public sector actors engage in corrupt behaviour it gives rise to greater cynicism, which leads to less trust and less civic engagement.[2] It is for these simple reasons that we have seen countries all over the world adopt standards and rules to help guide the ethical conduct of their public officials. This chapter offers an overview of those standards and rules. In order to maintain a manageable scope, focus will be placed almost exclusively on elected officials and the regimes that have developed in relation thereto at the national levels in the United States, United Kingdom, and Canada.

The chapter is divided into four parts. The first part offers an introduction to the important role that public sector ethics fulfill in the broader global discourse around corruption. This includes a look at how public sector ethics has been addressed at the international level as part of ongoing efforts to curtail conduct that is damaging to economic development and prosperity. The second part begins by offering a comparative introduction to the different approaches to standard setting that these regimes have taken, focusing attention on the institutional frameworks in place at the national levels in the US, UK, and Canada. The third part offers a comprehensive introduction to the various principles and rules of ethical conduct, including their rationale and how they operate. The final part looks at accountability, oversight and enforcement of these rules, including an overview of the importance of transparency and public reporting, as well as the role that the criminal law plays in public sector anti-corruption frameworks. Although the US, UK, and Canada each also have sub-national public sector ethics laws and rules, those regimes are not discussed in this chapter.

## 1.1 Conceptualizing Political Corruption

Before addressing political corruption within our broader dialogue about global corruption, it is important to first acknowledge the diversity of governance approaches that exist across nations. From dictatorships to monarchies to representative democracies, these approaches vary in significant ways that make it impossible to treat political corruption as a conceptual monolith. To say something coherent about the topic then, a decision about how we think we can recognize if public sector officials are engaging in corrupt practices ought to be made at the outset.

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[1] Daniel Kaufmann & Phyllis Dininio, "Corruption: A Key Challenge for Development" in Rick Stapenhurst, Niall Johnston & Riccardo Pelizzo, eds, *The Role of Parliament in Curbing Corruption* (Washington, DC: The World Bank Institute, 2006) 13 at 14.

[2] See e.g., Milan Skolník, "Corruption and Political Participation: A Review" (2020) 17:1 Social Studies 89, for a review of studies that have explored how corruption and the perception of corruption have impacted political participation.

Public sector officials spend a great deal of time and energy determining how to balance competing interests. Interests must of course be balanced when making policy decisions, but also when doing the everyday work of simply managing different relationships. It is in the tangled web of relationships and interests that the opportunity for corruption finds its home. It is also in this web that a public official can get caught up in helping others and lose sight of their professional duty to serve the broader public interest. Despite the complexity of public service, a useful conceptualization of political corruption must be able to establish a bright line between acting in the public interest and acting in a manner that improperly furthers private interests to the detriment of the public interest.

To help maintain clarity throughout this chapter, I will rely on a conceptual framework for public sector corruption that is inspired by Mark Philp's work and consists of meeting the following criteria:

1) A public official,
2) in violation of the trust placed in them by the public,
3) and in a manner that harms the public interest,
4) engages in conduct that exploits the office (including access and opportunities that they are afforded by virtue of holding that office) for clear personal or private gain in a way that runs contrary to the accepted rules and standards for the conduct of public officials within that political culture,
5) so as to benefit themselves or a third party by providing them with access to a good, service or opportunity (i.e., a benefit) they would not otherwise have access to.[3]

While the above framework is broad enough to capture any number of public sector actors, from elected officials to political appointees to public servants, this chapter is limited to elected officials. There are many similarities in the kinds of behaviours that are prohibited by the anti-corruption regimes in the US, UK, and Canada, but their different political cultures have also given rise to marked differences in their regulatory approaches. Understanding these differences will, in part, require a deeper analysis of what is meant by both "public interest" and the concepts of personal and/or private gain.

### 1.1.1 The Important Role of Political Culture

Anti-corruption regimes do not exist in a vacuum. The political culture within a given state will have a profound effect on when and why a regime emerges, how it develops, and whether it is adhered to. Research suggests that anti-corruption measures are more effective where political actors share a common political culture.[4] To identify or describe a political

[3] Mark Philp, "Conceptualizing Political Corruption" in Arnold J Heidenheimer & Michael Johnston, eds, *Political Corruption Concepts & Contexts,* 3rd ed (New Jersey: Transaction Publishers, 2002) 41 at 42.

[4] Richard Mulgan & John Wanna, "Developing Cultures of Integrity in the Public and Private Sectors" in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Cheltenham; Northampton: Edward Elgar, 2011) 416 at 416.

culture then, we look for shared political attitudes, values, standards and behaviours. We see these elements emerge from traditions, conventions, and customs that have developed over time and have been more or less adhered to, but also from decisions that are made about the design and structure of anti-corruption institutions. A political culture of 'ethics as compliance' might emerge, for example, if an anti-corruption regime requires ongoing and robust compliance aggressively enforced by independent oversight and auditing.

Another important factor in shaping political culture is the socio-economic reality of who holds elected office. As will be explored throughout this chapter, it can be difficult to design anti-corruption rules that are capable of effectively dissuading corruption from all public officials equally, including those who had previously accumulated immense personal wealth prior to serving in public office. Although it would be nice if every person who runs for elected office does so because they have a genuine desire to represent and serve others, it is impossible to separate holding elected office from holding a seat of political power. Sometimes wealth and power can intersect in a manner that challenges established political cultures and anti-corruption measures. As will become evident, the experience of the United States' former President Donald Trump is instructive in this regard.

Finally, it is important to say something about the role that public perception and engagement play in shaping political culture. Recall that the concept of public interest is integral to the conceptual framework for identifying public sector corruption that was presented above. It is because of how public interest and expectations have evolved that the demand for broader and more varied anti-corruption regimes has emerged. This evolution in understanding and expectation has inspired an evolution in language as well. The public has come to expect that elected officials will do more than merely avoid corrupt practices, but that they will act ethically and honourably. It is for this reason that the more inclusive language of "government ethics," "public sector ethics" and "conflicts of interest" have come to be used in place of the language of "anti-corruption" in the political realm. This is not to say that language of corruption is not used, but that it is more commonplace in the context of criminal anti-corruption laws than in the broader public sector regimes that deal with ethics and conflicts of interest. Each of the above expressions will be used throughout this chapter.

### 1.1.2 Role of Public Perception and Engagement

The avoidance of conflicts of interest has become the cornerstone of the modern anti-corruption regimes that will be considered in this chapter. When framed broadly, the concept of a conflict of interest can not only encompass the most egregious of self-dealing, but also the subtlest and even accidental mismanagement of public perception and expectation. Whereas the mere perception of a conflict of interest might once have been considered something worth considering for decision-makers, it is now treated almost by default as though it is a complete perversion of judgment for a public official to even allow themselves inadvertently to be in a position where they are perceived to have a conflict of interest. If the public merely perceives that an elected official is in a conflict of interest, whether or not they actually are, their ability to act in the public interest is called into question. The difference between perceived, apparent and real conflicts of interest will be explored in greater depth below.

## 1.2 International Standards

The international community has come to accept that ethical public sector governance is an important contributor to global economic development and prosperity. Various international bodies have taken steps to study, monitor, and provide guidance on the impact that public sector corruption can have, and to provide general advice on how to effectively manage conflicts of interest. The two most widely recognized international bodies to have taken up this work are the United Nations (UN) and the Organization for Economic Co-operation and Development (OECD). Both the UN and OECD have produced robust guidance documents that serve as resources for governments looking to implement or improve public sector anti-corruption measures. The World Bank Institute (WBI) and Transparency International (TI), the latter being a non-governmental organization that monitors and evaluates the effectiveness of anti-corruption regimes, have also recognized the important role public sector leadership plays in fostering the public trust needed for economic prosperity. The work of these four organizations will be discussed briefly.

### 1.2.1 UNCAC

The adoption of the United Nations Convention Against Corruption (UNCAC)[5] in October 2003, and its subsequent emphasis on providing guidance and oversight placed the UN at the forefront of anti-corruption initiatives. As explained in-depth in Chapters 2 and 3, Article 15 outlines criminalization requirements and law enforcement requirements that apply to the bribery of foreign officials.

Articles 7 and 8 also relate to public officials, but do not require member states to pass criminal laws. Instead, they require that each State Party commit to taking various other actions "in accordance with the fundamental principles of its legal system."[6] Article 7 stipulates that states shall apply principles of equity and merit when hiring in the public sector. They will also support the adequate training of employees who are in positions that are vulnerable to corruption;[7] promote adequate remuneration and pay scales;[8] enhance transparency in the funding of candidates for public office;[9] adopt systems that prevent conflicts of interests;[10] promote education to enhance public sector awareness about the risks of corruption;[11] and so forth.

Article 8 stipulates that each signatory state shall promote ethical standards and endeavour to adopt codes of conduct that enhance "integrity, honesty and responsibility among its public officials,"[12] including by facilitating the reporting of corruption to an appropriate

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[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] *Ibid*, art 7.
[7] *Ibid*, art 7, s 1(b).
[8] *Ibid*, art 7, s 1(c).
[9] *Ibid*, art 7, s 3.
[10] *Ibid*, art 7, s 4.
[11] *Ibid*, art 7, s 1(d).
[12] *Ibid*, art 8, s 1.

authority. State Parties should also, where appropriate, require public officials to declare their outside employment and other activities, investments they hold, and any assets or gifts they receive—particularly those from which a conflict of interest pertaining to their role as a public official may result—to an appropriate authority.[13]

UNCAC is complemented by a *Legislative Guide* (the *Guide*) to assist states that are seeking to pass laws to help implement the Convention.[14] The *Guide* provides helpful tips, including that states are more likely to receive better buy-in from public officials if they develop rules "through a process of consultation rather than a top-to-bottom approach."[15] States might consider attaching these rules to employment contracts and they are also encouraged to engage in regular initiatives to raise awareness about what the rules are and how they apply.[16]

In addition to the above, the *Guide* directly addresses the various declarations to appropriate authorities that UNCAC recommends under Article 8, and makes the important point that they should be considered minimum disclosure requirements.[17] The clear inference is that states are encouraged to go above and beyond the minimum recommendations that are put forth in UNCAC.

### 1.2.2 OECD

The United Nations General Assembly has granted what is called "observer status" to a number of international organizations, entities, and non-member states. Having this status allows those entities to participate in some limited way in the work of the General Assembly. The OECD is one such international organization that has been granted official observer status and accordingly, has been able to contribute to the work of the UN. The OECD is a policy-focused organization and works alongside other entities to help establish evidence-based standards and solutions to a variety of social, economic, and environmental issues. The OECD has been particularly active over the past two decades with its work on public sector trust and integrity.

The OECD's major work in this area began to gain public attention in 1998 with the issuing of its *Recommendation on Improving Ethical Conduct in the Public Service* (1998 Recommendation).[18] This 1998 Recommendation includes twelve principles related to managing ethics in the public service that could be used by all governments to support them in their review of their own ethics management systems. Included in those twelve principles

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[13] *Ibid*, art 8, s 5.

[14] 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>.

[15] *Ibid* at 32, para 91.

[16] *Ibid*.

[17] *Ibid* at 33, para 96.

[18] See János Bertók, *Trust in Government: Ethics Measures in OECD Countries*, (Paris: OECD Publications, 2000) at 74, online (pdf): <https://www.oecd.org/gov/ethics/48994450.pdf>, where the 1998 Recommendations are included as an Annex.

is that: ethical standards should be clear and reflected in a country's legal framework(s); guidance should be available to public servants and they should know their rights and obligations when exposing wrongdoing; the political class should demonstrate its commitment to ethical conduct in order to help reinforce the ethical conduct of public servants; and management must be committed to and supported by adequate accountability mechanisms. Each principle was developed and agreed upon by OECD Member countries, who were themselves encouraged to commit to a regular review of the policies, procedures, practices, and institutions they had in place to "encourage high standards of conduct and prevent misconduct as well as counter corruption."[19]

The 1998 Recommendation was followed by an implementation report in 2000, called *Trust in Government: Ethics Measures in OECD Countries*[20] (*Trust in Government*). *Trust in Government* is based on a survey of 29 OECD countries and described, in part, how they had implemented the 1998 Recommendation. Further goals of the *Trust in Government* report were to:

- Provide a comprehensive database from all Member countries for analysis;
- Identify promising practices – what works and how, in respective national environments; and
- Provide a framework for assessment.[21]

The robust report provides a broad comparative analysis that helped identify and uncover similarities and differences in principles and practices across jurisdictions. From this information, summaries of best practices were established, including: how to state and communicate core values; how to establish and implement measures focused on prevention; ways to punish or even criminalize misconduct; what sort of information ought to be publicly disclosed by whom and how often; how to establish reporting mechanisms; and how to ensure consistency in policy and application.[22]

Another comprehensive report in 2003, called *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*[23] (*Managing Conflict of Interest*), followed *Trust in Government*. Recall here that UNCAC was adopted in 2003. *Managing Conflict of Interest* offers a comparative survey of OECD member countries and again demonstrates a wide variety of approaches taken to prevent conflicts of interest, including proactive education; regulation and sanctions (criminal, administrative and/or monetary penalties); and emphasizing values and personal responsibility. Furthermore, there are a wide variety of systems of government. In turn, this means that different approaches were adopted, rather than a sole approach which might not map well across all settings.

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[19] *Ibid* at 26.
[20] *Ibid*.
[21] *Ibid* at 21.
[22] *Ibid*.
[23] János Bertók, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences,* (Paris: OECD Publications, 2003), online (pdf): <https://www.oecd.org/gov/ethics/48994419.pdf>.

*Managing Conflict of Interest* highlighted that while some countries are tackling the problem of public sector corruption in the midst of economies that are also in transition, others may be more stable with decentralized governments, and some may even be able to advance coherent federal frameworks or leverage the use of regulations and sanctions that can be updated regularly in their anti-corruption efforts. By drawing out these different categorizations, the report provides more useful information for individual readers (i.e., countries) who find themselves in one of those categories. It is easier to see similarities and to recognize learning opportunities with this greater contextualization of the survey results that had been gathered.

In order to continue the move towards developing more practical reports and resources to assist countries with actually enhancing their public sector ethics infrastructure, the OECD published *Managing Conflicts of Interest in the Public Service: A Toolkit* (*Toolkit*)[24] in 2005. This toolkit provides "a set of practical solutions for developing and implementing ways to manage conflicts of interest in accordance with the OECD Guidelines for Managing Conflict of Interest in the Public Service."[25] Among these practical solutions were definitions, diagrams, and checklists for identifying at-risk areas. The *Toolkit* also provides draft ethics codes that include, among other things, definitions of a conflict of interest, and sample rules and procedures related to the acceptance of gifts and gratuities, the registration of personal assets, and the implementation of public disclosure protocols. Finally, there is a section that emphasizes the importance of having policies and procedures in place to protect whistleblowers.

The publication of the *Toolkit* was later complemented by a collaborative effort between the OECD and the Asian Development Bank (ADB). The two organizations published a summary report of the proceedings of the 5th Regional Seminar on Making International Anti-Corruption Standards Operational, entitled *Managing Conflict of Interest: Frameworks, Tools, and Instruments for Preventing, Detecting, and Managing Conflict of Interest*.[26] One goal of the Seminar report is to emphasize that the OECD also supports the efforts of Asian and Pacific countries to fight corruption[27]—an aspect that received little attention in the OECD's earlier work. Building off of the earlier *Toolkit*'s theme, the Seminar report provides summaries and analysis of how conflicts of interest are managed in specific countries.[28]

The survey work done by the OECD and the *Toolkit* and reports it produced are very likely the most important international documents in relation to establishing the role that public sector ethics and accountability play in creating strong and healthy economies. This work

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[24] Howard Whitton & János Bertók, *Managing Conflict of Interest in the Public Service: A Toolkit*, (Paris: OECD Publications, 2005), online (pdf): <https://www.oecd.org/gov/ethics/49107986.pdf>.
[25] *Ibid* at 3.
[26] Kathryn Nelson et al, *Managing Conflict of Interest: Frameworks, Tools and Instruments for Preventing, Detecting, and Managing Conflict of Interest*: *Proceedings of the 5th Regional Seminar on Making International Anti-Corruption Standards Operational*, (Hosted by the Corruption Eradication Commission (KPK) Indonesia, Jakarta, 6-7 August 2007) (Paris; Manila: Asian Development Bank & OECD, 2008), online (pdf): <https://www.oecd.org/site/adboecdanti-corruptioninitiative/40838870.pdf>.
[27] *Ibid* at vii.
[28] *Ibid*.

drove international engagement on public sector ethics until the OECD adopted a new recommendation on public integrity in 2017.[29] The OECD *Recommendation of the Council on Public Integrity* (2017 Recommendation) is framed broadly as a "strategy against corruption"[30] and accordingly leverages robust data about corruption while using infographics to help explain why public integrity continues to be important in the context of corruption. The new 2017 Recommendation focuses increased attention on how vulnerable public procurement, public infrastructure projects, and policy-making can be to corruption and corrupt practices. It argues that actions to prevent public corruption must look beyond government and include measures aimed at educating individuals and dissuading corruption in the private sector as well.

One of the most important areas of emphasis in the 2017 Recommendation is the conceptualization of corruption as more than bribery. Corruption is known to include influence peddling, embezzlement of public property, use of confidential information, and abuse of power. Moving beyond a narrow understanding of corruption and trying to gain a broader sense of the full complexity of where and how corruption can emerge is imperative. To do this, transparency may not be enough; greater scrutiny and accountability mechanisms may also be needed. Public integrity requires a coherent and comprehensive integrity system, a culture of public integrity, and effective accountability mechanisms.[31] To that end, the OECD offers thirteen individual principles or recommendations. Among other areas, the recommendations focus on investing in and encouraging political and managerial commitments to integrity; establishing high standards of conduct for public officials; establishing clear institutional responsibilities; promoting a "whole-of-society" culture of public integrity; promoting a merit-based, professional public sector; and ensuring that enforcement mechanisms are appropriate and effective.

With the new recommendations published, the OECD has become relentless in promoting and encouraging their uptake by states. Their 2020 *Public Integrity Handbook* (*Handbook*)[32] acknowledges a need for greater clarity about how implementation of the thirteen principles might actually manifest. The *Handbook* explains the thirteen principles in greater depth and provides cross-sectoral "guidance to public officials and integrity practitioners, as well as to companies, civil society organizations and individuals."[33] Renewed emphasis is placed on the importance of merit-based employment in the public service (as opposed to patronage hiring), the government's role in providing guidance to the private sector in relation to corruption, the importance of civil society groups, and the role of citizens in helping to uphold public integrity values.[34] The *Handbook*'s guidance is highly practical, even discussing risk management processes and further emphasizing the value of enforcement

[29] OECD, *Recommendation of the Council on Public Integrity*, (OECD, 2017), online (pdf): <https://www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf>.
[30] *Ibid* at 1.
[31] *Ibid*.
[32] Carissa Munro et al, *OECD Public Integrity Handbook*, (Paris: OECD Publishing, 2020), online: <http://www.oecd.org/corruption-integrity/reports/oecd-public-integrity-handbook-ac8ed8e8-en.html>.
[33] *Ibid* at 3.
[34] *Ibid*.

systems "to ensure real accountability for integrity violations."[35] Given the questionable state of public sector ethics in one of the world's most developed economies (i.e., the US) at the time this *Handbook* was published, the emphasis on enforcement could have been expected in light of the controversies concerning integrity of the Trump administration.

In an increasingly digital-first world and at a time where the COVID-19 pandemic limited the ability to gather physically, the OECD has recently focused its efforts on creating new, digital tools to complement the *Handbook* and encourage its uptake. The OECD's Council on Public Integrity released a new recommendation, *Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, in recognition of the possibility that the pandemic might expose how vulnerable policy-making public procurement and public infrastructure spending are to corruption.[36] This new document, released in 2021, contains twelve principles for managing ethics in the public service, alongside the thirteen principles from 2017, as well as two new and separate OECD legal instruments. OECD legal instruments are different than recommendations because although they are not legally binding by default, they become legally binding on all Members other than those that abstain at the time of adoption. This move to create legal instruments signals that the OECD is confident in the quality of these principles and is willing to put added pressure on its Members to adopt them as binding commitments.

In order to support Members who are now expected to take more robust action to improve their public integrity and anti-corruption policies and infrastructure, the OECD has created an interactive multi-lingual website filled with background information and useful tools. This digital toolkit includes the OECD Public Integrity Maturity Model tool, for example, which allows governments or public sector organisations to "assess the elements of their integrity systems, and identify where they are situated in relation to good practice across four categories: nascent, emerging, established and leading."[37] The OECD's ongoing creation and modernization of resources supports better public sector ethics and accountability, and sets them apart as the international leader among NGOs in this space.

#### 1.2.3 World Bank

The World Bank participates as an observer in more than 30 OECD bodies and provides support to OECD's Global forums and regional events.[38] The World Bank signalled its interest in public sector ethics when it commissioned a 2004 report entitled *Legislative Ethics and Codes of Conduct*.[39] In July 2020, together with the United Nations and the OECD as part

[35] *Ibid*.

[36] OECD, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, OECD/LEGAL/0298 (OECD, 2021), online (pdf): <https://legalinstruments.oecd.org/public/doc/129/129.en.pdf>.

[37] "OECD Public Integrity Maturity Models" (last visited 2 September 2021), online: *OECD* <https://www.oecd.org/governance/ethics/public-integrity-maturity-models.htm>.

[38] "Partnerships with International Organisations" (last visited 2 September 2021), online: *OECD* <http://www.oecd.org/global-relations/oecdpartnershipswithinternationalorganisations/>.

[39] Rick Stapenhurst & Riccardo Pelizzo, "Legislative Ethics and Codes of Conduct" (2004) World Bank and SMU Research Collection School of Social Sciences Working Paper No 37, online: <https://ink.library.smu.edu.sg/soss_research/37/>.

of the G20 Anti-corruption Working Group, the World Bank was instrumental in publishing the *Preventing and Managing Conflicts of Interest in the Public Sector: Good Practices Guide* (the *Good Practices Guide*).[40] Although duplicative in some ways to previous efforts by the OECD, the *Good Practices Guide* is more narrowly focused and goes into greater depth with respect to conflicts of interest. It serves as an important multi-stakeholder contribution to the modern literature on public sector conflicts of interest.

#### 1.2.4 Transparency International

The OECD's 2020 *Public Integrity Handbook* emphasized the importance of civil society groups for good reason. Among the more high-profile and influential of these kinds of international non-governmental (NGO) and not-for-profit organizations is Transparency International (TI). TI works in over 100 countries conducting research about and advocating for improved anti-corruption practices and greater transparency to help uncover corruption that already exists in both the public and the private sectors. Every year TI holds conferences, publishes various reports and releases its famous Corruption Perceptions Index (CPI). The CPI is a list that "ranks 180 countries and territories by their perceived levels of public sector corruption, drawing on 13 expert assessments and surveys of business executives. It uses a scale of zero (highly corrupt) to 100 (very clean)."[41]

## 2. COMPARING APPROACHES

It is now well-established within the international community that public sector ethics regimes play an important role in helping governments to dissuade and combat corruption. The UN and OECD's work have drawn attention to the different ways these regimes have been established in countries that have varied systems of government. The political anti-corruption regimes of the US, UK, and Canada can be illustrative in this regard.

Within each of these countries there is a mix of hard and soft law that governs the behaviours of elected officials. Hard law, which can also simply be referred to as 'law,' refers to legal obligations that are binding and can be enforced by the courts. Examples of hard law are statutes/legislation, judge-made law (i.e., caselaw) and even contracts. Soft law, despite what its moniker may imply, serves an almost equally important role. Soft laws are those policies, procedures, and protocols that cannot be enforced by the court, but are nevertheless influential and, in some cases, enforceable through other mechanisms (we might call them *rules* for simplicity). An example of a soft law that is enforceable could be a code of ethical conduct that applies to members of the executive but over which the Prime Minister or President has sole enforcement authority. Even if the public disagrees with a decision to not enforce the code, no recourse to the courts would be available. Regardless, such a code of

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[40] Alexandra Habershon et al, *Preventing and Managing Conflicts of Interest in the Public Sector: Good Practices Guide,* (World Bank/OECD/UNODC, 2020), online (pdf): <https://www.unodc.org/documents/corruption/Publications/2020/Preventing-and-Managing-Conflicts-of-Interest-in-the-Public-Sector-Good-Practices-Guide.pdf>.

[41] "Corruption Perceptions Index" (last visited 2 September 2021), online: *Transparency International* (TI) <https://www.transparency.org/en/cpi/2020/index/nzl#>. This resource is explained more fully in Chapter 1.

conduct can still play an important role in influencing the ethical decision-making of the public officials to whom it applies.

The US, the UK and Canada all have laws that govern the ethical conduct of their elected officials. Those laws are passed by the relevant legislative bodies and can, for the most part, be enforced by the courts. What complicates matters however, is that because of the nature of their systems of government (i.e., parliamentary democracy in Canada and the UK and constitutional republic in the United States) even those laws are not always capable of being enforced by the courts. Canada's *Conflict of Interest Code for Members of the House of Commons*,[42] for example, is administered by the Conflict of Interest and Ethics Commissioner (CIEC), who is an agent of Parliament.[43] As an agent of Parliament who has also been given a high level of discretion under the *Code*, the CIEC's findings about whether an elected official has violated the *Code* are not reviewable by the court for their reasonableness. This means that it is effectively impossible to have a court enforce the *Code* if there is reason to disagree with the reasonableness of the Commissioner's decision-making. These types of challenges with the enforceability of ethics laws will be addressed in greater detail below.

## 2.1 Principles-based

Whether we are talking about soft law or hard law, public sector ethics laws are sometimes assigned to advisers or commissioners for their administration because the standards public officials are expected to meet can evolve over time. There are some behaviours that it seems obvious we should want to prohibit (e.g., selling favours from public office or misappropriating public funds), but new ways of misbehaving sometimes come to light. Many laws or rules are drafted using principle-first language that allows for greater malleability in interpretation and application. A principles-based law can be applied to new scenarios even where those scenarios were not previously contemplated, and a precedent does not exist. In Ontario, Canada, for example, the *Members Integrity Act*[44] includes a concept called the "Ontario parliamentary convention"[45] (OPC) that is not defined in the *Act*. OPC has historically been used quite flexibly by Ontario's Integrity Commissioner as a standard against which the behaviours of elected officials can be judged. Principles-based laws encourage discretionary decision-making and, arguably, signal that the rule-makers are interested in promoting a culture of ethics (as opposed to a culture of compliance which more readily flows from a rules-based approach).

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[42] Canada, House of Commons, *Standing Orders of the House of Commons, Appendix 1: Conflict of Interest Code for Members of the House of Commons* (consolidated version as of 1 January 2021) [*Canada Code*], online: <https://www.ourcommons.ca/about/standingorders/Index-e.htm>.

[43] See Ian Stedman, *Resisting Obsolescence: A Comprehensive Study of Canada's Conflict of Interest and Ethics Commissioner and the Office's Efforts to Innovate while Strategically Asserting Greater Independence* (PhD Dissertation, Osgoode Hall Law School, 2019), online: <https://digitalcommons.osgoode.yorku.ca/phd/60/>, for a discussion about the fact that it is in fact contested whether the CIEC is an agent of Parliament or simply an officer of the House of Commons.

[44] *Members' Integrity Act*, 1994, SO 1994, c 38 [*MIA*].

[45] *Ibid*, s 5.

## 2.2 Rules-based

By contrast, rules-based laws are more rigid and less flexible in their application. A rules-based approach relies on the prior identification of specific conduct that the rule-makers have determined to be undesirable and, ideally, establishes deterrents for those behaviours. A simple example might be a rule that states: 'spending public funds for personal gain is not allowed. If a public official is found to have broken this law, then they will be removed from their public office.' These laws might be otherwise characterized as if-then statements: 'if action A is proven to have taken place, then result B must follow.'

### 2.2.1 Values

There is an important yet subtle distinction that must be made between values and principles. Many statutes (and even non-statutory rules regimes) begin with a preamble that serves as a statement of the overarching values toward which the rules are aimed. While these value statements are not enforceable, they set the tone for what the rule-makers expect from those who are subject to the formal rules. Why include these statements of value? Even when rules and principles are used together, it can be incredibly difficult to design a regime that will account for and protect against all instances of conduct that we might believe to be unethical. A statement of values can signal to those who are subject to a set of rules that even when they are uncertain about what those rules require, they should still be trying to hold themselves to the high standards that are set out in those underlying values. Behaviours that are rooted in these values may emerge and, if they are repeated over time, come to form what we call behavioural conventions. Generally speaking, these conventions are unwritten, politically enforceable norms of conduct.

### 2.2.2 Procedures

A final basic building block or element of every public sector ethics regime is procedure. If the goal of a regime is to do more than simply raise awareness, that is, if the goal is to detect, root out and possibly punish bad behaviour, then those who are subject to allegations of impropriety will expect some level of fairness in the processes that are engaged. The importance of procedure is typically addressed using one or both of the following approaches:

1) by requiring the individual or body that administers the regime to set out procedures they will follow, and ideally to make those procedures available to the public or, at least, available to anyone who may become subject to the regime; or
2) by establishing specific, detailed procedures as rules that must be followed as part of the regime's administration.

Procedures help to establish stakeholder expectations and can, in some circumstances, also fill gaps in rules where a regime is not intended to (and generally, cannot possibly) be a comprehensive code covering all possible ethical scenarios. Procedural predictability is useful, for example, where principle-based rules apply, and a decision-maker has been permitted a measure of discretion.

## 2.3 Comparing the Structure of Different Regimes

When observing governments through a comparative lens, the US, the UK, and Canada can reasonably be viewed as being among the world's most advanced democracies. These nations each have deep commitments to the concept of the rule of law, observable through long-standing legal traditions, comparably high human rights standards, robust political institutions, and strong citizen engagement. Among those political institutions are government ethics regimes that are the focus of this chapter. Depending on the country in question, these regimes are overseen by advisers; administered by commissioners, agents of parliament or registrars; or maybe even overseen by the courts.

Given the political histories of these three nations, what exists today are complex and sometimes confusing tapestries of public sector ethics regimes that can, at times, appear more symbolic than functional. As one might imagine, there is an inherent conflict of interest that exists when legislators are ultimately the ones responsible for passing laws that set limits on their own conduct. What will become apparent as we explore how the regimes in these three countries operate is that there are significant limitations with respect to administrative independence and the effectiveness of oversight and enforcement mechanisms. When ethics violations are found, the outcomes (i.e., whether an individual is disciplined or not) often appear to be a simple reflection of who holds political power in that moment and what they deem to be politically expedient.

### 2.3.1 US

The US conflict of interest regime is divided into three components: the House of Representatives, the Executive, and the Senate. Elected members of the lower house or House of Representatives are subject to non-legislative Rules of the House of Representatives (the Rules).[46] The Rules are a lengthy document with standards of ethical conduct found primarily in Chapters XXIII (*Code of Official Conduct*) and XXVI (Financial Disclosure). The House Committee on Ethics is formally charged with overseeing the *Code of Official Conduct* (*COC*),[47] but the House recognized this was a large responsibility for the committee and adopted a resolution in 2008 to create the Office of Congressional Ethics (OCE).

The OCE is a non-partisan entity responsible for reviewing allegations of breaches of the *COC* and other alleged violations of any laws, rules, regulations or standards of conduct that would fall under the jurisdiction of the Committee on Ethics. The OCE Board conducts

[46] These rules are adopted anew by each successive Congress and can be found on the website of the House Committee on Rules: "Rules of the House of Representatives" (last visited 2 September 2021), online: *House Committee on Rules* <https://rules.house.gov/rules-and-resources>. The current Rules for the 117th Congress can be found at: US House of Representatives, Committee on Standards of Official Conduct, *Rules of the House of Representatives*, 117th Cong (Washington, DC: United States Government Printing Office, 2021) [*House Rules*], online (pdf): <https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf>.

[47] See "Committee Jurisdiction" (last visited 2 September 2021), online: *US House of Representatives, Committee on Ethics* <https://ethics.house.gov/about/committee-jurisdiction>, for more information about the Committee's jurisdiction.

investigations and then decides whether to refer that matter to the Committee on Ethics for further investigation and potential enforcement. To assist with this work and to help educate those who are subject to the Rules, the Committee on Standards of Official Conduct publishes a very lengthy (400+ pages) *House Ethics Manual* (the *Manual*).[48] The *Manual* provides greater detail about the Rules and outlines relevant precedents.

The OCE and the Committee on Ethics can compel witnesses and obtain evidence in order to conduct their investigations. The Committee recommends administrative actions in response to violations of the Rules,[49] which the House then votes on. The Committee must produce reports even when it dismisses an allegation. This requirement can help to educate stakeholders while also potentially deterring questionable ethical behaviour.

Members of Cabinet in the US are not also members of the House of Representatives and are accordingly not subject to concurrent conflict of interest rules. That said, these and other members of the executive branch are subject to the non-legislative Standards of Ethical Conduct for Employees of the Executive Branch (the Standards)[50] and the legislative rules found in the *Ethics in Government Act* (*EGA*).[51] They are also subject to criminal conflict of interest and public corruption laws,[52] and various other statutory rules[53] and executive orders[54] that relate to ethical conduct and financial disclosure. Although the tapestry of rules that makes up the executive branch ethics program can be confusing, an Office of Government Ethics (OGE) has also been created to provide consistency and support to further its effective operation.

The OGE leads and oversees the executive branch ethics program[55] that applies to all government agencies and helps to prevent conflicts of interest, including improper personal financial gain. Oversight in this context does not, however, mean enforcement. Headed by

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[48] US House of Representatives, Committee on Standards of Official Conduct, *House Ethics Manual* 110th Cong, 2nd Sess (Washington, DC: United States Government Printing Office, 2008), online (pdf): <https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf>.

[49] *House Rules*, *supra* note 46 at Rule XI, clause 3.

[50] *Standards of Ethical Conduct for Employees of the Executive Branch* (codified in 5 CFR Part 2635, as amended at 81 FR 81641) (US Office of Government Ethics, effective 1 January 2017), online (pdf): <https://www.oge.gov/web/oge.nsf/0/5438912F316A0D26852585B6005A1599/$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf>.

[51] *The Ethics in Government Act*, Pub L No 95–521, 92 Stat 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the USC) [*EGA*].

[52] See 187 USC § 201-209.

[53] See e.g., the *Stop Trading on Congressional Knowledge Act of 2012*, Pub L No 112–105, S 2038, 126 Stat 291, online (pdf): <https://www.congress.gov/112/plaws/publ105/PLAW-112publ105.pdf>, which prohibits members of Congress and other government employees from using non-public information for their own private profit.

[54] See e.g., "Ethics Pledges and Waivers" (last visited 15 September 2021), online: *The White House of President Barack Obama* <https://obamawhitehouse.archives.gov/21stcenturygov/tools/ethics-waivers>. These are generally found on the White House website, although there is no requirement that they be posted.

[55] *Office of Government Ethics and Executive Agency Ethics Program Responsibilities*, 5 CFR Part 2638, online: <https://www.govinfo.gov/content/pkg/CFR-2012-title5-vol3/xml/CFR-2012-title5-vol3-part2638.xml>.

a director, the OGE's role is purely preventative, educational, and supportive. It assists with interpreting rules and advises on how to best ensure compliance. The OGE works alongside the Designated Agency Ethics Official (DAEO) within each federal agency. The DAEOs are given various powers under the *EGA*, including the ability to provide advice to employees within their agencies or to provide disclosure waivers for employees who work part-time.[56] Inspector Generals (IG) for particular agencies investigate complaints with respect to compliance with the *EGA*.[57] IGs play a role in prevention and enforcement of ethics violations and work under the umbrella of an independent body called the Council of Inspectors General on Integrity and Efficiency.[58] Given the large number and the unique nature of many federal agencies, a decentralized approach to ethics oversight is likely the only practical approach.

The executive branch ethics program is complemented by several other statutes that are administered by the Office of the Special Counsel (OSC). Most important for our purposes is *The Hatch Act* (*HA*),[59] which was passed in 1939 and places limits on the political activities that most federal employees can engage in, with the President and Vice President being the most notable exceptions. In order to help ensure that federal programs are administered in a nonpartisan manner, the *HA* "prohibits Federal employees from conducting political activities while on Government premises, using Government resources, or during duty hours. Furthermore, *The Hatch Act* bars Federal employees from running for partisan political office or from fundraising for a candidate or political party."[60] Interestingly, the OSC is responsible for enforcing the *HA*, but the Special Counsel who heads the OSC is in fact appointed by the President and confirmed by the Senate. In situations where the President and Senate are aligned politically, there is a risk that appointments like that of the Special Counsel could become politicized.

Finally, the Senate is subject to the *Senate Code of Official Conduct*, which is found within the Standing Rules of the Senate[61] and administered by the Select Committee on Ethics. Just as there is for the House, the Select Committee on Ethics has also published a 500+ page *Ethics Manual*[62] with information about the Rules and examples of precedents.

### 2.3.2 UK

Britain's approach to public sector ethics is coloured by its parliamentary system. Its approach is complicated by the multiplicity of players involved. For example, members of the House of Commons are subject to the non-legislative *Code of Conduct* for Members of

[56] *EGA, supra* note 51.
[57] *Inspector General Act of 1978*, Pub L No 95-452, 5 USC app 3.
[58] *Ibid*.
[59] *The Hatch Act*, Pub L 49-314, 24 Stat 440, c 314.
[60] *Ibid*, s 5.
[61] US, Committee on Rules and Administration, S Res 285, *Standing Rules of the Senate*, 113 Cong, 2013, Rule XXXIV-XXXIX, online (pdf): <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf>.
[62] US, Select Committee on Ethics, *Senate Ethics Manual*, 108 Cong, (S Pub 108-1) (Washington, DC: US Government Printing Office, 2003), online (pdf): <https://www.ethics.senate.gov/public/_cache/files/f2eb14e3-1123-48eb-9334-8c4717102a6e/2003-senate-ethics-manual.pdf>.

Parliament,[63] which is not part of the Standing Orders. The Standing Orders merely specify that there shall be an Officer of the House called a Parliamentary Commissioner for Standards whose responsibility includes, "advis[ing] the Committee on Standards, its sub-committees and individual Members on the interpretation of any code of conduct to which the House has agreed."[64]

The Committee on Standards is also created under the Standing Orders and it is responsible for considering:

> any matter relating to the conduct of Members, including specific complaints in relation to alleged breaches in any code of conduct to which the House has agreed and which have been drawn to the committee's attention by the Commissioner; and to recommend any modifications to such code of conduct as may from time to time appear to be necessary.[65]

The *Code of Conduct* is simply approved by a resolution of the House and published in conjunction with *The Guide to the Rules relating to the Conduct of Members*.[66]

Despite the somewhat confusing language, the Committee on Standards cannot receive complaints directly about members. Any complaints alleging a violation of the *Code of Conduct* must be submitted to the Commissioner, whose reports will then be submitted to the Committee for its consideration and a determination regarding possible sanction(s). In some circumstances, where the Commissioner believes a breach to be minor, they can work with the member to rectify the issue. This might involve acknowledging a mistake, issuing an apology, or repaying some monies. The Commissioner is also responsible for maintaining a register of members' financial interests and reports to the Committee, and so rectification could also mean simply adding a financial interest to a member's report.[67] Reports about investigations are published on the Commissioner's website.[68]

Further to the Select Committee on Standards, there is also an independent Committee on Standards in Public Life (CSPL) that answers to the Prime Minister and cabinet. Members of the CSPL are public appointees and thus the CSPL is considered to be independent. The CSPL's very broad mandate is to "advise the Prime Minister on arrangements for upholding

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[63] UK, HC, *The Code of Conduct* (Prepared pursuant to the Resolution of the House 19 July 1995, adopted 19 July 2018) [*HC Code*], online (pdf): <https://publications.parliament.uk/pa/cm201719/cmcode/1882/1882.pdf>.

[64] UK, HC, *Standing Orders of the House of Commons, Public Business 2018* (Standing Order, Session 2017-19) (Publication on the Internet: HC, 15 May 2019) [*HC Standing Orders*], s 150(2)(c), online: <https://publications.parliament.uk/pa/cm201719/cmstords/1020/body.html>.

[65] *Ibid*, s 149(1)(b).

[66] *HC Code*, *supra* note 63 at 9.

[67] *HC Standing Orders*, *supra* note 64, s 150(4).

[68] "Parliamentary Commissioner for Standards" (last visited 15 September 2021), online: *UK Parliament* <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/>.

ethical standards of conduct across public life in England."[69] Another way to frame this mandate is to say that the CSPL's purpose is to advise the Prime Minister on how to strengthen and uphold the seven principles of public life (i.e., ethical standards) that those working in the public sector are expected to adhere to: selflessness, honesty, integrity, objectivity, openness, leadership, and accountability.[70] The UK's *Civil Service Code*[71] is also based on these seven principles and is incorporated into each individual employee's employment contract. This *Code* is also not legislative and is overseen by the Civil Service Commission (CSC).

Yet another non-legislative code applies to the Prime Minister's executive council. This *Ministerial Code*[72] is simply a set of rules issued by the Prime Minister. Some sections of the *Code* also apply to special advisers and parliamentary private secretaries. The *Code* is not enforced by any external or independent body, but is instead left to the discretion of the Prime Minister. When an allegation is made, the Prime Minister may choose to appoint an advisor to conduct an investigation. Given that the *Code* is specific to each Prime Minister, it is generally updated when a new Prime Minister takes office.

Britain's upper chamber is called the House of Lords. The House of Lords' *Code of Conduct* is overseen by the Sub-Committee on Lords' Conduct and administered by the House of Lords Commissioners for Standards. The Commissioners educate the Lords, administer the rules, investigate alleged breaches and maintain a register of Lords' interests.[73]

#### 2.3.3 Canada

Canada's federal conflict of interest regime can be divided into three components, all of which are supplemented by the criminal law. Elected members of the lower house are subject to a non-legislative *Conflict of Interest Code for Members of Parliament*,[74] which, unlike the UK, is found within the Standing Orders of the House of Commons. This *Code* can be

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[69] "About Us" (last visited 15 September 2021), online: *UK Government: Committee on Standards in Public Life* <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about>.

[70] "Guidance: The Seven Principles of Public Life" (published 31 May 1995), online: *UK Government - Committee on Standards in Public Life* <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2>.

[71] "Statutory Guidance: The Civil Service Code" (last updated 16 March 2015), online: *UK Government- Civil Service* <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>.

[72] UK, Cabinet Office, *Ministerial Code* (Issued by Prime Minister Boris Johnson, August 2019) [*Ministerial Code*], online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf>. For more information on the Ministerial Code, see UK, HC Library, *The Ministerial Code and the Independent Adviser on Ministers' Interests* (Research Briefing No CBP 03750) by Chris Rhodes & Hazel Armstrong (London: HC Library, 2021), online: <https://commonslibrary.parliament.uk/research-briefings/sn03750/>.

[73] UK, HL, *Code of Conduct for Members of the House of Lords*, 10th ed (July 2020) [*Lords Conduct*], online (pdf): <https://www.parliament.uk/globalassets/documents/lords-commissioner-for-standards/hl-code-of-conduct.pdf>.

[74] *Canada Code*, *supra* note 42.

updated by a vote of the members themselves and does not need to pass through the formal legislative process. This is important because it means that, at least in theory, the *Code* should be much easier to update than legislation would be, particularly by a majority government. But the fact that the *Code* is not legislative also means that it is an internal policy of the House and its application is subject to parliamentary privilege. Being subject to parliamentary privilege prevents the courts from interfering in the administration of the *Code*.[75]

In contrast to the US, members of the House who have been appointed to the executive council are also subject to the rules set out in the *Conflict of Interest Act*.[76] The *Act* applies to what it calls "reporting public office holders" including, but not limited to, ministers of the Crown, parliamentary secretaries, certain members of ministerial staff, and certain Governor in Council appointees. Both the *Code* and the *Act* are administered by the Conflict of Interest and Ethics Commissioner, who is appointed by the Governor in Council after consultation with the leaders of each recognized party in the House of Commons. Both the *Code* and *Act* are primarily rules-based but are written in language that allows for some degree of flexibility in interpretation. More detail about various rules will be provided below.

Finally, the upper chamber in Canada is called the Senate. The Senate consists of members who are appointed, not elected. Although the government that passed the *Act* did attempt to make senators subject to legislation that would be administered by the Conflict of Interest and Ethics Commissioner, senators voted against that idea.[77] Instead, senators insisted on establishing and appointing their own Senate Ethics Officer (SEO) who now administers, interprets and applies the *Ethics and Conflict of Interest Code for Senators*.[78] This is similar to the UK, where the House of Lords maintains a separate regime for the governance of its ethical conduct. Ultimately, the SEO makes recommendations back to the Senate and has no authority to discipline. Again, this *Code* is not legislative and can only be updated by the Senate and administered by the SEO. The courts have absolutely no role in overseeing these rules, even if a senator applies to the court to have a decision reviewed.[79] Instead, parliamentary privilege applies and protects the Senate's right to discipline its own members.

### 2.3.4 Codes of Ethics for Political Parties

Canada's 1991 Royal Commission on Electoral Reform and Party Financing[80] recommended that political parties develop their own internal codes of ethics. This recommendation had not been taken up by the major parties in 2014 when Elections Canada commissioned a report by Paul Thomas entitled *A Code of Ethics or Code of Conduct for Political Parties as a*

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[75] *Parliament of Canada Act,* RSC 1985, c P-1 [*POC Act*], s 86.
[76] *Conflict of Interest Act*, SC 2006, c 9 [*COI Act*], s 2.
[77] Ian Stedman & Ian Greene, "Ethics Commissions" in Ian Greene & David Shugarman, eds, *Honest Politics Now: What Ethical Conduct Means in Canadian Public Life* (Toronto: James Lorimer & Company Ltd, 2017) 124 at 147.
[78] Canada, Office of the Senate Ethics Officer, *Ethics and Conflict of Interest Code for Senators* (in force 18 June 2021), online (pdf): <https://seo-cse.sencanada.ca/media/au5e4jal/ethics-and-conflict-of-interest-code-for-senators-code-régissant-l-éthique-et-les-conflits-d-intérêts-des-sénateurs-june-2021.pdf>.
[79] See e.g., *R v Duffy*, 2015 ONCJ 694.
[80] Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy,* vol 1 (Ottawa: Ministry of Supply and Services, 1991).

*Potential Tool to Strengthen Electoral Democracy in Canada*.[81] One of Thomas' conclusions was that adoption of a code would cause political parties and their followers to be "more aware of, sensitive to and capable of reasoning about ethically challenging situations in ways that they otherwise might not have in the past."[82] These codes could be particularly instrumental in creating standards of conduct surrounding campaign tactics and constituency work (including supporting charitable organizations), mobilizing voter turnout or even something as simple as fostering a culture of truth-telling. Most importantly, these codes could fill gaps that arise when the political will is simply not there for updating legislative or other codes.

In contrast, the Conservative Party,[83] the Scottish National Party,[84] and the Liberal Democrats[85] in the UK have implemented codes of conduct. Despite what seem to be strong arguments in favour of implementing party-specific codes, few political parties at the federal level in Canada have adopted a code of ethics. The federal Liberal Party has a *Campaign Code of Conduct*[86] and the Green Party of Canada has a *Members' Code of Conduct*.[87] Some sub-national political parties in Canada have released codes, including the Quebec Liberal Party,[88] the United Conservative Party of Alberta[89] and the Ontario Liberal Party.[90] Some of these codes include enforcement mechanisms. Both the mere allegation of a violation and its enforcement being accused of can have political consequences. However, the codes are non-legislative and unless they are integrated into employment contracts it is unlikely that the courts will play any role in enforcing them. Regardless, there is potential in this space for more regulation of the ethical conduct of public officials and those with whom they work in and outside of office.

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[81] Elections Canada, *A Code of Ethics or Code of Conduct for Political Parties as a Potential Tool to Strengthen Democracy in Canada, by Paul G Thomas* (EC, December 2014), online (pdf): <https://www.elections.ca/res/rec/tech/cod/pdf/code_of_ethics_e.pdf>.

[82] *Ibid* at 17.

[83] "Code of Conduct for Conservative Party Representatives" (last visited 15 September 2021), online: *The Conservative Party (UK)* <https://www.conservatives.com/code-of-conduct>.

[84] Scottish National Party, *Code of Conduct*, online (pdf): <https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/9765/attachments/original/1503997100/Code_of_Conduct.pdf?1503997100>.

[85] Liberal Democrats (UK), "Members' Code of Conduct" (last updated January 2017), online: *Liberal Democrats (UK)* <https://www.libdems.org.uk/code-of-conduct>. For more on UK Political Parties' Codes of Conduct, see Committee on Standards in Public Life Secretariat, *Review of Political Parties' Codes of Conduct,* (July 2019), online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841226/Review_of_political_parties__Codes_of_Conduct_July_2019.pdf>.

[86] Liberal Party of Canada, *Campaign Code of Conduct*, (2018), online (pdf): <https://liberal.ca/legacy-uploads/wp-content/uploads/2018/11/8.5x11-Code-of-Conduct-ENG1.pdf>.

[87] Green Party of Canada, *Members' Code of Conduct,* v 1.3 (20 January 2019), online: <https://www.greenparty.ca/en/members/resources/party/procedures/safe-space-policy>.

[88] Quebec Liberal Party (QLP), *Code of Ethics and Conduct*, (Montreal: QLP, 2016), online (pdf): <https://plq.org/app/uploads/2016/08/03_code_of_ethics.pdf>.

[89] United Conservative Party of Alberta, *Code of Conduct*, (updated 17 October 2020), online (pdf): <https://static.unitedconservative.ca/Code-of-Conduct-Updated-October-17-2020.pdf>.

[90] Ontario Liberal Party, *Code of Conduct,* (adopted February 2018), online (pdf): <https://ontarioliberal.ca/wp-content/uploads/2019/02/2018-OLP-Code-of-Conduct.pdf>.

### 2.3.5 Importance of Independent Oversight

As should be apparent from the above overview of how the political ethics regimes in these three countries are structured, it is easy to take for granted that self-regulation in this space is acceptable. The complex accountability tapestries in each of these countries place varying levels of emphasis on undertaking active public engagement and consultation. There is perhaps good reason for this when we consider that one of the fundamental tenets of representative democracies is that those who govern should be elected and not appointed to their positions. It accordingly makes sense that elected officials would not want to subject themselves to accountability regimes where they, as a unified body, give up control over disciplinary outcomes. As we will see, it is very rare for an appointed or delegated ethics official to be granted authority to make a finding with disciplinary implications that do not also have to be approved by the legislative body to which they are accountable.

There is an important difference, however, between involving the public in the creation of the rules and in granting true independence to the individual or body responsible for their administration. On the understanding that ethics rules ought to be revisited periodically, Canada included mandatory periodic review clauses in both its *Act* and *Code*. Included in the *Code* is a requirement that the Standing Committee on Procedure and House Affairs undertake a comprehensive review of the rules every five years and report back to the House.[91] The *Act* requires only one such review, which must begin within five years of the *Act* coming into force and be conducted by whichever committee or committees the House and Senate assign the task.[92]

The UK Parliament's Committee on Standards launched a review of the *Code of Conduct* for Members of Parliament in late 2020, with assistance from the Parliamentary Commissioner for Standards. The review invited input from anyone wanting to contribute, including members of the general public.[93] These mandatory periodic reviews of parliamentary ethics laws are incredibly important so that Parliament has an opportunity to keep its standards current with public expectations, and to have effective systems of administration in place that can help to foster public trust in government and in politicians.[94]

Even if the rules are co-designed with public input, legislative bodies most commonly retain control over any disciplinary decisions that must ultimately be made. However, a level of independence from the government in decision-making about disciplinary measures is generally desirable. Not having independence can prove problematic when seeking to maximize public trust and minimize public cynicism, particularly if a disciplinary action is

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[91] *Canada Code*, *supra* note 42, s 33.

[92] *COI Act*, *supra* note 76, s 67(1).

[93] "Standards Committee Launches Inquiry Into Code of Conduct for MPs" (22 September 2020), online: *UK Parliament - Committees* <https://committees.parliament.uk/work/596/code-of-conduct/news/119395/standards-committee-launches-inquiry-into-code-of-conduct-for-mps/>.

[94] Jean T Fournier, "Strengthening Parliamentary Ethics: A Canadian Perspective", Remarks, (Paper delivered at the Australian Public Sector Anti-Corruption Conference, Brisbane, 29 July 2009) at 11, online (pdf): <https://seo-cse.sencanada.ca/media/fyaogolw/strengthening-parliamentary-ethics-july-29-2009.pdf>.

recommended by the ethics body and then the relevant legislative body or actor (particularly when the President or Prime Minister is involved) subsequently chooses not to take action.

There are three notable exceptions to the general approach that legislative bodies or actors will retain control over disciplinary decisions. These are: 1) situations where the ethics body is permitted to mete out small monetary penalties for an official failing to meet what are usually administrative obligations 2) situations where the ethics body is permitted to determine whether a matter is minor and can be easily remedied by working with the official, and 3) situations involving criminal law. Further, the age of the internet has created an environment where ethics bodies are often required or permitted to publish their work online. This transparency seems to mitigate some concerns about independence. Even if a legislative body or actor refuses to adopt a disciplinary recommendation, the fact that the recommendation was made public allows the electorate to have information that can influence how people vote in the next election.

## 3. CENTERING CONFLICTS OF INTEREST

Central to every public sector ethics regime is the concept of conflict of interest. It is generally accepted that there are three types of conflicts that should be addressed through these regimes: real conflicts of interest, apparent conflicts, and potential conflicts. Unsurprisingly, the types of conflict guarded against in individual regimes vary greatly. This variance is typically a function of the political will of those who create the regime, but can also be a function of whether a regime has been modernized and whether public input has been incorporated. Further, there is tremendous variation in the language used to describe each conflict. For example, to whom each type of conflict applies and what counts as a 'improper' or a 'private interest' may be expressed differently among regimes. Modernized regimes are more likely to include broader conceptions of what counts as a private interest, as well as prohibitions against apparent conflicts of interest and improperly benefitting individuals beyond oneself. Accounting for these distinctions may help illuminate how particular rules operate, including what gets captured by the rules and what is overlooked.

A real or actual conflict of interest arises when a public official's private interests stand in conflict with their public duties. In other words, when a public official cannot fulfil their public duties without also benefitting themselves personally. An example might be a Minister of Finance who must make decisions about the banking industry that could impact profit levels, but who also holds large amounts of stock in individual banks. Another example might be a Minister of Mining and Forestry who owns stock in a mining company in a remote area, but must also make a decision about whether to use public funds to build a road that would help create jobs by providing that mining company and its employees with better access to the mine site.

A potential conflict of interest can arise before an actual or real one develops. Public officials must always be cognizant of ways in which their own private interests could come into conflict with their public duties. Accordingly, a potential conflict exists whenever there is a mere possibility that a private interest could clash with a future public duty. Returning to the Minister of Finance example, that individual should know upon being assigned the

ministerial portfolio that the fact they own stock in those companies has the potential to put them in a conflict of interest if and when they ever need to make an official decision that could affect the profitability of those companies. A potential conflict is not a real conflict. In fact, a best practice in this space is to identify potential conflicts in advance so that steps can be taken to mitigate or outright protect against those potential conflicts becoming actual or real conflicts.

An apparent conflict of interest is much more complicated and less commonly addressed in public sector ethics regimes than the aforementioned conflicts, but is arguably equally as important. An apparent conflict of interest arises when it merely appears as though a public official is in a position where their ability to fulfil their public duties stands in conflict with their private interests.[95] These types of conflicts are much more common in the digital age of micro-blogging and social media, where citizens are much more actively engaged in understanding (or at the very least, exposed to) public policy decisions and can easily share information with one another without much worry about intermediaries or gatekeeping. Imagine our Minister of Finance has recognized upon accepting their appointment as minister that they are in a potential conflict of interest. The new minister immediately sells all bank stocks before being sworn in. The public believes that the minister continues to own that bank stock because a public registry of private interests was posted when the minister took office as a member. This registry is now out-dated, but the applicable rules specify that it does not need to be updated until six months after the minister is sworn in to the new position. In the interim, there appears to the public to be a potential conflict of interest. Imagine now that the minister makes a very public decision that has a positive impact on the profitability of the banking sector. To those who are unaware that the minister sold all their stock, this decision appears to place the minister in a conflict of interest.

Apparent conflicts of interests arise all the time. Sometimes they are a precursor to a real conflict of interest, but other times the appearance is simply the result of observers having imperfect or incomplete information about a situation. Appearances can of course be deceiving, but unless those appearances are acknowledged and tended to, they can also lead to distrust and public cynicism. Even though it may seem undesirable and maybe even impossible to prohibit apparent conflicts of interest, it is becoming increasingly more important to try to actively minimize or avoid apparent conflicts of interest and to address them if and when they do arise.

## 3.1 Defining Private Interests

To further complicate the concept of conflict of interest, the definition of a "private interest" is sometimes extended to include family members and/or dependents and can also be extended beyond mere financial interests. The inclusion of family members means that public officials must be aware of those family members' relevant interests. This requires those who design the rules to consider whether the family members captured must also be obligated to make either private or public disclosures about their interests. Extending

[95] See Valerie Jepson, "Apparent Conflicts of Interest, Elected Officials and Codes of Conduct" (2018) 61:2 Can Pub Admin 36 at 40, for a discussion of the reasonable apprehension of bias in the context of conflicts of interest.

conflicts of interest and reporting requirements to include family members in this way has been criticized as an invasion of privacy and public officials sometimes simply refuse to comply with any such filing requirements.

### 3.1.1 Improperly Benefitting Self and Others

A conflict of interest can arise when a public official not only uses their public office and powers in order to benefit themselves personally, but also when those actions "improperly benefit others."[96] Of course, official decisions always benefit someone (why make them otherwise?), but public sector ethics rules generally contemplate that it can be improper for a public official to benefit others with their decisions, even if those others are not their family members or dependents. This is often interpreted in a way that captures friends or close business acquaintances. This flexible language empowers ethics bodies to investigate official decisions that appear to favour someone who is known to the decision-maker or, more generally, decisions that appear not to be impartial.

The interpretation of the word "improper" is also central to conflict rules and their operationalization. What it means for something to be improper is very much open to interpretation. For example, the CIEC in Canada has recently interpreted this word in a way that seems to broaden the scope of the rule. In the 2019 *Trudeau II Report*[97] under the *Conflict of Interest Act* and in the 2021 *Ratansi Report*[98] under the *Conflict of Interest Code for Members for the House of Commons*, the CIEC provides that it may be improper (for the purpose of the ethics rules) to break some other rule external to the ethics rules in order to benefit another person.

### 3.1.2 Outside Activities

Conflict of interest laws also tend to restrict or prohibit elected officials from participating in certain outside activities. Not only is being a member of the executive now considered to be a full-time job, but having outside interests also opens more opportunities for public officials to encounter conflicts of interest. Ethics rules often prohibit members of the executive from having other business interests[99] and from accepting government contracts.[100] Elected officials who do not serve in the executive are not generally prohibited from owning a company or having other business interests, but might be prohibited from accepting government contracts.[101] Exceptions to these rules may exist where the ethics body has provided approval.

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[96] *MIA*, *supra* note 44, s 2.
[97] Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, (Ottawa: Parliament of Canada, 2019) (Commissioner: Mario Dion) [*Trudeau II Report*], online (pdf): <https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf>.
[98] Office of the Conflict of Interest and Ethics Commissioner, *Ratansi Report* (Ottawa: Parliament of Canada, 2021) (Commissioner: Mario Dion), online: <https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Ratansi%20Report.pdf>.
[99] See e.g., *MIA*, *supra* note 44, s 12; *Ministerial Code*, *supra* note 72, s 7.7; *COI Act*, *supra* note 76, s 17.
[100] See e.g., *COI Act*, *supra* note 76, s 13(1); *Ministerial Code*, *supra* note 72, s 7.7.
[101] See e.g., *MIA*, *supra* note 44, s 7.

Many public officials also have prior affiliations with organizations outside of government. For example, they may have sat on the board of directors for a company or volunteered with a charitable organization. Members of the executive are often required to recuse themselves from these positions,[102] whereas other elected officials may simply need to seek approval from the applicable ethics body. The goal, again, is to minimize the possibility of a conflict of interest arising.

#### 3.1.3 Matters of General Application

Importantly, decisions that are about matters of general application are not usually considered to be conflicts of interest. If a legislator is voting on something that impacts a whole industry, for example, this rule allows them to not have to recuse themselves from that vote simply because their spouse or child is employed in that same industry. The general consensus is that even though it is important to avoid conflicts of interest, the rules must still be reasonable about allowing legislators to represent their constituents. Consider, for example, that an elected member of parliament lives in a rural area and their spouse works on a local farm. One of the reasons that person may have been voted into office is because they promised the local farming community that they would advocate for the rights and interests of local farmers. This would be a reasonable, and arguably desirable, political platform. It would be completely unfair and undemocratic to prohibit that individual from voting on matters that are of general application to the farming industry simply because their spouse happens to work on one of the local farms.

#### 3.1.4 Member of a Broad Class

Similar to the general application exception above, ethics rules also sometimes carve out exceptions in order to allow legislators to vote on matters that affect their own or another person's private interests as long as it only affects them "as one of a broad class of persons."[103] This exception might allow our Minister of Finance, above, to make decisions about the banking industry without having to first sell their stocks. Whether a matter is broad enough to be considered "a broad class" is typically left to the ethics body or ethics advisor to interpret. These ethics bodies often publish annual reports, sample inquiries or guides that assist public officials by offering examples of precedent advice and/or decisions. These important resources are explored in greater depth below.

## 3.2 Improper Influence

In addition to restricting the right of elected officials to make decisions, public sector ethics laws generally prohibit officials from using their position to influence a decision made by another person in order to further their own private interest(s) or another person's or entity's private interest(s).[104] Prohibitions like this contemplate situations where an elected official feels tempted to assist their constituent(s) through seeking the circumvention of established policies and procedures that apply generally to everyone. A more egregious example exists

[102] See e.g., *Ministerial Code*, *supra* note 72, s 7.8; *COI Act*, *supra* note 76 s 21.
[103] See e.g., *COI Act*, *supra* note 76, s 2(1); *Canada Code*, *supra* note 42, s 3(3)(b); *MIA*, *supra* note 44, s 1.
[104] See e.g., *Canada Code*, *supra* note 42, s 9; *MIA*, *supra* note 44, s 4; *COI Act*, *supra* note 76, s 9.

when an elected official believes a colleague should award a contract to a certain individual (perhaps someone they know or otherwise have some personal connection to). In order to compel their colleague to award that contract to the favored party, the elected official may promise to vote a certain way on a matter of importance to that colleague that comes up in the legislative house or in the cabinet office. These kinds of behaviours are generally understood to be improper because they manipulate the playing field in a way that unfairly benefits some people or groups over others.

#### 3.2.1 Campaign Contributions

Although they tend to vary a great deal between countries, rules about campaign contribution limits can function in essence to constrain one of the ways that outsiders are able to have influence over politicians. If you limit the amount of money that any one person, entity or group can donate to an individual or political party's campaign fund, then it is less likely that politician (or aspiring politician) will feel obligated to return the favour to that donor. The unfortunate reality is that political campaigns can be incredibly expensive, so candidates must work very hard to raise enough money to be able to participate at a competitive level. Placing limits on either contributions or spending, or both, can help to curb the influential role that money plays in politics. Enforcing these limits can also help reduce the pressure to improperly prioritize the needs of their donors that politicians might feel after they take office.

Political spending in the US has been treated much differently than in Canada and the UK, due in part to the US Supreme Court's 2010 decision in *Citizens United*.[105] The Court struck down a federal law that prohibited corporations and unions from spending money in connection with federal elections. This did not mean that corporations and unions could make unlimited campaign contributions to a candidate or party, but that free speech gave them the right to spend their own money independently of candidates on matters that were political in nature. This has led to the creation of political action committees (also known as Super PACs) that allow wealthy donors to contribute money to non-profit organizations whose purpose is to independently spend money on political issues. Of course, the issues chosen often align with a party's or candidate's political interests, even though the candidate cannot endorse that PAC. Due to the US laws applicable to non-profits, the names of donors to these PACs are not required to be disclosed—although they sometimes are. This has been referred to as "dark money."[106] These PACs can have significant social and political influence that politicians must vigilantly guard against, especially given the already high cost of running for public office.

## 3.3 Insider Information

Public officials are generally prohibited from using knowledge that they acquire by virtue of their position and that is not available to the public to further (or seek to further) their private interests. Again, this prohibition sometimes extends to the interest(s) of their friends

[105] *Citizens United v Federal Election Commission*, 558 US 310 (2010).
[106] Heather K Gerken, "The Real Problem with *Citizens United*: Campaign Finance, Dark Money, and Shadow Parties" (2013) 97:4 Marq L Rev 903.

and families.[107] They are likewise generally prohibited from improperly attempting to further any other person's private interests.[108] A rule like this may seem somewhat intuitive given the centering of conflicts of interest; however, comprehensive public sector ethics regimes are nevertheless explicit about prohibitions on benefitting from knowledge derived from public positions in the same manner that they prohibit benefitting from decisions made in an official capacity.

Determining what counts as a decision or as an action in the context of conflict of interest laws can be difficult. Similar difficulties arise in evaluating what counts as a private interest. These are not monolithic concepts; they have been interpreted differently by different ethics bodies in different jurisdictions. While a private interest may be equated with a pecuniary interest (that is, benefitting oneself financially), it may also extend to include future favours or support with respect to future political ambitions, depending on the jurisdiction. Because these rules are often drafted using rather flexible language, restrictions on benefitting from the use of insider information are carved out and separated from rules about conflicts of interest in decision-making.

## 3.4 Contrasting Legislative and Executive Roles

The duty to avoid conflicts of interest can look very different for legislators who also serve as members of the executive. Assuming an elected official has private interests that they must be attentive to (e.g., a stock portfolio, investment properties, ownership interest in a company, etc.), being a member of the executive might require them to make more daily decisions that could potentially lead to conflicts than faced by a general legislator. Consequently, members of the executive need to be especially diligent in avoiding conflicts of interest. If mere apparent conflicts of interest continue to capture the public's attention and to provoke greater public cynicism and distrust in government, increased interest in the idea of having specialized ethics advisors who are employed by and become an integral part of the executive may be generated.

Finally, it is important to acknowledge that the inclusion of people with diverse perspectives and background experiences in public office is desirable. An inevitable corollary to the inclusion of diverse and highly qualified persons serving in public office is the reality that conflicts of interest will arise. The goal of these regimes must be to help recognize and minimize those conflicts so that they do not cause damage. Being in a potential or even real conflict is not the same as improperly benefitting from that conflict. The goal must be to recognize risk and then to take steps to minimize or eliminate harm. Different ways to work towards this goal are discussed below.

## 3.5 Recusal and Restraint on Participation

One of the most widely accepted ways to avoid being in a real conflict of interest once a potential conflict has been identified is to recuse oneself from that situation. Legislators are

[107] See e.g., *Canada Code*, *supra* note 42, s 10; *MIA*, *supra* note 44, s 3.
[108] *COI Act*, *supra* note 76, s 8.

generally expected to recognize when participating in a vote or debate might put them in a conflict of interest and to recuse themselves in advance. Some jurisdictions require legislators to register their recusals with an ethics body and that registry may even be made public.[109] Members of the executive may also avail themselves of the recusal mechanism in order to avoid conflicts of interest in their bureaucratic roles. This could happen on a case-by-case basis or, if the potential for a conflict has been identified in advance, a blanket prohibition or screen could be established. Some ethics bodies have authority to establish conflict of interest screens that are shared within a department in order to ensure that protocols are in place to determine who should handle files about particular matters that could, if handled by the executive member, give rise to a real or apparent conflict of interest.[110]

These conflict of interest screens are rather unique, and at times, controversial.[111] After all, elected officials should not be subject to the whims of unelected bureaucrats when it comes to deciding how to represent their constituents. To minimize controversy, ethics bodies might be given express authority from legislators to outright prohibit or restrain an elected official's participation in certain types of matters.[112] This is effectively a forced recusal, as opposed to a voluntary one effected through a screen. Unlike a recusal, a restraint operates automatically, ensuring that an official is not put in a position where it is possible to forget to recuse themselves. These mechanisms may be used not only where a financial interest is implicated, but also when benefits have the potential to accrue to some other personal or family interest.

## 3.6 Disclosure of Interests

The proposition that elected officials should be required to prepare and file disclosure statements with an ethics body when they take office is widely accepted. In many regimes, these filings must be updated on a yearly basis or whenever there is a "material change" in that official's interests.[113] One of the reasons for this disclosure requirement is so ethics bodies have an opportunity to review an official's ongoing interests and then provide them with personalized advice that takes their specific regime's requirements into account. This advice should hopefully help the official recognize and avoid any ethics transgressions.

A statement of private interests will always need to be filed for the elected official but may also be required for their family members and other dependents.[114] While the specific information required to be disclosed will vary by regime, the following details are generally included:

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[109] See e.g., *COI Act*, *supra* note 76, s 25(1); *Lords Conduct*, *supra* note 73, s 16.

[110] See e.g., *COI Act*, *supra* note 76, s 29.

[111] See e.g., *Democracy Watch v Canada (Attorney General)*, 2018 FCA 194, wherein Democracy Watch argued that allowing conflict of interest screens effectively circumvents the *Act*, which requires public office holders to report any conflicts of interest.

[112] See e.g., *MIA*, *supra* note 44, s 10; *Canada Code*, *supra* note 42, s 8.

[113] See e.g., *Canada Code*, *supra* note 42, s 21(3); *Lords Conduct*, *supra* note 73, s 14; *MIA*, *supra* note 44, s 20(4).

[114] See e.g., *MIA*, *supra* note 44, s 20(2)(a); *Lords Conduct*, *supra* note 73, s 45.

- Sources and amounts of any income (e.g., employment or investment);
- Sources and amounts of any liabilities. The definition of a liability will vary, but typically includes loans and other debts. This has also been interpreted as including "contingent liabilities" under some regimes;[115]
- A list of assets, including stocks, investment properties, high value personal property, and so forth;
- Professional memberships and associations; and,
- Volunteer engagements and commitments.

Some ethics bodies will audit these filings, which means the official could be required to include official statements to confirm their assets, liabilities, and other interests. Failure to disclose fully, accurately, and on time can sometimes result in fines or what have been called "administrative monetary penalties"[116] (AMPs).

### 3.6.1 Private Disclosure

The disclosure process happens in two stages: first, private disclosure, and then review and publication. The first is the private disclosure statement. Elected officials file their statement in confidence to the ethics body. This distinction between private and public is important because some of that disclosed information will then be made public. Private disclosure statements are typically filed yearly, but some jurisdictions merely require a yearly acknowledgement or confirmation rather than a *de novo* filing. This can ease some of the administrative burden and time required to comply, while providing the ethics body with the required information. Officials are also generally expected to file any updates on an ongoing basis. These are sometimes called a "statement of material change"[117] and time limits for compliance are typically imposed, after which a file or AMP may be issued.

### 3.6.2 Public Disclosure / Registry

After private disclosure statements are received, ethics bodies are then tasked with reviewing, possibly auditing, and summarizing their contents. Regimes that require disclosure of this nature will also include specific instructions about what information must then be made public.[118] The purpose of a public disclosure statement or registry is to be transparent about what private interests elected officials might have. In theory, this allows the public to keep a watchful eye on their elected leaders in order to ensure that they are not placing themselves in conflicts of interest or behaving in a manner that might improperly benefit someone. These public disclosures are made available online, and because this public disclosure is generally acknowledged to be an invasion of privacy,[119] only limited information is included.

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[115] See e.g., *COI Act*, *supra* note 76, s 22(2)(b).
[116] *COI Act*, *supra* note 76, s 52.
[117] *MIA*, *supra* note 44, s 20(4).
[118] See e.g., *MIA*, *supra* note 44, s 21(2); *Canada Code*, *supra* note 42, s 24(3).
[119] Ontario, Commission on Conflict of Interest, *Annual Report 1990-91* (Toronto: Publications Ontario, 1991) (Commissioner: Gregory T Evans) at 1, online (pdf):

Public statements generally contain:

- A list of the names of companies in which shares are held;
- The names and private companies in which an ownership interest is held and the nature of that company's operations;
- Information about investment properties (e.g. the number of properties and/or their general location);
- Information about companies and investments from which income is generated/received;
- The nature of any liabilities (this usually excludes mortgages on primary residences);
- A list and a description of the nature of any volunteer engagement; and
- A list and description of any professional memberships and affiliations.[120]

Despite the above lists, ethics bodies are also often given broad discretion to include or exclude any item from the public disclosure based upon what they reasonably believe is in the public's best interest.[121] This discretion is typically granted using principle-first language, providing for greater flexibility, and the ability to avoid establishing rigid precedents.

With respect to the statements of material change, some jurisdictions conduct reviews on an ongoing basis in order to add new information to their public registry. Others only update their public registry once per year, which permits new information to stay hidden from the public for a period of time. In most circumstances, real-time updates are certainly consistent with a regime that values transparency. However, again the reality is that ethics rules are generally agreed upon by the people who are subject to them. Public officials make deliberate decisions about ongoing disclosure obligations; accordingly, delayed disclosure is typically by design, unless the ethics body is empowered to exercise its discretion in this regard.

### 3.6.3 Blind Trusts and Divestiture

Occasionally an official will disclose assets or interests strictly prohibited by the rules. In Canada, for example, Ministers of the Crown are not allowed to "be a party to a contract with a public sector entity under which he or she receives a benefit."[122] Rules of this nature (that is, pre-determined conflicts) are effectively a consensus about what the rule-makers all agree is never going to be acceptable. Like other conflicts of interest, these rules might be implemented in several different ways. First, some public sector ethics regimes allow the person who holds the prohibited asset or interest to simply disclose it and then to proceed as they normally would. They may have to recuse themselves from certain discussions or certain votes, or they may set up a conflict of interest screen at their own discretion. Second,

<http://www.oico.on.ca/docs/default-source/annual-reports/annual-report-1990---1991.pdf?sfvrsn=8>.

[120] See e.g., *Canada Code*, *supra* note 42, s 24; *COI Act*, *supra* note 76, s 25(4); *MIA*, *supra* note 44, s 21.

[121] See e.g., *MIA*, *supra* note 44, s 21(4)(11); *Canada Code*, *supra* note 42, s 24(3)(l).

[122] *COI Act*, *supra* note 76, s 13(1).

some regimes require that prohibited assets be divested or sold, eliminating any potential for conflict. Finally, a blind trust may be executed. This mechanism is the most complicated response to the disclosure of prohibited assets or interests.

A blind trust requires that a public official's assets (usually shares in a private or publicly-traded company) be placed in a trust prior to their appointment to the cabinet position. A trust is a fiduciary relationship where one party (the trustor) gives the other party (the trustee) legal title to some asset that they then hold for the benefit of some third party (the beneficiary). In the blind trusts contemplated by public sector ethics laws, the trustor and the beneficiary are the same person (i.e., the public official). The trustee must be a third party who is arm's length to the trustor/beneficiary. The trust is "blind" because the beneficiary has no right to receive ongoing information about the trust or to direct the trustee's management decisions. Specific requirements for instruments of this nature are typically set out in the applicable ethics rules or left to the discretion of the relevant decision-maker in the ethics body.[123]

#### 3.6.3.1 Executive Branch Nominees

The executive branch in the US functions differently than it does in Canada and the UK, as elected officials in the US are not appointed to executive positions in the same manner. Instead, anybody can be nominated to the executive branch by the President. The nominees must be vetted by a Senate committee which is required to approve or confirm their appointment. When nominations are made, the Office of Government Ethics (OGE) is tasked with reviewing that person's private disclosure statement(s) and ensuring that they are free from conflicts of interest.[124] These individuals are expected to sign an ethics pledge and their public financial disclosure reports can then be requested from the OGE.[125]

### 3.6.4 Ethics Waivers (US)

Another unique feature of the US system of government is that the President can grant ethics waivers to members of the executive. The President establishes this power to grant ethics waivers simply by signing an executive order that brings the power into existence.[126] Different Presidents may require that the waivers be made public, but that level of disclosure is not in fact required.[127] The President can then create waivers that allow individual members of the executive to avoid having to comply with specific ethics rules. These waivers

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[123] See e.g., *MIA*, *supra* note 44, s 11(3); *Canada Code*, *supra* note 42, s 19.

[124] *EGA*, *supra* note 51, § 101.

[125] The White House, President Joe Biden, "Executive Order on Ethics Commitments by Executive Branch Personnel" (20 January 2021), online: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/>.

[126] *Ibid*, s 3.

[127] See e.g., Memorandum from Emory A Rounds, III, Director of the United States Office of Government Ethics to Agency Heads and Designated Agency Ethics Officials (18 February 2021), "Legal Advisory: Waiver Authority and Making Waivers Public under Section 3 of Executive Order 13989", LA-21-0, online (pdf): <https://www.oge.gov/Web/oge.nsf/Legal%20Docs/CF1E6B2DAF6E62A085258680006E1ECE/$FILE/LA-21-04.pdf?open>.

are typically used when a person comes into the executive from an industry with which they will be required to continue to interact. Ethics rules generally prohibit executive officials from working closely with former colleagues who might now benefit from their connection to the executive branch of government. This prohibition serves to minimize the risk of unintentional or inadvertent preferential treatment being given. Although there is no formal requirement to do so, ethics waivers are typically made available to the public on the OGE website. Because the OGE has no investigative authority however, the Office is limited in what it can do if the President does not share those waivers or release them publicly. This can be problematic in the context of wanting transparency about an official's ethical obligations.

#### 3.6.5 Gifts, Benefits, and Travel

Public sector ethics regimes generally include rules about what types of gifts, benefits, and travel a public official may permissibly accept.[128] Public officials commonly receive gifts of gratitude in exchange for speaking at or attending an event. Gratitude can also take the form of a benefit, including a free dinner or an upgraded seat. Sometimes public officials must even travel to remote locations in order to meet with constituents or tour a remote facility (e.g., mining operations). A public official may not be able to make such visits unless they accept travel and accommodations. These are the kinds of exchanges that are addressed.

Rules about gifts are often divided into four considerations:

(1) What types of gifts are acceptable?

Gifts are generally acceptable when they are received as part of a custom, protocol or social obligation that normally accompanies the responsibilities of holding public office.[129] Given that the custom of gift-giving in exchange for a dignitary's presence at an event is rather well-established, ethics bodies and advisors are generally quite flexible with allowing public officials to accept such gifts before seeking advice about its appropriateness. Given the social consequences of turning down a gift (i.e., being seen as rude), in some circumstances, ethics regimes provide for the possibility that it may be better to err on the side of politeness.

(2) What value of a gift is acceptable?

If a gift is acceptable under the rules about custom, protocol and social obligation, then the next question is often about its value and whether that value and or another aspect of the gift's nature warrants disclosure.

(3) When does a gift need to be publicly reported?

Each public sector ethics regime that includes rules about gifts and benefits will also determine when an item must be reported to the ethics body and/or made public. In Canada, for example, elected officials must report gifts that they or their family members receive from any one source that total

[128] These rules do not speak to what it is acceptable to give, as that could be covered by the regular conflict of interest rules relating to acceptable conduct.

[129] See e.g., *MIA*, *supra* note 44, s 6; *Canada Code*, *supra* note 42, s 14(2).

CDN$200 or more within a 12-month period. That report must be filed within 30 days of receipt or within 30 days from the date on which the value of the accumulated gifts from that single source totalled CDN$200.[130] The individual gifts must all be reported publicly as well.

(4) When, if ever, can a gift be retained by the recipient or must it be relinquished to the government (or some related entity)?

Finally, it is sometimes the case that a gift is worth much more than those within a particular jurisdiction believe it is acceptable for an elected official to receive and keep. When a public office holder in Canada (or a member of their family) accepts a gift or other advantage that has a value of CDN$1,000 or more, it must be forfeited to the Crown, unless the Conflict of Interest and Ethics Commissioner determines otherwise.[131]

The above rules apply to both gifts and benefits, but there may also be rules that apply specifically to travel. Some governments have rules requiring that the fair market value of any necessary travel must be reimbursed, while others allow elected officials to accept travel as a gift or benefit under limited circumstances. Designated public office holders in Canada (which include members of cabinet and other senior officials) are encouraged to pay for their travel from the consolidated revenue fund, or by using parliamentary or political party funds. If they cannot do so and the travel costs exceed CDN$200, they must file a statement with the Conflict of Interest and Ethics Commissioner disclosing the name of the person or organization that paid, the names of anyone who accompanied the official on the trip, and the nature and value of the trip and any other gifts or benefits received, including accommodations. Interestingly, the *Conflict of Interest Act* does not require that the information is made public. Instead, the Commissioner is merely expected to prepare a list once a year of such disclosures and to file that list with the Speaker of the House of Commons.[132]

## 3.7 Seeking Advice

Most public sector ethics bodies are given mandates that include the provision of education and awareness. This work can take many forms, but four are worth special attention: advice giving, regular meetings, specialized training sessions, and the use of digital media. Typically, stakeholders that are subject to the rules administered by an ethics body are entitled to contact that body to ask specific questions about how to meet their obligations. These questions could be about administrative obligations, as well as how to comply with the ethics rules (such as those related to conflicts of interest and insider information). An official can also sometimes request a formal opinion from the ethics body. How ethics rules operate should not be a guessing game for those who are subject to them. It is accordingly

[130] *Canada Code*, *supra* note 42, s 14; *COI Act*, *supra* note 76, s 23.
[131] *COI Act*, *supra* note 76, s 11(3); See also *Ministerial Code*, *supra* note 72, s 7.22 (note that in the UK, gifts exceeding £140 that are "given to Ministers in their Ministerial capacity become the property of the Government and do not need to be declared").
[132] *Canada Code*, *supra* note 42, s 15.

important to encourage stakeholders to reach out and proactively seek clarity whenever they have questions or concerns.

### 3.7.1 Advice as Absolution

One way to incentivize seeking advice is to structure the ethics regime so that the formal advice the ethics body provides can, if followed, be used as a defence to allegations of misconduct. For this to work effectively, however, the advice-seeker must fully disclose all relevant facts and the advice must be received before the unethical action occurs. If a complaint is subsequently made against that official, and if that official has done exactly what the ethics body has advised, then any subsequent investigation would be required to acknowledge that the official followed the advice.[133] Officials who follow the advice of ethics bodies, even if that advice is poor, can accordingly be confident that they will not be punished in any way for their compliance.

Practically speaking, regimes that allow prior advice to be used as a defence to an allegation of misconduct need to take the advice-giving function seriously. In Canada, for example, the CIEC provides advice. Giving bad advice, or even advice based on incomplete information, would reflect poorly on the Commissioner. It should be very rare for an official who received advice to have to rely on it for absolution after it was followed. These absolution provisions are rarely invoked by advice-seekers but do an important job of incentivizing public officials to seek advice from their ethics bodies before they act.

### 3.7.2 Regular Meetings with Advisor

Many of these regimes also require (or allow) newly elected officials to meet with their ethics advisor or ethics registrar. These meetings might be further required on a yearly basis, or whenever an official is appointed to a new position (e.g., a cabinet or executive position). As explained, elected officials may be required to file disclosure documents with ethics bodies that outline their private interests, including assets and liabilities. One of the ways that ethics bodies add value for officials is to provide them with disclosure-specific advice that will help them to better recognize and avoid apparent, potential, and actual conflicts of interest. By requiring these meetings on an annual basis, some regimes effectively force personalized education sessions on officials. While this can be an effective approach given the busy schedules of officials, it can also be seen as unnecessary and paternalistic. This latter perception has resulted in most regimes opting to forgo such requirements.

### 3.7.3 Regular Training

Further to the annual meetings, many ethics bodies offer regular or tailored training for their stakeholders. This can be especially useful for educating those who are subject to the rules as well as for their inner circle of advisors, and particularly those who may be responsible for guarding against problematic or unethical situations. Regular and focused training is integral to raising awareness and to building and sustaining a culture of excellence in ethical decision-making.

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[133] *MIA*, *supra* note 44, s 31(7).

### 3.7.4 Digital Media

Ethics bodies are beginning to leverage digital media to engage with stakeholders and the general public. Websites now do more than tell visitors how to phone or fax the office; they host information that can be searched, downloaded, and distributed. Social media channels are also being leveraged to engage and educate stakeholders.[134] The move into the digital age has created an opportunity for ethics bodies to expand their reach in a way that maybe was not contemplated when they were created. The new digital environment offers new and significant tools for ethics bodies. For example, some ethics bodies may have been given no explicit public education mandate, but may be permitted or required to make reports public. It costs less to use digital media than to have a physical mailing list, and a broader range of people can potentially access and take an interest in this work if it is posted online. In the wake of Donald Trump's presidency, where questions about the ethical conduct of the President and his advisors were in the headlines on an almost-daily basis, placing greater emphasis on outreach and education about how these regimes operate is crucial, and digital tools provide an efficient and effective means of doing so.

## 3.8 Post-Employment / Cooling Off

*The Hatch Act* restricts the political activity of federal employees in the US. Rules that restrict people working in the public service (not in ministers' offices) from also being politically engaged are very common. A public servant is generally expected to be politically neutral and loyal to the acting government. Neutrality and loyalty are valued so that public servants do not need to be replaced whenever the political party in power changes. This provides for the continuity and consistency necessary for bureaucracies to proceed on a (relatively) seamless basis. These kinds of political activity restrictions do not, however, apply to everyone.

Elected officials and their inner circles of advisors and staffers will always be politically-minded. Although it is not generally accepted that they should be allowed to campaign using public sector resources or while at their public sector jobs, their political nature is accepted. As such, these individuals are often subject to post-employment restrictions when they leave their roles in the public sector. Post-employment rules are important because political life can be cyclical in nature. If a person is committed to one political party over another, then they typically stick with that party and volunteer their time to assist with fundraising, strategizing, campaigning, and polling. This is very common for political operatives who work alongside ministers and party leaders. Because these people are known to go back and forth between government and industry, ethics rules are typically put in place specifically to prevent them from using their knowledge and/or connections in a way that would improperly benefit them in their private sector roles.

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[134] See e.g., Office of the Conflict of Interest and Ethics Commissioner, *Annual Report: Conflict of Interest Act 2020-21,* (Ottawa: Parliament of Canada, 2021) (Commissioner: Mario Dion), online: <https://ciec-ccie.parl.gc.ca/en/publications/Documents/AnnualReports/Annual%20Report%20Act%202020-21.pdf>.

Common post-employment rules provide that former public office holders:

- Must not seek preferential treatment from those they have worked with in the public sector;
- Must not disclose or benefit from the use of confidential information that they acquired while working in the public sector;
- Must not lobby their former employer or anyone they had close contact with in their former public sector role;
- Cannot take a position at a company or organization that has ongoing business with the government that they were privy to and that they have confidential information about; and,
- Cannot switch sides on an ongoing transaction.

Rules of this nature apply mostly to senior unelected officials and rarely to elected officials, unless they are also members of the executive.

## 4. PUBLIC REPORTING

Not only do public sector ethics bodies generally have an obligation to educate their stakeholders, they must also publicly report their own activities. Specific rules are often provided about what must be reported on, to whom, and when.[135] Public reporting typically takes the form of annual and complaint-specific reports. Annual reports can contain a range of information, including:

- The ethics body's composition and budget;
- A summary of the number of requests for advice received and what topics those requests covered;
- A summary of the number of requests for investigation received and who those requests related to;
- Summaries of outreach and education activities undertaken, including appearance before official committees; and,
- Samples of actual advice given (usually anonymized).

Ethics bodies that oversee the conduct of legislators typically report directly to that legislative body or to a selected committee. Annual and other reports are generally made public and the ethics body can be called upon to answer questions at the discretion of the legislative body or committee. Making these reports and proceedings public also means that they can indirectly contribute to the public awareness and education work that the ethics body undertakes.

[135] See e.g., *POC Act*, *supra* note 75, s 90.

## 4.1 Complaints, Investigations, and Enforcement

There is little point in having so many ethics rules if they cannot be enforced. Unfortunately, public sector ethics regimes can be more effective at setting standards for elected officials than enforcing those standards. The regimes that apply to unelected public servants tend to be more easily enforced because they are either legislative in nature or can be incorporated into employment contracts. This means they can either be enforced by the courts or a negative finding can lead to disciplinary action in the employment context.

There are several key elements that these complaint regimes tend to have in common. The first is the mechanism by which a complaint can be made and by whom it can be filed. Some ethics bodies are permitted to accept complaints from elected officials, from the legislative body as a whole (through a motion that is passed in the House, for example), and/or from members of the public. While it may seem counterintuitive to limit who can make a complaint, ethics regimes that provide for absolutely anyone to file a complaint are exceedingly rare. Some regimes have gotten around the need to be granular about who should have standing to file a complaint by allowing the ethics body or its head to exercise their own initiative in determining what to investigate. Providing these initiative rights is arguably ideal because it places an expectation on ethics bodies to stay proactive while also allowing them to accept complaints from the public without being obligated to investigate.

The next significant component of these regimes is the requirements regarding the quality of evidence needed from a complainant in order to support a request for investigation. Complaints processes can sometimes be used improperly and as political battlegrounds, with an elected official from one party filing a complaint against an official from a different party in order to engage the poor optics that would inevitably result from being subject to an ethics investigation. Complaints are also sometimes made that appear to be nothing more than fishing expeditions. This happens when the complainant submits low quality evidence, like newspaper articles or speculative postings they have copied from social media, and makes no specific arguments as to which rule(s) has been broken. It may be an inefficient use of resources to require or to even allow an ethics body to investigate when the complaint itself does not meet some basic evidentiary standards.

This leads to the next element: should it be mandatory for an ethics body to conduct an investigation into any complaint it receives or should the body be empowered to exercise its discretion? Regardless of which option is chosen, should the ethics body also have a duty to acknowledge every complaint? Should it be required to file a public report about every complaint, even if a complaint was deemed to be unfounded or vexatious? Each regime is different, but these are important questions that are generally addressed in their design.

Finally, some regimes are very detailed when it comes to establishing procedures. Procedural clarity is a mark of fairness in the legal system and allows stakeholders to know what they can expect. That said, most ethics bodies are not subject to the requirements of administrative law and procedural clarity is rarely mandated. It is accordingly nothing more than good practice standards that dictate whether complaint and investigation processes will be published in order for stakeholders to know what to expect and to provide for investigatory efficiency.

### 4.1.1 Discipline and Sanctions

Assuming an investigation into an alleged violation of an ethics rule results in a negative finding, what are the possible outcomes and next steps? How, if at all, can an ethics body correct and/or shape the behaviour of public officials through its work? As noted, public sector ethics regimes that apply to elected officials are generally not autonomous and fully independent. These regimes are tasked with conducting investigations and reporting their results back to the relevant legislative bodies. Those legislative bodies must then consider whether they agree with the findings and what, if anything, they would like to do about them. Disciplinary measures of any real consequence against a person who was democratically elected to office are then agreed to and meted out by their peers who were also democratically elected to office. Despite this apparent conflict, investigation reports nevertheless do have influence and can have a significant impact on ongoing behaviour and ethical compliance more generally. Ethics bodies have a variety of disciplinary tools at their disposal, including:

(1) Name and Shame

In a line of work where a person's reputation is perhaps as central to their role as their official duties, being featured in a report where the investigator concludes that there has been an ethics violation can be particularly damaging. The public wants desperately to trust that their politicians are serving in public office for the right reasons and that they are not taking improper advantage of their power or influence over the public purse. An investigation report may conclude that a public official has violated the ethics rules, but that the violation was inadvertent or did not rise to a level of such significance that disciplinary measures ought to be taken. A report could also recommend that a public official apologize publicly for a minor lapse of judgement, which is typically what happens when the official has been cooperative and has acknowledged or corrected their mistake. Regardless of whether a report recommends a significant penalty, the mere act of publishing a report explaining that an elected official has done wrong can have a profound and lasting impact on that person's reputation and career. This has been coined "naming and shaming."

(2) Salary Reduction or Suspension

An investigation report might recommend that a public official's salary be withheld for a period of time (e.g., until a debt has been repaid) or that they be suspended from the position either temporarily or permanently, with or without pay. These are significant penalties, however, and ethics bodies are unlikely to be given the authority needed to impose them. Suggesting such a penalty in response to a violation adds to the public shaming of that official and adds higher stakes to the subsequent discussion by the legislative body who is ultimately responsible for providing reprimand. They may choose to proceed with the recommended action, or they may choose something different, but the mere recommendation can do damage regardless.

(3) Monetary Penalties or Fines

An increasingly popular disciplinary tool is the administrative monetary penalty (AMP). The right to issue AMPs must be explicitly provided to the ethics body and the limits of that

power must be made very clear. In Canada, for example, the CIEC has the power to issue AMPs to certain designated public office holders (including members of cabinet) if they fail to fulfil certain administrative responsibilities under the *Act*. This includes, for example, filing annual private disclosure statements and statements of material change. Whether an AMP would be enforceable by a court of law if an elected official refused to pay is unclear, but it is perhaps reasonable to expect that the legislative body would exercise its right to discipline its own members and issue that same penalty if an elected member did refuse to pay.

(4) Impeachment

The US Constitution contains "emoluments clauses." The foreign emoluments clause prohibits the US President from "profiting, gaining from or receiving any other advantage from a foreign or domestic government."[136] This clause was added to the Constitution because many believed the Articles of Confederation were written in such a way that they might help give rise to a very weak central government. The Framers of the Constitution were accordingly concerned that an influential foreign state might be able to "sway the President's decision-making to its own benefit."[137] There is also a domestic emoluments clause which prohibits the President receiving any sort of advantage from any state government.[138] The remedy for violating one of these clauses has always been impeachment.[139]

Impeachment is both a political and legal process. Articles of impeachment are drafted and laid before the House of Representatives and then, if passed, before the Senate. The articles set out the allegations against the President and legislators vote on whether they agree to impeach based on that information. A vote to impeach is only one part of the process, which typically involves a number of hearings as well. Assuming a President is impeached by both Houses, they must then decide upon a remedy. Beyond the shame invoked by the impeachment itself, the Houses must also decide if the violation is worth removal from office and/or disqualification from holding public office in the future. Impeachment has also been used in the UK, but the procedure has been considered obsolete since 1806.[140]

(5) Removal

In the most egregious cases of misconduct, an elected official can be removed from office by their peers. This happens very rarely, but there are certainly examples from the UK,[141] the

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[136] US Const art I, § 9, cl 8.

[137] Gabe Lezra, "Profiting off the Presidency: Trump's Violations of the Emoluments Causes" (1 October 2019), online (blog): *American Constitution Society: Expert Forum* <https://www.acslaw.org/expertforum/profiting-off-the-presidency-trumps-violations-of-the-emoluments-clauses/>.

[138] US Const art II, §1, cl 7.

[139] Alexander Hamilton, James Madison & John Jay, "Federalist No 65" in Clinton Rossiter, ed, *The Federalist Papers*, (New York, NY: Dutton/Signet, 2012) 394.

[140] UK, HC Library, *Impeachment* (Research Briefing No CBP 7612) by Jack Simson Caird (London: HC Library, 2016), online (pdf): <https://researchbriefings.files.parliament.uk/documents/CBP-7612/CBP-7612.pdf>.

[141] *Ibid*.

US,[142] and Canada.[143] This may occur when an ethics investigation leads to a criminal investigation where it is subsequently determined that an elected official has committed a crime. Removal could also result from serious breaches of the public trust that do not quite rise to the level of criminality or where criminality cannot be proven to the requisite standard for criminal guilt.

#### 4.1.2 Contesting Outcomes

One of the reasons that establishing and communicating clear processes and procedures is crucial is because people who are the subject of negative findings will often want a way to appeal those findings and reports. Appeal mechanisms provide a means to ensure that ethics bodies are held accountable for their work. Of course, the ability to appeal is a function of how the ethics regime is structured. If the ethics body is only allowed to report back to the legislative body, and not to make final decisions about discipline, then it is less likely that an appeal mechanism will be available with respect to the ethics body's findings. Parliaments also have an inherent right (i.e., parliamentary privilege) to discipline their own members, so it is also highly unlikely that an official will be able to appeal a disciplinary action taken by a parliamentary body. Judicial review may be possible in the context of regimes that apply to public officials who are not elected, but these are the types of concerns generally addressed within the instruments that establish each individual regime.

## 4.2 Criminal Law

Criminal laws exist in every country to prohibit public officials from breaching the public trust or otherwise taking improper advantage of the benefits afforded by holding public office. The specific language of the criminal prohibitions will vary slightly by jurisdiction, but they are most often similar in substance. The Canadian *Criminal Code*, for example, includes laws against bribing judicial officers or other government actors,[144] committing frauds on government,[145] influencing or negotiating appointments or dealings in offices,[146] and committing breaches of trust.[147] Ethics bodies are typically required to suspend any inquiries or investigations into a matter if a related criminal charge is filed. Civil actions can also be brought against government officials for behaviours that amount to misfeasance in

[142] "List of Individuals Impeached by the House of Representatives" (last visited 2 September 2021), online: *United States House of Representatives: History, Art & Archives* <https://history.house.gov/Institution/Impeachment/Impeachment-List/>.

[143] See "3. Privileges and Immunities" in HC, *House of Commons Procedure and Practice* by Robert Marleau & Camille Montpetit, eds, Catalogue No X9-2/5-1999E (Ottawa: House of Commons, 2000), online: <https://www.ourcommons.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Language=E&Sec=Ch03&Seq=7>, wherein it is noted that the House has expelled members on four occasions.

[144] *Criminal Code*, RSC 1985, c C-46, ss 119-20.

[145] *Ibid*, s 121.

[146] *Ibid*, s 125.

[147] *Ibid*, s 122.

public office[148] or breach of their fiduciary duties.[149] For an explanation of criminal law regarding bribery, for example, see Chapters 2 and 3.

## 5. CONCLUSION

The concept of conflict of interest underpins public sector ethics laws, but by no means defines them. A wide variety of principles, rules, accountability mechanisms, and educational activities are required to establish and maintain high standards of ethical conduct. Public sector actors must balance competing interests on a day-to-day basis, particularly when it comes to policy- and other decision-making. It is in the consistently tangled web of relationships, interests, and responsibilities that the risk of corruption surfaces and the need to stay vigilant arises. A principle challenge of public sector ethics regimes is their legislative nature: the rules are established by those same individuals who are subject to them. Indeed, this inherent tension sometimes means that they are slow to be updated and improved. Regimes that become outdated can unfortunately also be quick to lose their influence over public officials.

While this chapter has offered an overview of the rules and responsibilities in place within the US, the UK and Canadian regimes, it is important to remember the difference between ethics and compliance. International organizations like the UN, the OECD and Transparency International continue to press for higher anti-corruption standards around the world in order to help foster a culture of public sector ethics. Proactive engagement with and education about the value of public sector ethics can help inspire countries to establish a conceptual space within their political cultures, where standards and rules for the conduct of public officials can emerge, and greater buy-in with underlying principles can be achieved.

[148] See e.g., *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263.
[149] See e.g., *The Toronto Party v Toronto (City)*, 2013 ONCA 327.

CHAPTER 11

# REGULATION OF LOBBYING

GERRY FERGUSON AND IAN STEDMAN*

* This chapter was originally written and updated by Jeremy Sapers as a directed research and writing paper, with significant additions and deletions made by Gerry Ferguson. Descriptions of UK law and policy in the original chapter were added by Madeline Reid and Gerry Ferguson.

## CONTENTS



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

# 1. INTRODUCTION

Lobbying is an aspect of the public policy-making process in all democratic countries and is not an inherently corrupt practice.[1] Broadly defined, lobbying occurs when special interest groups engage public officials in an effort to influence decision-making. Lobbyists may promote corporate interests or advocate for issues of broader public concern. Access to public officials has become a commodity in most developed nations and influence in the industry commands significant resources. When undertaken ethically and under the administration of a robust, transparent regulatory regime, lobbying can promote political rights and improve government decision-making. Legitimate lobbying practices facilitate democratic engagement and provide government officials with specialized knowledge.

Involving private interests in the legislative process risks fostering relationships that perpetuate undue influence, as well as creating routes of preferential access to public officials. The OECD warns that undue influence in policy-making constitutes a "persistent risk" in member countries due to the "unbalanced representation of interests in government advisory groups" and the "revolving door"[2] between government and the lobbying industry. Where access to decision-makers no longer fulfills the public interest, the legitimacy of lobbying erodes and corruption can follow. A recent Gallup World Poll, reported on by the OECD, found that only 41.8% of citizens in OECD countries trusted their government.[3] In an era when trust levels in national governments are declining, lobbying must be perceived by the public as legitimate to be effective. The legitimacy challenge is exacerbated by the fact that lobbying is generally understood as a practice that advances special interests.[4] Transparency in legislative decision-making is closely related to levels of public trust in politicians[5] and addressing concerns about lobbying is therefore a key lever for restoring confidence in government.[6] As a result, governments must develop lobbying policy that promotes transparency, integrity, and impartiality in the legislative process.

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[1] OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying*, (Paris: OECD, 2014) [OECD 2014], online: <http://www.oecd.org/gov/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm>.

[2] OECD, *Government at a Glance 2015*, (Paris: OECD, 2015) at 158, online: <https://read.oecd-ilibrary.org/governance/government-at-a-glance-2015_gov_glance-2015-en#page1>.

[3] OECD, *Government at a Glance 2021*, (Paris: OECD, 2021) at 206, online: <https://www.oecd-ilibrary.org/docserver/1c258f55-en.pdf?expires=1626707794&id=id&accname=guest&checksum=21E9FDA66352FF19E9FBBEC5E253952E>.

[4] Joel S Hellman, Geraint Jones & Daniel Kaufmann, "Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition" (2000) The World Bank Policy Research Working Paper No 2444, online: <http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2444>.

[5] Klaus Schwab, *The Global Competitiveness Report 2013–2014*, (Geneva: World Economic Forum, 2013), online (pdf): <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf>.

[6] OECD 2014, *supra* note 1.

Policy should reflect modern growth in the lobbying industry globally;[7] the number of lobbyists and lobbying activities have both increased significantly in recent years.[8] This growth has catalyzed social engagement and public concern for greater transparency and oversight. An opaque lobbying process can enable disproportionate access to decision-makers and provide unfair advantages for well-funded interests. This inequality suppresses minority interests and stifles public consultation in policy development.[9] The existence of powerful interests—be they corporate, private or government—and the participatory character of democracy ensure that lobbying will remain an entrenched practice. As efforts to engage public officials and influence decision-making continue, concomitant regulation must be maintained.

This chapter surveys lobbying in the context of corruption and anti-corruption policy development. The majority of the discussion focuses on relationships between individuals and government, and opportunities for corruption that are created when private interests engage government. While public officials are often bound by legislation and ethical codes of conduct, this chapter addresses primarily the regulation of lobbyists. Section 2 provides a brief introduction to terminology used throughout this chapter and a summary discussion of the challenges related to adopting objective definitions for global phenomena such as corruption and lobbying. Section 3 addresses the relationship between lobbying and democratic governance, and suggests that while lobbying is an integral component of democracy, democracy alone does not prevent corruption. Section 4 situates lobbying policy within broader regulatory frameworks, and recommends five basic principles to guide public officials in the development of lobbying policy. Sections 5, 6, and 7 contain a substantive review of lobbying regulatory regimes in the US, the UK, and Canada. Finally, Section 8 introduces the regulatory environment in the European Union, contrasting approaches and identifying areas for improvement.

## 2. TERMINOLOGY

### 2.1 Defining Lobbying

Although definitions of lobbying abound in academic literature, nongovernmental publications, and government directives, there is no global consensus on what constitutes "lobbying" or a "lobbying activity." However, defining these terms is a prerequisite to developing meaningful policy and identifying the scope of acceptable lobbying conduct. The

[7] OECD, *Lobbying in the 21st Century: Transparency, Integrity and Access,* (Paris: OECD, 2021) [OECD 2021] at 14, online: <https://www.oecd.org/corruption-integrity/reports/lobbying-in-the-21st-century-c6d8eff8-en.html>.
[8] *Ibid* at 128.
[9] OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency Through Legislation,* (Paris: OECD, 2009) [OECD Lobbyists 2009], online: <http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-1-9789264073371-en.htm>.

OECD advises that statutory definitions of lobbying must be "robust, comprehensive, and sufficiently explicit to prevent loopholes and misinterpretation."[10]

It has been suggested that "the word 'lobbying' has seldom been used the same way twice by those studying the topic."[11] A report published by the OECD in 2021 demonstrates that the definition of lobbying varies across member countries.[12] The Public Relations Institute of Ireland (PRII) suggests a typical and generally useful definition of lobbying:

> the specific efforts to influence public decision making either by pressing for change in policy or seeking to prevent such change. It consists of representations to any public officeholder on any aspect of policy or any measure implementing that policy, or any matter being considered, or which is likely to be considered by a public body.[13]

The European Commission provides another general definition, describing lobbying as "any solicited communication, oral or written, with a public official [intended] to influence legislation, policy or administrative decisions."[14] According to Transparency International, lobbying is "any direct or indirect communication with public officials, political decision-makers or representatives for the purposes of influencing public decision-making carried out by or on behalf of any organized group,"[15] and includes all activities intended to influence policy and decision-making of governmental, bureaucratic or similar institutions. As with corruption, statutory definitions of lobbying must reflect domestic environments.

The broad spectrum of language used to describe lobbying reflects the complexities of the influence industry. Dialogue between citizens and government can manifest directly between interest groups and legislators or through indirect, grassroots modes of influence intended to affect legislative processes by shifting public opinion.[16] Lobbyists may work on behalf of corporate interests, citizens groups or other organizations advocating for the public interest. A formal distinction can be made between promoters of the general, public interest

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[10] OECD 2014, *supra* note 1 at 38.

[11] Frank Baumgartner & Beth Leech, *Basic Interests: The Importance of Groups in Politics and Political Science* (Princeton, NJ: Princeton University Press, 1998) at 33.

[12] OECD 2021, *supra* note 7 at 138.

[13] OECD, *Lobbyists, Governments and Public Trust, Volume 2: Promoting integrity by self-regulation,* (Paris: OECD, 2012) [OECD 2012] at 23, online: <http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-2-9789264084940-en.htm>.

[14] European Commission, *Green Paper: European Transparency Initiative,* COM 2006 194 final (2006) [European Commission Green Paper], online: <https://op.europa.eu/en/publication-detail/-/publication/1e468b07-27ba-46bc-a613-0ab96fc10aa9>.

[15] Suzanne Mulcahy, *Lobbying in Europe: Hidden Influence, Privileged Access*, (Berlin: Transparency International [TI], 2015) at 6, online (pdf): <https://images.transparencycdn.org/images/2015_LobbyingInEurope_EN.pdf>; Dieter Zinnbauer, "Corrupting the Rules of the Game: From Legitimate Lobbying to Capturing Regulations and Policies" in Dieter Zinnbauer, Rebecca Dobson & Krina Despota, eds, *Global Corruption Report 2009: Corruption and the Private Sector* (Cambridge: Cambridge University Press, 2009) 32 at 32, online: <https://www.transparency.org/en/publications/global-corruption-report-2009>.

[16] Secondary tactics may include reorienting political debate and stimulating industry and grassroots opposition to proposed legislation.

and lobbying for the corporate, private interest.[17] Individual citizen and collective group access to legislators is a fundamental democratic political right; this right extends to any kind of special interest group, including corporate lobbies. Pharmaceutical, electronics manufacturing and equipment, real estate, and energy sectors are among the most commonly represented commercial interests.[18] Public interest groups advocate for trade unions, environmental concerns, industry transparency and regulation, among other civil society interests. Inclusive definitions of "lobbyist" recognize the following as members of the influence industry: lobbying consultancy firms, in-house lobbyists employed by corporations, lawyers working in public affairs departments for law firms and corporations, think-tanks, and expert groups created by government for the purpose of policy development.

Identifying lobbyists and what constitutes lobbying is essential for effective regulation; distinguishing between research, advisory, and lobbying efforts ensures that policy is neither under-inclusive nor overbroad.[19] Generally, broad definitions are preferable because under-inclusive legislation can encourage private interests to exploit unregulated alternatives to engage public officials.[20]

## 2.2 Terminology in a Comparative Context

Transnational economic, social, and political interdependencies have increased dramatically in recent years. Lobbying strategies and practices are evolving lockstep with the global socio-political landscape.[21] General constructions of corruption and lobbying are helpful to identify the boundaries of academic and legal inquiry, but do not easily accommodate comparative analysis. This is due in part to discourse variability across social, political, and economic lines. Unique legal approaches to corruption and lobbying regulation reflect broader social and institutional differences across jurisdictions. Divergent domestic lobbying practices have resulted in different rules for the same actors in different jurisdictions and inconsistent compliance at the international level.[22] It is therefore important that policy-makers develop specific anti-corruption policies. Further, the literature must acknowledge that legal (and extra-judicial) practices are the result of, and operate within, broader social structures.

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[17] Claude Turmes & Fred Thoma, "An Act for Parliament" in Helen Burley et al, eds, *Bursting the Brussels Bubble: The Battle to Expose Corporate Lobbying at the Heart of the EU* (Brussels: ALTER-EU, 2010) 162, online (pdf): <https://www.alter-eu.org/sites/default/files/documents/bursting-the-brussels-bubble.pdf>.

[18] OECD 2021, *supra* note 7 at 22.

[19] Categorizing lobbyists and demarcating regulatory boundaries is a challenging task for policy-makers. For example, the meta-category of think-tanks includes state-funded policy research organizations, politically affiliated bodies and largely independent academic associations and institutions.

[20] For example, think-tanks and law firms have rejected calls to join the lobbyist registries in the EU. These organizations provide alternatives for individuals who want to engage politicians outside of the regulatory regime.

[21] OECD 2014, *supra* note 1.

[22] *Ibid.*

While regional variation persists, globalization has somewhat standardized expectations of conduct and corruption discourse, largely through the proliferation of global corporations. In addition, as discussed in Chapter 1, the wide application of international instruments, such as UNCAC, suggests that there is an agreed "core of corruption" generally understood as undesirable and inconsistent with principles of good governance and global economic relations. Still, there is no universal definition of corruption, and the terminology common to global economic discourse and comparative study may advance ideological and regional preferences. For example, conceptions of corruption in the context of development rhetoric have been criticized as a "disguise [for] political agendas, or … the interests of the powerful."[23] To this extent, corruption is a normative concept, influenced by regional moral, ethical, and institutional traditions and practices. Lawmakers must recognize corruption discourse as being used and developed "by particular actors [representing] particular sets of practices,"[24] and that anti-corruption policies should be harmonious with both domestic needs and global expectations.

Historically, corruption and lobbying research has focused on single-country case studies. As discussed in Chapter 1, comparative literature on corruption is scarce due to the secrecy of corruption, the lack of a universal definition, and cultural differences across countries. While cultural differences may challenge comparative study and the development of objective definitions, domestic policy must reflect the unique "diversity, capacities and resources of lobbying entities."[25]

## 3. LOBBYING AND DEMOCRACY

Lobbying is a centuries-old component of governmental decision-making.[26] As will be argued in Section 3.1, lobbying is generally considered an acceptable and necessary practice in modern democracy, and lobbying regulation is widely recognized as a legitimate act of political participation.[27] When undertaken appropriately, lobbying can "strengthen accountability in government and the participation of citizens in policymaking"[28] by providing a valuable source of dialogue between citizens and public officials.[29] Lobbyists operate as guides, intermediaries, and interlocutors, providing services to interest groups by navigating the complexities of modern democratic decision-making. Not only do lobbyists provide an important conduit for citizens to communicate with government, they

[23] Elizabeth Harrison, "Corruption" (2007) 17:4/5 Dev Pract 672.
[24] *Ibid*.
[25] OECD 2014, *supra* note 1 at 38.
[26] OECD, Public Governance and Territorial Development Directorate, Public Governance Committee, *Lobbying: Key Policy Issues,* GOV/PGC/ETH(2006)6 (Paris: OECD, 2006) [OECD 2006], online: (pdf) <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2006)6&docLanguage=En>.
[27] OECD 2021, *supra* note 7 at 16.
[28] OECD 2012, *supra* note 13 at 14.
[29] Will Dinan & Erik Wesselius, "Brussels: A Lobbying Paradise" in Helen Burley et al, *supra* note 17, 23.

also promulgate valuable and often specialized information that advances informed decision-making and sound policy development.

Legitimate lobbying activities therefore improve the quality of public decision-making and promote the democratic right to petition government.[30] Unfettered access to public officials, however, presents opportunities for private interests to exercise undue influence. Influence peddling perpetuates corruption and is a major threat to democratic governance founded on equality and popular representation.[31] When the procurement of government favour becomes the province of vested and well-funded interests, lobbying can significantly damage public trust in the integrity of democratic institutions. Without effective regulation, the influence industry can become an "exclusive and elite pursuit."[32] Without adequate oversight and enforcement, regulation is ineffective.

## 3.1 Democracy as an Indicator of Transparency

Corruption, in the sense of the misuse of public office for private gain, is inherently inconsistent with basic principles of democracy: openness and equality.[33] Democratic processes empower citizens to detect and punish corruption.[34] For lobbying to maintain legitimacy and align with democratic principles, it must operate subject to disclosure and transparency requirements. Legitimate lobbying practices democratize the flow of information between voters and public officials, and mobilize citizen engagement in the legislative process. Dialogue is an essential component of effective democratic governance, and lobbying is an "important element of the democratic discussion and decision-making process."[35]

While theoretically consistent, the relationship between ethical lobbying practices and democracy is imperfect. As expected, according to Transparency International's Corruption Perceptions Index (CPI), the least corrupt nations are, almost without exception, democratic.[36] However, corruption persists despite democratization, economic liberalization, and the adoption of transnational laws and domestic enforcement designed to eliminate it.[37] Corruption levels in democratic states are moderated by the state's degree

[30] OECD 2014, *supra* note 1 at 40.
[31] OECD 2012, *supra* note 13 at 11.
[32] Craig Holman, "Obama & K Street – Lobbying Reform in the US" in Helen Burley et al, *supra* note 17, 125.
[33] Porta D Della & A Pizzorno, "The Business Politicians: Reflections from a Study of Political Corruption" in M Levi & D Nelken, eds, *The Corruption of Politics and the Politics of Corruption* (Oxford: Blackwell, 1996).
[34] Zinnbauer, *supra* note 15 at 32.
[35] *Ibid.*
[36] "Corruption Perceptions Index: 2020" (last visited 26 September 2021) [2020 CPI], online: *TI* <https://www.transparency.org/en/cpi/2020/index/nzl>. See Chapter 1, Section 4.1 for further discussion on TI's CPI.
[37] Wayne Sandholtz & William Koetzle, "Accounting for Corruption: Economic Structure, Democracy and Trade" (2000) 44:1 Intl Studies Q 31 at 32.

of poverty, national culture, and perceptions towards corruption,[38] and strength of key social institutions.[39]

Various studies indicate an association between economic underdevelopment and corruption regardless of whether a state is democratic or non-democratic; however, the types of corruption may vary depending on governance types. Countries with more economic opportunities than political ones, such as China, experience different types of corruption than countries with more political opportunities than economic ones, like India. These disparities engender different relationships between citizens and government. Economic problems encourage patronage. Patronage in turn encourages personal relationships with individual decision-makers, rather than broad affiliations with political parties.[40] Where there is restricted individual economic freedom, economic success depends less on market forces and more on the ability to influence decision-makers.[41] In contrast, systems that feature limited political access tend to centralize transactions among small groups of local government actors. These officials are typically appointed bureaucrats who do not rely on personal followings.

Strong social ties between corporations and government increase the likelihood of corruption.[42] Robust disclosure and transparency rules are often resisted by political leaders out of self-interest.[43] Further, enforcement faces significant challenges because these political-private relations often operate behind closed doors. Increased transparency through disclosure would subject these interactions to scrutiny and reduce opportunities for corruption.

Transparency International has documented a number of immediate measures that can be adopted to reduce the risk of interest groups exerting undue influence on public policy development:

- regulations on lobbying;
- regulations on the movement of individuals between the administration and the private sector (revolving door);
- regulations on conflict of interest;
- regulations on political finance;
- regulation on private sector competition;
- rules on transparent decision-making and access to information; and

[38] Raymond Fisman, "Estimating the Value of Political Connections" (2000) 91:4 Am Econ Rev 1095.
[39] Alvaro Curervo-Cazurra, "The Effectiveness of Laws against Bribery Abroad" (2008) 39:4 J Intl Bus Stud 634.
[40] Yan Sun & Michael Johnston, "Does Democracy Check Corruption? Insights from China and India" (2009) 42:1 Comp Politics 1.
[41] Sandholtz & Koetzle, *supra* note 37.
[42] Jamie D Collins, Klaus Uhlenbruck & Peter Rodriguez, "Why Firms Engage in Corruption: A Top Management Perspective" (2009) 87:1 J Bus Ethics 89.
[43] Holman, *supra* note 32.

- civil society and media oversight.[44]

# 4. REGULATORY SCHEMES

## 4.1 Lobbying and the Broader Regulatory Framework

Most regulatory regimes distinguish unscrupulous lobbying activity from criminal conduct. Distinct statutory instruments address lobbying as opposed to criminal conduct, such as bribery, government fraud, and extortion. In addition to criminal law, other areas of law and practice work alongside lobbying rules to create a broad regulatory regime aimed at promoting government integrity. These include election campaign and party funding rules (see Chapter 14), government procurement rules (see Chapter 12), conflict of interest rules (see Chapter 10), whistleblower protection (see Chapter 13), and access to government information infrastructure.

## 4.2 Principles

Public authorities have the primary responsibility to establish standards of conduct for public officials who may be targeted by lobbying and to enact legislation that regulates the lobbying industry.[45] Authorities must not only ensure that they act in accordance with these obligations, but also that the lobbyists they engage with operate ethically and legally and adhere to relevant principles, rules, and procedures. This dual responsibility reflects the role of public officials in promoting impartiality, integrity, and transparency in government.

Robust regulation and ethical standards are necessary to maintain integrity in the decision-making process and, consequently, public confidence in government institutions. If lobbyist registration and disclosure are not mandatory, transparency is compromised and lobbying activities risk undermining public trust in government. As discussed, undisclosed relationships with and disproportionate access to public officials can lead to corruption.[46] Lobbying commands the mobilization of significant private resources; the application of these resources may enable unfettered access to public officials that can lead to powerful private interests gaining influence at the expense of the public interest.[47]

Corporate lobbies have significantly greater resources at their disposal compared to public interest groups. Without effective regulation, financial disparity provides well-funded lobby groups privileged access to decision-makers. Deep pockets and preferential access allow corporate lobbies to engage in comprehensive and prolonged lobbying efforts that are

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[44] Francesco Bosso, Maíra Martini & Iñaki Albisu Ardigó, *Political Corruption Topic Guide*, (Berlin: TI, 2014) at 26–27, online: <https://knowledgehub.transparency.org/guide/topic-guide-on-undue-influence/5282>.

[45] OECD Lobbyists 2009, *supra* note 9.

[46] Hellman, Jones & Kaufmann, *supra* note 4.

[47] "OECD Forum on Transparency and Integrity in Lobbying", (27–28 June 2013) [OECD 2013], online: *OECD* <http://www.oecd.org/gov/ethics/lobbying-forum.htm>.

difficult for public interest groups to match.[48] These inequalities undermine democratic decision-making because those with greater resources become more capable of influencing policy.[49] In the interest of generating confidence in government, lobbying rules, policies and practices should level the playing field by promoting integrity, fairness in public policy-making, openness and inclusiveness, reliability, and responsiveness.[50] Effective regulation will leverage citizen engagement,[51] access to information and principles of open government.[52]

States face a number of choices when developing standards and procedures for lobbying, such as:

- Definition of lobbyist;
- Definition of lobbying;
- Regulatory scheme (voluntary/mandatory/self-regulated); and
- Enforcement mechanisms.

There is no single appropriate approach to regulation. A review of experiences in North America and Europe suggests that effective regulation results from an incremental process of political learning and reflects domestic cultural, political, and constitutional norms.[53] Policies from one jurisdiction cannot be uncritically transplanted to another. Nevertheless, while approaches to regulation may vary, effective policies contain many common elements.

In 2010, the OECD released the *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*.[54] These principles are intended to guide executive and legislative decision-makers in the development of regulatory and policy options that meet public expectations for transparency and integrity in lobbying. However, in 2021, the OECD found these principles to be relevant, yet inadequate, due to their focus on lobbying registries,

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[48] Anne Therese Gullberg, "Strategy Counts, Resources Decide: Lobbying European Union Climate Policy" in Helen Burley et al, *supra* note 17, 29.
[49] Dinan & Wesselius, *supra* note 29.
[50] OECD 2014, *supra* note 1.
[51] Lobbying is one of many tools that can promote inclusive decision-making. For an example of an innovative project, see: Government of Canada "Open Government Initiative" (last modified 19 February 2021), online: *Open Government Initiative* <https://open.canada.ca/en>; "Consulting with Canadians" (last modified 14 June 2021), online: *Government of Canada* <https://www.canada.ca/en/government/system/consultations/consultingcanadians.html>; Treasury Board of Canada, "Government-Wide Forward Regulatory Plans" (last modified 17 August 2021), online: *Government of Canada* <http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/gwfrp-ppreg-eng.asp>.
[52] OECD, "Open government" in OECD, *Modernising Government: The Way Forward,* (Paris: OECD, 2009) at 29 [OECD Modernising Government 2009], online: <https://read.oecd-ilibrary.org/governance/modernising-government_9789264010505-en#page1>.
[53] *Ibid*.
[54] OECD Council, *Draft Recommendations of the Council on Principles for Transparency and Integrity in Lobbying,* (OECD, 2010) C(2010)16, online (pdf): <https://one.oecd.org/document/C(2010)16/en/pdf>; OECD Council, 1213th Sess, C/M(2010)3/PROV (2010) at s 37(i), online (pdf): <https://one.oecd.org/document/C/M(2010)3/PROV/en/pdf>.

rather than the diverse practices and mitigation strategies available.[55] The OECD has ordered a review of these principles and recommendations, which will be completed in 2023.[56]

The OECD also provides five elements that lobbying legislation or regulation should address to enhance good governance, transparency, and accountability:

1. Standards and rules that adequately address public concerns and conform to the socio-political, legal and administrative context;
2. Scope of legislation or regulation that suitably defines the actors and activities covered;
3. Standards and procedures for disclosing information on key aspects of lobbying such as its intent, beneficiaries and targets;
4. Enforceable standards of conduct for fostering a culture of integrity in lobbying; and
5. Enhancing effective regulation by putting in place a coherent spectrum of strategies and practices for securing compliance.[57]

These elements do not suggest a "one size fits all" approach to regulation. Instead, they provide the fundamental building blocks from which legislators can develop meaningful policy tailored to political, legal, and cultural circumstances. The following section elaborates on these elements.

### 4.2.1 Standards Consistent with Socio-Political, Legal, and Administrative Context

Legislation and policy must consider constitutional traditions and rights, including the expectations of civil society regarding access to government and participation in the decision-making process. Across many countries, social expectations and codified rights vary widely, affecting how citizens petition government, seek interest representation, and develop social relationships with government.[58] Effective standards reflect a country's democratic and constitutional traditions and interact with wider legal and administrative frameworks (including codes of conduct for public officials, rules on election campaign financing, provisions providing protection for whistleblowers, access to information laws, and conflict of interest rules).[59] The regulatory framework and its constituent parts should foster integrity, transparency, accountability, and accessibility in government.[60]

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[55] OECD, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, OECD/LEGAL/0379, (OECD, 2021) at 4, online (pdf): <https://legalinstruments.oecd.org/public/doc/256/256.en.pdf>.
[56] *Ibid*.
[57] OECD Lobbyists 2009, *supra* note 9 at 3–4.
[58] OECD Modernising Government 2009, *supra* note 52.
[59] *Ibid*. For more information on lobbying and conflict of interest, see: Margaret Malone, *Regulation of Lobbyists in Developed Countries: Current Rules and Practices* (Dublin: Institute of Public Administration, 2004) at 3, online (pdf): <https://www.lobbyists.ru/eu1/1.pdf>.
[60] OECD Lobbyists 2009, *supra* note 9.

Public concern surrounding integrity in the lobbying industry may arise for various reasons. Understanding public concern allows legislators to appropriately define the parameters of policy development and respond meaningfully to the impetus for regulation. The OECD has identified three primary social concerns: (1) accessibility to decision-makers (2) integrity of government decision-making, and (3) conduct in lobbying.[61] Each of these concerns demands unique policy solutions. Considering the root causes of public concern will help identify the most appropriate regulatory response and measures for achieving compliance.

#### 4.2.2 Scope of Policy on Lobbying

The efficacy of lobbying regulation depends largely on how lobbying is defined and who is considered a lobbyist. Policy should consider the different types of entities and individuals that may engage public officials and the theatres where lobbying activities may occur. Regulation should reflect the complexities of modern legislative decision-making and the need to promote equity among all stakeholders. Regulations should primarily target individuals or organizations who receive remuneration for lobbying activities.[62] However, varying levels of public concern may demand a more encapsulating definition. According to the OECD, "where transparency and integrity are the principle goals of legislation, effectiveness is best achieved if definitions are broad and inclusive"[63] and capture formal and informal lobbying in traditional and modern theatres of lobby activity. Inclusive policies promote equal access to decision-makers and address public concern over integrity in the lobbying industry.

Policy should balance the public's interest in transparency and integrity with the government's interest in soliciting outside expertise. Broad definitions and rigorous disclosure requirements risk deterring informed members of the public from approaching government.[64] Regulations overburdened by excessive disclosure and reporting requirements will encourage non-compliance and consequently fail to meet their objectives.[65] Lobbyists may be hesitant to meet registration requirements out of a concern that disclosure will provide competitors with proprietary intelligence and indications of their work.[66] As a result, lobbyists may be encouraged to obscure disclosures or avoid compliance altogether. Lawmakers must balance the risks of mandating specific information disclosures with the challenges of accepting only summary descriptions of lobbyists' objectives.

Legislation that provides broad definitions of lobbyists and lobbying may include exclusionary provisions that exempt specific actors or activities from disclosure

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[61] *Ibid* at 20.
[62] OECD 2014, *supra* note 1.
[63] OECD Lobbyists 2009, *supra* note 9.
[64] Justin Greenwood, "Regulation of Interest Representation in the European Union (EU)" in Clive S Thomas, *Research Guide to US and International Interest Groups* (Westport, CT: Praeger Publishers, 2004) at 379.
[65] John Warhurst, "Locating the Target: Regulating Lobbying in Australia" (1998) 51:4 Parliamentary Aff 538 at 538.
[66] Greenwood, *supra* note 64 at 379.

requirements.[67] For example, legislation may exempt representatives of other governments acting in their official capacity or communications that are undertaken within the public realm. Compliance nonetheless relies on definitions and exclusions that are unambiguous and clearly understood by lobbyists and public officials.

#### 4.2.3 Standards and Procedures for Information Collection and Disclosure

Standards for transparency, accountability, and integrity in lobbying are the foundation for the appropriate conduct of public officials and lobbyists. Transparency "enable[s] the public to know who is lobbying for what, in order to allow it to take suitable precautions to protect its interest."[68] Enhancing transparency is the primary objective of lobbying regulation and effective disclosure is the surest method to promote accountability. Regulations and practices that mandate disclosure of information related to communications between public officials and lobbyists empower citizens to exercise their right of public scrutiny.[69] Because transparency enhances the perceived and actual integrity of government, policy must not only target lobbyists, but also public officials who make decisions and may be susceptible to bribery and other forms of corruption.[70]

Disclosure rules determine the type of information that must be shared, the nature of registration and reporting, and the manner in which information is communicated to the public. Sparse information will render regulations meaningless, while excessive data may bury meaningful information and encourage non-compliance.[71] At a minimum, lobbyists should identify their clients, beneficiaries, and objectives. Requirements must be harmonized with existing norms and laws related to confidential and privileged information; legitimate expectations of openness must be balanced against privacy rights and economic interests in protecting proprietary information. Regulations that avoid excessive demands and address privacy interests will facilitate disclosure of pertinent but parsimonious information.[72] Disclosure requirements should solicit lobbyists to identify the intent of their lobbying activity, their employer and beneficiaries, and the individuals, offices, and institutions targeted by their lobbying.[73] It is important that disclosure is timely and that updates are made periodically. Information should be readily available and technology should be utilized to encourage compliance and facilitate public access.

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[67] A P Pross, "The Rise of the Lobbying Issue in Canada" in Grant Jordon, ed, *Commercial Lobbyists: Politics for Profit in Britain* (Aberdeen: University of Aberdeen Press, 1991).

[68] Frederick M Hermann, "Lobbying in New Jersey, 2006" (Paper delivered at the Nineteenth Annual Meeting of the Northeastern Regional Conference on Lobbying in Philadelphia, Pennsylvania, August 2006) (Trenton, NJ: New Jersey Election Law Enforcement Commission, 2006), online (pdf): <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/24801/l7962006.pdf?sequence=1&isAllowed=y>.

[69] OECD Lobbyists 2009, *supra* note 9.

[70] Grant Jordan, "Towards Regulation in the UK: From 'General Good Sense' to 'Formalised Rules'" (1998) 51:4 Parliamentary Aff 524.

[71] OECD Lobbyists 2009, *supra* note 9.

[72] A possible solution to managing information overload is for regulations to define information requirements according to the type of lobbyist. This option may increase legislative complexity but ultimately improve the quality and accessibility of data.

[73] OECD Lobbyists 2009, *supra* note 9.

Electronic filing should improve the convenience, flexibility, accessibility, and comparability of lobbyist data.

#### 4.2.4 Standards of Conduct Fostering a Culture of Integrity

Lobbying requires the participation of both government and interest groups. As "it takes two to lobby" lobbyists and public officials share the responsibility of maintaining the integrity of regulatory schemes. Self-regulation through professional codes may be sufficient to inculcate a culture of professional ethics in the lobbying industry; however, the OECD notes that while voluntary codes may be capable of providing clear guidance, their application is "not stringent enough to change the behaviour of those who abuse legitimate means of influence."[74] Codes of conduct are intended to promote principles of behaviour harmonious with those of good governance—honesty, transparency, and professionalism. Without sufficient measures and resources to enforce rules and apply sanctions, self-regulation may fall short of meeting its objectives. Social concern surrounding the conduct of lobbyists may require government intervention through the codification and enforcement of professional standards.

There are three types of codes of conduct that may affect lobbyist operations: professional codes or self-regulation; employment and post-employment codes for current and former public office holders; and statutory or institutional codes. Together, these instruments help provide the social license and public support necessary for lobbyists to operate.

Professional codes are usually created by lobbyists themselves. They promote ethical standards from within, and are often developed and implemented on an ad hoc basis. Because enforcement is limited, the OECD concluded in 2012 that professional codes are largely ineffective.[75] Employment and post-employment codes prescribe the conduct of public officials in their interactions with lobbyists. They often apply during and following an official's term in public office.

These rules and procedures reflect broader democratic principles and promote public confidence in government decision-making. Public officials should ensure their engagement with lobbyists avoids preferential treatment, conforms to legal requirements of information disclosure, enhances transparency, and avoids conflicts of interest. Meeting these obligations may require "revolving door" provisions for public officials leaving office. Former public officials equipped with knowledge and access to current decision-makers are a valuable commodity for lobbyists. They may maintain favour with former staff and therefore retain the capacity to informally influence decision-making. Revolving door provisions mandate "cooling-off" periods during which former public officials must not lobby their former organizations. "Reverse revolving door" provisions prevent former lobbyists from influencing policy reform from the inside. Together, these restrictions minimize the transfer of confidential information, ensure lobbyists and government operate at arm's length and maintain public trust in government.

[74] OECD 2021, *supra* note 7 at 86.

[75] OECD 2012, *supra* note 13 at 80. In Europe, however, some public affairs organisations have introduced reprimands and expulsions into the voluntary codes.

#### 4.2.5 Mechanisms Encouraging Compliance

It is widely recognized that compliance is greatest where regulators utilize a gamut of enforcement strategies.[76] Soft measures and incentive-based tools, including communication outreach, education programs, and access to government buildings, should be used with more coercive sanctions to promote compliance. Communication strategies can be used to raise awareness of expected standards and mobilize conformity among key actors. Education programs, primarily targeting lobbyists and public officials, increase comprehension of rules and policies. Periodic courses complement existing professional curriculums, such as ethics training. These undertakings support formal reporting requirements and encourage compliance. Incentives can be used strategically to encourage compliance. For example, registered lobbyists may be granted access to automatic alert systems for consultation and release of government documents. Traditional sanctions include administrative fines and the removal of lobbyists from registries. Regulators may also develop innovative strategies based on individual experiences and compliance histories, such as public reporting of improprieties by lobbyists.

To maximize their effect, sanctions must be proportionate and timely. Regulatory authorities must operate with sufficient independence and resources to ensure meaningful, objective enforcement. This requires that regulators be insulated from political pressure and delegated sufficient discretion to initiate investigations and to allocate the nature and extent of the resources dedicated to each investigation.

## 5. COMPARATIVE SUMMARY

For more than a century, the US was the only jurisdiction to formally regulate lobbyists.[77] Before the early 2000s, only three other countries had implemented lobbying regulation: Australia, Canada, and Germany.[78] Globalization has since led to the adoption of lobbying policy across cultures and continents. For example, regulatory regimes now exist in the follow OECD countries: Poland, Hungary, Israel, France, Mexico, Slovenia, Austria, Italy, the Netherlands, Chile, the UK, and the EU.[79] Addressing the relationship between civil society and government is "increasingly regarded as a desirable and necessary development in the interests of good government."[80]

Global economic and political relationships have transferred methods of lobbying between countries and regions; indeed, many lobbying firms and public interest groups are themselves multinational organizations.[81] However, lobbying standards and rules cannot be

[76] OECD 2012, *supra* note 13.
[77] OECD Lobbyists 2009, *supra* note 9. However, provisions against bribery, fraud, and other forms of corruption and influence peddling were more common.
[78] Stephen F Clarke, "Summary" in *Regulation of Lobbying in Foreign Countries* (Washington, DC: The Law Library of Congress, 1991) 1.
[79] OECD 2014, *supra* note 1 at 17–18.
[80] Malone, *supra* note 59 at 3.
[81] Interest groups and stakeholders affected by legislative and policy change transcend international borders. This global element has taken on particular significance with the rise of multinational

borrowed from one jurisdiction and adopted in another without careful consideration. Effective policy must reflect the domestic socio-political, legal, and administrative environment. States possess varying degrees of regulatory competency and experience, making "political-learning"[82] an essential requirement for the development of effective regulation.[83] While globalization has normalized lobbying techniques, culturally specific lobbying strategies continue to reflect longstanding, localized social relationships between citizens and government.

Domestic approaches to lobbying regulation reflect regional value systems, political structures, and legislative objectives. For example, constitutional documents prescribe some limits to lobby regulation in Canada and the US. In order to maintain confidence in government, lawmakers must preserve traditional modes of representation and access to public officials.[84] This is increasingly difficult when international trade and governance structures demand globally normalized standards. Nonetheless, effective regulation will be tailored to accommodate the political culture, governmental system, social partnerships, and norms of the society in which it operates.[85]

Unlike the experience of the European Union, corporate lobbies in the US, the UK, and Canada rarely participate directly in policy-making and remain on the periphery of the legislative process. In the EU, lobbyists commonly hold positions on internal working groups and legislative consultative bodies.[86] It is not uncommon for industry to participate in expert groups directly involved in policy development.[87]

The political and economic systems in the US, and to a lesser extent, Canada and the UK, facilitate easy entry into the lobbying industry; motivated and well-resourced individuals should find few barriers. Since it is reasonable for individuals to pay third parties to promote their interests, lobbying undertakings often involve an element of compensation. The

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corporations, some of which generate annual revenues that dwarf the GDP of entire countries. Trade policy is developed with the economic best interests of the home country in mind. In the EU, corporate lobbies were integral in the development and implementation of the Global Europe trade strategy. This trade agenda intends to create open markets in developing countries and has the potential to significantly alter the economies of non-EU nations. Subsequent trade deals with South Africa have resulted in a nearly 50 percent increase in European imports, undercutting local producers, triggering unemployment and exacerbating South Africa's trade deficit. When the balance of power hangs heavily in favour of corporate lobbies, policy development may succumb to business interests at the expense of domestic and global public interests. For more information, see: European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Global Europe: Competing in the World—A Contribution to the EU's Growth and Jobs Strategy,* COM(2006) 567 (2006).

[82] In this context, political learning refers to the process whereby lawmakers draft legislation in response to acute incidents, such as corruption scandals. For more information, see Section 4, where it is suggested that lobbying policy should be forward-thinking rather than reactionary.

[83] OECD Lobbyists 2009, *supra* note 9.

[84] *Ibid.*

[85] *Ibid.*

[86] Clive S Thomas, ed, *Research Guide to US and International Interest Groups* (Westport, CT: Praeger Publishers, 2004) at 379.

[87] OECD Lobbyists 2009, *supra* note 9.

flexible and capitalist-driven North American systems necessitate regulation and transparency. The American legislative process endows individual lawmakers with significant influence over legislation. This creates an environment in which lobbyists often target individual public officials, rather than political parties or levels of government. This is particularly the case where the executive branch is the primary source of legislative change, as it is in Canada, the UK and the EU.[88] On the other hand, in many European countries, corporatist systems have historically played a significant role in policy development. Lobbying evolved alongside pre-existing relationships between industry and government, and corporate interests therefore continue to enjoy a high level of integration within European policy-making processes.[89] As such, the impetus for lobbyist registration is less clear for corporate groups, because corporate participation is historically a common and accepted practice.[90]

## 6. REGULATORY FRAMEWORK AND CONTEXT

In Canada and the US, lobbying regulation also exists in varying degrees at the provincial or state and municipal levels.[91] In the UK, rules and requirements for lobbyists and public officials vary between the House of Commons, House of Lords and devolved Assemblies and Parliaments in Wales, Northern Ireland, and Scotland. It should be noted that while lobbying schemes below the federal government level are an important source of regulation for the industry, they are outside the scope of this chapter.

### 6.1 US

#### 6.1.1 Governance Structure

The US has a republican system of government. At the national level, individual state governments send representatives to the legislative branch (Congress) composed of the House of Representatives and Senate. The President leads the executive branch of the federal government. Power is broadly diffused in the US, and there are many decision-making intervals that present the opportunity for lobbyists to engage public officials.

#### 6.1.2 Regulatory Framework

Lobbying in the US is protected by the first amendment to the Constitution, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

[88] OECD Lobbyists 2009, *supra* note 9.
[89] Karsten Ronit & Volker Schneider, "The Strange Case of Regulating Lobbying in Germany" (1998) 51:4 Parliamentary Aff 559.
[90] Clarke, *supra* note 78.
[91] At the provincial level, Alberta, British Columbia, Saskatchewan, New Brunswick, Newfoundland and Labrador, Nova Scotia, Manitoba, Ontario, and Quebec have lobbying registration regimes. At the municipal level, Ottawa and Toronto have implemented lobbying registries.

peaceably to assemble, and to petition the Government for a redress of grievances."[92] The *Lobbying Disclosure Act* (*LDA*) took effect in 1996 and constitutes the legal framework governing federal lobbying registration and reporting. In 2007, the *Honest Leadership and Open Government Act* (*HLOGA*)[93] was enacted and amended the *LDA*. The *HLOGA* modified the thresholds and definitions of lobbying activities, changed the frequency of reporting for registered lobbyists and lobbying firms, and added additional disclosure requirements.[94] In 2009, a Presidential Executive Order further enhanced lobbying regulation.[95] Filings are made jointly to the Secretary of the Senate and Clerk of the House of Representatives. These officials have the authority to provide guidance and assistance on the registration and reporting requirements of the *LDA*, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registrations and reports.[96]

#### 6.1.3 Summary

In 2019, a record $3.51 billion was spent on federal lobbying in the US. In 2020, that record was surpassed by an annual turnover of over $3.53 billion.[97] At that time, there were over 11,500 registered lobbyists in Washington, DC, representing the highest density of lobbyists in the world.[98] The US scored 67 on the 2020 Transparency International CPI and was ranked 25th out of 180 countries surveyed in regard to perceived corruption.[99] It seems likely that the perceptions of higher levels of lobbying will result in higher perceptions of corruption.

## 6.2 UK

#### 6.2.1 Governance Structure

The political system in the UK is known as the "Westminster model." The UK Parliament is comprised of a lower chamber, the House of Commons, and an upper chamber, the House of Lords. The House of Commons is made up of 650 elected Members of Parliament (MPs). The party with the most MPs forms the Government and its leader becomes the Prime Minister. The House of Lords is made up of unelected representatives, who can be

[92] US Const amend 1, § 1.
[93] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, 121 Stat 735 (2007) [*Honest Leadership and Open Government Act*], online (pdf): <https://transition.fec.gov/law/feca/s1legislation.pdf>.
[94] The Congressional Research Service found the impact of the *HLOGA* on the registration, termination, and disclosure of lobbyists and lobbying firms is mixed. For more information, see: US, Congress Research Service, *Lobbying Registration and Disclosure: The Impact of the Honest Leadership and Open Government Act of 2007* (CRS Report R40245) (Washington, DC: Congressional Research Service, 2011), online (pdf): <https://www.fas.org/sgp/crs/misc/R40245.pdf>.
[95] US, Federal Register, *Ethics Commitments by Executive Branch Personnel* (FR Doc E9-1719) (Washington, DC: Federal Register, 2009), online (pdf): <https://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1719.pdf>.
[96] *Lobbying Disclosure Act*, Pub L No 104-65, 109 Stat 691 (1995), online: <http://lobbyingdisclosure.house.gov/lda.html>.
[97] "Lobbying Data Summary" (last visited 4 October 2021), online: *Open Secrets* <https://www.opensecrets.org/federal-lobbying/summary>.
[98] Mulcahy, *supra* note 15.
[99] 2020 CPI, *supra* note 36.

hereditary peers, bishops, experts or those appointed by the Queen. Cabinet Ministers are appointed from the members of both chambers to head various departments. Bills can be introduced in either chamber by Ministers or MPs and must be approved by both chambers, except financial bills, which need only the approval of the House of Commons. In addition to the House of Lords and House of Commons, in 1997–98, the UK devolved powers to three nations, creating Legislative Assemblies in Wales and Northern Ireland, and a Parliament in Scotland.

### 6.2.2 Regulatory Framework

The regulatory framework in the UK has undergone many changes. Prior to 2014, the UK depended solely on self-regulation by lobbying professionals. After 2014, three professional associations emerged: the Chartered Institute of Public Relations (CIPR), the Public Relations Consultants Association (PRCA), and the Association of Professional Political Consultants (APPC). However, in 2018, the APPC merged with PRCA. Members of the CIPR are individuals, while members of PRCA are organizations. Both associations require members to adhere to a code of conduct and run registers for UK lobbyists.[100]

In a 2009 inquiry, the Public Administration Select Committee deemed the self-regulatory regime inadequate.[101] In 2010, the government began proactively publishing information on Ministers' meetings with lobbyists, but these disclosures do not include whom lobbyists represent. In order to fill this gap and supplement the self-regulatory regime, the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (*TLA*) was enacted in January 2014.[102] The *TLA* requires consultant lobbyists to disclose the names of clients through the Register of Consultant Lobbyists, which was launched in March 2015.[103] There were 143 lobbyist registrations under the *TLA* in March 2020, compared to 140 the previous year.[104] The Registrar is independent of government and the lobbying industry. The goal of the *TLA* is to balance openness with the freedom of lobbyists to represent others and the encouragement of public engagement with policy-making.[105]

In 2016, the *Lobbying (Transparency) Bill*, a private members' bill, was introduced in the House of Lords.[106] Although it was never passed into law, the proposed legislation would have repealed and replaced the current lobbyist regime under the *TLA*.[107] The bill proposed to broaden the scope of the register to include more in-house lobbyists and expand

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[100] Elizabeth David-Barrett, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (London: Transparency International UK [TI UK], 2015) at 28, online: <http://www.transparency.org.uk/publications/liftthelid/>.

[101] OECD 2014, *supra* note 1 at 217.

[102] *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4 [*TLA*], s 2(3), online: <https://www.legislation.gov.uk/ukpga/2014/4/contents/enacted>.

[103] "Registration" (last visited 29 September 2021), online: *Office of the Registrar of Consultant Lobbyists* <https://registerofconsultantlobbyists.force.com/CLR_Search>.

[104] Office of the Registrar of Consultant Lobbyists, "Statement of Accounts 2019-20" at 6, online (pdf): *Office of the Registrar of Consultant Lobbyists* <https://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2020/07/20200720-ORCL-2019-20-Annual-Report-Accounts-laid.pdf>.

[105] OECD 2014, *supra* note 1 at 217.

[106] *Lobbying (Transparency) Bill* [HL] (UK), 2016–2017 sess, Bill 75.

[107] *Ibid*, s 24.

disclosure requirements for lobbyists.[108] The bill also proposed that the Registrar issue a mandatory code of conduct to replace the voluntary codes of conduct that exist in the UK.[109]

The UK also regulates the lobbying activities of Members of Parliament. Although a tradition of representation of special interests by MPs exists in the UK and many MPs hold paid consultancies related to their roles as parliamentarians, scandals involving lobbying led to debates over consultancies and eventually to regulation.[110] The Resolution of July 15, 1947, as amended in 1995 and 2002, provides that:

> No Member of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received, is receiving, or expects to receive—
>
> (i) advocate or initiate any cause or matter on behalf or any outside body or individual, or
>
> (ii) urge any other Member of either House of Parliament, including Ministers, to do so,
>
> by means of any speech, Question, Motion, introduction of a Bill or amendment to a Motion or Bill, or any approach, whether oral or in writing, to Ministers or servants of the Crown.

The code of conduct for MPs also prohibits paid advocacy in any House proceedings and lays out principles to follow including integrity, honesty, and openness.[111] The House of Lords has a register for "peers consultancies and similar financial interests in lobbying for clients"[112] and peers are not allowed to vote or speak on behalf of consultancy clients if clients have a direct interest in lobbying. Staff of MPs and journalists are also subject to controls due to their access to Westminster and resultant ability to exert influence.[113]

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[108] UK, HL Deb (9 September 2016), vol 774, cols 1257–1258 (Lord Brooke of Alverthorpe). In the debate, Lord Brooke pointed out problems with the current register: "The current register has been in operation for 18 months, and it has failed abysmally. Three-quarters of the industry working in-house are exempt; of the consultant lobbyists covered, just 136 firms are signed up, a long way from the 700-plus registrants that the Government anticipated when pushing the Bill through. In the last quarter, one-third of the UK's registrants are effectively blank submissions, with no clients having met the very high bar that triggers registration. There is no requirement in current law to provide details of whom they have met in government, nor whom they are seeking to influence. It is little wonder that in the past six months the register has been viewed by the public a total of 363 times, which is an average of just two people visiting the website a day."

[109] *Lobbying (Transparency) Bill, supra* note 106.

[110] OECD Lobbyists 2009, *supra* note 9 at 74.

[111] *Code of Conduct for Members of Parliament,* prepared pursuant to the Resolution of the House of 19 July 1995, online: <http://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107602.htm>.

[112] Colin Nicholls QC et al, *Corruption and Misuse of Public Office*, 3rd ed (Oxford: Oxford University Press, 2017) at 418–419.

[113] OECD Lobbyists 2009, *supra* note 9 at 74.

### 6.2.3 Summary

The lobbying industry in the UK employs approximately 4,000 lobbyists and is worth £2 billion, making it the third largest lobbying industry in the world.[114] However, caution should be used when quantifying the lobbying industry in the UK. As Transparency International UK notes, "[d]ue to lack of reporting and data, there is no comprehensive information on the scale or nature of lobbying activity in the UK."[115]

Lobbying can occur anytime throughout the legislative process, as well as during drafting of a bill and after enactment when secondary regulation is created. Aside from Ministers, both MPs and peers are targeted by lobbyists, since both can influence policy by asking Ministers questions and tabling, scrutinizing and voting on bills. Parliamentary staff, who mainly draft positions on policies and bills, may also be targeted, along with the personal staff of Cabinet Ministers. Members of the civil service may also be subject to lobbying due to their role in drafting bills and secondary regulation.[116]

The UK scored 77 on the 2020 Transparency International CPI and was ranked tied for 11th out of 180 countries surveyed in regard to perceived corruption.[117]

## 6.3 Canada

### 6.3.1 Governance Structure

Canada is a federal country with ten provinces and three territories. The Parliament of Canada has two lawmaking bodies: elected members of Parliament in the lower chamber or the House of Commons, and appointed Senators in the upper chamber or the Senate. The leader of the party with the majority of seats in the House of Commons appoints a core executive of (usually elected) public officials called the Cabinet. The Cabinet has the greatest lawmaking power subject to the ultimate approval of Parliament. The legislative process is highly centralized and lobbying activities therefore focus on a relatively small number of key actors.

### 6.3.2 Regulatory Framework

The Canadian Constitution embraces the rule of law, democracy, and respect for democratic institutions.[118] Lobbying regulation must promote these principles, and lobbying

[114] David-Barrett, *supra* note 100 at 11.
[115] *Ibid.* Although numbers of ministerial meetings can provide some measurement, TI UK points out that lobbying can also be informal and take place outside of formal government meetings, such as during political party conferences. Lobbying may also target civil servants who are not required to disclose lobbying activity and meetings.
[116] *Ibid.*
[117] 2020 CPI, *supra* note 36.
[118] Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, C 11.

undertakings must not compromise the democratic process.[119] In 2006, the *Federal Accountability Act* (*FAA*) received Royal Assent and amended the *Lobbyists Registration Act* (*LRA*). Following the enactment of the *FAA*, the *Lobbying Act* (*LA*) was enacted in 2008 to provide comprehensive lobbying regulation at the federal level in Canada.[120] The *LA* mandates basic registration requirements for individuals paid to communicate with federal public office holders and is supplemented by the *Lobbyists' Code of Conduct* (*LCC*). Following extensive consultation, the current version of the *LCC* came into force on December 1, 2015.[121] The purpose of the *LCC* is to promote transparency and integrity in government decision-making by adopting mandatory ethical standards for lobbyists.[122] The Commissioner of Lobbying is an independent Officer of Parliament under the *LA* and has a mandate to develop and ensure compliance with the *LCC* and maintain the Registry of Lobbyists.[123]

#### 6.3.3 Summary

In 2020–2021, the Lobbyist Registrar reported a record high number of lobbyists registered at 8,005, with a monthly average of over 6,200.[124] Most registrants are consultant lobbyists, followed by in-house lobbyists for organizations and in-house lobbyists for corporations.[125] Consultant lobbyists must file one return per client and it is therefore not uncommon for consultants to have multiple active registrations. The House of Commons is the most common target of lobbying undertakings, followed by Innovation, Science and Eco nomic Development Canada, the Prime Minister's Office, Finance Canada and the Senate. The Prime Minister's Office was the third most contacted government institution in 2013–2014. The first budget for the Office of the Commissioner of Lobbying was CDN$467,000 in

[119] The Canadian Bar Association, National Administrative Law Section, *Lobbyists' Code of Conduct Consultation* (Ottawa: Canadian Bar Association, 2014), online (pdf): <https://lobbycanada.gc.ca/media/1729/cba_-_submission_-_2014-01-30.pdf>.

[120] On 12 December 2006, Bill C-2, the *Federal Accountability Act* (*FAA*), received Royal Assent. Under s 3.1(1) of the *FAA*, the *Lobbyists Registration Act* was renamed the *Lobbying Act*.

[121] Canada, Officer of the Commissioner of Lobbying of Canada, *The Lobbyists' Code of Conduct*, Ottawa: Office of the Commissioner of Lobbying, 2015 [Office of the Commissioner of Lobbying, [*The Lobbyist's Code of Conduct*], online: <https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct> (a subsequent consultation ended in 2020, with a new *LCC* expected in 2021, or shortly thereafter).

[122] Canada, Office of the Commissioner of Lobbying, *Annual Report 2013–14* (Ottawa: Office of the Commissioner of Lobbying, 2014) [Office of the Commissioner of Lobbying, *Annual Report 2013–14*] at 31, online (pdf): <https://www.orl-bdl.gc.ca/media/1505/ar_2013-14en.pdf>.

[123] Under s 68 of the *Federal Accountability Act*, the Government must consult with Parliament before appointing the Commissioner of Lobbying. This process promotes autonomy of the Office and minimizes partisanship.

[124] Office of the Commissioner of Lobbying of Canada, *Annual Report 2020–21*, (Ottawa: Office of the Commissioner of Lobbying, 2021) [Office of the Commissioner of Lobbying, *Annual Report 2020–21*] at 5, online (pdf): <https://lobbycanada.gc.ca/media/1972/oclc-pub-002-annualreport2021-en_final-web.pdf>.

[125] *Ibid* at 7.

1989.[126] As of 2019–2020, commensurate with an expanded mandate, the cost of operation has grown to CDN$5.2 million.[127]

Canada scored 77 on the 2020 Transparency International CPI and was ranked tied for 11th out of 180 countries surveyed in regard to perceived corruption.[128]

## 7. ELEMENTS OF LOBBYING REGULATION

Each country's laws and policies must define the activities that constitute lobbying and the actors involved in lobbying undertakings. Theatres of lobbying may be limited to formal engagements, such as consultative committees, or extend to include informal discussions and meetings. Generally, two classes of actors are targeted by regulation: public officials and lobbyists. Government officials captured by legislation are usually identified expressly in the statute that governs their conduct. Lobbyists are usually defined according to their conduct or engagement with government officials.

### 7.1 Definition of Government Officials

#### 7.1.1 US

The *LDA* defines Public Officials (POs), Executive Branch Officials (EBOs) and Legislative Branch Officials (LBOs). POs are any elected or appointed officials, or employees of a federal, state, or local unit of government.[129] EBOs include: the President; the Vice-President; officers and employees of the Executive Office of the President; any official serving in an Executive Level I-V position; any members of the uniformed services serving at grade 0–7 or above; and Schedule C employees.[130] LBOs include: members of Congress; elected officers of either the House or the Senate; employees or any other individual functioning in the capacity of an employee who works for a Member, committee, leadership staff of either the Senate or House; a joint committee of Congress; a working group or caucus organized to provide services to Members; and any other Legislative Branch employee serving in a position described under section 10(1) of the *Ethics in Government Act (EGA), 1978*.[131]

[126] Then called the Office of the Registrar of Lobbyists.
[127] Office of the Commissioner of Lobbying, "Financial Statement for the Year Ended March 31, 2020" (last modified 1 December 2020), online: *Office of the Commissioner of Lobbying of Canada* <https://lobbycanada.gc.ca/en/reports-and-publications/financial-statements-for-the-year-ended-march-31-2020/>.
[128] 2020 CPI, *supra* note 36.
[129] *Lobbying Disclosure Act*, *supra* note 96, § 3(15).
[130] *Ibid*, § 3(3).
[131] *Ibid*, § 3(4).

#### 7.1.2 UK

The *TLA* disclosure requirements only apply when lobbyists communicate on behalf of a client with "a Minister of the Crown or permanent secretaries,"[132] or an equivalent listed in the *TLA*. The communication must be made while the official holds the post in order to trigger the legislation. A Minister of the Crown is defined in section 2(6) as a "holder of an office in the government, and includes the Treasury." Equivalents to permanent secretaries include, for example, the Director of Public Prosecutions and the Chief Executive of Her Majesty's Revenue and Customs. Transparency International UK criticizes this narrow definition, which excludes communications with parliamentarians, Assembly members, and less senior civil servants.[133]

#### 7.1.3 Canada

The *LA* has broad application and distinguishes between public office holders (POHs) and designated public office holders (DPOHs). POHs refer to virtually all persons occupying an elected or appointed position in the federal government, including members of the House of Commons, the Senate, and their staff.[134] DPOHs include key decision-makers within government, senior public officials, senators, and certain staff of the Leader of the Official Opposition.[135] DPOHs are subject to post-employment, or revolving door, limitations and lobbyists have particular disclosure requirements for undertakings with DPOHs.

## 7.2 Definition of Lobbyist

Lobbying is no longer restricted to firm or consultancy lobbyists. Lobbyist ranks now include employees of corporations engaged in government relations, employees of public interest organizations, lawyers, think-tanks, and governments from other jurisdictions.

#### 7.2.1 US

The *LDA* defines a "lobbyist" as:

> any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client or a six month period.[136]

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[132] *TLA*, *supra* note 102, s 2(3).

[133] TI UK, *How Open is the UK Government? UK Open Governance Scorecard Results* (London: TI UK, 2015) [TI UK, *How Open is the UK Government?*] at 17, online: <https://www.transparency.org.uk/publications/how-open-uk-government-uk-open-governance-scorecard-results>.

[134] *Lobbying Act*, RSC 1985, c 44, s 2(1).

[135] *Ibid*; *Designated Public Office Holder Regulations*, SOR/2008–117, Schedule 1.

[136] *Lobbying Disclosure Act*, *supra* note 96, § 3(10).

#### 7.2.2 UK

The *TLA* only applies to "consultant lobbyists," which are defined as individuals who make communications with senior decision-makers about the workings of government in exchange for payment.[137] Only lobbyists registered under the *Value Added Tax Act 1994* are within the scope of the definition, which excludes smaller businesses. Further exclusions are discussed below.

#### 7.2.3 Canada

The *LA* identifies three types of lobbyists:

- Consultant lobbyists are individuals who lobby on behalf of clients and must register.
- In-house lobbyists (corporate) are senior office holders of corporations who carry on commercial activities for financial gain and must register when one or more employees lobby and lobby undertakings constitute 20% or more of their duties.
- In-house lobbyists (organizations) are senior officers of organizations that pursue non-profit objectives and must register when one or more employees lobby and lobby undertakings constitute 20% or more of their duties.[138]

## 7.3 Definition of Lobbying Activity

#### 7.3.1 US

Under the *LDA*, "lobbying activities" include:

> lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts and co-ordination with the lobbying activities of others.[139]

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[137] Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration* (November 2015) at 9, online (pdf): <http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>.

[138] Canada, Library of Parliament, *The Federal Lobbying System: The Lobbying Act and the Lobbyists' Code of Conduct*, (background paper), Pub No 2011-73-E (Ottawa: Library of Parliament, 2011), online: <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201173E>. The unique requirements for in-house lobbyists ensure that responsibility for the actions of lobbyists rest at the highest levels of corporate management.

[139] *Lobbying Disclosure Act*, *supra* note 96, § 3(7).

"Lobbying contacts" are "oral or written communications" with executive or legislative branch officials.[140] Unlike in Canada,[141] grass-roots activities that do not directly target public officials do not require registration.[142]

#### 7.3.2 UK

"Consultant lobbying" in the *TLA* is defined as follows in the Registrar's guidance:

> Organisations and individuals are considered to be carrying out the business of consultant lobbying if they fulfil the following criteria:
>
> They have made direct oral, written or electronic communications personally to:
>
> a Minister of the Crown, Permanent Secretary (or equivalents) currently in post, referred to as "Government Representatives"
>
> relating to:
>
> - The development, adoption or modification of any proposal of the Government to make or amend primary or subordinate legislation
> - The development, adoption or modification of any other policy of the government
> - The taking of any steps by the Government in relation to any contract, grant, financial assistance, licence or authorisation; or
> - The exercise of any other function of government.
>
> This communication is made in the course of a business and in return for payment on behalf of a client, or payment is received with the expectation that the communication will be made at a later date.[143]
>
> They are registered under the *Value Added Tax Act* (1994).[144]

Transparency International UK has criticized the ambiguity surrounding "direct contact" with a Minister or Permanent Secretary.[145] The Registrar's guidance states that "[m]aking communications personally means communicating directly with a Government Representative by name or by title, using oral, written or electronic communication. An

[140] *Ibid*, § 3(8).
[141] *Lobbying Act*, *supra* note 134, s 5(2)(j).
[142] There is one exception. The *LDA*, § 15, permits organizations that are required to file under § 6033(b)(8) of the *Internal Revenue Code* to use tax law definitions of lobbying in lieu of *LDA* definitions. Tax law definitions include grass-roots lobbying.
[143] Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 9.
[144] *Ibid*.
[145] David-Barrett, *supra* note 100 at 31.

example would be writing an email to a Minister of the Crown in which the email is addressed to the Minister specifically."[146] Communications with a government department, special adviser, administrator, or a private secretary are not covered by the *Act*. It is irrelevant whether the government official or lobbyist initiates communication.[147]

The CIPR's voluntary and universal UK Lobbying Register defines "lobbying services" as:

> activities which are carried out in the course of a business for the purpose of:
>
> a) influencing government, or
>
> b) advising others how to influence government.[148]

### 7.3.3 Canada

The *LA* designates certain activities as lobbying only when carried out for compensation.[149] Activities that must be reported include communicating with a POH in respect of:

- the development of any legislative proposal by the Government of Canada or by a member of the Senate or House of Commons;
- the introduction of any Bill or resolution in either House of Parliament of the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament;
- the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*;
- the development or amendment of any policy or program of the Government of Canada;
- the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada; and
- the awarding of any contract by or on behalf of Her Majesty in right of Canada.[150]

Individuals must also file a return if they undertake to arrange a meeting between a POH and any other person.[151]

The Canadian experience demonstrates the importance of precise vocabulary in achieving regulatory compliance. Legislation preceding the *LA* defined lobbyist activity as communication with public office holders "in an attempt to influence." Enforcement was

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[146] *Ibid* at 9.
[147] *Ibid*.
[148] Chartered Institute of Public Relations, *A Guide to Professional Conduct* at 1, online: <https://www.cipr.co.uk/CIPR/About_Us/Professional_standards/CIPR/About_Us/Professional_Standards.aspx>.
[149] *Lobbying Act*, *supra* note 134, s 5(1).
[150] *Ibid*, s 5(a)(i)–(vi).
[151] *Ibid*, s 5(b).

stymied by the evidentiary burdens of establishing that an "attempt to influence" had occurred. As a result, the *LA* instead describes lobbying activities as communications "in respect of" legislation and policies.[152]

## 7.4 Exclusions from the Definitions

Exclusions provide greater certainty in the application of laws and must therefore be clearly defined and unambiguous. Exclusionary provisions identify either classes of actors or specific activities that are exempt from registration and disclosure requirements. Activities commonly excluded comprise those that involve a pre-existing element of public disclosure, such as appearances before legislative committees or commissions, and other activities of an inherently public nature.

### 7.4.1 US

The *LDA*'s definition of "lobbying contact" excludes communications that are:

- made by a public official acting in his or her capacity as a public official;
- made by a media representative, if the purpose of the communication is to gather and disseminate news and information to the public;
- made in materials that are available to the public through a medium of mass communication;
- made on behalf of a foreign government, country or political party and disclosed under the *Foreign Agents Registration Act*;
- administrative requests for meetings, etc., that do not attempt to influence a covered official;
- made during participation in an advisory committee subject to the *Federal Advisory Committee Act*;
- testimony given before a committee, subcommittee, or task force of Congress;
- information provided in writing in response to a request for specific information from a covered official;
- communications that are compelled by statute, such as those required by subpoena;
- impossible to report without disclosing information that is not permitted to be disclosed by law;
- made to an official in an agency regarding a) criminal or civil inquiries, investigations or proceedings or b) filings that the government is required to keep confidential, if the agency is responsible for the proceedings or filings;
- made on the record in a public proceeding;

[152] *Lobbying Act*, *supra* note 134, s 5(1)(a).

- petitions to agencies that are intended to be on the public record;
- made on behalf of an individual that only relates to that individual's personal matters, unless the communication is made to a covered executive branch official, or a legislative branch official in the case of communications regarding legislation for the relief of the individual;
- disclosures protected under the *Whistle Blower Protection Act*, the *Inspector General Act* or other statutes;
- made by churches and religious orders that are exempt from filing federal income tax returns;
- made by officials of self-regulatory organizations registered with the Securities Exchange Commission or the Commodities Future Trading Commission; or
- made by the SEC or Commodities Future Trading Commission in relation to their regulatory responsibilities under statute.[153]

If an individual's communications fall into the above exceptions, they will not be considered a lobbyist under the *LDA* and will not be required to register. The definition of "lobbyist" also excludes individuals whose lobbying activities constitute less than 20% of the time spent working for a particular client over a six-month period, although that individual may still fit the description of a lobbyist in relation to other clients. Finally, even if an individual meets the definition of "lobbyist," they are not required to register if the total income from their lobbying activities on behalf of a particular client does not exceed $5,000, or if their total expenses for lobbying activities do not exceed $20,000 within six months.

#### 7.4.2 UK

The *TLA* lists a number of exclusions from its definition of consultant lobbyists. The Registrar's guidance summarizes these exclusions as follows:

- Individuals and organisations not registered under the *Value Added Tax Act 1994*;
- Individuals making communications in the course of their employer's business (only the employer is required to be registered);
- Officials or employees of governments of countries other than the United Kingdom;
- International organisations as defined by section 1 of the *International Organisations Act 1968* such as the United Nations;
- 'In-house' lobbyists defined as those who are lobbying on behalf of their own organisation;
- Organisations that carry on a business which is mainly non-lobbying and communicate with Ministers in a way that is incidental to the main course of their business; and

[153] *Lobbying Disclosure Act*, *supra* note 96, § 3(8)(B).

- Organisations that represent a particular class or body of people and whose income is derived wholly from those people, and where the lobbying is incidental to their general activity.[154]

The last exemption listed would apply, for example, to a workers' group lobbying on behalf of its own members. Charities are also excluded unless they receive payment from another person for lobbying on that person's behalf.[155] The definition of "consultancy lobbying" has been heavily criticized for its narrow scope by groups such as Transparency International UK. Particularly contentious are the exclusions of in-house lobbyists and those whose business is not primarily comprised of lobbying. Transparency International UK argues that the *TLA*'s inadequate scope "will prevent it from regulating the majority of lobbying that occurs."[156] The APPC, one of the UK's former self-regulating professional associations, estimated that the *TLA* would capture only 1% of all lobbying activity in the UK.[157] The Registrar of Consultant Lobbyists commented that the law was "very narrowly drafted."[158] Agreeing that the definitions were too narrow, the CIPR launched a universal voluntary register called the UK Lobbying Register in July 2015, open to all lobbyists and binding them to a code of conduct.[159] In contrast to these perspectives, some commentators have characterized the *TLA*'s minimal scope as "proportionate" to the problem and important for promoting healthy lobbying.[160]

### 7.4.3 Canada

Canada's exclusions reflect its constitutional and social environment. Exclusions for representatives of provincial governments[161] reflect Canadian federalism, and exclusions for Aboriginal councils and governments[162] reflect Canada's colonial history and constitutional protection of Aboriginal rights. The following communications are also exempt from the *LA*'s application:

- submissions to Parliamentary committees that are a matter of public record;
- communications on behalf of an individual or group to a POH about the enforcement, interpretation or application of a statute by that POH in relation to that individual or group; and
- requests for information submitted to a POH.[163]

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[154] Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 13, online.
[155] *Ibid*.
[156] TI UK, *How Open is the UK Government*, *supra* note 133 at 17.
[157] *Ibid*.
[158] Tom Moseley, "Lobbying Register Will Have Few Applicants, Registrar Predicts", *BBC News* (24 February 2015), online: <http://www.bbc.com/news/uk-politics-31151820>.
[159] See the CIPR website for more information at: <https://cipr.co.uk/CIPR/Our_work/Policy/Lobbying.aspx>.
[160] OECD 2014, *supra* note 1 at 217.
[161] *Lobbying Act*, *supra* note 134, s 4(1).
[162] *Ibid*.
[163] *Ibid*, s 4(2).

## 7.5 Disclosure Requirements

Disclosure must satisfy the transparency objectives of regulation. Policy should require lobbyists to provide information that facilitates public scrutiny of their activity and provides public officials with sufficient knowledge to balance the competing interests of lobbyists and the public at large. As discussed, meaningful disclosure must be concise. Satisfying the public interest in transparency may necessitate disclosure of the beneficiaries of lobbyists' efforts. The OECD has provided guidance for minimum requirements of disclosure rules: information must be relevant to legislative goals of transparency, integrity and efficacy; demands must result in information that is pertinent, yet parsimonious; and technology must be utilized to create accessible information infrastructure.[164] Identifying the direct beneficiaries of lobbying is much simpler for corporate interest lobbyists compared to public interest lobbyists. Nonetheless, policy should favour transparency from all lobbyists[165] and require disclosure of clients, lobbying objectives, and how the undertaking is funded.[166] Ultimately, the usefulness of disclosure requirements depends on the manner in which information is to be used and collected.[167] Under the relevant statutory instruments in Canada, the US, and the UK, disclosure is mandatory.[168]

### 7.5.1 Content of Disclosure

Lobbyists must be required to disclose all relevant information in a manner conducive to public reporting. Legislation that intends to uncover who is behind lobbying often provides financial thresholds for reporting.[169] Expenditures may provide a useful metric by which the public can comprehend the stakes involved and public officials can identify disparities in access between public interests and well-funded lobby groups.[170] The *LDA* applies earnings thresholds that trigger registration requirements and estimates of income and expenditures. The prevailing view in Canada is that the complexities of analyzing and monitoring financial disclosure outweigh the public benefit achieved through transparency.[171] There have been calls in Europe to strengthen disclosure requirements surrounding financial information.[172] Financial disclosure is viewed as necessary for overall lobbying transparency, the identification of lobbyists and beneficiaries, and the prevention of misleading and unethical

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[164] OECD 2021, *supra* note 7 at 72.
[165] OECD Lobbyists 2009, *supra* note 9.
[166] European Commission Green Paper, *supra* note 14 at 194.
[167] For example, information that may be used in criminal prosecutions may be subject to more rigorous disclosure and data retention rules.
[168] In the EU, registration is voluntary but attaches mandatory disclosure obligations.
[169] OECD Lobbyists 2009, *supra* note 9.
[170] John Chenier, *The Lobby Monitor*, 15 (29 October 2003) 1 at 13.
[171] House of Commons, Standing Committee on Elections, Privileges and Procedure, "First Report to the House", Minutes of Proceedings and Evidence, (Ottawa: 1985–1986) at 4.
[172] Rachel Tansey & Vicky Cann, *New and Improved? Why the EU Lobby Register Still Fails to Deliver*, (Brussels: ALTER-EU, 2015), online (pdf): <https://www.alter-eu.org/sites/default/files/documents/Why%20EU%20Lobby%20Register%20still%20fails%20to%20deliver%20-%20print%20version.pdf>.

lobbying.[173] However, financial regulations are difficult to assess[174] and exhaustive regulations may frustrate compliance and overburden regulators.[175]

Requiring registrants to disclose the targets of lobbying efforts advances the public interest in transparency. In order to define "lobbying activities" with sufficient precision and delineate the theatres of lobbying captured under regulation, policy should identify the decision-making points where lobbyists commonly attempt to exert influence.

#### 7.5.1.1 US

In the US, lobbyists must report any oral or written communication to a "covered executive branch official or a covered legislative branch official"[176] made on behalf of a client. Lobbyists must also identify the Houses of Congress and federal agencies contacted on behalf of clients.[177]

Lobbying firms must file separate registrations for each client if total income from that client for lobbying activities is equal to or greater than $2,500 during a quarterly period.[178] Organizations employing in-house lobbyists must file a single registration if total expenses for lobbying activities are equal to or greater than $10,000 during a quarterly period.[179] Registrants must disclose:

- the name, address, business telephone number, and principal place of business of the registrant and a general description of its business or activities;
- the name, address and principal place of business of the registrant's client and a general description of its business or activities;
- the name, address and principal place of business of any organization, other than the client, that contributes more than $10,000 toward the lobbying activities of the registrant in a semi-annual period and in whole or in major part plans, supervises, or controls such lobbying activities;
- a statement on the general issue areas the registrant expects to engage in lobbying activities on behalf of the client;
- the names of the registrant's employees who have acted or who will act as a lobbyist on behalf of the client and whether those employees have been a covered executive or legislative branch official in the past twenty years;
- whether the client is a State or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more State or local governments; and

[173] *Ibid.*
[174] OECD Lobbyists 2009, *supra* note 9.
[175] OECD 2006, *supra* note 26.
[176] *Lobbying Disclosure Act*, *supra* note 96, § 14.
[177] *Ibid*, §§ 3(8)(a), 5(b)(2)(b).
[178] *Honest Leadership and Open Government Act*, *supra* note 93, § 201(b)(5)(A).
[179] *Ibid*, § 201(b)(5)(B). Notably, registration is not required for pro bono clients since the monetary thresholds would not be met.

- details of their relationship with foreign entities, including the name, address, principal place of business, amount of contribution exceeding $5000 to lobbying activities, and approximate percentage of ownership in the client of any foreign entity.[180]

The *HLOGA* amended the *LDA* to require semi-annual disclosure of campaign and presidential library contributions. These reports are due within 30 days of the end of the semi-annual reporting period.[181] The *LDA* is unique in its financial disclosure requirements; Canada's *LA* does not adequately address transparency concerns related to campaign financing.

#### 7.5.1.2 UK

The disclosure requirements under the *TLA* are minimal. As noted above, registration requirements under the *TLA* are only triggered when a lobbyist or lobbying firm fits the narrow definition of "consultant lobbyist." Registrants submit quarterly returns disclosing clients for whom they have made communications amounting to consultant lobbying in the previous three months. Individual communications and the number of communications on behalf of particular clients are not disclosed.[182] Upon registration, lobbyists and lobbying firms must also disclose contact information, the name of any parent company, alternative trading names, and the names of directors or partners. Finally, consultant lobbyists must declare whether they follow a code of conduct and where to find that code of conduct. Lobbyists are not required to disclose who they are lobbying or the subject matter of their advocacy.

Until the two organizations merged in 2018, the APPC and PRCA maintained their own publicly available disclosure registries with client identities. The PRCA required disclosure of the identities of lobbying entities, lobbyists, and staff. The newly created Public Affairs Board, operated under PRCA, now oversees registration.[183] The CIPR also launched the UK Lobbying Register (UKLR) in July 2015. Any lobbyists, including in-house lobbyists and non-CIPR members, may register and the register is accessible to the public for free online.[184]

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[180] *Lobbying Disclosure Act*, *supra* note 96, § 4(b)(1)–(4); *Honest Leadership and Open Government Act*, *supra* note 93, § 202.

[181] *Honest Leadership and Open Government Act*, *supra* note 93, § 203. According to the Congressional Research Service: "Items reported under this provision include funds donated to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official; to an entity that is named for a covered legislative branch official, or to a person or entity in recognition of such official; to an entity established, financed, maintained, or controlled by a covered legislative branch official, or to an entity designated by such official; or to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, one or more covered legislative branch officials or covered executive branch officials."

[182] Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 6.

[183] Public Relations and Communications Association, "The Register" (last visited 4 October 2021), online: *PRCA* <https://register.prca.org.uk>.

[184] "The UK Lobbying Register" (last visited 4 October 2021), online: *UK Lobbying Register* <http://www.lobbying-register.uk/>.

Outside of legislative requirements, UK government departments proactively disclose quarterly data on lobbyist meetings of government ministers and permanent secretaries and have done so since 2010. Data is available online.[185] The Cabinet Office monitors compliance with disclosure requirements and makes reports to Parliament on each department every six months, producing some pressure to comply.[186] However, Transparency International UK argues that "data quality and depth of information is very poor" because disclosure of data is often delayed, only formal meetings are disclosed and information on the subject matter of meetings is scarce.[187] Parliamentarians, Assembly members, less senior civil servants, local government officials and public agencies are not required to publish any information on meetings.[188] These gaps have led Transparency International UK to conclude that "[t]he level of transparency over lobbying meetings with legislators and the civil service is negligible to non-existent."[189]

In terms of lobbying by UK legislators, the Resolution of November 6, 1947, as amended in 1995 and 2002, requires MPs to disclose any consultancies or undertakings which might involve remuneration for the provision of advice on lobbying. MPs are not prohibited from entering into agreements to provide services in their parliamentary capacity, but must register these agreements. The House of Lords also has a register for peers' consultancies or other financial interests in lobbying for clients.[190] MPs' support staff must register any gainful occupation that might be advantaged due to their access to Parliament, and journalists must report any other paid employment relevant to their privileged access to Parliament.[191]

Finally, All-Party Parliamentary Groups in the UK, which meet to discuss certain issue areas, must register the names of officers of the group, benefits received by the group, and the source of those benefits.[192] These disclosure requirements respond to the ability of lobby groups to gain access to all-party groups and improperly influence the MPs involved through financing and provision of hospitality.[193]

#### 7.5.1.3 Canada

Canada's reporting requirements are expansive, requiring lobbyists to identify communication or intent to communicate with "any department or other governmental institution."[194]

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[185] For an example, see: "Ministerial Gifts, Hospitality and Meetings with External Organisations in the Department of Business, Innovation and Skills (last updated 9 November 2016), online: *UK Government Data* <http://data.gov.uk/dataset/disclosure-ministerial-hospitality-received-department-for-business>.

[186] David-Barrett, *supra* note 100 at 53.

[187] *Ibid* at 52.

[188] *Ibid* at 22.

[189] *Ibid* at 52.

[190] Nicholls et al, *supra* note 112.

[191] OECD Lobbyists 2009, *supra* note 9 at 75–76.

[192] *Ibid*.

[193] *Ibid*.

[194] *Lobbying Act*, *supra* note 134, s 5(2).

Under our paraphrasing of the *LA*, all three categories of lobbyists must disclose extensive information, including:

- the name and business address of the individual and, if applicable, the name and business address of the firm where the individual is engaged in business;
- the name and business address of the client and the name and business address of any person or organization that, to the knowledge of the individual, controls or directs the activities of the client and has a direct interest in the outcome of the individuals activities on behalf of the client;
- where the client is a corporation, the name and business address of each subsidiary of the corporation that, to the knowledge of the individual, has a direct interest in the outcome of the individual's activities on behalf of the client;
- where the client is a corporation that is a subsidiary of any other corporation, the name and business address of that other corporation;
- where the client is a coalition, the name and business address of each corporation or organization that is a member of the coalition;
- where the client is funded in whole or in part by a government or government agency, the name of the government or agency and the amount of funding received;
- particulars to identify the subject-matter in respect of which the individual undertakes to communicate with a public office holder or to arrange a meeting, and any other information respecting the subject-matter that is prescribed;
- particulars to identify any relevant legislative proposal, bill, resolution, regulation, policy, program, grant, contribution, financial benefit or contract;
- if the individual is a former public office holder, a description of the offices held, which of those offices, if any, qualified the individual as a designated public office holder and the date on which the individual last ceased to hold such a designated public office;
- the name of any department or other governmental institution in which any public office holder with whom the individual communicates in respect of a matter regulated by the *LA* or expects to communicate or with whom a meeting is, or is to be, arranged, is employed or serves; and
- if the individual undertakes to communicate with a public office holder in respect of any matter regulated by the *LA*, particulars to identify any communication technique that the individual uses or expects to use in connection with the communication with the public office holder, including any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place

> pressure on the public office holder to endorse a particular opinion (grass-roots communication).[195]

The *Lobbyists Registration Regulations* provide the form and manner in which lobbyists must file returns under the *LA*.[196]

### 7.5.2 Timing

Unambiguous and strict reporting deadlines are as important as the content of reporting. In order to provide the public with meaningful information and the opportunity to mobilize counter-lobby initiatives, disclosure must be made and updated in a timely fashion.

#### 7.5.2.1 US

The *LDA* requires registration within 20 days of either: (1) the date that the employee/lobbyist was retained to make more than one lobbying contact (and meets the 20% of time threshold) or, (2) the date the employee/lobbyist makes a second lobbying contact (and meets the 20% of time threshold). Communications with executive branch officials and Congressional support staff "serving in the position of a confidential, policy-determining, policy-making or policy-advocating character"[197] qualify as lobbying contacts. Following initial disclosure, reports must be updated semi-annually thereafter.[198]

#### 7.5.2.2 UK

Under the *TLA*, any organization that intends to engage in consultancy lobbying must apply to join the Register before doing so.[199] Registrants must submit a return listing clients for the pre-registration quarter.[200] Lists of client names are updated quarterly and registrants must submit returns within two weeks of the end of each quarter.

#### 7.5.2.3 Canada

In Canada, initial reporting is required within ten days of entering into a lobbying undertaking,[201] and communications with senior public officer holders must be updated monthly thereafter.[202] These communications include telephone calls, in-person meetings, and video conferences.[203] Oral communication with a designated public office holder that is initiated by someone other than the public office holder and arranged in advance must be

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[195] *Ibid*, ss 5(2)(a)–(k).
[196] *Lobbyists Registration Regulations*, SOR/2008-116.
[197] US, Committee on the Judiciary Report, *The Lobbying Disclosure Act of 1995* (HR Rep No 104-339) (Washington, DC: US House of Representatives, 1995).
[198] *Honest Leadership and Open Government Act*, *supra* note 93, § 201(a)(1)(A-D).
[199] Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 5.
[200] *Ibid* at 6.
[201] *Lobbying Act*, *supra* note 134, s 5(1.1).
[202] *Ibid*, s 5(3).
[203] Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122 at 4.

reported. However, communications that are initiated by the public office holder do not generally require reporting.[204]

### 7.5.3 Procedures for Collection and Disclosure

As mentioned, lobbying regulation has proliferated incrementally around the world. A consequence of this sporadic development is the creation and adoption of specific requirements and separate registries for certain industries and different levels of government. Responding to modern demands for transparency, reporting and disclosure mechanisms must maximize efficiency while encouraging compliance and facilitating access to information.

One way to promote compliance and improve accessibility is to utilize electronic filing and reporting. There are many benefits to electronic filing: lobbyists can submit information remotely; forms can solicit quantifiable information amenable to data analysis; data store costs are reduced and archival and retrieval simplified; and, electronic filing facilitates the use of the internet to decentralize information and improve public access.[205] Policies regarding electronic filing should respect established rules and norms regarding the publication of private and privileged information, mitigate the risks of information overload and balance incentives for compliance with risks of disclosing proprietary corporate intelligence.

#### 7.5.3.1 US

All documents required by the *LDA* must be filed electronically.[206] The Secretary of the Senate and Clerk of the House of Representatives are required to maintain all registrations and reports filed under the *LDA* and make them accessible to the public over the internet, free of charge and in "a searchable, sortable and downloadable manner."[207]

#### 7.5.3.2 UK

Applications to join the UK Register can be completed online or on paper. The Register is available online and searchable by lobbyist and client name. Client lists from previous quarters are available.

#### 7.5.3.3 Canada

In Canada, the Registry of Lobbyists is the *LA*'s core instrument of transparency.[208] Lobbyists are required to file their returns electronically and the application process is provided in both official Canadian languages (English and French).[209] Information collected under the *LA* is a matter of public record accessible over the internet. Anyone may search the database

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[204] *Ibid*.
[205] OECD Lobbyists 2009, *supra* note 9.
[206] *Honest Leadership and Open Government Act*, *supra* note 93, § 205.
[207] *Ibid*, § 209(a)(3).
[208] OECD 2014, *supra* note 1 at 127.
[209] "Registry of Lobbyists" (last visited 4 October 2021), online: *Office of the Commissioner of Lobbying of Canada* <https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/guest?lang=eng>.

and generate reports. There were over 840,000 user searches of the Registry database in 2018—2019.[210]

## 7.6 Codes of Conduct

Lobbying involves two principal parties: government and interest groups. Because "it takes two to lobby," lobbyists share responsibility with public officials for maintaining the integrity of lobby regulatory schemes. As noted in Section 4.2.4, there are three types of codes. The Canadian system provides an example of a statutory code. The UK and the US systems provide examples of professional codes or self-regulation. Meaningful lobbying policy requires oversight of the conduct of public officials that is commensurate with regulation of lobbyists' behaviour. Many jurisdictions, including Canada, the US, and the EU, have developed codes of conduct that apply to public officials in their interactions with lobbyists.[211]

### 7.6.1 US

Various professional associations for lobbyists in the US require their members to abide by codes of ethics. Members of the Public Relations Society of America must pledge to abide by the Society's *Code of Ethics (*the *Code)*, which lists professional values, such as honesty, independence, fairness, and provisions of conduct.[212] For example, the *Code* requires members to reveal causes and sponsors for interests represented, disclose financial interests in a client's organization and disclose potential conflicts of interest. The *Code* also includes examples of improper conduct. The *Code* is supplemented by *Ethical Standards Advisories*, which provide guidance on specific timely issues (e.g., "The Ethical Use of Interns"). The National Institute for Lobbying and Ethics (NILE) also requires members to abide by its code

[210] Office of the Commissioner of Lobbying of Canada, *Annual Report 2018–19*, (Office of the Commissioner of Lobbying, 2019) at 7, online (pdf): <https://lobbycanada.gc.ca/media/1471/annual-report-2018-2019-en.pdf>.

[211] For public officials in Canada, see: "Values and Ethics Code for the Public Sector" (last visited 4 October 2021), online: *Government of Canada* <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049&section=HTML>. For public officials in the US, see: "Employee Standards of Conduct" (1 January 2017), online: *US Office of Government Ethics* <https://www.oge.gov/Web/oge.nsf/Resources/Standards+of+Ethical+Conduct+for+Employees+of+the+Executive+Branch>; "Rules of the House of Representatives" (last visited 4 October 2021), online: *House Committee on Rules* <https://rules.house.gov/rules-and-resources/rules-house-representatives>; "Rules of the Senate" (last visited 4 October 2021), online: *The Rules Committee* <https://www.rules.senate.gov/rules-of-the-senate>. For public officials in the EU, see: European Parliament, *Code of Conduct for Members of the European Parliament with Respect to Financial Interests and Conflicts of Interest*, online (pdf): <https://www.europarl.europa.eu/meps/en/about#firstanchor>.

[212] Public Relations Society of America, *PRSA Code of Ethics*, (New York: PRSA, 2000), online (pdf): <https://www.prsa.org/docs/default-source/about/ethics/prsa_code_of_ethics1ee4daa82781492ab1589370d0ec198b.pdf?sfvrsn=aa659309_0>.

of ethics.[213] The code endorsed by the NILE is more general and emphasizes principles like honesty, integrity, and avoiding conflicts of interest.

### 7.6.2 UK

The UK relies on professional associations to provide codes of conduct for lobbyists. Each of the three associations for UK lobbyists has its own code to which members must adhere. The CIPR's code is fairly general and consists of best practices, not prohibitions.[214] Principles such as integrity, honesty, and competency are emphasized. The CIPR's code does not prohibit the exchange of gifts or compensation between lobbyists and public officials or the employment of public officials, and also does not provide for client identity disclosure.[215] The APPC's code of conduct was more potent and prohibited lobbyists from providing financial inducements and employment to public officials.[216] It also required registration of clients and lobbying staff on its own registry. The PRCA's code was aimed specifically at lobbyists and required public disclosure of clients' names.[217] Like the APPC, the PRCA code prohibited members from hiring MPs, peers, or Assembly members.[218] The APPC and PCRA merger led to a joint *Public Affairs Code* that replaced the APPC *Code of Conduct* and the PRCA *Public Affairs and Lobbying Code of Conduct*.[219] Given that the CIPR runs the UKLR, lobbyists, who register with the UKLR and are not already subject to a code of conduct, must agree to abide by the CIPR Code.[220]

### 7.6.3 Canada

The first *LCC* came into force in 1997. The most recent iteration of the *LCC* was published in the *Canada Gazette* and came into force on December 1, 2015.[221] The update ensured that the *LCC* was consistent with the *LA*. As with the *LA*, the objective of the *LCC* is to ensure transparency of communications between lobbyists and government. It is for this reason that the *LCC* does not contain provisions that regulate the interactions between lobbyists and

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[213] The National Institute for Lobbying and Ethics has, for the time being, adopted the Code of Ethics used by the now defunct Association of Government Relations Professionals. The code can be found online at: "Code of Ethics" (last visited 4 October 2021), online: *National Institute for Lobbying & Ethics* <https://www.lobbyinginstitute.com/ethics>.

[214] Chartered Institute of Public Relations [CIPR], *Chartered Institute of Public Relations Code of Conduct*, *The CIPR Regulations*, Appendix A, online: <https://cipr.co.uk/CIPR/About_Us/Governance_/CIPR_Code_of_Conduct.aspx>.

[215] OECD 2012, *supra* note 13 at 44.

[216] Anna Lewicka-Strzalecka, "Ethical Model of Lobbying: An Analysis of the Codes Regulating Lobbying Activity" (2017) 20:8 Annales Ethics Econ Life 75 at 80.

[217] PRCA, *PRCA Professional Charter*, (London: PRCA, 2016), online (pdf): <https://www.prca.org.uk/sites/default/files/downloads/PRCA%20Code%20of%20Conduct%20-%20updated%20September%202016.pdf>.

[218] David-Barrett, *supra* note 100 at 28.

[219] Public Affairs Board, *Public Affairs Code,* PRCA, 2021 online: <https://www.prca.org.uk/sites/default/files/Public%20Affairs%20Code%20February%202021%2023.2.2021.pdf>.

[220] "Professional Standards" (last visited 4 October 2021), online: *UK Lobbying Register* <https://lobbying-register.uk/professional-standards/>.

[221] Office of the Commissioner of Lobbying, *The Lobbyists' Code of Conduct*, *supra* note 121 at 1.

their clients. The *LCC* also mandates respect for Canada's democratic institutions and enhanced rules regarding conflict of interest, preferential access, political activities, and the provision of gifts. Under the *LA*, the Commissioner of Lobbying is required to develop a lobbyists' code of conduct[222] and has authority to "conduct an investigation if he or she has reason to believe … that an investigation is necessary to ensure compliance with the *Act* or *Code*."[223] Canada is the only jurisdiction to legislate a mandatory code of conduct for lobbyists and the *LCC* is a statutory component of the lobbyist regulation regime.[224] The purpose of the *LCC* is to "assure the Canadian public that lobbyists are required to adhere to high ethical standards, with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making."[225] Breaches of the *LCC* are subject to the Commissioner's investigative reports submitted to Parliament, but the Commissioner does not have the authority to impose charges or sanctions under the *LA*.[226] The Commissioner's investigative authority extends beyond registered lobbyists and applies to all individuals who are engaged in lobbying activity that is subject to registration.[227]

The Canadian *LCC* is structured around three guiding principles: respect for democratic institutions; openness, integrity, and honesty; and professionalism. These principles animate a series of related rules:

> **Transparency**
>
> *Identity and purpose*
>
> 1. Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.
>
> *Accurate information*
>
> 2. Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.
>
> *Duty to Disclose*
>
> 3. Lobbyists shall inform each client of their obligations as a lobbyist under the *Lobbying Act* and the *Lobbyists' Code of Conduct.*
>
> 4. The responsible officer (the most senior paid employee) of an organization or corporation shall ensure that employees who lobby on the organization's or corporation's behalf are informed of their

[222] *Lobbying Act*, *supra* note 134, s 10.4(1).
[223] *Ibid*, s 10.2(1).
[224] OECD Lobbyists 2009, *supra* note 9.
[225] Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122 at 31.
[226] *Makhija v Canada* (*Attorney General*), 2010 FCA 342 at paras 7, 18, 414 NR 158; *Lobbying Act*, *supra* note 134, s 10.4–10.5.
[227] Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122.

obligations under the *Lobbying Act* and the *Lobbyists' Code of Conduct.*

**Use of Information**

5. A lobbyist shall use and disclose information received from a public office holder only in the manner consistent with the purpose for which it was shared. If a lobbyist obtains a government document they should not have, they shall neither use nor disclose it.

**Conflict of Interest**

6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.

In particular:

*Preferential access*

7. A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligation.

8. A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.

*Political activities*

9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).

*Gifts*

10. To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public officer holder is not allowed to accept.[228]

## 7.7 Compliance and Enforcement

Sanctions are an essential component of lobbying regulation but are rarely severe enough to constitute a true deterrent.[229] Enforcement must be impartial, predictable and timely in order to be effective. Regulatory authorities must operate at arm's length from government, be sufficiently resourced and endowed with powers to investigate infractions and enforce

[228] Office of the Commissioner of Lobbying, *The Lobbyists' Code of Conduct*, *supra* note 121 at 5–6.
[229] OECD 2014, *supra* note 1.

policy. Lax enforcement of regulation can lead to a "culture of entitlement"[230] in government decision-making. Where illicit lobbying practices and corruption have become normalized or are viewed as a cost of doing business, sanctions must be paired with educational initiatives to facilitate the slow development of a culture of integrity. Different systems of government will generate fewer or greater opportunities for lobbying; opportunities for corruption will be correspondingly few or abundant. For example, the openness of the American legislative process fosters not only a competitive advocacy environment, but also increased opportunities for illegitimate lobbying practices. It is important that legislators routinely look for evidence that those who lobby are authorized to do so.[231]

In order for regulations to effectively limit corrupt practices, regulators must have the authority to investigate contraventions and apply sanctions. Sanctions may take the form of fines, imprisonment or the removal of privileges, such as access to public officials. The separation between regulatory and criminal law regimes will often require regulatory authorities to hand off investigations when criminal activity is uncovered. The implications of this relationship are two-fold. Disclosure requirements must provide regulatory bodies with adequate information to assist law enforcement agencies in their investigations. In turn, law enforcement agencies must follow through with investigations and ensure that corruption offences are not overtaken by more urgent priorities.

### 7.7.1 Sanctions

#### 7.7.1.1 US

The *HLOGA* instituted a prohibition of gifts or travel by registered lobbyists to members of Congress and Congressional employees.[232] The Secretary of the Senate and Clerk of the House of Representatives are responsible for verifying the accuracy, completeness, and timeliness of registration and reports.[233] They must notify any lobbyist in writing that may be in non-compliance.[234] If the lobbyist or lobbying firm fails to provide an appropriate response, the United States Attorney for the District of Columbia must be alerted within 60 days of the original notice.[235] The aggregate number of registrants cited for non-compliance is publically available online.[236] Any individual who fails to remedy a defective filing within 60 days of notice, or otherwise fails to comply with the *LDA*, may be subject to a fine not exceeding $200,000.[237] Any individual who knowingly and corruptly violates the *LDA* may be subject to a period of incarceration not exceeding five years.[238]

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[230] Canada, Commission into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Research Studies,* vol 2 (Ottawa: Public Works and Government Services Canada, 2006) at 203, online (pdf): <https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/phase2report/volume2/cispaa_vol2_full.pdf>.
[231] OECD Lobbyists 2009, *supra* note 9.
[232] *Honest Leadership and Open Government Act*, *supra* note 93, § 206.
[233] *Lobbying Disclosure Act*, *supra* note 96, § 6(2).
[234] *Ibid*, § 6(7).
[235] *Ibid*, § 6(8).
[236] *Honest Leadership and Open Government Act*, *supra* note 93, § 210.
[237] *Ibid*, § 211(a)(2).
[238] *Ibid*, § 211(b).

The Public Relations Society of America and the National Institute for Lobbying and Ethics have no enforcement mechanisms for their codes of ethics. Both will revoke membership if an individual is convicted of an offense involving lobbying activities. The Society justifies its lack of internal enforcement and punishment by pointing out the expense and difficulty of enforcement in the past. Instead, the Society now focuses on promoting and inspiring ethical values through its *Code of Ethics* and professional development programs.

#### 7.7.1.2 UK

Under the *TLA*, lobbyists commit an offence if they engage in consultancy lobbying without joining the registry or while their entry in the register is incomplete or inaccurate.[239] Failing to submit complete, accurate quarterly returns on time is also an offence.[240] If convicted of an offence under the *Act*, offenders are liable for a fine. The Registrar may also impose civil penalties for conduct amounting to an offence, in which case no due diligence defence is available.[241] Civil penalties may not exceed £7,500.[242] Transparency International UK has criticized this sanction as lacking in deterrent power.[243]

Both professional associations for lobbyists in the UK can investigate complaints and impose sanctions for member violations of their codes of conduct. Approximately four formal complaints and 20–30 informal complaints are received each year by the CIPR, most resolved through confidential conciliation agreements.[244] If conciliation is unsuccessful, a Complaints Committee or a Disciplinary Committee for particularly egregious conduct takes over. Committee members are drawn from outside the public relations industry and committees can request information and call witnesses. From 2007–2012, the CIPR's Complaints Committee dealt with only one lobbying-related hearing, and the Disciplinary Committee conducted only two hearings between 2002 and 2012.[245] Potential sanctions include reprimands, an order to repay fees for work involved in the complaint, an order to pay the CIPR's costs for the complaint process, or expulsion from the CIPR.[246] Since APPC and PRCA merged, the Public Affairs Board investigates complaints against its members. Complaints are first assessed by independent adjudicators. *Prima facie* breaches of the *Public Affairs Code* are referred to a Professional Practice Panel for hearing. Disciplinary powers of the Professional Practice Panel include suspension and expulsion.[247] The 2009 Public Administration Select Committee inquiry found that a scarcity of complaints and toothless

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[239] *TLA*, *supra* note 102, ss 12(1)–(2).
[240] *Ibid*, s 12(3).
[241] *Ibid*, s 14.
[242] *Ibid*, s 16.
[243] David-Barrett, *supra* note 100 at 32.
[244] OECD 2012, *supra* note 13 at 44.
[245] *Ibid*.
[246] "Professional Standards" (last visited 30 September 2021), online: *Chartered Institute of Public Relations* <https://cipr.co.uk/CIPR/About_Us/Professional_Standards.aspx>.
[247] Public Affairs Board, *Public Affairs, Complaints, Determination, and Disciplinary Rules and Procedures* (Public Affairs Board, 2021) at 5–-10, online (pdf): <https://www.prca.org.uk/sites/default/files/Public%20Affairs%20Code%20February%202021%2023.2.2021.pdf>.

nature of the available sanctions contributed to the finding that self-regulation in the UK was inadequate.[248]

#### 7.7.1.3 Canada

The *LA* contains various penalties and sanctions. It is an offence to fail to file a required return or knowingly make a false or misleading statement in a return.[249] Authorities may proceed summarily or by indictment. On summary convictions, contraventions may be subject to a fine not exceeding CDN$50,000 or imprisonment for a term not exceeding six months.[250] On proceedings by way of indictment, contraventions may be subject to a fine not exceeding CDN$200,000 or imprisonment for a term not exceeding two years.[251] Individuals convicted of an offence under the *LA* may be prohibited from lobbying for up to two years.[252] Although the first conviction under the *LA* was in 2013—2014,[253] the Commissioner of Lobbying continues to include the number of cases referred to police in every *Annual Report*. During the period covered by the 2020-21 *Annual Report*, for example, the Commissioner referred three new files to police for investigation.[254] As discussed, the *LCC* allows broad discretion for the Commissioner to investigate unscrupulous activity. This investigative authority extends beyond individuals who have registered and applies to all parties who undertake lobbying activity. Violations are subsequently reported to Parliament, encouraging compliance through the specter of "naming and shaming" unscrupulous lobbyists.

### 7.7.2 Education Programs

Education programs are less expensive than monitoring, investigating, and prosecuting misconduct, and the OECD suggests that they may also be more effective.[255] These initiatives promote the legitimate role of lobbying in government decision-making and alert public officials and lobbyists to registration requirements and codes of conduct. Professional and industry associations may mandate ethics training as a condition of membership.

#### 7.7.2.1 US

As in the UK, professional associations like the Public Relations Society of America provide ethical training to lobbyist members. At the state level, lobbyists in Louisiana, for example, are required under statute to complete yearly training on the *Louisiana Code of Governmental Ethics*.[256]

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[248] OECD 2014, *supra* note 1 at 217
[249] *Lobbying Act*, *supra* note 134, s 14(1).
[250] *Ibid*, s 14(1)(a).
[251] *Ibid*, s 14(1)(b).
[252] *Ibid*, s 14.01.
[253] Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122.
[254] Office of the Commissioner of Lobbying, *Annual Report 2020–21*, *supra* note 124.
[255] OECD Lobbyists 2009, *supra* note 9 at 39.
[256] *Louisiana Code of Governmental Ethics*, RS 42:1170(4)(a)-(b).

#### 7.7.2.2 UK

In the UK, there is no mandatory ethics or integrity training for lobbyists or public officials. Resistance to such training exists among public officials, partly due to potential exposure to ridicule for spending public money on the development of ethical behaviour.[257] However, Transparency International UK recommends the institution of mandatory training.[258] The UK's two professional associations provide training and education for lobbyists. The CIPR holds voluntary education events and classes and also runs industry-recognized certificate and diploma programs that incorporate ethical training. The PRCA offers regular, voluntary training sessions covering a wide range of topics, including ethics and regulation.[259]

#### 7.7.2.3 Canada

In Canada, the Office of the Commissioner of Lobbying provides training sessions to help lobbyists understand the requirements and functioning of the reporting system. Each registrant in Canada is also assigned a Registration Advisor who provides guidance and individual support to lobbyists. As a matter of policy, the Office contacts every new registrant to introduce them to their Registration Advisor and inform them of their obligations. The Office also meets regularly with federal public officials and management teams in federal departments and agencies.

### 7.7.3 Revolving Door

The "revolving door" between the political world and the lobbying world threatens the integrity of lobbyists and public confidence in government.[260] Revolving door provisions are intended to limit pre- and post-employment conflicts of interest.[261] The OECD defines conflict of interest as "a conflict between the public duty and private interests of a public official, in which the public official has private interests which could improperly influence the performance of their official duties and responsibilities."[262] If former lobbyists are free to assume public sector roles, there is a risk of regulatory and institutional capture. If former public officials are free to assume positions as lobbyists, they may gain preferential access to current decision-makers. To prevent potential conflicts of interest, revolving door provisions

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[257] David-Barrett, *supra* note 100 at 22.

[258] *Ibid* at 7.

[259] "Training Courses" (last visited 30 September 2021), online: *Public Relations and Communication Association* <https://www.prca.org.uk/training/courses?title=&level_68=All&skill_69=11&city=All&trainer_58=All>.

[260] David-Barrett, *supra* note 100 at 48–52.

[261] In the OECD's report *Government at a Glance 2015, supra* note 2, the under-regulation of pre-public employment in most member countries is criticized. Only seven OECD countries impose restrictions on public officials who have worked in the private sector, worked for suppliers to government, lobbied government, or negotiated public contracts on behalf of private companies prior to public employment. By contrast, 22 OECD countries impose rules or procedures for post-public employment.

[262] OECD, *Guidelines for Managing Conflicts of Interest in the Public Service: OECD Guidelines and Country Experiences*, (Paris: OECD, 2003) at 10, online (pdf): <https://www.oecd.org/gov/ethics/48994419.pdf>.

must prescribe adequate "cooling-off" periods. These periods prohibit public officials from negotiating future lobbying jobs while in office or undertaking roles in the influence industry and lobbyists from assuming public sector roles until the proscribed duration has expired.

#### 7.7.3.1 US

The *LDA* contains limited revolving door provisions. Under the *LDA*, individuals who have aided a foreign entity in any trade negotiation or dispute with the US are ineligible for appointment as United States Trade Representative or Deputy United States Trade Representative.[263] As amended by the *HLOGA*, the *United States Code* (*USC*) provides extensive post-employment restrictions for past public officials. Generally, the *USC* prohibits any person who is a former officer or employee of the executive branch of the US from communicating or appearing before a current public official, with intent to influence that public official on matters in which the former public official participated substantially and personally, for a period of two years.[264] Notably, the *USC*, as amended by the *HLOGA*, allows former lawmakers to assume lobbying activities provided they do not personally contact current legislators. The *USC* prohibitions were reinforced by Obama's 2009 and now Biden's 2021 Presidential *Executive Orders* that require all executive agency appointees to sign an ethics pledge.[265] This pledge contains four revolving door prohibitions:

- **All Appointees Entering Government**. I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
- **Lobbyists Entering Government**. If I was registered under the Lobbying Disclosure Act, 2 U.S.C. 1601 et seq., or the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 et seq., within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
    (a) participate in any particular matter on which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment;
    (b) participate in the specific issue area in which that particular matter falls; or
    (c) seek or accept employment with any executive agency with respect to which I lobbied, or engaged in registrable activity

[263] *Lobbying Disclosure Act*, *supra* note 96, § 21(b)(3).
[264] *Honest Leadership and Open Government Act*, *supra* note 93, § 101.
[265] US, Exec Order No 13989, 86 Fed Reg 7029 (20 January 2021), online: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/>. Executive orders have no jurisdiction over the legislative branch. They remain effective only as long as the issuing President remains in office. The 2021 *Executive Order* will expire with the end of the Biden Administration.

> under FARA, within the 2 years before the date of my appointment.
>
> - **Appointees Leaving Government**. If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, and its implementing regulations, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment. I will abide by these same restrictions with respect to communicating with senior White House staff.
> - **Appointees Leaving Government to Lobby.** In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that I register under FARA, for the remainder of the Administration or 2 years following the end of my appointment, whichever is last.[266]

*Executive Orders* of this kind are remarkable for two reasons. First, former public officials are prohibited from lobbying not only their former department or agencies, but the entire Executive Branch of government. Second, "reverse" revolving door provisions restrict, for the first time, the ability of lobbyists entering the public service from helping former clients. Legislation in neither Canada nor the EU contains similar 'reverse' revolving door provisions.

#### 7.7.3.2 UK

In the UK, revolving door regulation applies to all Crown servants for two years after the last day of paid service. Senior officials are subject to an automatic cooling-off period of three months for all outside employment, which can be extended to two years or waived in certain situations. Senior officials are also prohibited from lobbying the government for two years after they leave their posts. In some situations, more junior officials will also require authorization to take new appointments in the two-year period after leaving their posts, including when potential employment involves lobbying the government. The Advisory Committee on Business Appointments implements the rules and provides advice.[267] Transparency International UK argues that this regime is inadequate, stating:

> Senior civil servants and ministers are required to consult the Advisory Committee on Business Appointments (ACoBA) before taking up appointments. ACoBA can impose waiting periods on individuals, so that they cannot take up appointments until a certain period after leaving office,

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[266] *Ibid*.

[267] Jens Clausen & Vicky Cann, *Blocking the Revolving Door: Why We Need to Stop EU Officials Becoming Lobbyists* (Brussels: ALTER-EU, 2011) at 27, online (pdf): <http://www.alter-eu.org/sites/default/files/AlterEU_revolving_doors_report.pdf>.

> and can advise that appointments should only be taken on condition that the individual will not engage in lobbying former colleagues. However, the Committee is only an advisory body. There is nothing to stop individuals from ignoring its advice.
>
> A series of high-profile scandals suggest that the ACoBA regime is not working. In March 2010, Channel 4's Dispatches documentary showed secret recordings of several MPs and former Ministers offering their influence and contacts to journalists posing as representatives of a potential corporate employer, interested in hiring them for lobbying work. One former Cabinet Minister, Stephen Byers, said "I'm a bit like a sort of cab for hire" and offered examples of how he had used his influence and contacts in the past. [footnotes omitted][268]

#### 7.7.3.3 Canada

In Canada, DPOHs are subject to the *LA*'s five-year prohibition on lobbying after they leave office.[269] This period begins when the DPOH ceases to carry out the functions of their employment. Anyone who violates the five-year cooling-off period commits an offence and is liable on summary conviction to a fine not exceeding CDN$50,000.

## 8. COMPARING REGULATIONS IN THE EUROPEAN UNION

Brussels boasts the second-highest density of lobbyists in the world, after Washington, DC.[270] Lobbying regulation for European Union (EU) institutions is distinct from that of the US, the UK, and Canada. The Transparency Register (TR) for lobbyist disclosures is a joint initiative of the European Parliament (EP) and European Commission (EC). It was launched in 2011 under Article 27 of the *Interinstitutional Agreement on the Transparency Register* (*IIA*).[271] Registrants must comply with the *Code of Conduct for Interest Representatives* (*CCIR*), which is codified in Annex III of the *IIA*. The European Council is not a party to the *IIA* and the TR does not extend to lobbying undertakings with the Council.

Unlike the registers in the US, UK, and Canada, registration with the TR is voluntary but incentivized. The TR is an example of an institutional register, meaning it provides

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[268] TI UK, *Cabs for Hire?: Fixing the Revolving Door Between Government and Business,* (London: TI UK, 2012) at 3, online (pdf): <http://www.transparency.org/files/content/pressrelease/20110517_UK_Revolving_Door_EN.pdf>.

[269] *Lobbying Act*, *supra* note 134, s 10.1(1). Former public officials may apply to the Commissioner for an exemption from the five-year post-employment ban. The Commissioner will consider whether granting the exemption would be in keeping with the purpose of the *LA*.

[270] Mulcahy, *supra* note 15 at 4.

[271] EC, *Agreement Between the European Parliament and the European Commission on the Transparency Register for Organisations and Self-employed Individuals Engaged in EU Policy-making and Policy Implementation,* [2014] OJ, L 277/11 [EC Agreement], online (pdf): <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919(01)&from=en>.

registrants with access to government institutions.[272] Registrants gain access to EC and EP premises, as well as other advantages such as opportunities to participate as speakers in committee hearings.[273] In order to be eligible to register, individuals and entities must meet the activity-based definition of lobbying in the *IIA*, which includes any "activities ... carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions."[274] This definition of lobbying includes communications with a broader range of government officials than the US, UK, and Canada. The *IIA* provides specific examples of lobbying activities, such as organizing events to which Members, officials or staff of EU institutions are invited. However, like the UK's *TLA*, the TR has been criticized for under-inclusiveness, as registration can be avoided by conducting meetings away from EU premises and strategically not including lobbyists in expert groups.[275] Also, just as formal meetings are emphasized in the *TLA*, the EU's TR focuses on formal engagement with EU institutions, such as appearances before parliamentary and administrative committees, rather than informal communications.

After registration, registrants will be considered lobbyists and will be bound by the CCIR. Registrants are also required to self-identify as a certain type of lobbyist or entity, such as in-house lobbyists, think-tanks, or NGOs.

Registration imports mandatory annual disclosure requirements. Along with general contact and company information, lobbyists must disclose information on their lobbying activities and costs, including their lobbying objectives, fields of interest and targeted policies, and legislative proposals. The Register also provides information on specific activities in which the registrant engages, such as the registrant's EU initiatives or participation in EU structures and platforms like expert groups. Unlike the registers in the US, UK, and Canada, the clients of lobbying firms are not disclosed. The Register is available online in a searchable database.[276]

Violations are punished by removal from the Register and resultant loss of incentives. Serious violations and noncompliance with the CCIR can be punished by removal for up to two years. Unlike the regimes in the US, the UK, and Canada, since registration is voluntary, failure to comply is not an offence and is not punishable by fines or incarceration.

## 9. CONCLUSION

Lobbying regulation is often enacted in the wake of political scandal. Public decision-making and confidence in government stand to benefit from policy that is forward-looking and

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[272] Markus Krajewski, "Legal Study: Legal Framework for a Mandatory EU Lobby Register and Regulations" (2013), online (pdf): <http://www.foeeurope.org/sites/default/files/news/foee_legal_framework_mandatory_eu_lobby_register.pdf>.

[273] EC Agreement, *supra* note 271 at 15.

[274] *Ibid* at 12.

[275] OECD Lobbyists 2009, *supra* note 9.

[276] "Transparency Register" (last modified 24 September 2021), online: *Europa* <https://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en>.

proactive, rather than reactionary.[277] The American approach sets a high standard for disclosure, and the Canadian regime is commendable. More stringent financial disclosure requirements would enhance the integrity of the Canadian regime. The UK's lobbying legislation would benefit from a broader definition of lobbying activity and more demanding and detailed disclosure requirements. Transparency in the EU would be greatly improved with the adoption of a mandatory registry; mandatory disclosure is the single most effective way to ensure standards of behaviour in lobbying, reduce corruption and promote confidence in public office. If a mandatory registry is adopted, the European Council should be a signatory.

The effectiveness of a lobbying regulatory regime demands that stakeholders are aware of responsibilities and obligations, and that enforcement mechanisms are objective and robust. American pluralism has produced a unique community of civil society watchdog groups that monitor lobby activity generally and in specific policy fields. These groups promote competency and understanding of lobbying regulations. Similar groups exist in Canada and the EU; however, in these jurisdictions the government has a greater responsibility to undertake education and awareness initiatives.

Lobbying remains an important component of democracy and will surely continue to operate as a mechanism for citizens to communicate with public officials and governments to acquire information from special interest groups. As jurisdictions such as Canada, the US, the UK, and the EU continue to improve upon their regulatory regimes, globalization will cause expectations to develop amongst diplomatic and economic partners. While nations with fledgling lobbying policy can benefit from lessons learned in other regions, lawmakers must be mindful of domestic requirements and traditional relationships between government, commercial interests, and the public at large. Nonetheless, in order for lobbying to maintain public legitimacy and promote principles of good governance, regulation must have clearly defined application and standards for information collection and disclosure that encourage compliance, and should integrate harmoniously within the broader regulatory and legal regime.

[277] OECD 2014, *supra* note 1.

CHAPTER 12

# PUBLIC PROCUREMENT

CONNOR BILDFELL AND GERRY FERGUSON

## CONTENTS



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

# 1. INTRODUCTION

Transparency International (TI) defines public procurement as "the acquisition by a government department or any government-owned institution of goods or services."[1] Although large-scale items and projects, such as armaments or infrastructure buildings, are the most obvious examples of public procurement, the term also refers to the acquisition of supplies and services including school supplies (such as textbooks), hospital supplies (such as bed sheets), and financial or legal services.[2]

This chapter introduces the vast topic of corruption in public procurement.[3] After setting out the context, including the negative effects and prevalence of corruption in public procurement, the chapter will explore how public procurement works and which industries suffer from the highest levels of procurement corruption, along with the key elements of effective procurement systems. It will conclude with a discussion of international legal instruments and standards for regulating procurement, as well as private and public law governing the public procurement process in the US, UK, and Canada.

For convenience, many examples of corruption and methods for reducing corruption tend to be drawn from the most prevalent area of public procurement corruption: the construction industry. This should not be taken as an indication that procurement corruption and its prevention are identical in all public procurement sectors. For example, military defence procurement is typically governed by a process separate from the general government procurement regime.[4] The absence of a full discussion of other sectors and procurement regimes is primarily a product of the limited space that can be dedicated to the subject of procurement corruption in this book.

## 1.1 Adverse Consequences of Corruption in Public Procurement

The World Bank distinguishes between two broad categories of corruption:

(1) **state capture**, which refers to actions by individuals, groups, or organizations to influence public policy formation by illegally transferring private benefits to public officials (i.e., efforts by private actors to shape the institutional environment in which they operate); and

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[1] Susanne Kühn & Laura B Sherman, *Curbing Corruption in Public Procurement: A Practical Guide*, (Transparency International, 2014) at 6, online (pdf): <https://images.transparencycdn.org/images/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>.

[2] *Ibid*.

[3] Illustrating the vastness of this topic, the Public Procurement Research Group's *Bibliography on Public Procurement Law and Regulation* amounts to 500 pages ((University of Nottingham, 2019), online (pdf): <https://www.nottingham.ac.uk/pprg/documentsarchive/bibliographies/bibliography.pdf>).

[4] Canada, Parliamentary Information and Research Service, *Defence Procurement Organizations Worldwide: A Comparison*, by Martin Auger, Publication No 2019-52-E (Ottawa: Library of Parliament, 2020) at 2–4, online (pdf): <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2019-52-e.pdf>.

(2) **administrative corruption**, which refers to the use of the same type of corruption and bribes by the same actors to interfere with the proper implementation of laws, rules, and regulations.[5]

Examples of public procurement corruption (i.e., corruption in the context of government acquisition of goods or services) can be found in either category. Corruption in the nature of "state capture," for example, may involve attempts by private firms to influence the broader project appraisal, design, and budgeting process by making illicit campaign contributions. "Administrative corruption" could include, for example, a bidder's attempt to bribe an administrative decision-maker in order to secure a lucrative public procurement contract. A further example would be the giving of a bribe by a contractor to a government engineer or inspector to "ease up" on their inspection of substandard goods or services provided by the contractor. Although such actions may be seen by the parties involved as relatively harmless, the reality is that the effects of corruption in public procurement, no matter how "small" the act, can be devastating.

Corruption in public procurement can have many detrimental effects. For instance, corruption often increases the cost and lowers the quality of goods or services acquired while reducing the likelihood that the goods or services purchased will meet the public's needs.[6] As the OECD describes, "Those paying the bribes seek to recover their money by inflating prices, billing for work not performed, failing to meet contract standards, reducing quality of work or using inferior materials, in case of public procurement of works. This results in exaggerated costs and a decrease in quality."[7] The OECD estimates that corruption drains off anywhere between 10-25% of national procurement budgets.[8] Furthermore, corruption in public procurement may distort a country's economy as corrupt officials allocate budgets

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[5] Elizabeth Anderson, "Municipal 'Best Practices': Preventing Fraud, Bribery and Corruption" (Vancouver, BC: International Centre for Criminal Law Reform and Criminal Justice Policy, 2013) at 2, online: <https://icclr.org/wp-content/uploads/2019/06/Municipal-Best-Practices-Preventing-Fraud-Bribery-and-Corruption-FINAL.pdf>. See also Joel S Hellman, Geraint Jones & Daniel Kaufmann, "Seize the State, Seize the Day: An Empirical Analysis of State Capture and Corruption in Transition" (Paper prepared for the ABCDE 2000 Conference, Washington, DC, 18–20 April 2000), online (pdf): <https://openknowledge.worldbank.org/bitstream/handle/10986/19784/multi_page.pdf>.

[6] Kühn & Sherman, *supra* note 1 at 4. Kühn and Sherman provide a number of examples of the detrimental effects of corruption in public procurement. According to TI, corruption can add as much as 50% to a project's costs: "Public Procurement", online: *Transparency International* <www.transparency.org/topic/detail/public_procurement>.

[7] OECD, *Preventing Corruption in Public Procurement*, (2016) at 7, online (pdf): OECD <http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf>.

[8] OECD, OECD Public Governance Reviews, *Implementing the OECD Principles for Integrity in Public Procurement: Progress Since 2008* (OECD, 2013), online: <www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>. See also UNODC, Corruption and Economic Crime Branch, *Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances* (2013) at 1, online (pdf): *UNODC* <https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf> (noting that various studies suggest that between 10 and 25% of a public contract's value may be lost to corruption); OECD, *supra* note 7 at 7(noting that it has been estimated that between 10 and 30% of the investment in publicly funded construction projects may be lost to mismanagement and corruption).

based on the bribes they can solicit rather than the needs of the country.[9] This encourages approval of large-scale infrastructure projects because they provide greater opportunities for corruption ("it is easier to hide bribes and inflated claims in large projects than in small projects"[10]). When public infrastructure projects are tainted by corruption, nearly everyone suffers, and that includes project owners, funders, employees, construction firms and suppliers, government officials, and the general public.[11]

Corruption in public procurement can also be detrimental to the environment. To illustrate, in the Philippines, a contract for a $2 billion nuclear power plant (the Bataan Nuclear Power Plant) was controversially awarded to Westinghouse, who later admitted to having paid $17 million in commissions to a friend of Ferdinand Marcos, the Filipino dictator.[12] The contract was initially denied, but Marcos reversed the decision. Westinghouse claimed these commissions were not a bribe. The nuclear reactor sits on a fault line, and if an earthquake occurs while the nuclear reactor is operational, there is a major risk of nuclear contamination. The power plant has not been operational or produced any electricity since its completion in the 1980s. This project was a massive misuse of public funds and would be a health and environmental nightmare if operational.

Corruption in public procurement can also lead to deaths and serious injuries. For example, the damage caused by natural disasters such as earthquakes may be magnified where buildings have not been built or maintained properly as a result of bribery.[13] In southern Italy, a maternity wing of a six-story hospital collapsed and almost no occupants survived.[14] Investigation into the incident found that although the planning for the hospital was designed to code and included adequate materials to prevent the collapse, the building had not been built to code.[15] This failing is suspected to have been linked to Mafia involvement in Italy's construction sector.[16] The builders' disregard for building regulations and the inspectors' failure to properly control and inspect the building resulted in a preventable catastrophe and many preventable deaths.

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[9] Paul Collier & Anke Hoeffler, "The Economic Costs of Corruption in Infrastructure" in Diana Rodriguez, Gerard Waite & Toby Wolfe, eds, *Global Corruption Report 2005* (London: Pluto Press in association with Transparency International, 2005) 12 at 13, online (pdf): <https://images.transparencycdn.org/images/2005_GCR_Construction_EN.pdf>.

[10] Giorgio Locatelli et al, "Corruption in Public Projects and Megaprojects: There is an Elephant in the Room!" (2017) 35 Intl J Project Man 252 at 256.

[11] Kühn & Sherman, *supra* note 1 at 4; "Impacts of Corruption", online: *Independent Broad-Based Anti-Corruption Commission* <https://www.ibac.vic.gov.au/preventing-corruption/corruption-hurts-everyone>. For an example of the complex web of different parties that can be involved in procurement projects, see "Why Corruption Occurs" (1 May 2008), online: *Global Infrastructure Anti-Corruption Centre* <www.giaccentre.org/why_corruption_occurs.php>.

[12] Peter Bosshard, "The Environment at Risk from Monuments of Corruption" in Rodriguez, Waite & Wolfe, *supra* note 9, 19 at 20.

[13] James Lewis, "Earthquake Destruction: Corruption on the Fault Line" in Rodriguez, Waite & Wolfe, *supra* note 9, 23 at 23.

[14] David Alexander, "The Italian Mafia's Legacy of High-Rise Death Traps" in Rodriguez, Waite & Wolfe, *supra* note 9, 26 at 26.

[15] *Ibid*.

[16] *Ibid*.

The effects of corruption in health sector procurement were felt acutely during the global COVID-19 pandemic, where corruption led to problems such as "[s]ubstandard ventilators, grossly overpriced equipment, [and] lucrative contracts awarded to companies with little or no expertise," as well as "[p]rice rigging and gouging of essential items."[17] As Jillian Kohler and Tom Wright explain, the risk of corruption is heightened during times of emergency, including public health crises, as vast resources are deployed to "rapidly resolve a critical and complex problem, often through acquiring limited resources under large amounts of pressure."[18] The authors point to various instances of corruption across the globe during the COVID-19 crisis:

> Examples of alleged corruption during the pandemic are already bountiful in many countries. In an effort to procure N95 face masks, the United States Federal Government gave a direct award of US$ 55 million to a company that had no experience in supplying medical supplies and no recorded employees. In the UK, the government directly procured 3.5 million testing kits, which later turned out to be unusable, while a senior procurement official for the National Health Service (NHS) in London was reported to have traded PPE for private gain. In Brazil, it was reported that the Federal Government purchased masks from a supplier with ties to President Jair Bolsonaro that were 67 percent more expensive than the other supplier bids in the same procurement competition.[19]

Corruption in public procurement can also have less tangible impacts. For example, it can lead to an erosion of public confidence in government institutions. As former managing director of TI Cobus de Swardt writes:

> When the products that citizens ultimately pay for are dangerous, inappropriate or costly there will be an inevitable loss of public confidence and trust in governments. Corrupted bidding processes also make a mockery of the level playing field for businesses, especially for younger, innovative companies eager to compete in a fair manner who may not have the backdoor contacts to buy contracts.[20]

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[17] Tom Wright & Sean Darby, "COVID-19 Has Created Conditions in Which Corruption in Health Procurement Can Flourish. Here's How Open Contracting Would Help"(1 July 2020), online: *Transparency International UK* <https://www.transparency.org.uk/covid-19-has-created-conditions-which-corruption-health-procurement-can-flourish-heres-how-open>.

[18] Jillian Clare Kohler & Tom Wright, "The Urgent Need for Transparent and Accountable Procurement of Medicine and Medical Supplies in Times of COVID-19 Pandemic" (2020) 13:58 J Pharm Policy Pract, online: <https://www.ncbi.nlm.nih.gov/pubmed/32934820>.

[19] *Ibid* [citations omitted]. See also "Policy Measures to Avoid Corruption and Bribery in the COVID-19 Response and Recovery" (26 May 2020), online: *OECD* <https://www.oecd.org/coronavirus/policy-responses/policy-measures-to-avoid-corruption-and-bribery-in-the-covid-19-response-and-recovery-225abff3/>.

[20] Cobus de Swardt, "Transparency in Public Procurement: Moving Away from the Abstract" (27 March 2015), online (blog): *OECD Insights* <oecdinsights.org/2015/03/27/transparency-in-public-procurement-moving-away-from-the-abstract/>.

Thus, public procurement corruption results not only in immediate, tangible losses to the public, but also in a deeper erosion of public trust in the government. The effect may be to drive away good companies who are unwilling to buy their way into procurement contracts, leaving behind a pool of unscrupulous and inexperienced contractors to carry out the projects.

The broader implications of a loss of confidence in the state and its institutions are severe. Professor Larry Diamond observes:

> In the absence of trust, citizens become cynical about their political system and disaffected with the existing order. Distrust may produce alienation and withdrawal from the political process, leaving behind a shallow, fragile state that cannot mobilize national resources or shape a collective vision for national development. If it festers for very long, widespread and intense distrust may eventually generate a backlash against the political order and a search for more radical, anti-system alternatives. Failed states, revolutions, civil wars, and other related traumatic failures of governance all share in common the absence or collapse of trust.[21]

## 1.2 How Much Money is Spent on Public Procurement?

Annually, governments worldwide spend approximately $9.5 trillion on public procurement projects, which represents 10 to 20% of GDP and up to 50% or more of total government spending.[22] The OECD estimates that corruption costs account for around $2 trillion of this annual procurement budget.[23] Broadly speaking, this distorts competition, compromises the quality of public projects and purchases, wastes taxpayer dollars, and contributes to endemic corruption, thus eroding trust in government.[24] Some procurement projects—such as the construction of facilities for major sporting events like the Olympics or the construction of airports—are so large in relation to local economies that cost overruns

[21] Larry Diamond, "Building Trust in Government by Improving Governance" (Paper delivered at the 7th Global Forum on Reinventing Government, Vienna, 27 June 2007) [unpublished].
[22] Kühn & Sherman, *supra* note 1 at 4. Canadian federal departments and agencies alone spend about C$22 billion annually: "The Procurement Process" (last updated 16 October 2020), online: *Public Services and Procurement Canada* <https://buyandsell.gc.ca/for-businesses/selling-to-the-government-of-canada/the-procurement-process>.
[23] Kühn & Sherman, *supra* note 1 at 4.
[24] *Ibid*; OECD, *supra* note 7 at 7. Like all forms of corruption, corruption in public procurement is extremely difficult to quantify. Even where corrupt activities are identified, it can be very difficult to trace and calculate the chain of losses that flow from incidences of corruption. It is often practically impossible to calculate the quantum of loss. See e.g. "Section 1: Understanding the Cost of Corruption in Relation to Infrastructure Projects" (last updated 10 April 2020), online: Global Infrastructure Anti-Corruption Centre <www.giaccentre.org/cost_of_corruption.php>.

may distort an entire country or region's economy.[25] To the extent that such cost overruns are due to corruption, corruption contributes to the destabilization of local economies.

## 1.3 Public Procurement Corruption within Developed Countries

Corruption in public procurement is not only a concern for the developing world. It also exists in developed countries. Therefore, adequate controls are needed in all countries. The US spends over $550 billion a year on procurement,[26] and although it has extensive laws and regulations in place, its system is far from free of corruption.[27] For example, in 2013, a former manager of the US Army Corps of Engineers was found guilty of accepting bribes from construction contractors for certifying bogus and inflated invoices.[28] Italy provides another example:

> Italian economists found that the cost of several major public construction projects fell dramatically after the anti-corruption investigations in the early nineties. The construction cost of the Milan subway fell from $227 million per kilometre in 1991 to $97 million in 1995. The cost of a rail link fell from $54 million per kilometre to $26 million, and a new airport terminal is estimated to cost $1.3 billion instead of $3.2 billion.[29]

A further example of public procurement corruption within developed countries is provided by the findings of the Charbonneau Commission. The Charbonneau Commission, known officially as the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, was a major public inquiry into corruption in public contracting in Quebec.[30] Justice France Charbonneau chaired the commission, which was launched on October 19, 2011 by then-Premier Jean Charest. The Commission had a three-fold mandate:

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[25] Bent Flyvbjerg & Eamonn Molloy, "Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures" in Susan Rose-Ackerman & Tina Søreide, eds, *International Handbook on the Economics of Corruption*, vol 2 (Cheltenham: Edward Elgar, 2011) at 87.

[26] US, Government Accountability Office, *A Snapshot: Government-Wide Contracting* (26 May 2020) online (blog): *GAO* <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2019-infographic>.

[27] Daniel I Gordon, "Protecting the Integrity of the U.S. Federal Procurement System: Conflict of Interest Rules and Aspects of the System That Help Reduce Corruption" in Jean-Bernard Auby, Emmanuel Breen & Thomas Perroud, eds, *Corruption and Conflicts of Interest: A Comparative Law Approach* (Cheltenham: Edward Elgar, 2014) 39 at 39.

[28] "19-Year Corruption Sentence for Ex-Manager with Army Corps of Engineers", *The New York Times* (12 July 2013), online: <www.nytimes.com/2013/07/12/us/19-year-corruption-sentence-for-ex-manager-with-army-corps-of-engineers.html>.

[29] Tina Søreide, *Corruption in Public Procurement: Causes, Consequences, and Cures*, Report R 2002-1 (Norway: Chr Michelson Institute, 2002) at 1, online (pdf): <https://www.cmi.no/publications/file/843-corruption-in-public-procurement-causes.pdf>.

[30] For a concise summary of the Charbonneau Commission's activities and findings, see "Charbonneau Commission Finds Corruption Widespread in Quebec's Construction Sector", *CBC News* (24 November 2015), online: <www.cbc.ca/news/canada/montreal/charbonneau-corruption-inquiry-findings-released-1.3331577>.

1) Examine the existence of schemes and, where appropriate, paint a portrait of activities involving collusion and corruption in the provision and management of public contracts in the construction industry (including private organizations, government enterprises, and municipalities) and include any links with the financing of political parties.
2) Investigate possible infiltration of organized crime in the construction industry.
3) Consider possible solutions and make recommendations establishing measures to identify, reduce, and prevent collusion and corruption in awarding and managing public contracts in the construction industry.[31]

In her final report, Justice Charbonneau concluded that corruption and collusion in the awarding of government contracts in Quebec were far more widespread than originally believed.[32] Influence peddling was found to be a serious issue in Quebec's construction sector and organized crime had infiltrated the industry. As Justice Charbonneau writes in the preamble to the full report, "[t]his inquiry confirmed that there is a real problem in Quebec, one that was more extensive and ingrained than we could have thought."[33]

While Quebec has faced significant corruption issues, including ongoing corruption scandals involving Montreal-based construction company SNC-Lavalin, journalist Barrie McKenna argues that Quebec's corruption problem extends beyond provincial borders and affects Canada as a whole.[34] He provides three reasons for this assertion: (1) federal tax money is wasted, (2) the negative reputation of a Canadian company engaging in international business affects all Canadian companies, and (3) corruption spreads and is not necessarily stopped by provincial borders.[35] He claims that "[i]t defies logic that corruption would be a way of life in one province and virtually absent in the rest of the country."[36]

The issue of corruption in Quebec's construction sector was thrust into the spotlight again in 2018–19 when Prime Minister Justin Trudeau was found to have attempted to influence a decision of the Attorney General and Minister of Justice Jody Wilson-Raybould relating to a

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[31] "Mandate" (last updated 12 February 2015), online: Government of Quebec <www.ceic.gouv.qc.ca/la-commission/mandat.html>.

[32] Quebec, Commission on the Awarding and Management of Public Contracts in the Construction Industry (CEIC), *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction* by France Charbonneau & Renaud Lachance (CEIC, November 2015), online (pdf): *Government of Quebec* <https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf>. An English translation of vol 3 of the report, which includes the report's recommendations, is available online (pdf): <https://www.allardprize.org/sites/default/files/charbonneau_inquiry_vol._3.pdf>.

[33] Martin Patriquin, "No One Can Deny It Now: Quebec Is Facing a Corruption Crisis", *Maclean's* (24 November 2015), online: <www.macleans.ca/news/canada/quebecs-now-undeniable-corruption-crisis/>.

[34] Martin Patriquin, "Quebec: The Most Corrupt Province", *Maclean's* (24 September 2010), online: <www.macleans.ca/news/canada/the-most-corrupt-province/>.

[35] Barrie McKenna, "Quebec's Corruption Scandal Is a Canadian Problem", *The Globe and Mail* (10 December 2012), online: <www.theglobeandmail.com/report-on-business/quebecs-corruption-scandal-is-a-canadian-problem/article6140631/>.

[36] *Ibid*.

criminal prosecution against SNC-Lavalin on corruption and fraud charges. As outlined in an August 2019 report published by the Canadian Conflict of Interest and Ethics Commissioner (Ethics Commissioner),[37] SNC-Lavalin was charged in February 2015 with criminal corruption and fraud offences that allegedly took place between 2001 and 2011. At the time, Canada did not have a regime to allow remediation agreements, also known as deferred prosecution agreements (DPAs). In early 2016, SNC-Lavalin began lobbying government officials to adopt such a regime. Following public consultations, amendments to the *Criminal Code* allowing for such a regime were adopted as part of the 2018 federal budget. On September 4, 2018, the Director of Public Prosecutions informed the Office of the Minister of Justice and Attorney General that she would not invite SNC-Lavalin to negotiate a possible remediation agreement. The Prime Minister's Office and the Minister of Finance's office were then informed of this decision by Ms. Wilson-Raybould's office. The Prime Minister then directed his staff to find a solution that would safeguard SNC-Lavalin's business interests in Canada and avoid potential adverse economic consequences. Having reviewed several possible means of intervening in the matter, Ms. Wilson-Raybould made it known that she would not intervene in the Director of Public Prosecutions' decision. The Ethics Commissioner found that, after doing so, "senior officials under the direction of Prime Minister Trudeau continued to engage both with SNC-Lavalin's legal counsel and, separately, with Ms. Wilson-Raybould and her ministerial staff to influence her decision, even after SNC-Lavalin had filed an application for a judicial review of the Director of Public Prosecutions' decision."[38] The commissioner found that the Prime Minister attempted "to circumvent, undermine and ultimately … to discredit"[39] Ms. Wilson-Raybould's decision. The Ethics Commissioner found that the Prime Minister's conduct breached s. 9 of the *Conflict of Interest Act*, which prohibits public office holders from using their position to seek to influence a decision of another person so as to further their own private interests or those of their relatives or friends, or to improperly further another person's private interests.[40]

Not long after the Commissioner's report was published in December 2019, a construction subsidiary of SNC-Lavalin pleaded guilty to one count of fraud over $5,000 under s. 380 of the *Criminal Code* in connection with its activities in Libya between 2001 and 2011.[41] The agreed statement of facts submitted in conjunction with this plea noted that SNC-Lavalin paid $127 million to two shell companies between 2001 and 2011, and about $47 million of that money was used to reward Saadi Gadhafi, son of the late dictator Muammar Gadhafi, for helping SNC-Lavalin to secure lucrative construction projects. SNC-Lavalin also paid for

[37] Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report,* by Mario dion (Ottawa: Office of Conflict of Interest and Ethics Commissioner, August 2019), online (pdf): <https://publications.gc.ca/collections/collection_2019/ccie-ciec/ET4-28-2019-eng.pdf>. See also Mark Gollom, "What You Need to Know About the SNC-Lavalin Affair", *CBC News* (13 February 2019), online: <https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271>.

[38] Ethics Commissioner, *ibid* at 1.

[39] *Ibid* at 44.

[40] *Conflict of Interest Act*, SC 2006, c 9, s 9.

[41] SNC-Lavalin, Press Release, "SNC-Lavalin Group Settles Federal Charges" (18 December 2019), online: <https://www.snclavalin.com/en/media/press-releases/2019/18-12-2019>; Kamila Hinkson, "SNC-Lavalin Pleads Guilty to Fraud for Past Work in Libya, Will Pay $280M Fine", *CBC News* (18 December 2019), online: <https://www.cbc.ca/news/canada/montreal/snc-lavalin-trading-court-libya-charges-1.5400542>.

Saadi Gadhafi's personal expenses, including decorating his Toronto condo. As part of the settlement, SNC-Lavalin agreed to pay a record fine of $280 million, payable in equal instalments over five years, and to be subject to a three-year probation order. Weeks later, in January 2020, former SNC-Lavalin executive Sami Bebawi was sentenced to eight years and six months in prison for fraud, corruption, and proceeds of crime offences in connection with the same scheme.[42]

These examples demonstrate that all countries, whether developed or developing, need effective procedures and laws in place to reduce the opportunity for corruption in public procurement.

### 1.4 Importance of Maintaining a Low-Risk Environment

Anti-corruption scholars and practitioners agree that increased opportunities for corruption have a positive relationship with actual incidences of corruption. It is therefore crucial to maintain a low-risk environment. The lack of accountability enabled by a loose regulatory framework produces opportunities for corruption. The World Bank explains the connection between accountability and decreased corruption risk as follows:

> Accountability … is the degree to which local governments have to explain or justify what they have done or failed to do.… Accountability can be seen as the validation of participation, in that the test of whether attempts to increase participation prove successful is the extent to which [the public] can use participation to hold a local government responsible for its actions…. In theory, … more transparency in local governance should mean less scope for corruption, in that dishonest behavior would become more easily detectable, punished and discouraged in the future.[43]

## 2. RISKS AND STAGES OF CORRUPTION IN PUBLIC PROCUREMENT

### 2.1 Risk by Industry and Sector

Transparency International's Bribe Payers Index (2011) ranked 19 industries for prevalence of foreign bribery. The public works and construction sector scored lowest, making it the

[42] Sidhartha Banerjee, "Former SNC-Lavalin Executive Sami Bebawi Sentenced to 8½ Years in Prison for Fraud, Corruption", *The Globe and Mail* (10 January 2020), online: <https://www.theglobeandmail.com/business/article-former-snc-lavalin-executive-sami-bebawi-sentenced-to-8-years-in/>.

[43] Decentralization Thematic Team, "Accountability, Transparency and Corruption in Decentralized Governance", World Bank, online: *Center for International Earth Science Information Network* <https://www.ciesin.columbia.edu/decentralization/English/Issues/Accountability.html>.

industry most vulnerable to bribery.[44] The list below ranks the industries and business sectors from highest prevalence of foreign bribery to lowest prevalence of foreign bribery:

1. Public works contracts and construction
2. Utilities
3. Real estate, property, legal and business services
4. Oil and gas
5. Mining
6. Power generation and transmission
7. Pharmaceutical and healthcare
8. Heavy manufacturing
9. Fisheries
10. Arms, defence, and military
11. Transportation and storage
12. Telecommunications
13. Consumer services
14. Forestry
15. Banking and finance
16. Information technology
17. Civilian aerospace
18. Light manufacturing
19. Agriculture

The OECD has reported that almost two-thirds of foreign bribery cases between 1999 and 2014 occurred in four industries: extractive (19%); construction (15%); transportation and storage (15%); and information and communication (10%).[45]

TI suggests that the construction industry is particularly vulnerable to bribery because of the large size and fragmented nature of construction projects, which often involve multiple contractors and subcontractors.[46] The large and complex nature of many construction projects makes it difficult to monitor payments and implement effective policies and standards. Since major public infrastructure projects are often "special purpose, one-of-a-kind deals" that are massive in scale, produce high levels of economic rents, present difficulties in establishing benchmarks for cost and quality, and can be challenging to

[44] Deborah Hardoon & Finn Heinrich, *Bribe Payers Index 2011* (Transparency International, 2011) at 15, online: <https://issuu.com/transparencyinternational/docs/bribe_payers_index_2011>. The 2011 Bribe Payers Index is TI's most recent Bribery Index.
[45] See also OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (2014) at 22, online: <https://doi.org/10.1787/9789264226616-en>
[46] Kühn & Sherman, *supra* note 1 at 20.

monitor, corruption risks abound.[47] Construction projects also involve many "touch points" at which private actors require government approval, resulting in increased opportunities for the offering or demanding of bribes.

## 2.2 Stages and Opportunities for Procurement Corruption

Corruption in public procurement can take many forms and can occur at any time throughout the procurement process. Most corruption experts agree that the following factors magnify opportunities for corruption: (1) monopoly of power, (2) wide discretion, (3) weak accountability, and (4) lack of transparency.[48] Government agencies in developing countries have a greater tendency to display these characteristics, creating more opportunities for procurement corruption in those countries. Procurement in developing countries can account for over 20% of the country's GDP, and the high proportion of the economy occupied by public procurement makes it difficult for companies to find contracts outside the public sphere.[49] This motivates companies to resort to corruption when competing for contracts in developing countries,[50] while public officials in those countries are often motivated to resort to corruption in order to supplement their low wages.[51] Meanwhile, the broad discretion afforded to officials in making procurement decisions and the lack of capacity to monitor and punish corruption exacerbate opportunities for corruption.

In "Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation," Jill Wells explores how corruption opportunities arise, especially in the project selection and project preparation stages of the procurement process for public infrastructure projects.[52] Since public infrastructure projects carry the highest risk for procurement corruption and consume "roughly one half of all fixed capital investment by governments,"[53] the public infrastructure sector is a worthy area for more detailed analysis. According to Wells, estimates of bribery payments in public infrastructure construction

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[47] Susan Rose-Ackerman & Rory Truex, "Corruption and Policy Reform" (2012) Yale Law & Economics Research Paper 444 at 24, online: <papers.ssrn.com/sol3/Papers.cfm?abstract_id =2007152>. See also Locatelli et al, *supra* note 10.

[48] Glenn T Ware et al, "Corruption in Procurement" in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Cheltenham: Edward Elgar, 2011) 65 at 67.

[49] Simeon Djankov, Federica Saliola & Asif Islam, "Is Public Procurement a Rich Country's Policy?" (1 December 2016), online (blog): *World Bank Blogs* <https://blogs.worldbank.org/governance/public-procurement-rich-country-s-policy>. For data on procurement spending as a percentage of GDP and total government expenditures in OECD countries, see OECD, *Government at a Glance 2017* (Paris: OECD Publishing, 2017) at 173, online: <https://doi.org/10.1787/gov_glance-2017-59-en>.

[50] Ware et al, *supra* note 48 at 66.

[51] Marie Chêne, "Low Salaries, the Culture of Per Diems and Corruption", (23 November 2009), online: *U4 Anti-Corruption Resource Centre* <https://www.u4.no/publications/low-salaries-the-culture-of-per-diems-and-corruption/>.

[52] Jill Wells, *Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation,* U4 Issue 8 (U4 Anti-corruption Resource Centre, 2015), online (pdf): <https://www.u4.no/ publications/corruption-in-the-construction-of-public-infrastructure-critical-issues-in-project-preparation-1.pdf>.

[53] *Ibid* at 1.

"vary globally from 5% to 20% [of construction costs] or even higher."[54] However, focusing solely on bribe payments distorts the overall size and impact of corruption. Wells cites the work of Charles Kenny, who engages in a broader impact analysis and suggests that the most harmful forms of corruption for development outcomes are:

> (1) corruption that influences the project appraisal, design, and budgeting process by diverting investment towards projects with low returns and towards new construction at the expense of maintenance and (2) corruption during project implementation that results in substandard construction that shortens the life of projects and hence drastically reduces the economic rate of return (ERR).[55]

Wells provides an overview of corruption risks at various stages of the public procurement process for infrastructure projects:

**Table 12.1** *Overview of Corruption Risks during Public Procurement Process for Infrastructure Projects*[56]

| **Stages** | **Risks** | **Main actors** |
|---|---|---|
| Project appraisal | • Political influence or lobbying by private firms that biases selection to suit political or private interests<br>• Promotion of projects in return for party funds<br>• Political influence to favour large projects and new construction over maintenance<br>• Underestimated costs and overestimated benefits to get projects approved without adequate economic justification | • Government ministers<br>• Senior civil servants<br>• Procurement officers<br>• Private consultants (e.g., planners, designers, engineers, and surveyors) |
| Project selection, design, and budgeting | • Costly designs that increase consultants' fees and contractors' profits<br>• Designs that favour a specific contractor<br>• Incomplete designs that leave room for later adjustments (which can be manipulated)<br>• High cost estimates to provide a cushion for the later diversion of funds<br>• Political influence to get projects into the budget without appraisal | • Government ministers<br>• Senior civil servants<br>• Procurement officers<br>• Private consultants (e.g., planners, designers, engineers, and surveyors) |

[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid* at 18.

| | | |
|---|---|---|
| Tender for works and supervision contracts | • Bribery to obtain contracts (leaving costs to be recovered at later stages)<br>• Collusion among bidders to allocate contracts and/or raise prices (potentially with assistance from procurement officers)<br>• Interference by procurement officers to favour specific firms or individuals<br>• Going to tender and signing contracts for projects that are not in the budget | • Procurement officers<br>• Private consultants (e.g., supervising engineer)<br>• Contractors |
| Implementation | • Collusion between contractor and the supervising engineer (with or without the client's knowledge) that results in the use of lower quality materials and substandard work<br>• Collusion between contractors and the supervising engineer to increase the contract price or adjust the work required in order to make extra profits, cover potential losses, or recover money spent on bribes | • Procurement officers<br>• Private consultants (e.g., supervising engineer)<br>• Contractors and subcontractors |
| Operation and maintenance, including evaluation and audit | • Agreement by the supervising engineer to accept poor quality work or work below the specification, leading to rapid deterioration of assets<br>• A lack of allocated funds for maintenance, as new construction takes precedence in the project identification stage for future projects | • Procurement officers<br>• Private consultants (e.g., supervising engineer)<br>• Contractors and subcontractors |

Procurement scholars and practitioners agree that sound public investment in infrastructure projects requires an effective public investment management system (PIM system).[57] Wells notes that such management systems should include an analysis of whether the proposed project is a strategic priority, whether there are alternatives, whether the proposed project is likely to be economically feasible, and whether the project is likely to survive environmental and social impact assessments. Before an infrastructure project is chosen, it should be subject to an independent, professional appraisal to ensure that improper, irrelevant, or corrupt influences were not driving the project proposal. Once a project is selected, a detailed design and budget must be prepared in a manner that ensures against, or at least minimizes the risk of, corruption influencing the design and budget phases.

Public procurement projects face the potential problem of inaccurate estimations of costs and benefits. First, public officials may promote and support "low-ball" estimates of projects in order to gain public support for the project. Subsequently, as the project evolves, those initial estimates may prove to be wildly low. Studies showcase the role that "delusion,

[57] Anand Rajaram et al, "A Diagnostic Framework for Assessing Public Investment Management" (2010) World Bank Policy Research Working Paper No 5397, online (pdf): <https://openknowledge.worldbank.org/bitstream/handle/10986/3881/WPS5397.pdf>.

deception, and corruption" play in explaining underperformance with regard to cost estimates and benefit delivery of major infrastructure projects.[58] Research by Flyvbjerg and Molloy suggests that an important step in curbing corruption is focusing on accurate cost and benefits estimates at the planning and approval stage. They suggest that "planning fallacy," a psychological phenomenon that influences planners and project promoters to "make decisions based on delusional optimism rather than on rational weighing of gains, losses, and probabilities,"[59] contributes to the tendency of projects to run significantly over budget. Planning fallacy, or "optimism bias," may result in the incorrect tender being chosen, as it rewards individuals for exaggerating the benefits of their design and underestimating the cost of the project.[60] Optimism bias can also be dangerous because when contracts are awarded for below their reasonable cost, contractors may cut corners by using inferior materials and compromising on quality in order to stay within the budget.[61]

Planners need to be aware of optimism bias in order to take steps to prevent it. Flyvbjerg and Molloy suggest that strategically implementing procedures to monitor and review forecasts can assist in reducing the prevalence of corruption and deception in public procurement.[62] Their suggestions include developing financial, professional, or criminal penalties for "consistent and unjustifiable biases in claims and estimates of costs, benefits, and risks."[63] The Treasury of the UK addressed this issue by denying access to funding for infrastructure project proposals that do not show that they have accounted for optimism bias in their planning.[64]

Corruption that occurs in the planning and project development stages is of particular concern. Corrupt politicians may choose projects that do not provide significant, or any, benefit to the public because they know that certain projects allow them to extract more bribes from contractors or because they owe a contractor a favour. This kind of deliberate manipulation during project planning is likely to facilitate corrupt acts throughout the project lifecycle.[65] As construction projects provide significant opportunity for corruption, countries may be infrastructure-heavy and yet have insufficient capacity to maintain and use the infrastructure. For example, a country may build hospitals that it cannot afford to staff or supply. As noted by the consulting firm Mott Macdonald, once a public need is found and officials determine that public funds will be allocated to meet this need, care must be taken in setting the parameters and budget for the project:

> During the project preparation period, significant opportunities arise for the diversion of public resources to favour political or private interests. This

[58] Flyvbjerg & Molloy, *supra* note 25, at 81.
[59] *Ibid* at 88.
[60] *Ibid* at 99.
[61] Wells, *supra* note 52.
[62] Flyvbjerg & Molloy, *supra* note 25 at 104.
[63] *Ibid*.
[64] UK, Her Majesty's Treasury, *Review of Large Public Procurement in the UK by Matt MacDonald* (London: HM Treasury, 2002), online (pdf): <www.parliament.vic.gov.au/images/stories/committees/paec/2010-11_Budget_Estimates/Extra_bits/Mott_McDonald_Flyvberg_Blake_Dawson_Waldron_studies.pdf>.
[65] *Ibid* at 2.

> stage of the project cycle is when some of the worst forms of grand corruption and state capture occur. But this is not all. Failures in project preparation (whether due to corruption, negligence, or capacity constraints) can also open up opportunities for corruption at later stages of the project cycle. For example, inadequate project preparation may lead to subsequent implementation delays that may require changes that can be manipulated to benefit individuals or companies. The preparation stage is especially likely to facilitate corrupt acts at a later stage when failures at this stage are deliberate.[66]

It is important to screen out projects with high costs and grossly negative rates of return as early as possible, as this is the most serious consequence of inadequate project screening.[67] Governments spend a significant amount of money on consulting during appraisal and planning of the project, and thus should ensure projects are feasible and valuable to the public prior to expending public funds for consulting.[68]

Wells refers to an index developed by Era Dabla-Norris et al. to measure the efficiency (effectiveness) of public management of public investments in various countries.[69] Wells summarizes the index and the results of its application:

> The index records the quality and efficiency of the investment process across four stages: (1) ex ante project appraisal, (2) project selection and budgeting, (3) project implementation, and (4) ex-post evaluation and audit.… A total of 71 low and middle income countries were scored on each of the four stages. The scoring involved making qualitative assessments on 17 individual components in each stage, with each component scored on a scale of 0 to 4 (with a higher score reflecting better performance). The various components were then combined to form a composite PIM index.
>
> Unsurprisingly, Dabla-Norris et al. (2011) found that low income countries and oil exporting countries had the lowest overall scores. The overall median score was 1.68, but scores ranged from a low of 0.27 (Belize) to a high of 3.50 (South Africa). The highest scores were among middle income countries (South Africa, Brazil, Colombia, Tunisia, and Thailand). Across regions, Eastern Europe and central Asian countries had relatively more developed PIM processes, followed by Latin America, East Asia, and the Pacific. The Middle East, North Africa, and sub-Saharan Africa regions trailed furthest behind.
>
> More interesting than variations across countries and regions was the considerable variation in individual scores for each of the four stages. Generally, the first and last stages (ex-ante appraisal and ex post evaluation)

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[66] *Ibid*.

[67] *Ibid* at 9.

[68] *Ibid*.

[69] Era Debla-Norris et al, "Investing in Public Investment: An Index of Public Investment Efficiency" (2010) IMF Working Paper WP/11/37, online (pdf): <https://www.imf.org/external/pubs/ft/wp/2011/wp1137.pdf>.

> were the weakest. The median score for project appraisal was only 1.33, with country scores ranging from 4 for South Africa and Colombia down to 0 for a number of low income countries. These included several in sub-Saharan Africa (Guinea, Chad, Sierra Leone, the Republic of Congo, and Sao Tome and Principe), as well as Trinidad and Tobago, Belize, the West Bank and Gaza, and the Solomon Islands.
>
> The conclusion emerging from this exercise is that, while a number of countries have improved their project implementation (mainly through the introduction of procurement reforms), only a handful of developing countries have been able to improve the processes of project appraisal, design, and selection – hence moving towards better construction project management.[70]

Public officials and others may abuse infrastructure procurement projects for improper personal gain (e.g., through bribes, kickbacks, etc.) or for overt or clandestine political purposes. Wells refers to a study in Uganda in which David Booth and Frederick Golooba-Mutebi[71] found that the price of road construction per kilometer in Uganda was twice as high as similar road construction in Zambia:

> Booth and Golooba-Mutebi (2009, 5) concluded, "All of the evidence indicates that, under the pre-2008 arrangements, the roads divisions of the Ministry of Works operated as a well-oiled machine for generating corrupt earnings from kickbacks." They went on to show how this operated as a complex system of political patronage. In addition to ensuring the personal enrichment of the minister, chief engineer, and many senior civil servants, the arrangement also provided a reliable means of accumulating funds to be made available to state house and other top government offices for "political" uses (such as patronage and campaign finance). Public officials raised money through a variety of means including accepting bribes for awarding contracts and signing completion certificates. The relative difficulty of skimming resources from donor-funded projects led to a situation where only a fraction of project funds made available by donors was being utilised.[72]

The evidence before the Charbonneau Commission, discussed in Section 1.3, in relation to corruption in public infrastructure projects in Quebec and the connection between those corrupt funds and illegal campaign financing demonstrate that these types of corrupt public

[70] Wells, *supra* note 52 at 5.

[71] David Booth & Frederick Golooba-Mutebi, "Aiding Economic Growth in Africa: The Political Economy of Roads Reform in Uganda" (2009) Overseas Development Institute Working Paper No 307), online (pdf): <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4965.pdf>.

[72] Wells, *supra* note 52 at 7.

infrastructure practices can also exist in countries, such as Canada, that are perceived to have low levels of corruption.[73]

Effective project screening will align proposed investment with actual development needs. Wells notes that inadequate independent pre-screening of infrastructure projects can lead to the proverbial "white elephant" phenomenon. She refers to a 2013 World Bank study that describes three types of white elephant projects:

> - [Projects involving e]xcess capacity infrastructure, such as a road or airport with little or no traffic demand;
> - Projects for which there is no operational budget to provide services that will be needed for success (such as hospitals or schools); and
> - Capital investment in projects that are never completed (sometimes not even started) but are used to secure access to the contract value.[74]
>
> An example of the first type can be found in Angola, where close examination of the list of projects in 2011 revealed a bridge to be built in a remote area of the country's southeast region for which there were no connecting roads—quite literally, this was a "bridge to nowhere." This project could not have been approved with even a cursory evaluation (Wells, 2011).
>
> The second type (also in Angola) is illustrated by the expansion of power generation capacity that was not matched by investment in transmission and distribution, so that the power could get to the users (Pushak and Foster, 2011).
>
> The third type has been well-illustrated by the award of a contract for major road projects in Uganda. Part of the contract value was siphoned off and used for patronage payments, and many of the projects were never completed (Booth and Golooba-Mutebi, 2009) [footnotes omitted].[75]

## 2.3 Procurement Offences

Corruption in public procurement occurs most frequently through bribes, extortion, bid-rigging, and other forms of fraud. These types of corruption are discussed in more detail below.

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[73] For example, it has been reported that Quebec pays 30% more for building stretches of road than elsewhere in Canada. See Patriquin, *supra* note 34.
[74] World Bank Poverty Reduction and Economic Management Netork, *Investing to Invest: Strengthening Public Investment Management*, Country Clearance Version (May 2013) [unpublished].
[75] Wells, *supra* note 52 at 10.

### 2.3.1 Bribery

Bribery refers to the improper offering, giving, soliciting, or receiving of anything of value in order to influence a public official's exercise of a public duty. The OECD estimates that bribery in government procurement in OECD countries increases contract costs by 10 to 20%, suggesting that at least $400 billion is lost to bribery every year.[76] The following are a few examples of how bribery of public officials can manifest in public procurement:

- a contractor may bribe a government official to provide planning permission for a project or to approve a design that does not meet standards;
- a bidder may offer bribes to a government official in order to receive improper favourable treatment throughout the bidding process or to induce the official to manipulate the tender evaluation; or
- a bidder may make a donation to a political party in exchange for preferential treatment.[77]

### 2.3.2 Extortion

Extortion refers to the attempt to secure a benefit or advantage by making a demand backed by force or threat. The following are some examples of how extortion can manifest in public procurement:

- a bidder may threaten to harm a government official or the official's family unless the official gives unwarranted favourable treatment to the bidder;
- a government official may demand something in return for assisting a company to win a bid or for fair treatment in the bidding process; and
- bribery can include an element of extortion.

### 2.3.3 False Invoicing, Bid-Rigging, and Other Forms of Fraud

Fraud refers to any intentionally deceptive act or omission designed to secure a benefit or advantage. Public procurement attracts fraudulent behaviour in part because it can involve the exchange of massive amounts of money and resources.[78] The following are a few examples of how fraud can manifest in public procurement:

- a bidder may deliberately submit false invoices or other false documentation (with or without collusion of public officials);
- bidders may form a cartel and secretly pre-select the winners for certain projects (a form of bid-rigging);

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[76] OECD, *OECD Principles for Integrity in Public Procurement*, (OECD Publishing, 2009) at 9, online (pdf): <https://www.oecd.org/gov/ethics/48994520.pdf>.
[77] "How Corruption Occurs" (last updated 10 April 2020), online: *Global Infrastructure Anti-Corruption Centre* <https://giaccentre.org/how-corruption-occurs/>.
[78] Paul Fontanot et al, "Are You Tendering for Fraud?" (April 2010) 62:3 Keeping Good Companies 146 at 146.

- a contractor may submit false information in order to receive more money or more time to complete a project; or
- bidders and public officials may illegally divert funds through money laundering or embezzlement.

These are just a few of the ways corruption manifests in public procurement. Given the great potential for many types of corrupt practices to arise in public procurement, regulation of public procurement procedures should be a priority at all levels of government.

## 3. TYPES OF PUBLIC PROCUREMENT

This section will describe the three main ways procurement occurs: public-private partnerships (P3s), sole sourcing, and competitive bidding.

### 3.1 Public-Private Partnerships

Procurement of large-scale, complex projects such as public infrastructure can involve public-private partnerships (P3s). Broadly speaking, a P3 is a cooperative venture between public and private actors in which the private sector assumes a defined level of responsibility for the financing, provision, and/or operation of public infrastructure or services.[79]

Although P3s in the public infrastructure context can take many forms and can include a variety of attributes, at least three features tend to be present: (1) bundling of construction and operation, (2) private but temporary ownership of assets, and (3) risk sharing over time between the public and private sector.[80] One distinguishing feature found in most major infrastructure P3s is that the private sector bears considerable (if not complete) responsibility for project financing (i.e., providing the funds necessary to realize the project). This follows from a core conceptual underpinning of the P3 model: project risks should be transferred to the party best able to manage those risks.[81] The transfer of financing responsibilities to the private sector is said to alleviate strains on public budgets and harness the efficiency and depth of private finance markets. Through a P3 arrangement, the costs of a project can be paid off over the project lifecycle, which poses less risk to both governments and taxpayers

[79] See also World Bank, *Public-Private Partnerships Reference Guide*, 3rd ed (2017) at 1, online: <https://library.pppknowledgelab.org/documents/4699/download> (defining a P3 as "[a] long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance").

[80] Eduardo Engel, Ronald Fischer & Alexander Galetovic, "Public-Private Partnerships: When and How" (19 July 2008) Universidad de Chile Centro de Economía Aplicada Working Paper 257 at 49, online (pdf): <https://library.pppknowledgelab.org/documents/2212>. Also reproduced at (July 2009) Stanford King Center on Global Development Working Paper 379, online (pdf): <https://siepr.stanford.edu/sites/default/files/publications/379wp.pdf>.

[81] "Frequently Asked Questions: What Is a P3?" (archived), online: *PPP Canada* <https://web.archive.org/web/20160314121323/http://p3canada.ca/en/about-p3s/frequently-asked-questions/>.

as compared to front-loaded arrangements.[82] In addition, many P3 arrangements take some form of a "concession" model, whereby a private sector concessionaire undertakes investment and operation of the project for a fixed period of time, after which ownership of the assets reverts to the public sector.

Each P3 arrangement sits along a continuum between "purely public" and "purely private."[83] A project sitting closer to the "private" end of the spectrum might include an agreement whereby private sector participants build, own, and operate the infrastructure. This is commonly referred to as a "BOO" (build-own-operate) arrangement.[84] By contrast, a project sitting closer to the "public" end of the spectrum might involve an agreement whereby private sector participants merely operate and maintain the infrastructure. This is referred to as an "OM" (operate and maintain) arrangement.[85]

Despite substantial private sector involvement in many P3 arrangements, governments continue to maintain a substantial role in ensuring that P3 projects operate effectively. The government must provide a favourable investment environment, establish adequate regulatory frameworks and chains of authority, select a suitable procurement process, and maintain active involvement throughout the project lifecycle.[86] These responsibilities highlight the need to ensure that government officials are acting with honesty and integrity.

To distinguish between P3s and the other two models discussed below, we can look to the list of five essential differences between so-called "conventional procurement" and P3s, as outlined by the World Bank:

> 1) Conventional public procurement contracts for major public infrastructure typically last, at most, for only a few years (generally expiring within five years). P3s, by contrast, are generally long-term contracts that can exceed 30 years in duration. This creates an ongoing partnership relationship of interdependency and, as a result, the selection requirements, expectations, and procedures are very different.
>
> 2) Conventional public procurement contracts typically have as their object the construction of facilities, and the final product—which is often designed and planned by the public authority—can be tested and accepted at the end of the construction. P3s often focus instead on the provision of a service with private sector participation in the delivery of that service. As such, conventional procurement tends to be more *input oriented*, whereas P3s are more *output oriented*.

[82] Engel, Fischer & Galetovic, *supra* note 80 at 49.
[83] Young Hoon Kwak, YingYi Chih & C William Ibbs, "Towards a Comprehensive Understanding of Public Private Partnership for Infrastructure Development" (2009) 51:2 Calif Manage Rev 51 at 54. Some suggest that based on the nature of the public–private relationship inherent in P3s, governments *set* policy while the private sector *implements* policy, invoking the metaphor of "governments steering and the private sector rowing": Joan Price Boase, "Beyond Government? The Appeal of Public–Private Partnerships" (2000) 43:1 Can Public Admin 75 at 75.
[84] Kwak, Chih & Ibbs, *ibid* at 54.
[85] *Ibid*.
[86] *Ibid*.

3) In most P3s, the project proponent (i.e., the lead firm carrying out the project) creates a Special Purpose Vehicle (SPV) to develop, build, maintain, and operate the asset(s) for the life of the contract. The SPV constitutes a consortium that includes the building contractor, bank lender(s), and other private sector participants. The SPV is the entity that signs the contract with the government, and the SPV subcontracts out its various obligations. This unique way of structuring the contract and the various obligations is not typically found in conventional procurement.

4) Conventional procurement is typically financed by the public sector. It relies ultimately on taxpayer dollars. By contrast, P3s are often financed through user fees, tariffs, direct payments from the public authority, loans, guarantees from lenders, equity contributions from P3 partners, or some combination thereof.

5) P3s, some argue, can reduce costs by allocating risks such as project failure or delays to parties best able to manage them, and private sector participants have stronger incentives to reduce costs in P3s as compared to conventional procurement.[87]

PPP Canada, a now-defunct Crown corporation created to promote adoption of the P3 model across Canada, suggested that the P3 model may be preferred over alternative models such as competitive bidding where the following conditions are present:

- You have a major project, requiring effective risk management throughout the lifecycle;
- There is an opportunity to leverage private sector expertise;
- The structure of the project could allow the public sector to define its performance needs as outputs/outcomes that can be contracted for in a way that ensures the delivery of the infrastructure in the long term;
- The risk allocation between the public and private sectors can be clearly identified and contractually assigned;
- The value of the project is sufficiently large to ensure that procurement costs are not disproportionate;
- The technology and other aspects of the project are proven and not susceptible to short-term obsolescence; and
- The planning horizons are long-term, with assets used over long periods and are capable of being financed on a lifecycle basis.[88]

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[87] World Bank, *Procurement Arrangements Application to Public-Private Partnerships (PPP) Contracts Financed under World Bank Projects,* Guidance Note (September 2010) at 14, online (pdf): <https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/GuidanceNote_PPP_September2010.pdf>.
[88] PPP Canada, *supra* note 81.

The likelihood that the P3 model will be selected over alternative models, such as competitive bidding, increases where there is significant scope for innovation and a long project lifecycle (e.g., the design, construction, and operation of state-of-the-art hospitals). By contrast, where the project is comparatively simple and has a short project lifecycle (e.g., the installation of a simple transmission line), the likelihood that some other form of procurement will be selected increases.

Professors Engel, Fischer, and Galetovic suggest that P3s are the superior choice where there is a need to provide strong incentives to reduce or control project lifecycle costs.[89] This is because in the P3 arrangement, the private sector participant involved in the operation of the project has an incentive to minimize costs while still meeting project standards, since the firm shares in the economic savings derived from any cost-cutting measures that enhance the project. This can, however, present problems to the extent that such measures reduce the quality of service.[90] Engel, Fischer, and Galetovic also suggest that P3s may be the superior choice where demand risk is largely exogenous and there is a large upfront investment.[91] The authors add, however, that any form of public procurement—such as P3s or competitive bidding—should be pursued only where full privatization is not possible.[92] This will generally be the case where competition is not feasible.[93]

Despite the foregoing observations, P3s can—and often do—contain elements of the competitive bidding model. For example, private sector partners are often selected based on a competitive bidding process, as described in Section 3.3.

P3s have gained ascendency on the world stage as a preferred model of delivering large-scale infrastructure goods and services to the public. Between 1985 and 2004, 2,096 P3 infrastructure projects were undertaken worldwide, with a combined capital value of nearly $887 billion.[94] The World Bank estimates that the private sector financed approximately 20% of infrastructure investments in developing countries in the 1990s, totalling about $850 billion.[95]

However, views on P3s are mixed. As with any method of public procurement, the P3 model has advantages and disadvantages.[96] Detractors argue that P3s—rather than being efficient,

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[89] Engel, Fischer & Galetovic, *supra* note 80at 49.
[90] *Ibid* at 50.
[91] *Ibid* at 49.
[92] *Ibid*.
[93] *Ibid*.
[94] AECOM Consult, Inc, "Synthesis of Public-Private Partnership Projects for Roads, Bridges & Tunnels from Around the World, 1985-2004" (United States Department of Transportation, 2005), cited in Kwak, Chih & Ibbs, *supra* note 83 at 56.
[95] See Mona Hammami, Jean-Francois Ruhashyankiko & Etienne B Yehoue, "Determinants of Public-Private Partnerships in Infrastructure"(2006) International Monetary Fund Working Paper 06/99 at 3, online (pdf): <www.imf.org/external/pubs/ft/wp/2006/wp0699.pdf>.
[96] For discussion of the advantages and disadvantages of P3s, see Kwak, Chih & Ibbs, *supra* note 83; Engel, Fischer & Galetovic, *supra* note 80; Heather Fussell & Charley Beresford, *Public-Private Partnerships: Understanding the Challenge*, 2nd ed (Columbia Institute, Centre for Civic Governance, 2009) at 84, online (pdf): <https://columbiainstitute.eco/wp-content/uploads/2019/11/columbiap3_eng_v8-webpdf.pdf>.

revolutionary models of delivering public goods and services—"cost more and deliver less."[97] Some scholars, such as Martha Minow, Dominique Custos, and John Reitz, have criticized P3s for failing to sufficiently protect public values and interests.[98] Scholars who espouse this view argue, *inter alia*, that P3s can open the door to private capture of public decision-makers.

## 3.2 Sole Sourcing

Although most public procurement now occurs through a competitive bidding process, the sole source contracting method is still used for some goods and services. Sole source contracting involves two parties negotiating a contract without an open competitive process.[99] Sole sourcing may be preferred for efficiency purposes in emergencies, for small-value contracts, or where there are confidentiality concerns.[100] However, as sole sourcing is not a public and transparent process, it can be difficult for public bodies to justify this method due to concerns relating to fairness and discrimination.[101] From an anti-corruption perspective, a public entity should sole source its contracts as seldom as possible.

One added complication in the sole-sourcing context is the phenomenon of unsolicited bids.[102] Some public authorities are willing to consider project proposals initiated, designed, and submitted by private firms, rather than the authority itself. This flips the traditional competitive bidding model on its head: the idea for the project comes not from the public authority, but from the private sector.

Although unsolicited bids may be seen as a welcome opportunity to introduce greater private sector participation in the identification of public needs as well as to inject private sector innovation into the delivery of public goods and services, they may also be a dangerous proposition. The result of increased acceptance of unsolicited bids may be to allow private firms to intrude upon the government's role in formulating policy and designing public infrastructure to achieve public policies.

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[97] See e.g. Toby Sanger, "Ontario Audit Throws Cold Water on Federal-Provincial Love Affair with P3s" (2 February 2015), online: *Canadian Centre for Policy Initiatives*, <https://www.policyalternatives.ca/publications/monitor/ontario-audit-throws-cold-water-federal-provincial-love-affair-p3s>.

[98] Martha Minow, "Public and Private Partnerships: Accounting for the New Religion" (2003) 116 Harv L Rev 1229; Dominique Custos & John Reitz, "Public-Private Partnerships" (2010) 58 Am J Comp L 555.

[99] Robert C Worthington, "Legal Obligations of Public Purchasers" (last modified 14 May 2002), online: *Government of Canada* <www.tbs-sct.gc.ca/cmp/doc/lopp_olap/lopp_olap-eng.asp>.

[100] *Ibid*.

[101] *Ibid*.

[102] For a detailed discussion of unsolicited bids, see John T Hodges & Georgina Dellacha, "Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency" (2007) Public Private Infrastructure Advisory Facility Working Paper No 1, online (pdf): <https://ppiaf.org/documents/3094/download>.

Perhaps the principal issue with unsolicited bids is that they may be associated with a lack of competition and transparency.[103] In an unsolicited bid, where there is only one party seeking an exclusive contract for a project that was drawn up by that party, the public might perceive the proposed project as serving special interests or being tainted by corruption.[104]

Professors Graeme Hodge and Carsten Greve summarize the concerns raised over unsolicited bids:

> [Unsolicited bids add] a whole new dimension to project initiation, planning and completion with new powerful interest groups moving in alongside elected governments. Thus, we see today new infrastructure projects being suggested by real estate agents as well as various project financiers and merchant bankers, rather than bureaucrats—whose purpose, one would have thought, would be to do just this, as well as analyzing a range of smaller packages of alternative improvement options. Whilst such government-business deals may well end up meeting the public interest, it would seem more by coincidence than by design.[105]

John Hodges and Georgina Dellacha suggest that with unsolicited bid submissions, it may be best for the public authority to hold a tendering process nonetheless in order to preserve some level of competition and enhance transparency, even if there is only one bidder.[106] This is said to evidence the government's commitment to transparency and demonstrate that there is in fact only one interested bidder.[107] The effect is to lend the project greater legitimacy in the public eye.

At the end of the day, whether unsolicited bids serve the public interest will depend on the particular circumstances surrounding the proposed project including the actors involved, the need for the project, whether the party proposing the project is the only one who could successfully carry it out, and other factors.

## 3.3 Competitive Bidding

Public procurement more often occurs through the process of competitive bidding or tendering. Although tendering is often used synonymously with bidding, tendering is a specific type of competitive bidding. The tendering process involves particular contractual relationships and obligations, which will be discussed later in this chapter. Broadly

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[103] *Ibid* at vi.
[104] *Ibid* at 1.
[105] Graeme Hodge & Carsten Greve, "The PPP Debate: Taking Stock of the Issues and Renewing the Research Agenda" (Paper delivered at the International Research Society for Public Management Annual Conference, Brisbane, Australia, 26–28 March 2008), cited in World Bank & Department for International Development of the United Kingdom, *Good Governance in Public-Private Partnerships: A Resource Guide for Practitioners* (June 2009) at 36, n 30, online: <https://openknowledge.worldbank.org/bitstream/handle/10986/12665/708460ESW0P1050e0Practices0in0PPPs.pdf>.
[106] Hodges & Dellacha, *supra* note 102 at 3.
[107] *Ibid*.

speaking, there are four stages of the traditional competitive bidding process: planning, bidding, bid evaluation, and implementation and monitoring.[108] These are also the basic stages in the P3 context, although some details vary. There can be many parties involved throughout the various stages of the bidding process. The bidder is the party or individual responding to the call for bids in the hope of winning the contract. The next section will focus on situations in which a government entity or official is the party requesting tenders. Other stakeholders can include contractors, engineers, agents, subcontractors and suppliers. The following four stages briefly describe the procurement process:

1. **Planning**: This stage involves needs assessment, advertising, the production of bidding documents, and the formation of a procurement plan.[109] At this stage, the government assesses what is necessary to serve the public interest, with consideration to factors such as cost and timeliness.[110] The administrative and technical documents needed for launching the call for bids are prepared.[111]
2. **Bidding**: Candidates are short-listed, the government holds pre-bid conferences, the bids are submitted, and questions about the respective bids are clarified.[112] There are various types of bidding procedures that may be employed at this stage. For example, the government may solicit tenders through an Invitation to Tender (ITT) or Request for Quotation (RFQ). Tenders are typically used when the government is searching for technical compliance with contract requirements and the lowest acceptable price for a specifically defined project. Alternatively, the government may issue a call for proposals through a Request for Proposal (RFP), Request for Standing Offer (RFSO), or Request for Supply Arrangement (RFSA). Proposal calls—particularly RFPs—are typically used for complex or lengthy construction projects and are most likely used in the P3 context. Where the government is contemplating a P3, a Request for Qualifications (RFQu) is often issued prior to RFPs.[113] RFQus help the government identify a shortlist of qualified bidders who will be invited to submit proposals at the RFP stage.
3. **Bid evaluation**: The bids are evaluated, the government compiles a bid evaluation report, and the contract is awarded to the winning bidder. The process by which the bids are evaluated and the contract granted varies according to the bidding approach selected, as well as the governing legislation. For example, in Canada, PWGSC requires that RFPs be evaluated transparently and that debriefs be provided to losing bidders.[114]

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[108] Kühn & Sherman, *supra* note 1 at 7.
[109] *Ibid*.
[110] OECD, *supra* note 76 at 77.
[111] *Ibid* at 81.
[112] Kühn & Sherman, *supra* note 1at 7.
[113] The Canadian Council for Public-Private Partnerships, *Public-Private Partnerships, A Guide for Municipalities* (November 2011) at 29.
[114] *Ibid* at 30.

4. **Implementation and monitoring**: The final contract between the bidder and the government is drafted and implemented, any changes are incorporated, the bidder's project is monitored and audited, and any appeals are launched.[115]

## 4. HALLMARKS OF A GOOD PROCUREMENT SYSTEM

Governments have many goals in enacting public procurement laws, including fair competition, integrity, transparency, efficiency, user satisfaction, best value, wealth distribution, risk avoidance, and uniformity. Transparency, competition, and integrity are three hallmarks of a good procurement system.[116]

### 4.1 Transparency

Transparency was explained at the 1999 International Anti-Corruption Conference in the following terms:

> Transparency, in the context of public procurement, refers to the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed. This requires the release, as a minimum, of information sufficient to allow the average participant to know how the system is intended to work, as well as how it is actually functioning. Transparency is a central characteristic of a sound and efficient public procurement system and is characterized by:
>
> - Well-defined regulations and procedures open to public scrutiny.
> - Clear, standardized tender documents.
> - Bidding and tender documents containing complete information; and
> - Equal opportunity in the bidding process.
>
> Transparency requires that published rules are the basis for all procurement decisions and that these rules are applied objectively to all bidders. Transparency is an effective means to identify and correct improper, wasteful—and even corrupt—practices.[117]

Transparency in a public procurement process is important because it reduces the risk of corruption and bribery by opening up the process to monitoring, review, comment, and

[115] *Ibid*.

[116] Steven L Schooner, "Desiderata: Objective for a System of Government Contract Law" (2002) 11:2 Pub Procurement L Rev 103 at 104.

[117] Wayne A Wittig, "Good Governance for Public Procurement: Linking Islands of Integrity" (Paper delivered at the meeting of the OECD Public Governance Committee in Paris, France, 20–21 June 2005) at 11, online: <https://doi.org/10.1787/oecd_papers-v5-art35-en>.

influence by stakeholders.[118] Former Secretary-General of the United Nations Ban Ki-moon describes the role of transparency in public procurement in the following terms:

> Transparency is a core principle of high-quality public procurement. An open and transparent procurement process improves competition, increases efficiency and reduces the threat of unfairness or corruption. A robust transparency regime enables people to hold public bodies and politicians to account, thereby instilling trust in a nation's institutions. Transparency also supports the wise use of limited development funds, from planning investments in advance to measuring the results.[119]

Transparency in public procurement can be enhanced by implementing a number of best practices, including:

- advance publication of procurement policies and plans;
- advertisement of tender notices;
- disclosure of evaluation criteria in solicitation documents;
- publication of contract awards and prices paid;
- establishment of appropriate and timely complaint and dispute resolution mechanisms;
- implementation of financial and conflict of interest disclosure requirements for public procurement officials; and
- publication of supplier sanction lists.[120]

Transparency encourages public confidence in the project, which is particularly important in a democracy. Without transparency, corruption is free to continue in the shadows. With transparency, corruption is subject to the glare of public scrutiny. As Justice Louis Brandeis once wrote, "[s]unlight is said to be the best of disinfectants."[121]

Although transparency is recognized as a key condition for promoting integrity and preventing corruption in public procurement, it must be balanced with other imperatives of good governance.[122] For example, demands for greater transparency and accountability may create some tension with the objective of ensuring an efficient management of public resources (administrative efficiency) or providing guarantees for fair competition.[123] The

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[118] Kühn & Sherman, *supra* note 1 at 12.
[119] Ban Ki-moon, "Foreword" in *Supplement to the 2011 Annual Statistical Report on United Nations Procurement,* UNOPS, 2012,) i, online (pdf): <https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>.
[120] Therese Ballard, "Transparency in Public Procurement" in UNOPS, *supra* note 119, 2 at 2.
[121] Louis D Brandeis, *Other People's Money*, online: *University of Louisville* <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>.
[122] OECD, *Integrity in Public Procurement: Good Practice from A to Z*, (Paris: OECD, 2007) at 10, online (pdf): <www.oecd.org/development/effectiveness/38588964.pdf>.
[123] *Ibid*.

challenge for policy-makers is to design a system in which an appropriate degree of transparency and accountability is present to reduce corruption risks while still pursuing other aims of public procurement.

## 4.2 Competition

Competition is seen as vital to the process because, under laissez-faire economic theory, it provides governments with the best quality for the best price.[124] Robert Anderson, William Kovacic and Anna Caroline Müller identify three leading reasons why competition is important in public procurement:

1) with free entry and an absence of collusion, prices will be driven towards marginal costs;
2) suppliers will have an incentive to reduce their production and other costs over time; and
3) competition drives innovation.[125]

## 4.3 Integrity

TI defines integrity in the public procurement context as "behaviours and actions consistent with a set of moral or ethical principles and standards, embraced by individuals as well as institutions that create a barrier to corruption."[126] Integrity requires that procurement be carried out in accordance with the law and without discrimination or favouritism.

In 2008, the OECD developed best practices guidance to "reinforce integrity and public trust in how public funds are managed"[127] and promote a good governance approach to procurement based on the following principles:

**Transparency**

1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.
2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

[124] Schooner, *supra* note 116 at 105.
[125] Robert D Anderson, William E Kovacic & Anna Caroline Müller, "Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance" in *UNOPS*, *supra* note 119, 9 at 10.
[126] Transparency International, *The Anti-Corruption Plain Language Guide*, (2009) at 24, online (pdf): <https://images.transparencycdn.org/images/2009_TIPlainLanguageGuide_EN.pdf>.
[127] OECD, *supra* note 76 at 3.

**Good management**

3. Ensure that public funds are used in procurement according to the purposes intended.
4. Ensure that procurement officials meet high professional standards of knowledge, skills, and integrity.

**Prevention of misconduct, compliance and monitoring**

5. Put mechanisms in place to prevent risks to integrity in public procurement.
6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.
7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

**Accountability and control**

8. Establish a clear chain of responsibility together with effective control mechanisms.
9. Handle complaints from potential suppliers in a fair and timely manner.
10. Empower civil society organizations, media and the wider public to scrutinise public procurement.[128]

This list illustrates how the three key pillars of an effective procurement system—transparency, competition, and integrity—are closely connected to one another.

Although sound procurement rules are essential to the achievement of a robust procurement system, rules alone are not sufficient. As the OECD observes:

> Implementing rules requires a wider governance framework that encompasses: an adequate institutional and administrative infrastructure; an effective review and accountability regime; mechanisms to identify and close off opportunities for corruption; as well as adequate human, financial and technological resources to support all of the elements of the system. They also require a sustained political commitment to apply these rules and regularly update them.[129]

[128] OECD, *Checklist for Enhancing Integrity in Public Procurement* (2008), online (pdf): <https://www.oecd.org/gov/41760991.pdf>.
[129] OECD, *supra* note 8at 24–25, online: <www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>.

## 5. PRIVATE LAW ENFORCEMENT OF TENDERING FOR PUBLIC CONTRACTS

Private law remedies are not the focus of the analysis of public procurement in this chapter. However, the following is a brief overview of how companies may use private law tools to ensure that government bodies in the US, UK, and Canada follow tendering processes. Even where the purchaser is a government body, procurement contracts are considered "generally commercial in nature"[130] and therefore typically fall into the realm of private law remedies. Generally, the private law framework allows companies to seek a private law remedy (the principal one being damages) against the public body.

It is somewhat problematic that a private law action for damages is by far the most common remedy sought in public procurement disputes.[131] Because civil actions are expensive, legal recourse is often inaccessible to smaller bidders who cannot afford the legal costs or where the value of the procurement contract does not economically warrant a lawsuit. Moreover, the settlement of private lawsuits often involves confidentiality agreements that impede public transparency. The US, UK, and Canada have public law bodies in place to hear complaints about the procurement process and resolve disputes between bidders and contracting bodies. However, the remedies available in the public law context do not always sufficiently account for the damages the contracting party has suffered.

### 5.1 US

The *Contract Disputes Act of 1978* (*CDA*) provides a mechanism for parties to make a claim in contract law against the federal government.[132] Bid protests are heard by the Government Accountability Office (GAO) or the Court of Federal Claims. The GAO hears the majority of the protests.[133] The GAO has not allowed losing bidders to claim lost profits as part of their damages. Instead, companies are limited to seeking the costs of preparing their quotation and filing their protest.[134] This position was solidified in the Effective Learning decision:

> [W]e know of no situation where anticipated profits may be recovered when the underlying claim is based upon equitable, rather than legal, principles.… Here, since a contract between the government and Effective Learning never came into being, the only relief possible was equitable in nature. Hence, the monetary recovery in this situation was limited to the

[130] *Irving Shipbuilding Inc v Canada (AG)*, 2009 FCA 116 at para 21, 314 DLR (4th) 340.
[131] Decentralization Thematic Team, *supra* note 43.
[132] *Contract Disputes Act of 1978*, codified as amended at 41 USC §§ 7101–7109.
[133] Congressional Research Service, *GAO Bid Protests: An Overview of Time Frames and Procedures* by Kate M Manuel & Moshe Schwartz (2016) at 1, online (pdf): <https://www.fas.org/sgp/crs/misc/R40228.pdf>.
[134] *Introl Corp* B-218339, 9 July 1985, 85-2 CPD 35, online: <https://www.gao.gov/products/b-218339.2>.

> reasonable value of services and did not encompass any potential profits that might have been earned by Effective Learning.[135]

The GAO's position on damages stems from precedential inability of parties who do not secure a contract to sue and seek damages.[136] US law requires a contract to exist between the parties before a plaintiff is entitled to seek anticipated profits.[137] Unlike in Canada and the UK, US law does not imply a contract between the party soliciting bids and the bidding parties; the only contract that exists is when the party soliciting bids selects one of the bids. At that point, the government agency and the bidding party form a contract for goods or services.

However, US law has developed to a point that allows bidding parties to bring an action against the federal government for failure to follow its procurement laws and procedures. In 1940, the US Supreme Court held in *Perkins v Lukens Steel Co* that aggrieved parties lacked standing in federal court to challenge government contract awards where they failed to receive the contract.[138] In a subsequent case, *Heyer Products Co v United States*, the US Court of Claims found an implied commitment in procurement requests to consider each bid fairly and honestly, and allowed an unsuccessful bidder to file a claim for "bid preparation expenses."[139] In *Scanwell Laboratories v Shaffer*, the US Court of Appeals for the District of Columbia Circuit held that the *Administrative Procedure Act*[140] reversed *Perkins* and that review of public procurement decisions was available in district courts.[141]

## 5.2 UK

*Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* established that when an organization, particularly a public sector body, invites tenders to be submitted, it is giving an implicit promise to adhere to the tendering rules set out for the particular tender.[142] Failure to do so will give aggrieved parties the right to bring an action for damages.

This principle was further developed in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*, where the High Court held that when the public sector seeks tenders, a contract exists between the bidder and public body that requires all tenders to be considered fairly. In *Harmon*, the trial judge found that the bids had been manipulated and

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[135] *Effective Learning, Inc – Request for Review of Prior Claim Decision*, B-215505, 19 Feb 1985, 85-1 CPD 207, online: <https://www.gao.gov/products/b-215505>.

[136] Duncan Fairgrieve & François Lichère, eds, *Public Procurement Law: Damages as an Effective Remedy* (Portland: Hart, 2011) at 202.

[137] *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956) (denying an attempt by unsuccessful bidders to make a claim for lost profits because there was no contract upon which to base this claim); *Cincinnati Electric Corp v Kleppe*, 509 F (2d) 1080 (6th Cir 1975) (upholding the finding that the only loss the unsuccessful bidder could claim was the cost of preparing the bid).

[138] *Perkins v Lukens Steel Co*, 310 US 113 (1940).

[139] *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956).

[140] *Administrative Procedure Act*, codified as amended at 5 USC §§ 551–59 (1946).

[141] *Scanwell Laboratories v Shaffer*, 424 F (2d) 859 (DC Cir 1970).

[142] *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195 (CA).

the defendant had chosen a bid over the plaintiff's, who was in fact the lowest bidder.[143] The judge found this to be a breach of contract:

> In the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.[144]

This creates a contract distinct from the contract being tendered for and requires that the purchaser abide by the terms it sets out in its call for tenders.

## 5.3 Canada

The legal framework for procurement in Canada was established in the seminal case *The Queen (Ont) v Ron Engineering*.[145] This case created the concept of dual contracts in procurement cases.[146] Contract A is formed when a call for tenders is issued (the offer) and a bid is submitted in response (the acceptance).[147] Contract B arises between the entity calling for tenders and the successful bidder.

In Quebec, although *Ron Engineering* has been applied by the courts, the same results are obtained under civil law principles of offer and acceptance.[148] This is because Quebec's *Civil Code* imposes obligations on the parties arising from pre-contractual negotiations even though no contractual relationship arises between the party calling for tenders and the bidder before acceptance of the bid.[149]

The Supreme Court of Canada further developed this dual contract procurement paradigm in *MJB Enterprises Ltd v Defence Construction*, where the Court established that Contract A will form only between the procuring entity and compliant bidders.[150] A compliant bidder is one whose bid complies with the requirements of the tender documents. This requirement ensures a degree of fairness and transparency. *MJB* also clarified that the terms of Contract A are dictated by the terms and conditions of the tender call.[151] In *Martel Building Ltd v*

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[143] Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons, (1999) 67 Con LR 1, [1999] EWHC Technology 199.
[144] *Ibid*.
[145] *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 27, 1981 CanLII 17.
[146] Prior to *Ron Engineering*, *ibid,* it was believed that no formal contractual relationships arose until the acceptance of a bid. See e.g. *Belle River Community Arena Inc v WJC Kaufmann Co*, 20 OR (2d) 447, 87 DLR (3d) 761 (CA).
[147] This is a simplification. Contract A will not always be formed upon the submission of a tender. For example, a contract will arise only where there is a clear intention to contract. However, what is relevant is that the submission of a tender will often give rise to contractual obligations. See *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at paras 17, 19, 23, 170 DLR (4th) 577.
[148] *Civil Code of Québec*, SQ 1991, c 64, arts 1385, 1396. See Halsbury's Laws of Canada (online), *Construction* at para HCU-18 (2013 Reissue).
[149] *Ibid*.
[150] MJB Enterprises Ltd v Defence Construction (1951) Ltd, [1999] 1 SCR 619 at para 30, 170 DLR (4th) 577.
[151] *Ibid* at para 22.

*Canada*, the Supreme Court held that procuring entities have an obligation of fairness towards bidders with whom Contract A has formed.[152] Purchasers must be "fair and consistent" and treat all bidders "fairly and equally."[153] This means, at minimum, that when a purchaser sets the bid requirements, the purchasing entity must fairly evaluate each bidder based on the indicated criteria. *Design Services Ltd v Canada* clarified that the duty of care owed by the procuring entity to bidders does not extend to subcontractors.[154]

The 2014 Federal Court case *Rapiscan Systems, Inc v Canada* held that government procurement decisions could be subject to the administrative law remedy of judicial review if an "additional public element" exists.[155] The Federal Court outlined numerous considerations to help determine the presence of an "additional public element." Where the procurement decision is closely connected to the procuring entity's statutory powers or mandate, it is more likely that the public law remedy of judicial review will be available.[156] The operative question is whether "the matter is coloured with a 'public element' sufficient to bring it within the purview of the public law and therefore review by the Court on the rationale that (i) it involves a breach of a statutory duty, or (ii) it undermines the integrity of government procurement processes."[157]

Judy Wilson and Joel Richler extract three principles from the line of jurisprudence emanating from *Ron Engineering*:

> [F]irst, the law imposes obligations on both the procuring authorities and the bidders. Procuring authorities must, at all times, adhere to the terms and conditions of Contract A and cannot accept any non-compliant bids, no matter how attractive they may be. As well, procuring authorities must act towards all compliant bidders fairly and in good faith, particularly during the evaluation of any bidder's submission. Also, procuring authorities cannot make their ultimate decisions to award or reject submissions based on criteria that are not disclosed in the terms and conditions of the procurement documents. Bidders, for their part, cannot revoke or supplement their submissions, unless permitted to do so by the terms and conditions of Contract A.
>
> Second, the law *does* permit procuring authorities to create the terms and conditions of Contract "A" as they see fit. Thus, privilege clauses – clauses which provide the procuring authority with discretionary rights – are recognized as fully enforceable and, if properly drafted, allow procuring authorities to reserve to themselves the right to award contracts to bids that may not be for the lowest price, or not to award contracts at all. As well, procuring authorities are free to impose any number of criteria on bidders

[152] This is a simplification. This will be true except where it is clear that the parties did not expect and intend fair and consistent treatment. See *Martel Building Ltd v R*, 2000 SCC 60 at para 88, 193 DLR (4th) 1.
[153] *Ibid* at paras 84, 88.
[154] *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737.
[155] *Rapiscan Systems, Inc v Canada (Attorney General)*, 2014 FC 68 at paras 50–51, 369 DLR (4th) 526.
[156] *Ibid* at para 51.
[157] *Ibid*.

> such as: prior similar work experience; the absence of claims or prior litigation; local contracting; scheduling criteria; composition of construction teams; and so on.
>
> Third, and perhaps somewhat contradictory of the second principle, while the list of requirements and criteria imposed on bidders may be extensive, it will always be open to the courts to impose limitations where the discretion retained by the procuring authority is extreme. The courts have made it clear that maintaining the integrity of competitive procurement processes was a fundamental goal of procurement law in Canada.[158]

# 6. PUBLIC LAW FRAMEWORK

## 6.1 International Legal Instruments

### 6.1.1 UNCAC

Article 9(1) of United Nations Convention Against Corruption (UNCAC) requires State parties to "establish systems of procurement based on transparency, competition and objective criteria in decision making, and which are also effective in preventing corruption."[159] As the *Legislative Guide* to UNCAC notes, Article 9 includes, at minimum:

> a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
>
> b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
>
> c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
>
> d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to paragraph 1 of article 9 are not followed;

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[158] Jody Wilson & Joel Richler, "Canadian Procurement Law: The Basics" (23 September 2011) [emphasis in original], online: *Mondaq* <https://www.mondaq.com/canada/government-contracts-procurement-ppp/146564/canadian-procurement-law-the-basics>.

[159] UNODC, Division for Treaty Affairs, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed (New York: United Nations, 2012) at 28, online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

> e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.[160]

As with other international agreements that address domestic procurement, UNCAC contemplates that these requirements may not apply to contracts below a certain dollar threshold.[161] The *Legislative Guide* to UNCAC justifies this exception on the grounds that "excessive regulation can be counterproductive by increasing rather than diminishing vulnerability to corrupt practices,"[162] but does not provide further elaboration.

### 6.1.2 OECD Convention

The OECD Convention contains no articles on public procurement. However, the *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials*, adopted in November 2009, includes the following as Recommendation XI:

> Member countries should support the efforts of the OECD Public Governance Committee to implement the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105], as well as work on transparency in public procurement in other international governmental organizations such as the United Nations, the World Trade Organization (WTO) and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.[163]

Recommendation XI(i) states that member states should, through laws and regulations, permit authorities to suspend enterprises convicted of bribery of foreign public officials from competition for public contracts.

### 6.1.3 World Bank

The World Bank funds large infrastructure projects throughout the developing world. According to the World Bank, its procurement system includes a portfolio of approximately $56 billion across 172 countries.[164] To combat corruption, the World Bank has created its own sanctioning system, which relies heavily on debarment as a penalty. Because of a reciprocal agreement between the World Bank and other development banks, debarment from World Bank projects also leads to debarment from projects funded by the African Development

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[160] *Ibid* at 29–30.
[161] *Ibid* at 29.
[162] *Ibid*.
[163] OECD, Working Group on Bribery, *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online (pdf): <www.oecd.org/daf/anti-bribery/44176910.pdf>.
[164] World Bank, Press Release, "New World Bank Procurement Framework Promotes Strengthened National Procurement Systems" (30 June 2016), online: *World Bank* <www.worldbank.org/en/news/press-release/2016/06/30/new-world-bank-procurement-framework-promotes-strengthened-national-procurement-systems>.

Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank.[165] This is commonly referred to as "cross-debarment." For more on the World Bank's sanctioning process, see Chapter 7, Section 8.3.

In July 2015, the World Bank announced a new Procurement Framework, which came into effect on July 1, 2016.[166] Most notably, the new framework allows contract award decisions to be based on criteria other than lowest price. In this respect, "value for money" was introduced as a core procurement principle. This signals "a shift in focus from the lowest evaluated compliant bid to bids that provide the best overall value for money, taking into account quality, cost, and other factors as needed."[167] In addition, the World Bank prepared a series of "Standard Procurement Documents" requiring bidders to provide beneficial ownership information.[168] This followed after the World Bank announced it would be considering ways of collecting and disseminating information on beneficial ownership of entities participating in its procurement processes, having received a letter signed by 107 civil society organizations encouraging it to do so.[169]

The procurement process has been subject to some criticism. After noting that the *Foreign Corrupt Practices Act* (*FCPA*) provides little deterrence to companies operating in countries where demand for bribes is high and profits to be made are great, US lawyer and academic Annalisa Leibold, criticized the World Bank's conduct when financing a pipeline project in Chad:

> Even the World Bank was ineffective at preventing corruption there. It rushed the pipeline project, ignored important information about the empirical nature of the resource curse, and divorced its own analysis from Chad's political and economic context.[170]

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

[166] Guidance on the framework, as well as the framework itself, can be accessed online: "Procurement Framework and Regulations for Projects After July 1, 2016", online: *World Bank* <www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework>.

[167] *Ibid*.

[168] These forms can be accessed online: *ibid.*

[169] Richard L Cassin, "Compliance Alert: World Bank Adopts More Flexible and Transparent Procurement Reforms" (22 July 2015), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2015/7/22/compliance-alert-world-bank-adopts-more-flexible-and-transpa.html>; Daniel Dudis, "World Bank Adopts Key Transparency International Goals in New Procurement Policies" (31 July 2015), online (blog): *Transparency International* <blog.transparency.org/2015/07/31/world-bank-adopts-key-transparency-international-goals-in-new-procurement-policies/>.

[170] Annalisa Leibold, "Chad: Corruption Is Real, the FCPA Not So Much" (8 July 2015), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2015/7/8/chad-corruption-is-real-the-fcpa-not-so-much.html>.

Another US academic Paul Sarlo, criticized the World Bank's "undisciplined lending practices," stating that "[t]he World Bank undermines the transnational anti-corruption regime through its failure to carry out due diligence of project-implementing agencies when it advances loans to notoriously corrupt governments."[171] He points out that the personal success of World Bank officials "depend[s] on the number of loans they approve."[172] Further, "whether a loan is stolen should make little difference to the World Bank because of its ability to earn interest and even accelerate payment on that loan."[173] Due to the lack of incentive to ensure loans are used for their intended purpose, Sarlo called for increased regulation of the World Bank's lending practices.

### 6.1.4 WTO Agreement on Government Procurement

The WTO Agreement on Government Procurement (WTO-AGP)[174] has the status of a binding international treaty among its more than 40 members.[175] Although the primary objective of the WTO-AGP is to ensure free market access among State parties, it is relevant to procurement in that it contains provisions that require fairness and transparency in government procurement.[176] For example, Article XVI.1 mandates that a procuring entity "promptly inform participating suppliers of the entity's contract award decisions … [and], on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender."[177] Article XVII.1 requires that, upon request, "a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially, and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender."[178] However, the WTO-AGP applies only to "covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values."[179] These thresholds and restrictions are in place "largely because it is a cumbersome and expensive process to open all contracts to international bidding."[180] In the context of government construction contracts in Canada, the WTO-AGP applies to:

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[171] 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 1308.
[172] *Ibid* at 1309.
[173] *Ibid*.
[174] *Agreement on Government Procurement*, 15 April 1994, 1915 UNTS 103 (entered into force 1 January 1996) (being Annex 4(b) of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3).
[175] "Agreement on Government Procurement: Parties, Observers and Accessions", online: *World Trade Organization* <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>.
[176] "Agreement on Government Procurement", online: *World Trade Organization* <https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.
[177] *Revised Agreement on Government Procurement*, Annex to the Protocol Amending the Agreement on Government Procurement,30 March 2012,GPA/113 (entered into force 6 April 2014), online: <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm>.
[178] *Ibid*.
[179] "Agreement on Government Procurement", *supra* note 175.
[180] Canada, House of Commons, Standing Committee on International Trade, "Canada-United States Agreement on Government Procurement: Report of the Standing Committee on International

- listed central government entities procuring construction services in excess of C$8.5 million;
- listed sub-central government entities (which do not include provincial legislatures or Crown corporations but do include provincial departments and ministries) procuring construction services in excess of C$8.5 million; and
- all construction services identified in Division 51 of the United Nations Provisional Central Product Classification.[181]

#### 6.1.5 United States–Mexico–Canada Agreement

Chapter 13 of the United States–Mexico–Canada Agreement (USMCA),[182] the successor to the North American Free Trade Agreement (NAFTA), deals with government procurement. Unlike its predecessor chapter in NAFTA (Chapter 10) (which is largely preserved), this chapter does not apply to Canada.[183] As a result, suppliers in the US, Mexico and Canada no longer have a single trade agreement providing a common set of rules governing public procurement in North America.[184] Instead, there is one agreement between the US and Canada (the WTO-AGP), another between the US and Mexico (the USMCA), and another between Mexico and Canada (the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)).[185] While the procurement rules in these agreements are similar in many respects, they are not identical. From the perspective of contractors who operate internationally, this lack of uniformity is less than ideal.

The objective of Chapter 13 of the USMCA is to provide suppliers of goods and services in the US and Mexico with secure and guaranteed access to procurement opportunities in each other's markets.[186] While a detailed discussion of Chapter 13 is beyond the scope of this text, it is significant that Article 13.17 sets out rules designed to promote integrity in procurement practices. This provision has four components:

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Trade", 40th Parl, 3rd Sess (May 2010) at 10, online: <https://www.ourcommons.ca/Content/Committee/403/CIIT/Reports/RP4416059/ciitrp01/ciitrp01-e.pdf>.

[181] "Agreement on Government Procurement: Coverage Schedules", online: *World Trade Organization* <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm>; "Thresholds in National Currencies (All Notifications by Canada)", online: *World Trade Organization* <https://e-gpa.wto.org/en/ThresholdNotification?PartyId=1012>.

[182] United States–Mexico–Canada Agreement, 30 November 2019 (entered into force 1 July 2020) [USMCA] [note also that in Canada, it is frequently referred to as CUSMA], online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>.

[183] *Ibid* at art 13.2(3).

[184] Clifford Sosnow, Marcia Mills & Faye Voight, "The USMCA: Is the Glass Half Empty or Is the Glass Half Full?" (13 December 2018), online: *Fasken LLP* <https://www.fasken.com/en/knowledge/2018/12/ott-newsletter-the-usmca-is-the-glass-half-empty-or-is-the-glass-half-full/>.

[185] *Ibid*.

[186] "GBA+ of the Canada-United States-Mexico Agreement" (last modified 2 July 2020), online: *Government of Canada*<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/gba-plus_acs-plus.aspx?lang=eng>.

1) Each Party shall ensure that criminal, civil, or administrative measures exist that can address corruption, fraud, and other wrongful acts in its government procurement.

2) These measures may include procedures to debar, suspend, or declare ineligible from participation in the Party's procurements, for a stated period of time, a supplier that the Party has determined to have engaged in corruption, fraud, or other wrongful acts relevant to a supplier's eligibility to participate in a Party's government procurement.

3) Each Party shall ensure that it has in place policies or procedures to address potential conflicts of interest on the part of those engaged in or having influence over a procurement.

4) Each Party may also put in place policies or procedures, including provisions in tender documentation, that require successful suppliers to maintain and enforce effective internal controls, business ethics, and compliance programs, taking into account the size of the supplier, particularly SMEs, and other relevant factors, for preventing and detecting corruption, fraud, and other wrongful acts.

Chapter 13 also includes provisions designed to enhance transparency in government procurement that mirror provisions in the WTO-AGP. For example, Article 13.15 provides that "a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select the unsuccessful supplier's tender or an explanation of the relative advantages of the successful supplier's tender." Similarly, Article 13.16 provides that "[o]n request of the other Party, a Party shall provide promptly information sufficient to demonstrate whether a procurement was conducted fairly, impartially and in accordance with this chapter, including, if applicable, information on the characteristics and relative advantages of the successful tender, without disclosing confidential information."

Chapter 13 does not automatically apply to all government procurement. Coverage depends on the type and value of the goods or services being procured, the government entity involved and other criteria.

### 6.1.6 Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[187] which incorporates by reference the Trans-Pacific Partnership (TPP) (which never entered into force due to the US's withdrawal in January 2017), is a trade agreement between 11 countries (including Australia, Canada, Japan, and Mexico) designed to promote free trade among signatory countries. Like the USMCA, the CPTPP contains a chapter on government procurement (Chapter 15). The CPTPP contains a provision—Article 15.18—designed to promote integrity in procurement practices. It states:

[187] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018* (entered into force 30 December 2018) [CPTPP], online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng>.

> Each Party shall ensure that criminal or administrative measures exist to address corruption in its government procurement. These measures may include procedures to render ineligible for participation in the Party's procurements, either indefinitely or for a stated period of time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to government procurement in the Party's territory. Each Party shall also ensure that it has in place policies and procedures to eliminate to the extent possible or manage any potential conflict of interest on the part of those engaged in or having influence over a procurement.

Also like Chapter 13 of the USMCA, Chapter 15 of the CPTPP includes provisions designed to enhance transparency in government procurement that mirror provisions in the WTO-AGP. For example, Article 15.16 provides that "a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select the unsuccessful supplier's tender or an explanation of the relative advantages of the successful supplier's tender." Similarly, Article 15.17 provides that "[o]n request of any other Party, a Party shall provide promptly information sufficient to demonstrate whether a procurement was conducted fairly, impartially and in accordance with this chapter, including, if applicable, information on the characteristics and relative advantages of the successful tender, without disclosing confidential information."

Chapter 15 does not automatically apply to all government procurement. Coverage depends on the type and value of the goods or services being procured, the government entity involved, and other criteria.

### 6.1.7 Comprehensive Economic and Trade Agreement

The Comprehensive Economic and Trade Agreement[188] (CETA) is a treaty between Canada and the EU setting standards for trade in goods and services, non-tariff barriers, investment, government procurement, and other areas like labour and the environment.[189] Signed on October 30, 2016,[190] CETA has not yet fully come into force (though substantial parts have been provisionally applied since September 21, 2017). It will fully come into force once ratified by all signatories.

Chapter 19 of CETA deals with government procurement. This chapter includes provisions designed to promote integrity in government procurement. For example, Article 19.4(4) provides generally that a "procuring entity shall conduct covered procurement in a transparent and impartial manner that: … (b) avoids conflicts of interest; and (c) prevents

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[188] *Canada-European Union (EU) Comprehensive Economic and Trade Agreement*, 30 October 2016, (provisional application as of 21 September 2017) [CETA], online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

[189] "CETA Explained" (last modified 24 September 2020), online: *Government of Canada* <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/ceta_explained-aecg_apercu.aspx?lang=eng>.

[190] "EU-Canada Summit: Newly Signed Trade Agreement Sets High Standards for Global Trade" (30 October 2016), online: *The European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=1569>.

corrupt practices." It also includes provisions designed to enhance transparency in government procurement. For instance, Article 19.15(1) provides that "[a] procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender." Similarly, Article 19.16(1) provides that "[o]n request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this chapter, including information on the characteristics and relative advantages of the successful tender."

Chapter 19 does not automatically apply to all government procurement. Coverage depends on the type and value of the goods or services being procured, the government entity involved, and other criteria.

### 6.1.8 EU–UK Trade and Cooperation Agreement

On June 23, 2016, the UK held a referendum to decide whether it should leave the European Union.[191] A narrow majority of voters elected to leave the EU, an event commonly referred to as "Brexit." For the UK to formally leave the EU, however, it had to invoke Article 50 of the Lisbon Treaty, which provides that "[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements"[192] and gives the parties two years to agree on the terms of the exit. That process formally concluded on January 31, 2020, when the UK officially left the EU.[193] However, both sides agreed to preserve many aspects of their existing trade relationship until December 31, 2020 to permit negotiation of a new trade agreement.[194] That agreement, the EU–UK Trade and Cooperation Agreement (TCA), was struck on December 24, 2020 and came into effect provisionally on January 1, 2021.[195] The UK Parliament implemented this agreement through the *EU (Future*

[191] "Brexit: What You Need to Know About the UK Leaving the EU", *BBC News* (30 December 2020), online: <www.bbc.com/news/uk-politics-32810887>.

[192] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December2007, OJ C306/01 (entered into force 1 December 2009). Article 50 came into force in 2009 after amendments were made to the Lisbon Treaty of 2007.

[193] BBC News, *supra* note 191.

[194] *Ibid*.

[195] *Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part*, 30 December 2020, OJ L 444 at 14 (applied provisionally 1 January 2021, entered into force 1 May 2021) [TCA], online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf>. See also UK, Government of the United Kingdom, *UK-EU Trade and Cooperation Agreement: Summary* (London: Prime Minister's office, 2020), online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf>; Tom Edgington, "Brexit: What Are the Key Points of the Deal?", *BBC News* (30 December 2020), online: <https://www.bbc.com/news/explainers-55180293>.

*Relationship) Bill* on December 30, 2020.[196] The European Parliament and the Council of the European Union have yet to ratify the agreement.

Title VI of the TCA deals with public procurement and seeks "to guarantee each Party's suppliers access to increased opportunities to participate in public procurement procedures and to enhance the transparency of public procurement procedures."[197] It incorporates certain provisions of the WTO-AGP, extends the scope of covered procurement and includes additional provisions regarding the use of electronic means in procurement; electronic publication of notices; environmental, social and labour considerations; domestic review procedures; and other matters. Importantly, it puts EU and UK suppliers on an equal footing when bidding on procurement tenders covered by the agreement in one or the other jurisdiction.

The UK is currently in the process of acceding to the WTO-AGP.[198] The UK's shift from the EU regime to the WTO-AGP regime is significant, as the latter is "less prescriptive" than the former.[199]

### 6.1.9 African Union Convention on Preventing and Combating Corruption

Article 11(2) of the African Union (AU) Convention requires parties to establish mechanisms "to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights."[200] Article 11(3) requires state parties to adopt "other such measures as may be necessary to prevent companies from paying bribes to win tenders."[201]

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[196] *EU (Future Relationship) Bill*, 2019-21 sess, online (pdf): <https://publications.parliament.uk/pa/bills/cbill/58-01/0236/20236.pdf>. See also "Brexit: New EU Trade Arrangements to Begin After Parliament Vote", *BBC News* (31 December 2020), online: <https://www.bbc.com/news/uk-politics-55493437>.

[197] TCA, *supra* note 195, at Title VI, preamble.

[198] "UK to Join Government Procurement Pact in Its Own Right in the New Year" (7 October 2020), online: *World Trade Organization* <https://www.wto.org/english/news_e/news20_e/gpro_07oct20_e.htm>; Department for International trade, Press Release, "Government Secures Access for British Business to £1.3 Trillion of Global Procurement Contracts" (7 October 2020), online: <https://www.gov.uk/government/news/government-secures-access-for-british-business-to-13-trillion-of-global-procurement-contracts>.

[199] John Forrest et al, "Continuity or Change? Procurement Rules after Brexit"(12 November 2020), online: *DLA Piper LLP* <https://www.dlapiper.com/en/us/insights/publications/2020/11/procurement-rules-after-brexit/>.

[200] *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, 43 ILM 5 (entered into force 5 August 2006), online (pdf): <https://www.legal-tools.org/uploads/tx_ltpdb/AfricanUnionConventiononPreventingandCombatingCorruption_11-07-2003__E__04.pdf>.

[201] *Ibid*.

### 6.1.10 UN Commission on International Trade Law Model Law on Public Procurement

On July 1, 2011, the United Nations Commission on International Trade Law (UNCITRAL) published the UNCITRAL Model Law on Public Procurement (MLPP).[202] The MLPP is designed as a tool for "modernizing and reforming procurement systems" and assisting countries in implementing legislation where none is currently in place.[203] It is an extensive, detailed model law (84 pages) and accompanied by a very detailed guide (419 pages).[204]

The objectives of the MLPP are outlined in its preamble:

a) Achieving economy and efficiency;

b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;

c) Maximizing competition;

d) Ensuring fair, equal and equitable treatment;

e) Assuring integrity, fairness and public confidence in the procurement process; and

f) Promoting transparency.[205]

The MLPP was intended to apply to all types of procurement and requires no threshold amount for its application to transactions. The MLPP also provides guidance in applying procurement law to security and defence contracts. The MLPP sets out minimum requirements and essential principles for effective procurement legislation:

a) the applicable law, procurement regulations, and other relevant information are to be made publicly available (article 5);

b) requirements for prior publication of announcements for each procurement procedure (with relevant details) (articles 33–35) and ex post facto notice of the award of procurement contracts (article 23);

c) items to be procured are to be described in accordance with article 10 (that is, objectively and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on an objective basis);

d) requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate,

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[202] *UNCITRAL Model Law on Public Procurement* (adopted 1 July 2011), online (pdf): <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf>.

[203] United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (New York: United Nations, 2014) at iii, online (pdf): <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf>.

[204] *Ibid*.

[205] *Ibid* at 3.

with the particular criteria that will determine whether or not suppliers or contractors are qualified communicated to all potential suppliers or contractors (articles 9 and 18);

e) open tendering is the recommended procurement method and the use of any other procurement method must be objectively justified (article 28);

f) other procurement methods should be available to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement, and the procurement of complex or specialized items or services) with conditions for use of these procurement methods (articles 29–31);

g) a requirement for standard procedures for the conduct of each procurement process (Chapters III–VII);

h) a requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement (article 7);

i) a requirement for a mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (article 22(2)); and

j) mandatory challenge and appeal procedures if rules or procedures are breached (Chapter VIII).[206]

The MLPP is a framework law and does not include all the regulations necessary for implementation. However, it does provide insight into some important aspects of procurement law and guidance on implementing effective procurement laws and regulations.

## 6.2 US

The US procurement system is considered by some to be one of the most sophisticated and developed in the world.[207] Even so, it is unable to prevent all corruption, as demonstrated by the case of a senior US Department of Defense acquisition official who pled guilty to criminal conspiracy in connection with the negotiation of a $23 billion acquisition from Boeing.[208]

US law on public procurement falls under the *Competition in Contracting Act* of 1984. The *Federal Acquisition Regulation* further details the rules of hosting and participating in public procurement. Although the Government Accountability Office (GAO) and the Court of

[206] *Ibid* at 14–15.
[207] Ware et al, *supra* note 48.
[208] *Ibid*.

Federal Claims have heard hundreds of protests under the *Federal Acquisition Regulation*, these cases have rarely resulted in a finding that there was improper motivation for deviating from the rules.

### 6.2.1 *Competition in Contracting Act*

The *Competition in Contracting Act* (*CICA*) was passed in 1984 to promote competition and reduce government costs of procurement.[209] The *CICA* requires that all procurement processes carried out by executive agencies involve a "full and open competition through the use of competitive procedures"[210] (subject to some exceptions); it also places various requirements on all contracts over $25,000. The *CICA* governs all procurement contracts that do not fall under more specific procurement legislation. Exceptions to the *CICA*'s "full and open competition" requirements[211] include:

1) single source contracts for goods or services;
2) cases of unusual and compelling urgency;
3) the maintenance of expertise or certain capacity;
4) requirements under international agreements;
5) situations with express authorization by statute;
6) national security interests; and
7) cases in which the head of the agency determines the exception is necessary and notifies Congress in writing.[212]

"Full and open competition" is fulfilled when "all responsible sources are permitted to submit sealed bids or competitive proposals."[213]

### 6.2.2 *Federal Acquisition Regulation*

The *Federal Acquisition Regulation* (*FAR*) took effect on April 1, 1984. Its purpose is to codify and publish uniform policies and procedures for all acquisitions by executive agencies.[214] The system is designed to efficiently deliver the product or service necessary not only to fulfill public policy objectives, but also to provide the best value while promoting the public's trust.

According to section 9.103 of the *FAR*, the US government will contract only with "responsible contractors." To be deemed "responsible," contractors must meet a set of standards contained in section 9.104, including a "satisfactory record of integrity and

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[209] *Competition in Contracting Act*, 41 USC § 253 (1984).
[210] *Ibid.* However, requirements change based on the dollar value of the contract.
[211] For additional commentary on the "full and open competition" requirements, see generally Congressional Research Service, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by Kate M Manuel (30 June 2011), online (pdf): <https://fas.org/sgp/crs/misc/R40516.pdf>.
[212] *Competition in Contracting Act*, 41 USC § 253 (1984).
[213] 41 USC § 403(6) (2009).
[214] *Federal Acquisition Regulation*, 48 CFR § 1.101 (1983).

business ethics."[215] Contractors that fail to meet the standard of "presently responsible" can be debarred or suspended from public procurement. Causes for debarment include convictions for fraud, bribery, embezzlement or "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[216] The *FAR* also includes a catch-all provision that facilitates debarment for "any other cause of so serious or compelling nature that it affects the present responsibility of a Government contractor."[217] Causes for debarment might arise from contract-related conduct or non-contractual conduct, such as environmental misdemeanours.[218] Officials in charge of debarment have wide discretion and may consider mitigating factors or remedial measures implemented by the contractor.[219] Debarment is government-wide and company-wide and generally lasts no more than three years.[220]

Suspensions are imposed pending investigations or legal proceedings when necessary to protect the government's interest. The imposition of a suspension must be based on "adequate evidence."[221] Causes for suspension are similar to causes for debarment, except only adequate evidence of the commission of an offence, rather than a conviction, is required.

Part 3.10 of the *FAR* introduces the *Contractor Code of Business Ethics and Conduct*. Section 3.1002 states that contractors must operate "with the highest degree of honesty and integrity" and have a written code of business ethics and conduct, along with a compliance training program and internal controls system that will promote compliance with that code of conduct. Other requirements for various types of contracts are laid out in section 52.203-13.

To promote accountability in decision-making, the GAO operates a bid protest system. This system allows parties who believe a federal agency has failed to comply with procurement laws and regulations on a specific bid to file a protest with the GAO in order to have their complaint resolved expeditiously.[222]

## 6.3 UK

Following the UK's withdrawal from the EU, EU law, including EU procurement rules, no longer applies in the UK. This withdrawal did not, however, automatically result in the repeal of procurement rules (including those based on EU law) that had been implemented through domestic legislation and regulations. However, in the wake of Brexit, the UK

[215] *Ibid* at § 9.104(d).
[216] *Ibid* at § 9.406-2(a)(5).
[217] *Ibid* at § 9.406-2(c).
[218] Thomas P Barletta, "Procurement Integrity and Supplier Debarment – A U.S. Perspective" (Address delivered at the Transparency International Canada Day of Dialogue, Toronto, 6 May 2015) [unpublished].
[219] *Federal Acquisition Regulation*, *supra* note 214 at § 9.406-1.
[220] Barletta, *supra* note 218.
[221] *Federal Acquisition Regulation*, *supra* note 214 at § 9.407-1(b)(1).
[222] "Bid Protests", online: US Government Accountability Office <www.gao.gov/legal/bid-protests>.

government has proposed sweeping changes to its domestic procurement rules. In particular, in December 2020, the UK Cabinet Office published a green paper entitled "Transforming Public Procurement" that proposes an "overhaul" of the UK's public procurement regime.[223] Since major changes are on the horizon, the discussion below provides only a brief summary of the existing regime and the proposed new regime.

### 6.3.1 *Public Contracts Regulations 2015*

Currently, the UK has two main sets of regulations[224] governing public procurement: the *Public Contracts Regulations 2015* (*PCR*),[225] which apply in England, Wales and Northern Ireland, and the *Public Contracts (Scotland) Regulations 2015*, which apply in Scotland.[226] Although broadly similar, the two sets of regulations differ in some respects.[227] The discussion below focuses on the *PCR*.

The *PCR* were enacted to ensure the UK's compliance with EU requirements (which are no longer binding in the UK). Generally speaking, these regulations apply if the following preconditions are met:

1) **The body doing the buying is a contracting authority.** The definition of "contracting authority" is wide and includes central government, local authorities, associations formed by one or more contracting authorities, and other bodies governed by public law;
2) **The contract is for public works, public services or public supplies.** Sometimes the contract will be a mixed contract (e.g., the supply and maintenance of computers). Where it is, a contracting authority must determine which element (e.g., the supply element or the service element) is the predominant element and, therefore, which set of rules will apply. This can be important to get right as the rules vary slightly depending on the type of contract (e.g., lower financial thresholds apply to services and supplies contracts than to works contracts); and
3) **The estimated value of the contract (net of VAT) equals or exceeds the relevant financial threshold.** The rules expressly prohibit deliberately splitting contracts to bring them below the thresholds.

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[223] UK, Cabinet Office, *Transforming Public Procurement* (Cm 353, 2020) at 5, online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944196/CCS001_CCS1020400576-001_Transforming_Public_Procurement_WebAccessible__1_.pdf>.
[224] See also *Concession Contracts Regulations 2016*, SI 2016/273; *Utilities Contracts Regulations 2016*, SI 2016/274.
[225] *Public Contracts Regulations 2015*, SI 2015/102.
[226] *Public Contracts (Scotland) Regulations 2015*, SSI 2015/446. Scotland introduced further reforms to its public procurement regime through the *Procurement (Scotland) Regulations 2016*, SSI 2016/145.
[227] See Jill Petrie, "Procurement Reform in Scotland: Update, January 2016" (15 January 2016), online (blog): *BTO Solicitors* <www.bto.co.uk/blog/procurement-reform-in-scotland-–-update,-january-2016.aspx>.

The principles of procurement are set out in section 18 of the *PCR*: treating economic operators equally, without discrimination and in a transparent and proportionate manner.[228] The *PCR* also provide that contracting authorities are not to design a procurement process to exclude it from certain provisions of the *PCR* or to artificially narrow competition.[229] The *PCR* impose a duty on the contracting authority in relation to economic operators, and if this duty is breached and the breach causes loss, an economic operator can bring a claim under the *PCR*.[230] The *PCR* specify the remedies that may be sought by economic operators. There are exclusions as to when the *PCR* apply, such as where the authority is buying for the defence and security sector, in which case the *Defence and Security Public Contracts Regulations 2011* may cover the situation.[231]

In 2019 and 2020, in preparation for the UK's exit from the EU, amendments were made to the *PCR* (and other statutes and regulations relating to public procurement).[232]

#### 6.3.2 *Public Services (Social Value) Act 2012*

The *Public Services (Social Value) Act 2012* (*PSA*)[233] creates a statutory requirement for public authorities in England and Wales "to have regard to economic, social and environmental well-being in connection with public services contracts."[234] The *PSA* applies only to public service contracts, not public works or supplies contracts. A 2014 review of the *PSA* found that, although implementation was underway, there were struggles in defining the measurement technique of social value and lack of clarity on what should be measured. These issues made it difficult to compare bids objectively.[235] In conducting this review, the government provided some guidance for public authorities on how to comply with the *PSA* and include *PSA* considerations in the tendering process. The *PSA* may be seen as a toothless initiative, as there are no penalties for non-compliance. However, the *PSA* does provide for holistic consideration of the environmental, societal and economic impacts of tender submissions, rather than limiting consideration to the actual cost of the initial procurement project.

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[228] *Public Contracts Regulations 2015*, *supra* note 225, s 18(1).
[229] *Ibid* at s 18(2).
[230] *Ibid* at s 91.
[231] Crown Commercial Service, "Guidance: Public Procurement Policy" (Last updated 1 January 2021), online: *Government of the United Kingdom* <https://www.gov.uk/guidance/public-sector-procurement-policy#handbooks-and-guidance>.
[232] *The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (UK)*, SI 2019/560; *The Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (UK)*, SI 2019/623; *The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020*, SI 2020/1319. The former two regulations were repealed and replaced by the third. See *Government of the United Kingdom, Explanatory Memorandum to the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020*, online (pdf): <https://www.legislation.gov.uk/uksi/2020/1319/pdfs/uksiem_20201319_en.pdf>.
[233] *Public Services (Social Value) Act 2012* (UK), 2012, c 3.
[234] *Ibid*.
[235] UK, Cabinet Office, *Social Value Act Review* (Cabinet Office, 2015) at 11, online (pdf): <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_150212.pdf>.

### 6.3.3 Proposed New Regime

In a December 2020 green paper entitled "Transforming Public Procurement," the UK Cabinet Office proposed an "overhaul" of the UK's public procurement regime.[236] This proposal seeks to achieve the following objectives:

> The Government's goal is to speed up and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery. The current regimes for awarding public contracts are too restrictive with too much red tape for buyers and suppliers alike, which results in attention being focused on the wrong activities rather than value and transparency. We need a progressive, modern regime which can adapt to the fast-moving environment in which business operates.[237]

The proposal seeks to achieve these objectives by "comprehensively streamlin[ing] and simplify[ing] the complex framework of regulations that currently govern public procurement" into a "single, uniform set of rules for all contract awards,"[238] supplemented by sector-specific rules (e.g., defence or utilities).

From an anti-corruption perspective, the proposed regime seeks to "minimise the risk of corruption," including by "embedding transparency by default throughout the commercial lifecycle,"[239] requiring all contracting authorities to implement an open contracting data standard,[240] introducing new discretionary and mandatory grounds for exclusion of suppliers (including a mandatory exclusion for any supplier with a criminal conviction related to fraud, a mandatory exclusion for non-disclosure of beneficial ownership, and a discretionary exclusion for suppliers who have entered into a deferred prosecution agreement)[241] and creating a centrally managed debarment list.[242]

The government has invited comments on its proposal, which will likely be followed by draft legislation.

## 6.4 Canada

This section on Canadian law and procedures is restricted to the public procurement policy framework at the federal level. Federal laws and policies aim not only to ensure good governance and enforce the rule of law, but also to ensure compliance with Canada's international treaty obligations. As Canada is a federal state, federal laws and policies generally govern federal public procurement only. Any reference to "sub-federal procurement" refers to procurement that occurs below the federal level (i.e., provincial or

[236] UK Cabinet Office, *supra* note 223.
[237] *Ibid* at para 1.
[238] *Ibid* at para 3.
[239] *Ibid* at para 6.
[240] *Ibid* at para 6.
[241] *Ibid* at paras 111–15.
[242] *Ibid* at para 10.

municipal). Describing procurement laws and procedures only at the federal government level is a serious limitation. Federal procurement laws and procedures are in general far more detailed and stringent than most provincial and municipal procurement regimes. Improvement of these latter regimes is a pressing need in Canada.

### 6.4.1 Canada-US Agreement on Government Procurement

The Canada-US Agreement on Government Procurement (CUSAGP) came into effect on February 16, 2010.[243] Its primary goal, similar to the USMCA and the WTO-AGP, is to grant Canada and the US access to each other's public infrastructure industry.[244] However, CUSAGP is significant in that it represents the first time Canada has made sub-federal procurement commitments in an international treaty.[245] The CUSAGP also provides exemptions to "Buy American" provisions for Canadian bidders and guarantees US suppliers access to provincial markets and contracts, with the exception of Nunavut.[246]

The core principles of the CUSAGP address non-discrimination and transparency. For the purposes of transparency, entities subject to the CUSAGP are obligated to make their procurement policies readily accessible and to use competitive tendering processes except in certain circumstances.[247] The exceptions cover the typical scenarios in which competitive tenders are not necessary, such as in the event of an emergency.

In Canada, the CUSAGP applies to procurement for construction services[248] in the provinces where the value of the services is greater than or equal to C$5 million.[249] For Crown corporations and municipalities, it applies to contracts valued at C$8.5 million or more.[250] Relatively few municipal contracts meet this monetary threshold.

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[243] *Agreement Between the Government of Canada and the Government of the United States of American on Government Procurement*, Can TS 2010 No 5 (entered into force 12 February 2010), [US-Canada Procurement Agreement], online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/agreement-accord.aspx?lang=eng>.

[244] For an overview of the CUSAGP, see "Canada-U.S. Agreement on Government Procurement" (last modified 2 March 2021), online: *Government of Canada* <tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/agreement-accord.aspx?lang=eng>.

[245] Standing Committee on International Trade *supra* note 180 at 1.

[246] "Canada-U.S. Agreement on Government Procurement", online: *Government of Canada* <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng>.

[247] *US-Canada Procurement Agreement*, *supra* note 243 at Appendix C, Part A, ss 7–9.

[248] A "construction services" contract is defined under the agreement as "a contract which has as its objective the realization by whatever means of civil or building works": *ibid* at Annex 5. Procurement in this context is defined as "contractual transactions to acquire property or services for the direct benefit or use of the government": *ibid*.

[249] *Ibid* at Annex 2.

[250] *Ibid* at Appendix C, Part B. All municipalities and Crown corporations in BC are subject to the agreement, though there is a list of Ontario ministries, agencies and municipalities that are not covered by the agreement.

### 6.4.2 Canadian Free Trade Agreement

The Canadian Free Trade Agreement (CFTA), which replaced the Agreement on Internal Trade (AIT), is an intergovernmental trade agreement between all federal, provincial, and territorial governments in Canada that entered into force on July 1, 2017.[251] Its purpose is "to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open, efficient, and stable domestic market."[252] It commits federal, provincial, and territorial governments to a comprehensive set of rules governing internal trade.[253] These rules are designed to align with Canada's international commitments (including under CETA) and to offer Canadian firms the same access to the Canadian market as firms from Canada's international trading partners.[254] The CFTA applies to most areas of economic activity in Canada, except in respect of entities, goods, and services that are specifically listed in the schedules for Canada and each province and territory.[255]

Chapter 5 of the CFTA deals with government procurement. The purpose of this chapter is "to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers."[256] The general principles set out in this chapter provide that each party "shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities"[257] and shall treat the goods, services, and suppliers of any other party no less favourably than its own goods, services, and suppliers.[258] The rules in this chapter generally apply to procurement by departments, ministries, boards, councils, publicly funded institutions (such as health or academic institutions), municipalities and other government bodies, enterprises, and agencies.[259] However, they apply only if certain financial thresholds are met.[260] Chapter 5 also provides for specific exceptions that are unique to Canada and each provincial and territorial government.

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[251] *Canadian Free Trade Agreement: Consolidated Version* (entered into force 17 July 2017, consolidated 24 September 2020) (Governments of Canada, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland and Labrador, the Northwest Territories, Yukon, and Nunavut) [CFTA], online (pdf): <https://www.cfta-alec.ca/wp-content/uploads/2020/09/CFTA-Consolidated-Text-Final-English_September-24-2020.pdf>.

[252] *Ibid* at Article 100.

[253] "Backgrounder: Highlights of Canada's New Free Trade Agreement" (7 April 2017), online (pdf): *Internal Trade Secretariat, CFTA* <https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-general-backgrounder.pdf>. See also Jon Tattrie, "Canadian Free Trade Agreement" in *The Canadian Encyclopedia* (edited 23 April 2018), online: <https://www.thecanadianencyclopedia.ca/en/article/canadian-free-trade-agreement>.

[254] *Ibid*.

[255] *Ibid*.

[256] CFTA, Article 500.

[257] *Ibid* at Article 502.

[258] *Ibid*.

[259] *Ibid* at Article 103.

[260] "Covered Procurement Thresholds", online: *Internal Trade Secretariat (CFTA)* <https://www.cfta-alec.ca/procurement/covered-procurement-thresholds/>.

From a transparency and anti-corruption perspective, Article 516 sets out basic transparency requirements regarding the provision of information to suppliers, the publication of award information, and the collection and reporting of statistics.[261] Article 518 requires each party to provide a "timely, effective, transparent, and non-discriminatory" administrative or judicial review procedures for alleged breaches, as well as procedures that provide for appropriate remedies.

### 6.4.3 *Criminal Code*

Public procurement is also regulated or limited by a number of *Criminal Code* offences, including bribery of officers,[262] frauds on the government,[263] breach of trust of a public officer,[264] municipal corruption,[265] fraudulent disposal of goods on which money has been advanced,[266] extortion,[267] and secret commissions.[268] These offences are briefly described in Chapter 2, Section 2.5. Sections 121(1)(f) and 121(2) of the *Criminal Code* are specific offences in relation to federal and provincial procurement, but do not cover municipal procurement offences. At the time of writing, these *Criminal Code* sections have not been used to prosecute unlawful procurement actions. Instead, procurement offences are prosecuted under the fraud and breach of trust offences in the *Criminal Code*, or the offence of "bid-rigging" under s. 47 of the *Competition Act*[269] (punishable by fine and/or a maximum of 14 years' imprisonment).

### 6.4.4 Federal Policy Framework and Integrity Regime

The policy framework[270] for federal public procurement is set out in the *Financial Administration Act*[271] (and subordinate Government Contracts Regulations), the *Federal Accountability Act*,[272] the *Auditor General Act*,[273] and the *Department of Public Works and*

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[261] *Ibid* at Article 516.
[262] *Criminal Code*, RSC 1985, c C-46, s 120.
[263] *Ibid* at s 121.
[264] *Ibid* at s 122.
[265] *Ibid* at s 123.
[266] *Ibid* at s 389.
[267] *Ibid* at s 346.
[268] *Ibid* at s 426.
[269] RSC 1985, c C-34.
[270] For a more detailed examination of this framework, see Public Services and Procurement Canada, *Supply Manual*, January 2021 version, effective 5 May 2021 (Strategic Policy Sector, Public Works and Government Services Canada, 2021) at s 1.15, online: <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1>.
[271] *Financial Administration Act*, RSC 1985, c F-11.
[272] *Federal Accountability Act*, SC 2006, c 9, ss 308, 301, 306. This act was largely the government's response to the Sponsorship Scandal and the Gomery Commission's Report that investigated the scandal: Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: Privy Council Office, 2006), online: <http://publications.gc.ca/site/eng/9.688112/publication.html>. See also Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Fact Finding Report* (Ottawa: Public Works and Government Services Canada, 2005), online: <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm>.
[273] *Auditor General Act*, RSC 1985, c A-17.

*Government Services Act*.[274] Within this legislative and regulatory framework, the principal source of federal public procurement policy in Canada is the Integrity Regime. In brief, the following are some of the key features of this regime:

- The purpose of the Integrity Regime is to "foster ethical business practices, ensure due process for suppliers and uphold the public trust in the procurement process."[275]
- The Integrity Regime is administered by Public Services and Procurement Canada (PSPC), formerly Public Works and Government Services Canada (PWGSC), on behalf of the Canadian government.
- The Integrity Regime applies government-wide to procurement and real property transactions over $10,000 (as well as any other contract that incorporates the regime by reference), subject to specified exceptions.[276]
- A supplier convicted of certain listed Canadian offences will be declared automatically ineligible for ten years (with the possibility of a reduction of up to five years under an administrative agreement).[277]
- A supplier convicted of an offence outside Canada that is "similar to" any Canadian offence for which a conviction would result in automatic ineligibility may be declared ineligible for ten years (with the possibility of a reduction of up to five years under an administrative agreement).[278]
- A supplier whose affiliate has been convicted of any Canadian offence for which a conviction would result in automatic ineligibility, or of a "similar offence" outside Canada and the supplier "directed, influenced, authorized, assented to, acquiesced in or participated in the commission of the offence,"[279] may be declared ineligible for ten years (with the possibility of a reduction of up to five years under an administrative agreement).
- PSPC may suspend a supplier if the supplier has been charged with, or admits guilt of, any Canadian offence for which a conviction would result in automatic ineligibility, or has been charged with, or admits guilt of, a "similar offence" outside Canada.[280]

More information on the Integrity Regime can be found in Chapter 7, Section 8.6.

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[274] *Department of Public Works and Government Services Act*, SC 1996, c 16.
[275] "About the Integrity Regime" (2020), online: *Government of Canada* <https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>.
[276] *Ibid*.
[277] "Ineligibility and Suspension Policy" (2017), online: Government of Canada <https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>.
[278] *Ibid*.
[279] *Ibid*.
[280] *Ibid*.

### 6.4.5 Public Procurement in Quebec

An in-depth treatment of Quebec's efforts to curb public procurement corruptions is beyond the scope of this text. However, a few brief remarks are warranted.

The issue of corruption in Quebec's construction sector was thrust into the spotlight in 2009 after reports revealed widespread bid-rigging and collusion, causing public outrage. As mentioned in Section 1.3, then-Premier Jean Charest appointed the Charbonneau Commission to conduct a public inquiry into corruption in the awarding and management of public contracts in the province's construction industry. The Commission's report can be accessed online.[281] Evidence at the public inquiry revealed a thick web of corruption in the construction sector at the provincial and municipal level and a connection between this corruption and political party and election financing. The evidence also revealed that organized crime had infiltrated Quebec's construction industry.

In Quebec's 2012 elections, the Parti Québécois (PQ) under Pauline Marois was elected. Anxious to demonstrate the difference between the new government and the old, the PQ put together its first bill—the *Integrity of Public Contracts Act*—in about six weeks.[282] The central feature of Bill 1 was a new system of pre-authorization for companies involved in public procurement. Companies are required to obtain a certificate of integrity from the Autorité des marchés financiers (AMF), Quebec's securities markets regulator, before entering into construction and service contracts or subcontracts involving expenditures of CDN$5 million or more, Ville de Montréal contracts covered by Orders in Council and certain P3 contracts.[283] Beginning in November 2015, the threshold for pre-authorization of public service contracts was lowered to CDN$1 million, and the Quebec government subsequently indicated its intention to eventually lower the threshold to CDN$100,000 for all public contracts (except Ville de Montréal contracts, which are subject to different thresholds).[284] The certificate will be automatically denied if any of a set of objective criteria are not met.[285] The decision also depends on subjective criteria, as there is discretion to deny applications "if the enterprise concerned fails to meet the high standards of integrity that the

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[281] France Charbonneau & Renaud Lachance, *supra* note 32.

[282] Bill 1, *Loi sur l'intégrité en matière de contrats public* [*Integrity in Public Contracts Act*], 1st Sess, 40th Leg, Quebec, 2012 (received assent and entered into force December 7, 2012), SQ 2012, c 25.

[283] Louis Letellier, "Application of An Act Respecting Contracting by Public Bodies" (Address delivered at the Transparency International Canada 5th Annual Day of Dialogue, Toronto, 6 May 2015) [unpublished].

[284] Linda Gyulai, "More Contract Bidders to Be Vetted under Provincial Decree", *The Montreal Gazette* (11 June 2015), online: <montrealgazette.com/news/local-news/more-contract-bidders-to-be-vetted-under-provincial-decree>; "Information on Public Contracts", online: *Autorité des marchés* publics <https://amp.quebec/en/information-on-public-contracts/>.

[285] *An Act Respecting Contracting by Public Bodies*, CQLR c C-65.1, s 21.26 [*Contracting Public Bodies Act*]. The objective criteria in s 21.26 involve previous convictions for various offences. However, Bill 26 (enacted in April 2015) amended the *Act* by describing two situations in which the AMF need not automatically refuse to issue a certificate even though the objective criteria in s. 21.26 are met. See Bill 26, *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, 1st Sess, 41st Leg, Quebec, 2014, c 6, cl 26 (assented to 1 April 2015), SQ 2015, c 6.

public is entitled to expect from a party to a public contract."[286] The legislation identifies potentially relevant factors in making this determination.

Writing in 2015, Canadian lawyer and former politician Graham Steele, argued that this provision is "startlingly subjective."[287] He advanced a number of other critiques of Bill 1. For example, he claimed that "the Bill 1 debate is devoid of any real diagnosis of why or where the corruption is occurring."[288] He also argued that Quebec's lawmakers had almost no objective evidence to support a belief that their anti-corruption legislation would work to stem corruption, yet no one opposed the bill.[289] He suggested that the public outcry pushed legislators to simply "do something, and do it quickly," therefore focusing efforts on "building an edifice that sounds like it *might* work to stem corruption, rather than examining the evidence, in the literature and precedents from around the world, for what was *likely* to work [emphasis in original]."[290] Steele suggested that, while public outcry was placated, Bill 1 has had "an almost entirely nominal effect."[291]

In 2017, after Steele published his critique, the Quebec legislature passed Bill 108, the *Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*,[292] which among other things amended the *Act Respecting Contracting by Public Bodies* and created a new, neutral, independent body responsible for overseeing public procurement and the application of legislation and regulations governing public contracts in Québec: the Autorité des marchés publics (AMP). The AMP, which took over the public procurement functions of the AMF, describes its role and mandate as follows:

> The Autorité des marchés publics (AMP) is a neutral, independent body that is the sole gateway for oversight of public procurement and the application of legislation and regulations governing public contracts in Québec. Its oversight role covers the public sector, the health and education networks, government corporations, and the municipal sector.
>
> However, a specific feature applies to the City of Montréal. The duties and powers attributed to the AMP, except those pertaining to the examination

[286] *Contracting Public Bodies Act*, *ibid* at s 21.27.
[287] Steele, *supra* note 165 at 79.
[288] *Ibid* at 102.
[289] *Ibid* at 114.
[290] *Ibid* at 116.
[291] *Ibid* at 118. As of June 2015, 1,300 companies have been approved by the AMF and six or seven have been rejected. See Gyulai, *supra* note 284. SNC-Lavalin received approval to bid on public contracts in Quebec in February 2014: "SNC-Lavalin, WSP Green-Lit to Bid on Public Contracts in Quebec" *CBC News* (5 February 2014), online: <www.cbc.ca/news/canada/montreal/snc-lavalin-wsp-green-lit-to-bid-on-public-contracts-in-quebec-1.2524363>. For more on the realities of Bill 1 for companies, see Linda Gyulai, "Anti-Corruption Legislation Creates Niche Market for Private-Eye and Accounting Firms", *The Montreal Gazette* (17 July 2014), online: <montrealgazette.com/news/local-news/anti-corruption-legislation-creates-niche-market-for-private-eye-and-accounting-firms>. For the first decision on the legality of the AMF's refusal of authorization, see *9129-2201 Québec inc c Autorité des marchés financiers*, 2014 QCCS 2070, leave to appeal to QCCA ref'd 2014 QCCA 1383.
[292] *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*, 41st Leg, 1st Sess, Quebec (received royal assent 1 December 2017), SQ 2017, c 27.

> of the contract management of a designated organization are, with respect to the City of Montréal or a person or an organization related to the City of Montréal and covered by the Act, exercised by the Inspector General of the City of Montréal. The Inspector General assumes the same obligations as the AMP would pursuant to its duties and powers.
>
> The AMP's mission is to oversee all public contracts, in particular compliance with the tendering and contract award process and to receive complaints from interested persons. It is also responsible for the register of business enterprises that are authorized to enter into public contracts and subcontracts and the register of enterprises ineligible for public contracts.
>
> The Act attributes various powers to the AMP, including audit and investigative authority that enables the AMP, as the case may be, to issue orders, make recommendations or suspend or cancel contracts.[293]

Thus, the AMP's role is not restricted to pre-authorization; it extends more broadly to overseeing public procurement and public contracts in the province.[294] Lawyers Nathalie Beauregard and Marjolaine Verdon-Akzam summarize the AMP's key responsibilities and powers as follows:

> Among other tasks, the AMP must
>
> - examine the compliance of a tendering or awarding process for a public contract of a public body – the review may be done on the AMP's own initiative, or after a complaint is filed by an interested person, or on the request of the Chair of the Conseil du trésor or a bidder;
> - maintain the register of enterprises ineligible to enter into a public contract or subcontract and the register of enterprises authorized to do so; and
> - ensure that the contract management of the Ministère des Transports and any other public body the government designates is carried out in accordance with the normative framework to which the body is subject.
>
> Various powers are given to the AMP to conduct audits and investigations and to give subsequent orders and recommendations. These may include, but are not limited to, orders to a public body to amend its tender documents or to cancel the public call for tenders, and to suspend the performance of any public contract or cancel such a contract.[295]

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[293] "About Us", online: *Autorité des marchés publics* <https://amp.quebec/en/about-us/>.

[294] Sarah Chaster, "Public Procurement and the Charbonneau Commission: Challenges in Preventing and Controlling Corruption" (2018) 23 Appeal 121 at 141, online: <https://journals.uvic.ca/index.php/appeal/article/view/18113>.

[295] Nathalie Beauregard & Marjolaine Verdon-Akzam, "Public Contracts: Québec Introduces the Autorité des Marchés Publics"(17 June 2016), online: *Osler LLP*

Notably, Bill 108 did not amend the provision creating subjective grounds to deny public contracts.[296] However, Sarah Chaster notes that the bill has been hailed as a significant improvement:

> Bill 108 helps to better situate Quebec's pre-authorization scheme within a more nuanced public procurement framework. Section 21.27 of the *ACPB*, which contains the provision allowing discretion to refuse authorization if an enterprise "fails to meet the high standards of integrity" expected by the public, is not amended by the bill. This means the same "startling subjectivity" raised by Steele would still be present in the legislation. However, the broad discretion might be tempered somewhat since pre-authorization would now be established within the concentrated expertise of the AMP, whose mission would include not only pre-authorization but also generally overseeing all public contracts and ensuring integrity and ongoing compliance with public procurement processes. Bill 108 has been lauded as a significant change that would bring positive developments and greater uniformity to Quebec's public procurement processes. It responds directly to one of the most central recommendations made by the Commission with regards to public procurement [i.e., the recommendation that Quebec create a public procurement authority].[297]

It remains to be seen whether the AMP will succeed in enhancing transparency and integrity in the Quebec public procurement. It is clear, however, that Quebec has taken an important step in the right direction.

#### 6.4.6 Office of the Procurement Ombudsman

The Government of Canada has put in place a Procurement Ombudsman.[298] As set out in s. 22.1(3) of the *Department of Public Works and Government Services Act*, the mandate of the Procurement Ombudsman is to:

> a) review the practices of departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices;
>
> b) review any complaint respecting the compliance with any regulations made under the *Financial Administration Act* of the award of a contract for the acquisition of materiel or services by a department to which the

<https://www.osler.com/en/resources/regulations/2016/public-contracts-quebec-introduces-the-autorite-d>.

[296] Chaster, *supra* note 294 at 141.

[297] *Ibid*.

[298] "Frequently Asked Questions", online: *Office of the Procurement Ombudsman* <http://opo-boa.gc.ca/faq-eng.html>. An ombudsman is an "an independent, objective investigator of people's complaints against government and/or private sector organizations. After a fair and thorough review, an Ombudsman decides if the complaint is valid and makes recommendations in order to resolve the problem": *ibid*.

Agreement, as defined in section 2 of the *Canadian Free Trade Agreement Implementation Act*, would apply if the value of the contract were not less than the amount referred to in Article 504 of that Agreement.

c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department; and

d) ensure that an alternative dispute resolution process is provided, on request of each party to such a contract.[299]

A primary function of the Procurement Ombudsman is to review the procurement practices of departments, including PSPC, and publicly report on the results. In order to ensure its independence in carrying out this duty, the Procurement Ombudsman operates at arm's length from PSPC.

The Office of the Procurement Ombudsman:

- works with suppliers and federal departments to clarify and address procurement issues;
- helps preserve the integrity of the federal procurement process by reviewing complaints from suppliers about the award or administration of a contract and making balanced recommendations;
- helps facilitate the resolution of contract disputes through alternative dispute resolution;
- reviews procurement practices in one or across a number of federal departments where recurring or systemic procurement issues are present;
- makes recommendations to strengthen fairness, openness and transparency in federal procurement practices; and
- shares information on effective practices identified in the federal government and other jurisdictions to highlight leadership and reinforce positive initiatives in the field of procurement.[300]

# 7. EVALUATION OF PROCUREMENT LAWS AND PROCEDURES

## 7.1 OECD Review of Country Compliance

The OECD established the OECD Working Group on Bribery (Working Group), a peer-monitoring group, to evaluate each country's performance in implementing the OECD Anti-Bribery Convention. Phase 1 evaluated the country's legislation, phase 2 evaluated whether the country was applying their legislation, phase 3 evaluated the country's enforcement of the Convention and phase 4 (currently ongoing) further evaluates the country's

[299] *Department of Public Works and Government Services Act*, SC 1996, c 16, s 22.1(3).
[300] Office of the Procurement Ombudsman, *supra* note 298.

performance. In each phase, the Working Group provides recommendations for the country to improve its compliance. The Working Group also publishes follow-up reports on each country's performance.[301]

### 7.1.1 US

The 2010 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the US* did not criticize the US's implementation of the Convention in respect of its public procurement regime. However, it did note that the US rarely chose to debar companies that were convicted of bribery of a foreign public official even though US laws provided that companies could be debarred from federal contracts for up to three years for convictions under domestic and foreign anti-bribery laws. Recommendation 4 suggested that debarments be applied equally to companies convicted of domestic and foreign bribery.[302]

The Working Group's 2012 follow-up for the US described the actions taken to implement the OECD's recommendation on debarment. The follow-up report confirmed that there is a statutory mechanism for the debarment of persons convicted of violations of the *Arms Export Control Act*.[303] In addition, the report noted that although the *FCPA* does not impose mandatory statutory debarment, debarment was usually the result of indictment and/or conviction.[304]

The 2020 *Phase 4 Report* commended the US on its "strong enforcement" of the *FCPA* and on "maintaining its prominent role in the fight against transnational corruption."[305] The report noted that these achievements resulted from "a combination of enhanced expertise and resources to investigate and prosecute foreign bribery, the enforcement of a broad range of offences in foreign bribery cases, the effective use of non-trial resolution mechanisms, and the development of published policies to incentivise companies' cooperation with law enforcement agencies."[306] The report also made various recommendations for the US to:

- consider how it can enhance protections for whistleblowers who report suspected acts of foreign bribery by non-issuers and enhance guidance about the protections available to whistleblowers who report suspected acts of foreign bribery;

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[301] For more information on the OECD monitoring process see "Country Monitoring of the OECD Anti-Bribery Convention", online: *OECD* <www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.
[302] OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, (2010), online (pdf): <www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf>.
[303] *Arms Export Control Act of 1976* (Title II of Pub L No 94–329, 90 Stat 729 (codified at 22 USC ch 39)).
[304] OECD, Working Group on Bribery, *United States: Follow-Up to the Phase 3 Report and Recommendations*, (2012) at 13, online (pdf): <www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf>.
[305] OECD, Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention – Phase 4 Report: United States*, (2020) at 7, online (pdf): <https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf>.
[306] *Ibid*.

- consider having the Securities and Exchange Commission consolidate and publicize its policy and guidance on how it enforces the *FCPA*;
- continue to evaluate the effectiveness of whether the Corporate Enforcement Policy encourages self-disclosure and deters foreign bribery;
- ensure that law enforcement agencies make publicly available whether a non-prosecution agreement or a deferred prosecution agreement with a legal person in an *FCPA* matter has been extended or completed;
- when extending a deferred prosecution agreement, ensure the law enforcement agency makes available the groups for extension; and
- collect data, to the extent possible within its system, on debarment in foreign bribery cases to improve the monitoring of impact of sanctions.[307]

### 7.1.2 UK

The 2012 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the UK* noted that while the UK had significantly enhanced its foreign bribery enforcement efforts since the previous review, it needed to be more transparent when resolving cases. The report made further recommendations for the UK to:

- maintain the role and resources of the Serious Fraud Office (SFO) in criminal foreign bribery investigations and prosecutions;
- avoid confidentiality agreements that prevent disclosure of key information about settled cases;
- promptly adopt a roadmap to proactively extend the Convention to overseas territories;
- continue to provide evidence to other countries after settlements, where appropriate; and
- ensure that companies effectively move towards "zero tolerance" of facilitation payments.[308]

The 2017 *Phase 4 Report* commended the UK on having "taken significant steps since Phase 3 to increase enforcement of the foreign bribery offence" and on becoming "one of the major enforcers among the Working Group countries."[309] The report also acknowledged that the UK had made "[i]mportant legislative reforms, including the introduction of deferred

[307] *Ibid* at 111–13.
[308] OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom,* (2012) at 58–62, online (pdf): <https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>.
[309] OECD, Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention – Phase 4 Report: United Kingdom*, (2017) at 5, online: <https://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>.

prosecution agreements, and high-level political commitments."[310] Further, the report noted that the UK had taken "taken significant steps to enhance its detection capabilities, including through intelligence analysis by the SFO [Serious Fraud Office], improved whistleblowing channels, and mobilisation of some of its government agencies."[311]

On the other hand, the report identified a number of areas of concern. For example, it noted that "Scotland's practices and frameworks for foreign bribery enforcement could be brought in line with those in place in England and Wales," "there is also scope to improve communication between law enforcement authorities from England and Wales and those in Scotland," "the persistent uncertainty about the SFO's existence and budget is harmful," "anti-money laundering measures should be enhanced to improve detection of foreign bribery, including adopting the Criminal Finances Bill," and "the tax administration [should] conduct as a matter of priority a comprehensive review of its methods and capacity to detect and report foreign bribery."[312]

In its two-year follow-up report on its *Phase 4 Report*, the Working Group noted that the UK had "addressed a number of key Phase 4 recommendations, notably asserting the SFO's role in foreign bribery cases and generally enhancing the capacity for enforcement of the foreign bribery and related offences."[313] On the other hand, the report lamented that "no steps have been taken to address long-standing recommendations to ensure the independence of foreign bribery investigations and prosecutions, or to enhance detection through AML-reporting mechanisms."[314] The report also observed that "[d]espite an increased level of enforcement of foreign bribery laws, the total number of finalised and ongoing cases relative to the UK economy remains relatively low."[315]

### 7.1.3 Canada

The 2011 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* found that the *CFPOA* was lacking because it did not include civil or administrative debarment sanctions for companies convicted under the act.[316] The suggested sanction was exclusion from bidding on government contracts for a set period after conviction under the *CFPOA*.[317] Canada's domestic bribery laws already provided for this:

> Persons convicted under section 121 of the Criminal Code of bribing an official of the Government of Canada, government of a province, or Her Majesty in right of Canada or a province ("Frauds on the Government"),

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[310] *Ibid*.
[311] *Ibid*.
[312] *Ibid*.
[313] OECD, Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention – Phase 4 Two-Year Follow-Up Report: United Kingdom*, (2019) at para 1, online (pdf): <https://www.oecd.org/corruption/United-Kingdom-phase-4-follow-up-report-ENG.pdf>.
[314] *Ibid*.
[315] *Ibid* at para 2.
[316] OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, (2011), online (pdf): <https://www.oecd.org/canada/Canadaphase3reportEN.pdf>.
[317] *Ibid* at recommendation 2.

> have no capacity to contract with Her Majesty or receive any benefit under a contract with Her Majesty, pursuant to subsection 750(3) of the Criminal Code, under Part XXIII, entitled "Sentencing."[318]

This provision applies only to charges of domestic bribery, and thus it does not capture *CFPOA* offences. However, the Working Group's 2013 follow-up report found that Canada had remedied this problem in July 2012, when PSPC added convictions for foreign bribery under s. 3 of the *CFPOA* to the list of offences that would automatically result in debarment.[319] For more information on PSPC's debarment policies, see Chapter 7, Section 8.6.

Other key recommendations included that Canada:

- amend the *CFPOA* so that it is clear that it applies to bribery related to the conduct of all international business, not just for-profit business;
- ensure that sanctions applied in practice for *CFPOA* violations are effective, proportionate and dissuasive;
- take such measures as may be necessary to prosecute Canadian nationals for bribery of foreign public officials committed abroad; and
- clarify that police and prosecutors may not consider factors such as the national economic interest and relations with a foreign state, when deciding whether to investigate or prosecute allegations of foreign bribery.[320]

The Working Group's 2013 follow-up report noted that Canada had introduced legislation (Bill S-14, subsequently enacted as the *Fighting Foreign Corruption Act*) addressing a number of its concerns. In particular, this legislation, among other things, clarified that the offence of foreign bribery: applies to all businesses, regardless of profit; extended the jurisdictional scope of the *CFPOA* so that Canada may prosecute foreign bribery committed by Canadians or Canadian companies, regardless of where the offence was committed; and established specific criminal offences for bookkeeping violations committed for the purpose of bribing foreign public officials or hiding such bribery.[321] The report also noted that the Public Prosecution Service of Canada was in the process of updating its policies.[322]

Canada's Phase 4 evaluation is scheduled for 2023.[323]

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[318] *Ibid* at 23.

[319] OECD, Working Group on Bribery, *Canada: Follow-Up to the Phase 3 Report and Recommendations*, (2013) at 6–7, online (pdf): <www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>.

[320] For the full set of recommendations, see Canada's *Phase 3 Report supra* note 316 at 59-61.

[321] *Ibid* at para 2.

[322] *Ibid* at para 3.

[323] OECD, Working Group on Bribery, *Monitoring Schedule: December 2016 – June 2026*, (2020) online (pdf): <http://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Calendar.pdf>.

# 8. OTHER ISSUES

## 8.1 Role of Discretion in Public Procurement

The degree to which discretion should be regulated is a key issue facing governments in designing effective procurement systems. Although discretion leaves space for corruption, some discretion is required in order to ensure that the best bid—not just the lowest—is selected. The need for discretion generally increases with the complexity of the project and the number of factors to consider. Italian economist Gustavo Piga, describes some of the problems associated with strict regulation of discretion:

> Reducing discretion has other drawbacks that are seldom considered in the fight against corruption. First, rigid procedures may shield procurement officials/politicians from responsibility for poor performance and failures ('not my fault, the rules' fault), while favoritism may be hidden by a wall of complex procedural rules. Second, if the agent is competent, discretion offers valuable flexibility, especially in complex procurement situations.[324]

Instead of removing discretion, holding officials accountable for defects in the procurement process may be viewed as a more efficient way of reducing corruption.[325] At a deeper level, creating a culture of integrity within government institutions is essential, though this cannot be achieved through laws and regulations alone.

## 8.2 Role of Technology in Combatting Corruption in Public Procurement

Technology is increasingly being viewed as an important tool for combatting corruption in public procurement. TI describes the use and potential of technology to reduce corruption in public procurement as follows:

> Information and communication technologies have been increasingly used by governments across the world as part of procurement reform processes. This so-called e-procurement, defined as "the use of any internet-based inter-organisational information system that automates and integrates any parts of procurement process in order to improve efficiency, transparency and accountability in the wider public sector" (Vaidya 2007) has been used by governments to conduct procurement-related tasks, such as the acquisition of goods and services, and the allocation of contracts to bidders (Neupane et al. 2014).
>
> There are several types of e-procurement, including e-tendering, e-auctions, and contract management databases (OECD 2011). Each of them aims to

[324] Gustavo Piga, "A Fighting Chance Against Corruption in Public Procurement?" in Rose-Ackerman & Søreide, *supra* note 25, 141 at 152.
[325] Ariane Lambert-Mogiliansky & Konstantin Sonin, "Collusive Market-Sharing and Corruption in Procurement" (2006) 15:4 J Econ Manage Strategy 883 at 900.

address issues that are also seen as problematic from a corruption risk perspective in the different stages of the procurement process, namely, (i) contracting process, covering the initial needs assessment, budget allocation and initial market research through to the preparation of the tender, and (ii) evaluation of applications and (iii) award of contracts.

…

The literature highlights several benefits of e-procurement, including: improvements in market access and competition, promotion of integrity, reduction of costs of information, easy access to information, and increased transparency and accountability, among others. With regard to corruption, Schapper (2007) stresses that "the strength of e-procurement in the anti-corruption agenda arises from this capacity to greatly reduce the cost and increase the accessibility of information as well as automate practices prone to corruption".

Nevertheless, the extent to which the use of technology in public procurement will de facto lead to less corruption and more accountability depends on a series of other factors, including a clear legal framework on public procurement that supports the e-procurement vision and objectives, effective training to both public officials and business, public awareness initiatives to develop civic oversight, as well as, strong oversight and law enforcement bodies that make use of the information available to investigate and punish corruption and mismanagement throughout the procurement process.

The establishment of an e-procurement system as a stand-alone reform is unlikely to bring about positive transformational results. Transparency and accountability must be built into e-procurement specifications and design in order to allow for a meaningful analysis of the information generated. For example, e-procurement should allow for the generation of meaningful management and audit reports, and the tracking of actions and decisions of individuals throughout the procurement cycle (Schapper 2007).

Within this framework, when well designed and implemented, e-procurement in the public sector usually enhances transparency and it has the potential to increase accountability and minimise the risks of corruption (OECD 2008).[326]

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[326] Transparency International, *The Role of Technology in Reducing Corruption* in *Public Procurement,* (28 August 2014) at 2–3, online (pdf): <https://knowledgehub.transparency.org/assets/uploads/helpdesk/The_role_of_technology_in_reducing_corruption_in_public_procurement_2014.pdf>. See also Arjun Neupane et al, "Role of Public E-Procurement Technology to Reduce Corruption in Government Procurement" (Paper delivered at the 2012 International Public Procurement Conference, 17–19 August, Seattle, Washington), online (pdf): <https://eprints.usq.edu.au/21914/1/Neupane_Soar_Vaidya_Yong_PV.pdf>; "The Potential of Fighting Corruption Through Data Mining" (9 January 2015), online (blog): *Transparency International* <https://blog.transparency.org/2015/01/09/the-potential-of-fighting-corruption-through-data-mining/>.

As an illustration of recent efforts to use new technologies to combat corruption, in June 2020, the World Economic Forum published a report exploring the use of blockchain technology as a means of reducing corruption in public procurement.[327] As this report describes, blockchain is an open, distributed ledger that can record transactions in a verified and permanent way. This technology "provides the unique combination of permanent and tamper-evident record-keeping, transaction transparency and auditability, automated functions with 'smart contracts', and the reduction of centralized authority and information ownership within processes. These properties make blockchain a high-potential emerging technology to address corruption."[328] The report reaches the following conclusions about blockchain's potential to provide "technologically induced sunlight" in public procurement processes:

> Overall, blockchain-based e-procurement systems provide unique benefits related to procedural transparency, permanent record-keeping and honest disclosure. However, blockchain technology also presents certain challenges, most notably scalability and vendor anonymity. A blockchain-based solution is also unable to reduce corruption risk in certain human activities that can occur outside the electronic procurement system, most notably bribery or collusion among vendors or between vendors and tenderers. Given the challenges and limitations, the case for a blockchain-based e-procurement system is ambiguous and depends most on the specific country context, institutional goals and the technology's design, configuration and implementation.[329]

While technology offers a potentially powerful tool for enhancing transparency and combatting corruption in public procurement, it is no panacea. It is just one aspect of a sound public procurement system.

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[327] World Economic Forum, *Exploring Blockchain Technology for Government Transparency: Blockchain-Based Public Procurement to Reduce Corruption*, (June 2020), online (pdf): <http://www3.weforum.org/docs/WEF_Blockchain_Government_Transparency_Report.pdf>.

[328] *Ibid* at 4.

[329] *Ibid* at 35. See also Carlos Santiso, "Will Blockchain Disrupt Government Corruption?", *Stanford Social Innovation Review* (5 March 2018), online: <https://ssir.org/articles/entry/will_blockchain_disrupt_government_corruption>.

CHAPTER 13

# WHISTLEBLOWER PROTECTIONS

VICTORIA LUXFORD*

* Victoria Luxford thanks Gerry Ferguson for his supervision and additions to this chapter, especially its first version. She also thanks Professor Komarov for his various suggestions for this chapter. Section 7.3 on the Ontario Security Commission's Whistleblower Program was written by Jeremy Henderson for the 2018 edition and has been updated by Victoria Luxford for this 2022 version.

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

# 1. INTRODUCTION

Whistleblowing is one method of uncovering corruption in public and private sector organizations. Indeed, whistleblowing may be seen as "among the most effective … means to expose and remedy corruption, fraud and other types of wrongdoing in the public and private sectors."[1] Transparency International (TI) cites whistleblowing as one of the key triggers for effective corruption investigations.[2] Examples of prominent whistleblowers include Dr. Jiang Yanyong in China, who blew the whistle on the spread of the SARS virus contrary to explicit orders, and Allan Cutler in Canada, who "disclosed suspicions of fraud that led to the revealing of millions of misspent public funds in a sponsorship scandal, leading to the defeat of the Liberal party in the 2006 elections."[3] More recently, Dr. Li Wenliang in China has made headlines as a whistleblower for attempting to warn others of a "disease that looked like Sars"[4]—which would soon spread throughout the world in the COVID-19 pandemic. Whistleblowers can thus play pivotal roles in promoting political accountability and protecting public health and safety.

However, the benefits of whistleblowing can only be reaped if effective legal regimes are in place to safeguard reporting persons from retaliation, and to ensure that the appropriate parties act upon the disclosures in a timely and efficient manner. In the past 15–20 years, the need to enact and enforce whistleblowing laws has become one of the most prominent issues, nationally and internationally, in the global fight against corruption. The call for effective whistleblowing laws has gathered steam in international conventions against corruption, and a number of countries have responded by creating new whistleblower laws or improving their existing whistleblower laws.[5]

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[1] Simon Wolfe et al, *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* (BluePrint for Free Speech, October 2015) at 1, online (pdf): <https://www.blueprintforfreespeech.net/s/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf>. See also Kristine Artello & Jay S Albanese, "Rising to the Surface: The Detection of Public Corruption" (2020) 21:1 Criminology, Crim Just L & Society 1 at 7-8.

[2] Transparency International (TI), *Whistleblower Protection and the UN Convention Against Corruption*, (Berlin: TI, 2013) at 2, online: <http://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption>.

[3] David Banisar, "Whistleblowing: International Standards and Developments" in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (Washington, DC: World Bank, Institute for Social Research, UNAM, 2011) at 6–7, online: <http://ssrn.com/abstract_id=1753180>.

[4] "Li Wenliang: 'Wuhan whistleblower' remembered one year on", *BBC News* (7 February 2021), online: <https://www.bbc.com/news/world-asia-55963896>.

[5] Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Cheltenham: Edward Elgar, 2012) at 243. For a global overview of whistleblowing laws and their effectiveness through whistleblower protection litigation, see: Samantha Feinstein et al, *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation*, (London: Government Accountability Project/International Bar Association, 2021), online (pdf): <https://cfe.ryerson.ca/sites/default/files/Are%20Whistleblowing%20laws%20working%20REPORT_02March21.pdf>.

This chapter will set out international obligations concerning whistleblower protection, then identify best practices, and finally explore the current state of public sector whistleblower protection primarily in the United States, United Kingdom, and Canada.

## 2. WHAT IS WHISTLEBLOWING?

One of the most widely used academic definitions of whistleblowing originated in an article by Marcia Miceli and Janet Near in 1985. They defined "whistleblowing" as "the disclosure by organization members (former or current) of the illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action."[6] This definition focuses only on the act of disclosure, rather than on whistleblowing as a process that needs to be examined before, during, and after disclosure. Many academics have now embraced broader conceptions of whistleblowing. David Banisar, for example, "treats whistleblowing as a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms."[7] In their study on public sector whistleblowing in Norway, Marit Skiveness and Sissel Trygstad identify several problems with Miceli and Near's narrow definition of whistleblowing, and they advocate for a bifurcated definition which recognizes whistleblowing as a process:

> [W]e suggest a distinction between weak and strong whistle-blowing. We see the general definition of Miceli and Near as the first step in the whistle-blowing process, and we define this as 'weak whistle-blowing'. 'Strong whistle-blowing' focuses on *process* and on cases where there is no improvement in, explanation for, or clarification of the reported misconduct from those who can do something about it. [8]

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[6] Janet P Near & Marcia P Miceli, "Organizational Dissidence: The Case of Whistle-Blowing" (1985) 4 J Bus Ethics 1 at 4. Reasons for adopting this definition are discussed by Rodney Smith in "The Role of Whistle-Blowing in Governing Well: Evidence from the Australian Public Sector" (2010) 40:6 Am Rev Pub Admin 704 at 708, and include maintaining consistency with how whistleblowing has been defined by governments (including its definition within legislation), maintaining consistency with other academic work, and using a definition "that allows for a wide range of propositions about whistle-blowing to be tested."

[7] Banisar, *supra* note 3 at 4.

[8] Marit Skivenes & Sissel C Trygstad, "When Whistle-Blowing Works: The Norwegian Case" (2010) 63:7 Hum Relations 1071 at 1077; the three problems that the authors identify with Miceli and Near's definition, in the context of their study, are:

> whistle-blowing concerns all forms of communication where critical voices are raised about wrongdoing in the presence of someone who can stop the misconduct[,] … the definition rests on employees' assessments of illegitimate, immoral and/or illegal situations and can thus cover many types of misconduct … [and] empirically, the definition does not seem to grasp how Norwegian employees and managers collaborate, nor how Norwegian working life is structured.

Thus, when whistleblowing is examined as a process it necessitates laws or policies that provide a clear description: (1) of what types of perceived wrongdoing should be disclosed, (2) to whom such disclosures should be made initially and subsequently (if the initial disclosure does not prompt an investigation), (3) how and by whom the alleged wrongdoing should be investigated, (4) the mechanisms and procedures that are in place to encourage persons to disclose wrongdoing while protecting the whistleblower from any disciplinary action or adverse consequence for reporting the wrongdoing, and (5) the steps to be taken if adverse consequences are, or appear to be, imposed on the whistleblower.

The question of what laws and practices produce the best whistleblowing regime is not one that is susceptible to a single answer. Section 4 of this chapter will review some features of whistleblowing regimes that arguably lead to more successful results. As will be seen, to be effective whistleblower laws must be examined in the overall context of a country's legal and political sophistication, as well as its social and economic realities.

## 3. INTERNATIONAL LEGAL FRAMEWORK

This section will briefly review existing regional and global treaties against corruption with mandates in regard to whistleblowing laws for member states. As will be seen, the standards for whistleblowing laws contained within these international agreements are generally rather weak and lacking in detail.

### 3.1 UNCAC

Article 33 of UNCAC provides for the protection of reporting persons (i.e., whistleblowers):

> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.[9]

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See also Björn Fasterling, "Whistleblower Protection: A Comparative Law Perspective" in AJ Brown et al, eds, *International Handbook on Whistleblowing Research* (Cheltenham: Edward Elgar, 2014) 331 at 334 for a critique of Miceli and Near's definition. The author argues:

> [The] definition is problematic because rather than disclosing illegal, immoral or illegitimate practices, the whistleblower discloses information that he or she believes will provide evidence or at least a substantiated indication of illegal, immoral or illegitimate practice. The disclosure can under no circumstances be independent of the whistleblower's own subjective judgment.

[9] *United Nations Convention Against Corruption*, 31 October 2003, I-42146 (entered into force 14 December 2005) [UNCAC], art 33.

The above Article is meant to cover individuals with "information that is not sufficiently detailed to constitute evidence in the legal sense of the word."[10] However, Article 33 is optional, not mandatory. A state need only "consider" adopting "appropriate measures" to protect whistleblowers, and the provision only provides protection from "any unjustified treatment" to those who acted "in *good faith* and on *reasonable grounds*" [emphasis added]. Thus, a State Party is free to deliberate, and then simply decide not to adopt any reporting protections.[11] Even with its obvious weaknesses, the protections offered under this section represent an expansion of previously recognized protections, and the UN in supporting documents has encouraged ratifying states to enact robust whistleblowing regimes under Article 33:

> The UN Office on Drugs and Crime's "Anti-Corruption Toolkit" notes that Article 33 is an advancement from previous agreements such as the 2000 Convention against Transnational Organized Crime which only protects witnesses and experts. The Toolkit extensively covers whistleblowing and recommends legal and administrative measures for reporting and protection including compensation, the creation of hotlines, and limits on libel and confidentiality agreements.[12]

In comparison, Article 32 of UNCAC provides for mandatory protection of witnesses, experts, and victims: it dictates that states "shall take appropriate measures … to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them."[13] Unfortunately, this mandatory protection does not protect whistleblowers from retaliation or intimidation unless they are "witnesses or victims" to the wrongdoing and they give "testimony" in the prosecution of wrongdoers. Most potential whistleblowers do not fall into this narrow group. Moreover, the ultimate objectives of whistleblowing laws are not simply to assist in the prosecution of an alleged wrongdoer, but also to play a preventative role. As TI observed, "the ideal situation is where a whistleblower raises concerns in time so that action can be taken to prevent any offence."[14]

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[10] United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons - Whistleblower Protection* (Vienna: UN, 2015) [UN Good Practices] at 6, online (pdf): <https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf>.

[11] Björn Fasterling & David Lewis, "Leaks, Legislation and Freedom of Speech: How Can the Law Effectively Promote Public-Interest Whistleblowing?" (2014) 153:1 Intl Labour Rev 71 at 76. The authors also suggest, at 76, that limiting protection in Article 33 to those who have "reasonable grounds" may be an unnecessary limitation of whistleblower protection: "It almost goes without saying that in some situations it will be difficult to distinguish between strong suspicions and reasonable grounds."

[12] Banisar, *supra* note 3 at 13.

[13] UNCAC, *supra* note 9, art 32.

[14] TI, *supra* note 2 at 6.

Articles 32 and 33 are integral to the overall effectiveness of UNCAC. In fact, Marco Arnone and Leonardo Borlini argue that these provisions are essential to meeting all other objectives within UNCAC:

> Articles 32 and 33 … address the protection of witnesses, thereby complementing efforts regarding the prevention of public and private corruption, obstruction of justice, confiscation and recovery of criminal proceeds, as well as cooperation at the national and international levels. Even though the aim is far from easy to achieve, the underlying rationale is obvious: unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives of the Convention could be undermined.[15]

Without the protection offered in these provisions, countries attempting to operationalize UNCAC would be unnecessarily hobbled by difficulties in uncovering, investigating, and resolving corruption issues.

In 2017, the Corruption and Economic Crime Branch of the United Nations Office on Drugs and Crime (UNODC) released the *State of implementation of the United Nations Convention against Corruption*, a comprehensive analysis of the implementation of certain chapters of UNCAC.[16] This flagship study found that there was

> considerable variation among States parties with regard to the implementation of article 33 … [m]ore than two thirds of States parties have not established comprehensive whistle-blower protection measures or were found to be only partially in compliance with the provision under review, although legislation was pending in a significant number of cases.[17]

Particular challenges reported in respect of Articles 32 and 33 were as follows:

> The main challenge in respect of the implementation of article 32 is that of addressing inadequate normative frameworks and, in some States parties, the complete absence of comprehensive measures or programmes for the protection of witnesses, experts and victims, as well as their relatives or associates. This is explained by the significant costs of such programmes, limited awareness of state-of-the-art measures and practices for witness and expert protection, specificities of the national legal systems (including sometimes the small size or geographical isolation of the country), weak inter-agency coordination and limited capacities (e.g., in terms of human resources and technological and institutional infrastructure). A further

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[15] Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Cheltenham: Edward Elgar, 2014) at 429.

[16] UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed, COSP, 7th Sess, (Vienna: UN, 2017), online: <https://www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementation.html>.

[17] *Ibid* at 152.

> challenge concerns the non-application of existing measures in practice, owing to the novelty of witness protection laws and methods, lack of instructions and regulations for their implementation and lack of experience in running the relevant programmes. It was noted that most States parties have not entered into relocation agreements with other States parties, in some cases because of the alleged high complexity of such an operation. Finally, many States parties do not have provisions in place to enable the presentation and consideration of the views and concerns of victims.
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> …
>
> The challenges reported as relevant to the implementation of article 33 are much the same as those related to witness protection. Additionally, the need was emphasized for carrying out ancillary programmes to raise awareness on the importance of disclosing acts of corruption, the reporting mechanisms and the means of protection available to whistle-blowers. This would facilitate the practical application of laws on the protection of whistle-blowers. Further suggested ancillary measures include the provision of financial incentives for whistle-blowers, the creation of institutionalized whistle-blower protection policies within companies, and the establishment of independent bodies specifically responsible for implementing the domestic public interest disclosure and whistle-blower protection policies.[18]

## 3.2 OECD Convention

The OECD Convention itself does not specifically include provisions on whistleblowing. Nevertheless, various subsequent OECD instruments encourage the adoption of whistleblower protections. For example, in 1998 the OECD issued a *Recommendation on Improving Ethical Conduct in the Public Service*. That recommendation stated that transparency and accountability in the decision-making process should be encouraged through "measures such as disclosure systems and recognition of the role of an active and independent media."[19] That recommendation was abrogated and replaced by the *Recommendation of the Council on Public Integrity*, which was adopted in 2017.[20] This states that to "cultivate a culture of public integrity,"[21] adherents should, among other things:

> 9. Support an **open** organisational culture within the public sector responsive to integrity concerns, in particular through:

[18] *Ibid* at 152 and 157.
[19] OECD, Public Governance Committee, *Recommendation on Improving Ethical Conduct in the Public Service*, C(98)70/FINAL (1998).
[20] OECD, *Recommendation of the Council on Public Integrity*, OECD/LEGAL/0435 (2017), online: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0435#dates>.
[21] *Ibid.*

> a) encouraging an open culture where ethical dilemmas, public integrity concerns, and errors can be discussed freely, and, where appropriate, with employee representatives, and where leadership is responsive and committed to providing timely advice and resolving relevant issues;
>
> b) providing clear rules and procedures for reporting suspected violations of integrity standards, and ensure, in accordance with fundamental principles of domestic law, protection in law and practice against all types of unjustified treatments as a result of reporting in good faith and on reasonable grounds[;]
>
> c) providing alternative channels for reporting suspected violations of integrity standards, including when appropriate the possibility of confidentially reporting to a body with the mandate and capacity to conduct an independent investigation[.][22]

Further, to "enable **effective accountability**,"[23] adherents should "[a]pply an internal **control and risk management** framework to safeguard integrity in public sector organisations, in particular through … ensuring control mechanisms are coherent and include clear procedures for responding to credible suspicions of violations of laws and regulations, and facilitating reporting to the competent authorities without fear of reprisal."[24]

The 2003 *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service* stipulates that states ought to "[p]rovide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused."[25] The 2009 *Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* similarly recommends that member states should put in place "easily accessible channels … for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles."[26] The 2019 *Recommendation of the Council on Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises* specifically addresses reporting persons and provides, in part:

> High standards of conduct should be applied to the state, setting an example for conduct in SOEs and exhibiting integrity to the public as the

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[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] OECD, *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service,* (June 2003) at 12, online (pdf): <http://www.oecd.org/governance/ethics/2957360.pdf>.
[26] OECD, Working Group on Bribery, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, (26 November 2009) at IX, online (pdf): <www.oecd.org/daf/anti-bribery/44176910.pdf>.

> ultimate owner. To this end, representatives of the ownership entity and others responsible for exercising ownership on behalf of the state should:
>
> …
>
> Have clear rules and procedures for reporting concerns about real or encouraged illegal or irregular practices that come to their notice in the performance of their ownership functions. Procedures should include, as needed and where appropriate, reporting to competent authorities that are removed from the ownership function and that have the mandate and capacity to conduct investigations free from undue influence. Those reporting concerns should be protected in law and in practice against all types of unjustified treatments as a result.
>
> …
>
> The state should, without intervening in the management of individual SOEs, take appropriate steps to encourage integrity in SOEs, expecting and respecting that SOE boards and top management promote a "corporate culture of integrity" throughout the corporate hierarchy through, *inter alia*: (i) a clearly articulated and visible corporate policy prohibiting corruption; (ii) facilitating the implementation of applicable anti-corruption and integrity provisions through strong, explicit and visible support and commitment from boards and management to internal controls, ethics and compliance measures (hereafter referred to as "integrity mechanisms"); (iii) encouraging an open culture that facilitates and recognises organisational learning, and encourages good governance and integrity and protects reporting persons (also known as "whistleblowers"), and; (iv) leading by example in their conduct.
>
> …
>
> Encouraging the establishment of clear rules and procedures for employees or other reporting persons to report concerns to the board about real or encouraged illegal or irregular practices in or concerning SOEs (including subsidiaries or business partners). In the absence of timely remedial action or in the face of a reasonable risk of negative employment action, employees are encouraged to report to the competent authorities. They should be protected in law and practice against all types of unjustified treatments as a result of reporting concerns.[27]

Recommendations such as these show a recognition of the important role that whistleblowers can play in reducing corruption in the public service and in business. Finally, the OECD publication *Committing to Effective Whistleblower Protection* refers to protection of

[27] OECD, *Recommendation of the Council on Guidelines on Anti-Corruption and Integrity in State Owned Enterprises*, OECD/LEGAL/0451 (2019), online: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0451>.

whistleblowers as the "ultimate line of defence for safeguarding the public interest,"[28] and identifies areas of reform for whistleblower protection frameworks in OECD countries. However, as Arnone and Borlini note, the whistleblower protections in OECD member states are far from uniform.[29]

## 3.3 Other Regional Conventions and Agreements

References to whistleblower protection can be found in a number of other regional conventions and agreements. For example, the first inter-governmental agreement to tackle whistleblower protection was the Inter-American Convention against Corruption. This Convention came into force on March 6, 1997, under the purview of the Organization of American States, a group of 35 member states in the Americas (including Canada and the US) formed in 1948.[30] The Convention suggests that signatories consider introducing or

[28] OECD, *Committing to Effective Whistleblower Protection*, (Paris: OECD Publishing, 2016), online: <http://www.oecd.org/corruption-integrity/reports/committing-to-effective-whistleblower-protection-9789264252639-en.html>.

[29] See Arnone & Borlini, *supra* note 15 at 424. They state:

> Whistleblower protection is seen as a horizontal issue which confronts its Member States. In its Report the WGB has engaged rather frequently with the issue. For instance:
>
> > The Phase 3 report on the UK points out that the law does not apply to nationals working abroad on contracts made under a foreign law. The Phase 3 report on South Korea cited the enactment of the 2011 law as an important development, since the law extends protective measures to private-sector employees who report foreign bribery cases. The Phase 3 report on Japan noted the requirement for a review of its 2004 law after approximately five years. As the Act came into force in 2006, the review took place in March 2011. It was conducted by the Consumer Commission—made up of representatives from academia, the business community, the legal profession, media, etc. They concluded there was no need to amend the Act but that, due to the insufficiency of legislative information for the review, further research was recommended. The Phase 2 report on Chile notes the 2007 law establishing whistleblower protection in the public sector, encourages the authorities to expand it to state companies, and recommends that Childe enhance and promote the protection of private- and public-sector employees. According to the 2009 follow-up report of the recommendations of the Phase 2 report, this recommendation has been only partially implemented. See TI (2013:21).

For an in-depth illustration of the OECD follow-up mechanism see Chapter 16 of Arnone & Borlini, *supra* note 15. The OECD report, *Government at a Glance 2017* ((Paris: OECD Publishing, 2017) at 121, online: <http://www.oecd-ilibrary.org/governance/government-at-a-glance-2015_gov_glance-2015-en>) states that 88% of member countries have whistleblower protection laws. Out of 26 respondent countries to the OECD's survey, all have protections in place for public sector employees, while eight do not for private sector employees. One third of respondents provide incentives to whistleblowers. See the report at 120-121 for more detailed data.

[30] "Who We Are" (last visited 1 February 2021), online: *Organization for American States* (OAS) <http://www.oas.org/en/about/who_we_are.asp>. For information on signatories and ratification, see

strengthening whistleblower protections within their own legal and institutional systems as a means of preventing corruption: Article III, section 8, provides that "state parties agree to *consider* the applicability of measures … [and] systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems" [emphasis added].[31] The whistleblower provision is thus optional, not mandatory. The agreement emphasizes the role that each signatory's domestic legal context would play in the creation and maintenance of an effective whistleblower protection scheme. However, apart from Canada, the US and Peru, Arnone and Borlini reported that as of 2014, the other OAS Convention members have nonexistent, or weak, whistleblower laws.[32] A March 2020 Report of the *Mechanism for Follow-Up on the Implementation of the Inter-*

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"Signatories and Ratifications B-58: Inter-American Convention Against Corruption" (last visited 1 February 2021), online: *Organization of American States* <http://www.oas.org/juridico/english/sigs/b-58.html>.

[31] *Inter-American Convention Against Corruption*, 29 March 1996, OAS Treaties Register B-58 (entered into force 6 March 1997), art III, point 8. The full text of the Convention can be found at "Inter-American Convention Against Corruption" (last visited 1 February 2021), online: *OAS* <http://www.oas.org/juridico/english/treaties/b-58.html>.

[32] Arnone & Borlini, *supra* note 15 at note 9, state:

> As detailed in Chapter 16 of this book, the Implementation of the Convention is overseen by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). The reports show that apart from Canada, the US and Peru, most OAS countries do not have specific whistleblower laws, but most have some protection for whistleblowers contained in criminal laws, procedural laws or labor laws. There is also a smaller group of countries without regulation on the subject. Reports frequently recommend measures of protection for whistleblowers where they are considered incomplete (e.g., Argentina, Brazil, Chile, Nicaragua, and Trinidad and Tobago). The latest reports on Bolivia and Paraguay call for the implementation of whistleblower systems, which have been enacted, but then left aside. The report finds that in Bolivia whistleblowers are often persecuted. On the other hand, Costa Rica argues that no whistleblower system is necessary as, surprisingly, there have never been any reprisals against whistleblowers. Notably, in 2010 the OAS agreed [to create] a model whistleblower law. This model law was updated and approved by the OAS Anti-Corruption Mechanism on 19 March 2013.

The model law in question can be found at OAS, *Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses,* Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, 21st meeting, SG/MESICIC/doc345/12 rev 2, (March 2013), online (pdf): <http://www.oas.org/juridico/PDFs/model_law_reporting.pdf>. However, there are problematic aspects of this model law. For example, firstly, the "law" appears to resemble an agreement (both stylistically and substantially) more than it does a model of legislation, and it is unclear how this "model" could easily be adopted by OAS countries that want to implement legislation. Secondly, the model law (at Article 8) imposes a positive obligation on "[a]ny person having knowledge of an act of corruption" to report to the appropriate authorities. It is unclear how such an obligation could be effectively introduced or enforced, especially if protection against reprisals continues to be weak or nonexistent. Finally, many of the provisions are vague, and it is unclear how the legislative goals will be met: Article 16, for example, states that "[p]rotection for persons reporting acts of corruption must

*American Convention against Corruption* (*MESICIC*) lists, among the most common recommendations with regard to the provisions reviewed in the second round, a number of recommendations related to Article III, section 8. These include, *inter alia*, "[e]stablish mechanisms to protect all whistleblowers and their families, not only their physical integrity, but also to provide protection in the workplace, especially when the person is a public official and the acts of corruption involve his superior or co-workers" and "[e]stablish mechanisms for reporting, such as anonymous reporting or protection of identity reporting, that guarantee the personal security and the confidentiality of the identity of public servants and private citizens who in good faith report acts of corruption."[33]

On the other hand, at least one regional Convention "requires" state members to have whistleblowing laws. The Council of Europe, a human rights organization with 47 member states (of which 27 belong to the European Union), produced the Council of Europe Civil Law Convention on Corruption, which came into force on November 1, 2003.[34] Article 9 states: "Each Party *shall provide* in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities" [emphasis added].[35] The Council of Europe has also adopted Recommendation CM/Rec(2014)7 of the Committee of Ministers to member states on the protection of whistleblowers, which "sets out a series of principles to guide member states when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems."[36]

Another regional agreement is the *Anti-Corruption Action Plan for Asia and the Pacific*, which was created out of the joint efforts of the Asian Development Bank and the OECD. It was

safeguard their physical and psychological integrity and that of their family group, their property, and their working conditions, which could possibly be threatened as a result of their reporting an act of corruption." While the model law goes on to suggest that this may involve legal advice, confidentiality, protection from dismissal, or even police protection, there is little indication of how such broad goals will be operationalized within OAS countries.

[33] OAS, *Hemispheric Report of the Fifth Round of Review*, Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, 34th meeting, SG/MESICIC/doc 564/20 rev 1, (March 2020) at 72, online (pdf): <https://www.oas.org/en/sla/dlc/mesicic/docs/mesicic_inf_hem_final_5_ronda_ing.pdf>.

[34] "Who We Are" (last visited 1 February 2021), online: *Council of Europe* <http://www.coe.int/en/web/about-us/who-we-are>. For a list of signatories to *the Civil Law Convention on Corruption*, see "Chart of Signatures and Ratifications of Treaty 17" (last updated 8 August 2021), online: *Council of Europe* <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/181?module=signatures-by-treaty&treatynum=174>.

[35] *Council of Europe Civil Law Convention on Corruption*, 4 November 1999, Eur TS 173 (entered into force 2002), art 9. The full text of the Convention can be found at "Details of Treaty No.174" (last visited 1 February 2021), online: *Council of Europe* <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

[36] Council of Europe, Committee of Ministers, *Protection of Whistleblowers*, Recommendation CM/Rec(2014)7 and Explanatory Memorandum (adopted on 30 April 2014) at 6, online (pdf): <https://rm.coe.int/16807096c7>.

endorsed on November 30, 2001.[37] Pillar 3 of the action plan specifically identifies the protection of whistleblowers as a critical element in encouraging public participation in combating corruption.[38] However, the provisions of the action plan are not mandatory: under Implementation, the action plan states that "[i]n order to implement these three pillars of action, participating governments of the region concur with the attached Implementation Plan and will *endeavour to comply* with its terms" [emphasis added].[39]

Two examples involve organizations in African countries. First, the African Union is made up of the majority of African states and was launched in 2002.[40] The Preamble to the 2003 African Union Convention on Preventing and Combating Corruption recognizes the serious detrimental effects that corruption has on the stability of African states, as well as people in Africa.[41] It recognizes the potential of whistleblowing as a corruption prevention mechanism, and seems to have a scope wide enough to encompass ordinary citizens within its protection. The language of these provisions is mandatory—State Parties *undertake* to:

> 5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
>
> 6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.
>
> 7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.[42]

It should be noted that clause 5 on protection of informants and witnesses requires "legislative" measures, while clause 6 on protection of citizens who report corruption from fear of reprisals does not require "legislative" measures and is satisfied if a state implements

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[37] "3rd regional Anti-Corruption Conference for Asia and the Pacific" (last visited 1 February 2021), online: *OECD* <http://www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/3rdregionalanti-corruptionconferenceforasiaandthepacific.htm>.

[38] Asian Development Bank/OECD Anti-Corruption Initiative for Asia and the Pacific, *The Anti-Corruption Action Plan for Asia and the Pacific,* (Tokyo: OECD, 2001) at Pillar 3, online (pdf): <http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf>. Countries endorsing the Action Plan can be found at 1.

[39] *Ibid* at 5.

[40] "AU in a Nutshell" (last visited 1 February 2021), online: *African Union* <https://au.int/en/au-nutshell>.

[41] *African Union Convention on Preventing and Combating Corruption,* 11 July 2003, 43 ILM 5 (entered into force 5 August 2006) [*AUCPCC*], online (pdf): <https://www.legal-tools.org/uploads/tx_ltpdb/AfricanUnionConventiononPreventingandCombatingCorruption_11-07-2003__E__04.pdf>.
The AUCPCC Preamble emphasizes the negative consequences of corruption in Africa: "Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples."

[42] *Ibid*, art 5. Arnone & Borlini, *supra* note 15 at 425, argue that, although the language is obligatory, "no particular penalizing scheme can be inferred for failure to comply with these requirements."

some form of non-legislative protective measures. In addition, as Arnone and Borlini argue, clause 7 may act as a deterrent to truthful whistleblowers, since it is wide enough to punish honest whistleblowers who "reasonably" suspect corrupt behaviour, which on further investigation is not proven.[43] Finally, the effectiveness of the convention is weakened by the fact that there is no credible enforcement or evaluation mechanism: each state simply self-reports on its convention compliance.[44]

Second, the South African Development Community is composed of 15 member states in the southern region of Africa. The 2001 *Southern African Development Community Protocol Against Corruption*, Article 4, encourages the creation and maintenance of "systems for protecting individuals who, in good faith, report acts of corruption."[45] This provision, like that of the African Union Convention, contains mandatory language.[46] Furthermore, both of these documents contain strongly worded provisions denouncing individuals who make false reports.[47] This is problematic because it may have a chilling effect on information disclosures:

> Such provision, the aim of which is to prevent a misuse of the Convention itself, might paradoxically well result in a general impasse of the investigation. What is more, in many countries the menace of such punishment is an effective deterrent to truthful whistleblowers who expose the guilty.[48]

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[43] Arnone & Borlini, *supra* note 15 at 425-426.

[44] *AUCPCC*, *supra* note 41, art 22(7). Kolawole Olaniyan, "The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal" (2004) 4 Afr Hum Rts LJ 74 at 76, states that "the Convention lacks any serious, effective or meaningful mechanism for holding states accountable for the obligations they assume under it, or for resolving disputes among State Parties, including a potential claim by one party that another is failing to properly carry out its obligations." However, Lucky Bryce Jatto Jnr, in "Africa's Approach to the International War on Corruption: A Critical Appraisal of the *African Union Convention on Preventing and Combating Corruption*" (2010) 10 Asper Rev Intl Bus & Trade L 79 at 93-94, suggests that the Advisory Board (created pursuant to Article 22(1)) could, potentially, exert some influence over effectively reviewing and encouraging development of anti-corruption policies, through its power to create its own rules of procedure:

> [U]nlike the practice with most peer-review monitoring mechanisms, which rely to some extent on 'country self-assessments based on a questionnaire' and allow room for subjective and unreliable results, the AU Advisory Board receives annual reports on the progress made in the implementation of the *AU Convention* from the *independent* national anti-corruption authorities or agencies created pursuant to the *AU Convention* by the State Parties. In addition, given its mandate to 'build partnerships,' the AU Advisory Board may invite submissions from civil society and private sector organizations.

[45] *Protocol Against Corruption*, Southern African Development Community, 14 August 2001 (entered into force 6 August 2003) [*SADCPAC*], art 4 , online (pdf): <http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf>.

[46] *Ibid*, art 4: "each State Party *undertakes* to adopt measures".

[47] *Ibid.* Article 4(1)(f) of *SADPAC* suggests that there should be "laws that punish those who make false and malicious reports against innocent persons." The *AUCPCC*, *supra* note 41, art 5, clause 7, has almost identical requirements.

[48] Arnone & Borlini, *supra* note 15 at 426.

The potential chilling effect of denouncing those who make false reports, coupled with the lack of oversight and monitoring of ratification and enforcement, makes it unlikely that these agreements will have any significant influence in causing member states to create effective whistleblower protection regimes.

Finally, although not a regional agreement *per se*, the European Union—the political and economic union of 27 member states in the European region—in 2019 issued Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the Protection of Persons Who Report Breaches of Union Law (the Whistleblower Directive).[49] It came into force on December 16, 2019. The recitals acknowledge the "fragmented" state of whistleblower protection in the EU. The Whistleblower Directive sets out minimum standards for the protection of persons reporting breaches of EU law (Article 1), and defines the material scope to which it applies (Article 2). It addresses, among other things, both internal and external reporting (chapters II and III), as well as public disclosures (chapter IV). EU member states are required to bring into force the laws, regulations, and administrative provisions necessary to comply with the Whistleblower Directive by December 17, 2021 (Article 26).

# 4. "BEST PRACTICES" IN WHISTLEBLOWER PROTECTION LEGISLATION

## 4.1 Limitations of Best Practices

Various organizations and academics have developed suggestions for "best practices" and standards for whistleblower protection legislation. These best practices are suggestions as to how to most effectively draft whistleblower legislation and they provide ideas for countries attempting to develop or improve whistleblower legislation.[50] By way of an important introductory observation, Paul Latimer and AJ Brown note that effective whistleblower protection can only exist in a democratic society that values accountability and transparency; in other words, "[a] precondition for whistleblower laws is the rule of law, including an independent legal system and independent judiciary."[51] This precondition will be met in varying degrees from country to country. In a similar vein, the efficacy of whistleblower protection will be dependent not only on what is found within the four

[49] EC, *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons who Report Breaches of Union Law*, [2019] OJ, L 305/17 [EC Directive].

[50] The role of best practices was highlighted by TI, which suggests that UNCAC implementation reviews ought to provide special guidance regarding the implementation of Article 33, which "should take into consideration material developed by other institutions such as the TI 'International Principles for Whistleblower Legislation' as well as best-practice materials, guiding principles and model legislation produced by the Organisation for Economic Co-operation and Development (OECD), Organization of American States (OAS) and others": TI, *supra* note 2 at 5.

[51] Paul Latimer & AJ Brown, "Whistleblower Laws: International Best Practice" (2008) 31:3 UNSW LJ 766 at 769.

corners of the applicable legislation, but more importantly in how the appropriate bodies put legislative protections into practice.

It is also important to recognize that it is seldom, if ever, effective to simply transplant successful legislative regimes from one cultural setting to another[52] or from developed countries to developing countries.[53] Whistleblowing schemes in developed democracies may not be appropriate or effective in the "specific context of developing countries who do not always have an institutional framework in place that supports the rule of law and [where] a culture of transparency and accountability remains questionable."[54] Thus, in discussing best practices, it is crucial to take into account the cultural and institutional environments of the countries that are considering the adoption of whistleblower protection legislation. If such contextual factors are not taken into account, the efficacy of whistleblower legislation will be seriously undermined.[55] Brown warns that best practices models should be examined with a careful eye on the legal, administrative, and political context of each country:

> [T]he search for "ideal" or "model" laws is complicated by three problems: the diversity of legal approaches attempted by jurisdictions that have sought to prioritise whistleblower protection through special-purpose legislation (sometimes inaccurately called 'stand-alone'); the frequent lack of evidence of the success of these approaches; and the lack of a common conceptual framework for understanding policy and legal approaches to

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[52] For example, in Heungsik Park et al, "Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey, and the UK" (2008) 82:4 J Bus Ethics 929 at 937, the authors conclude that legislative and organizational responsiveness to cultural context may play a large role in the efficacy of whistleblower protection:

> [O]rganizational systems for dealing with an employee's response to wrongdoing should be based on an understanding of the impact of nationality and cultural orientation on employees' preferred ways to blow the whistle. This has obvious implications for policy and practice, suggesting as it does that organizations seeking to improve the likelihood of employees reporting wrongdoing may need to tailor their policies and procedures to a country-specific context.

See also Wim Vandekerckhove et al, "Understandings of Whistleblowing: Dilemmas of Societal Culture" in Brown et al, *supra* note 8, 37.

[53] For example, in Sajid Bashir et al, "Whistle-Blowing in Public Sector Organizations: Evidence from Pakistan" (2011) 41:3 Am Rev Pub Admin 285 at 286, the authors suggest:

> [S]tudies in developed countries cannot be generalized and may not necessarily have any applicable lessons for organizations in developing countries such as Pakistan because of the absence of a robust legal system and the cultural dimensions of being a closely knit society where everyone is related to someone significant through common sect, cast [sic] or creed.

[54] Marie Chêne, *Good Practice in Whistleblowing Protection Legislation (WPL)*, (U4 Helpdesk, TI, 2009) at 1, online: <http://www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/>.

[55] *Ibid*. For example, the author, at 9, cites the impact of the use of informants in past authoritarian regimes as a factor that stigmatizes the actions of whistleblowers.

> whistleblowing across different legal systems, including those where whistleblower protection may be strong but not reflected in special-purpose legislation.
>
> [N]otwithstanding international interest, there is no single 'ideal' or 'model' law that can be readily developed or applied for most, let alone all countries. This is due to the diverse and intricate ways in which such mechanisms must rely on, and integrate with, a range of other regimes in any given jurisdiction.[56]

## 4.2 Sources for Best Practices

What should a good whistleblower law look like? There are various sources that one can turn to in order to try to extract the best aspects or elements of a "good" whistleblower law. Some of the leading sources for determining best practices in regard to designing a sound and effective legal regime for whistleblowers include the following:

1. David Banisar, "Whistleblowing: International Standards and Developments" in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (Washington, DC: World Bank, Institute for Social Research, UNAM, 2011), online: <http://ssrn.com/abstract_id=1753180>.
2. Tom Devine, *International Best Practices for Whistleblower Policies*, (Washington, DC: Government Accountability Project, 2015), online (pdf): <http://www.ourcommons.ca/content/Committee/421/OGGO/WebDoc/WD8991016/421_OGGO_reldoc_PDF/DevineTom-e.pdf>.
3. Paul Latimer & AJ Brown, "Whistleblower Laws: International Best Practice" (2008) 31:3 UNSW LJ 766, online: <http://papers.ssrn.com/abstract_id=1326766>.
4. TI, *Recommended Draft Principles for Whistleblowing Legislation*, (Berlin: TI, 2009), online (pdf): <https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>.
5. Marie Terracol, *A Best Practice Guide for Whistleblowing Legislation*, (Berlin: TI, 2018), online (pdf): <https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf>.
6. Simon Wolfe et al., *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* (BluePrint for Free Speech, October 2015) at 1, online (pdf): <https://www.blueprintforfreespeech.net/s/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf>.
7. United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of*

[56] AJ Brown, "Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience" (2013) 2:3 E-J Intl & Comp Labour Stud 4 at 5 (and citing the work of Fasterling, *supra* note 8 at 334).

*Reporting Persons*, (Vienna: UN, 2015), online (pdf): <https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf>.

8. Canadian Standards Association, *Whistleblowing Systems — A Guide*, EXP01-16 (Toronto: CSA Group, 2016), online (pdf): <https://community.icann.org/download/attachments/59643288/CSA%20Whistleblower%20Guideline.pdf?version=1&modificationDate=1470853787000&api=v2>.

## 4.3 General Characteristics

While the scope and significance of the appropriate elements of best practices are open to reasonable disagreement, academics and organizations tend to focus on five broad areas: (1) scope and clarity of legislation (2) mechanisms for disclosure (3) protection of identity (4) protection against retaliation, and (5) remedies available for wronged whistleblowers. This section will briefly discuss each of these areas in turn.

### 4.3.1 Scope and Clarity of Legislation

The scope of whistleblower protection legislation, especially in regard to the range of people protected and the types of disclosures covered, is an area of central concern for organizations and academics. Banisar suggests that most legislation dedicated to whistleblower protection is too narrow, and that the efficacy of these laws is difficult to measure.[57] Best practices in whistleblowing legislation favour wide coverage; indeed, "in time there may be a case for whistleblowing laws to move to a full 'no loopholes' approach, targeting public sector and private sector whistleblowing with sector-blind principles and practices."[58] Closing the "loopholes" in legislation involves increasing the range of people who fall within legislative protection. TI, for example, suggests that legislative protections should apply to all whistleblowers, regardless of whether they work in the public or private sector.[59] In addition, members of the public may be a "useful" information source, and they may require protection from intimidation or reprisals.[60] According to Tom Devine, Legal Director of the Government Accountability Project, "[s]eamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect."[61]

[57] Banisar, *supra* note 3 at 2.

[58] Latimer & Brown, *supra* note 51 at 775.

[59] TI, *supra* note 2 at 13. See also Tom Devine, "International Best Practices for Whistleblower Statutes" in David Lewis & Wim Vandekerckhove, eds, *Developments in Whistleblowing Research* (London: International Whistleblowing Research Network, 2015) 7 at 9 [Devine, *Whistleblower Statutes*], online (pdf): <http://www.whistleblowingimpact.org/wp-content/uploads/2017/06/prev1-Whistleblowing-And-Mental-Health.pdf>, wherein he notes that whistleblower protection should protect all citizens who have relevant disclosures regardless of their formal employment status. He cites broad US whistleblower protection laws (primarily in the criminal realm) as a good example of legislation affording protection to all those who take part in or are impacted by the activities of an organization: "[o]verarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings."

[60] UN Good Practices, *supra* note 10 at 9-10.

[61] Devine, *Whistleblower Statutes*, *supra* note 59 at 8.

Whistleblower protection also should provide protection against "spillover relation"; that is, it should protect those who are not whistleblowers, but who may be perceived as whistleblowers, have assisted whistleblowers, or are preparing to make a disclosure.[62] The UK's *Public Interest Disclosure Act 1998* (*PIDA*),[63] which protects workers in the public and private sectors as well as those working as independent contractors, has been seen as a model of expansive coverage.[64] In a 2013 Report, TI emphasizes *PIDA*'s broad coverage:

> In 1998, the UK passed one of the most comprehensive whistleblower protection laws in the world: the Public Interest Disclosure Act. Known as PIDA, the law applies to the vast majority of workers across all sectors: government, private and non-profit. It covers a range of employment categories, including employees, contractors, trainees and UK workers based abroad.
>
> …
>
> Several countries have used PIDA as a template for their own laws and proposals, including Ireland, Japan and South Africa. [65]

In addition, the *types* of disclosures protected should be broad and should cover a wide range of wrongdoing; that is, "[p]rotected whistleblowing should cover "any" disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions."[66] TI notes that "[l]imiting the scope of information for which individuals will be protected hinders whistleblowing. Indeed, if people are not fully certain that the behaviour they want to report fits the criteria, they will remain silent, meaning that organisations, authorities and the public will remain ignorant of wrongdoing that can harm their interests."[67] The substance of the disclosure should be paramount, rather than the form of the disclosure or the category within which the disclosure is made to fit.[68] Here, again, *PIDA* has been seen as a leading example, despite its use of enumerated categories of wrongdoing rather than a completely open-ended approach:

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[62] *Ibid* at 9.

[63] *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*].

[64] Mark Worth, *Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU,* (Berlin: TI, 2013) at 10, online (pdf): <https://images.transparencycdn.org/images/2013_WhistleblowingInEurope_EN.pdf>.

[65] *Ibid* at 83.

[66] US, Government Accountability Office, *International Best Practices for Whistleblower Policies* by Tom Devine (Washington, DC: Government Accountability Project, 2015) [Devine, *Whistleblower Policies*], online (pdf): <http://www.ourcommons.ca/content/Committee/421/OGGO/WebDoc/WD8991016/421_OGGO_reldoc_PDF/DevineTom-e.pdf>. Similarly, Banisar, *supra* note 3 at 25, suggests that "comprehensive whistleblowing laws generally have broad definitions of wrongdoing that apply to the revealing of information relating to criminal acts, to dangers to health or safety, and to abuses of power."

[67] Marie Terracol, *A Best Practice Guide for Whistleblowing Legislation*, (Berlin: TI, 2018) at 7, online (pdf): <https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf>.

[68] Latimer & Brown, *supra* note 51 at 785.

> Under PIDA, whistleblowers are able [to] disclose a very broad range of crimes and wrongdoing, including corruption, civil offences, miscarriages of justice, dangers to public health or safety, dangers to the environment, and covering up of any of these.[69]

The sectoral approach, which offers protection to disclosures in certain areas (such as public health) but not others, has been criticized as unnecessarily narrow. A piecemeal approach, wherein protection to different types of whistleblowers is provided for in different pieces of legislation, may similarly result in loopholes and a less effective disclosure regime overall. This was one of the major criticisms in a TI review of whistleblower protection in European countries, where "research found that whistleblowing legislation in the countries covered by this report is generally fragmented and weakly enforced."[70] The report recommends that a "single, comprehensive legal framework" be provided for the protection of whistleblowers.[71] Generally speaking, there seems to be a consensus that dedicated legislation is preferred in a whistleblower protection regime, and that broad coverage (in terms of those protected and the types of wrongdoing that may be disclosed) is vitally important.

A related best practices concern is the need to provide clarity in whistleblowing laws and policies, regardless of the scope and framework of the legal regime. As TI states:

> [a]n important requirement of any whistleblowing legislation is to make sure that it clearly sets out its scope of application, that is, what types of wrongdoing are covered, whom it applies to and what level of belief in the concern raised the whistleblower should have.… Loopholes and lack of clarity might lead to situations where individuals decide to speak up in the belief that they are protected, when in fact they are not and as such are vulnerable to unfair treatments.[72]

The public may not understand the meaning of terms such as "the public interest," and therefore clarity may require setting out a more detailed list of the types of wrongdoing covered by the legislation.[73] Lack of clarity in legislation, whether related to the breadth of coverage or the manner of required disclosure, can have significant impacts on the overall efficacy of the legal regime. For example, TI discusses how confusion regarding Latvian laws made investigating and acting upon disclosures difficult, if not impossible:

> In Latvia, the lack of a clear set of steps for receiving and responding to a disclosure has even been evidenced within the Ombudsman's Office, a

[69] Worth, *supra* note 64 at 83.
[70] Anja Osterhaus & Craig Fagan, *Alternative to Silence: Whistleblower Protection in 10 European Countries*, 2nd ed (Berlin: TI, 2009) at 3, online (pdf): <https://transparency.hu/wp-content/uploads/2016/04/TI-Alternative-to-Silence-report-ENG.pdf>. The countries studied in the report were Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia, and the report found that at the time the only country with a dedicated and comprehensive piece of legislation was Romania.
[71] *Ibid* at 4.
[72] Terracol, *supra* note 67 at 7.
[73] UN Good Practices, *supra* note 10 at 22.

> government institution which oversees matters related to the protection of human rights and good governance. In 2007, nearly half of the Ombudsman's Office employees complained of alleged misconduct by the Office's director. The lack of clear reporting channels internally led to confusion about how to investigate and resolve the case. After pressure from non-governmental organisations, including the local TI chapter, the case was heard by a parliamentary body, which did not investigate the root of the claims. As a result, the case was ultimately dismissed.[74]

Whatever the preferred route, the prescribed mechanisms for disclosure ought not to be overly complicated or formalistic. As Banisar notes:

> An overly prescriptive law which makes it difficult to disclose wrongdoing undermines the basic philosophy of promoting disclosure and encourages informal or anonymous releases. However, at the same time, a law that allows for unlimited disclosures will not encourage internal resolution and promote the development of a better internal culture of openness.[75]

#### 4.3.2 Mechanisms for Disclosure

Certain disclosure procedures have also been identified as preferable. Based in part on Australian studies, TI recommends that internal reporting (where the first line of reporting should be to the appropriate authorities *within* the organization) be encouraged through the establishment and maintenance of internal systems of disclosure, which offer the benefits of ease and accessibility to potential whistleblowers.[76] Key to the efficacy of such internal mechanisms is ensuring "a thorough, timely and independent investigation of concerns … [with] adequate enforcement and follow-up mechanisms."[77]

However, external means of disclosure should also be available and accessible, and it should be possible to disclose information to other bodies such as regulators or the media (albeit,

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[74] Osterhaus & Fagan, *supra* note 70 at 11.

[75] Banisar, *supra* note 3 at 26.

[76] TI, *Recommended Draft Principles for Whistleblowing Legislation*, (Berlin: TI, 2009) at point 7, online (pdf): <https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>.

[77] *Ibid*. Rodney Smith, "The Role of Whistle-Blowing in Governing Well: Evidence From the Australian Public Sector" (2010) 50:6 Am Rev Pub Admin 704 at 719, concludes that large-scale research into whistleblowing in the Australian public sector suggests that internal reporting is overwhelmingly popular amongst whistleblowers, even when there are external reporting agencies available. The study showed:

> [B]etter outcomes … were associated with public sector organizations that publicized good whistle-blowing procedures, had well-trained managers and specialist staff, and that offered specialist support for whistle-blowers.

External agencies became important in the relatively small number of cases in which reprisals occurred.

possibly along different tiers of disclosure).[78] This is because the circumstances of the particular case may make a certain avenue of disclosure more appropriate than another, and "a variety of channels need to be available to match the circumstances and to allow whistleblowers the choice of which channel they trust most to use."[79] TI states that "[i]f there is a differentiated scale of care in accessing these channels, it shall not be onerous and must provide a means for reporting on suspicion alone."[80] Similarly, Banisar recommends that internal disclosures should be encouraged and facilitated, but that "procedures should be straightforward and easily allow for outside organizations to seek the counsel of higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective."[81] The October 2015 G20 Report likewise called for:

> [C]lear rules for when whistleblowing to the media or other third parties is justified or necessitated by the circumstances … [and] clear rules for defining the internal disclosure procedures that can assist organisations to manage whistleblowing, rectify wrongdoing and prevent costly disputes, reputational damage and liability, in the manner best suited to their needs.[82]

The stepped or tiered approach can be observed in *PIDA*:

> PIDA uses a unique "tiered" system by which whistleblowers can make their disclosures and be legally protected from retaliation. Employees can disclose information to their employer, regulatory agencies, "external" individuals such as members of Parliament, or directly to the media. However, the standards for accuracy and urgency increase with each tier, so whistleblowers must heed this in order to be legally protected.[83]

A similar approach can be observed in the EU Whistleblower Directive. Article 7(2) provides that "Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation." Articles 8 and 9 address the obligation to establish reporting channels and procedures for internal reporting and follow-up.

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[78] For example, Paul Stephenson & Michael Levi, *The Protection of Whistleblowers: A Study on the Feasibility of a Legal Instrument on the Protection of Employees Who Make Disclosures in the Public Interest*, CDCJ(2012)9FIN (Strasbourg: Council of Europe, 2012) at 5, online: <http://rm.coe.int/doc/0900001680700282>, suggest that external routes (such as regulatory authorities and law enforcement) are required where internal reporting proves ineffective, and that "[g]oing to the press is – or should be – an option of last resort, albeit a vital one." At 29, the authors explicitly recommend "a 'stepped approach,' with different grounds required at each stage … [and] if at any stage there is no response, then it is clear the whistleblower can go to the next level."

[79] OECD, Public Sector Integrity Division and Anti-Corruption Division, *Committing to Effective Whistleblower Protection*, (Paris, OECD Publishing, 2016) at 53, online: <http://dx.doi.org/10.1787/9789264252639-en>.

[80] TI, *supra* note 76 at point 8.

[81] Banisar, *supra* note 3 at 57.

[82] Wolfe et al, *supra* note 1 at 5.

[83] Worth, *supra* note 64 at 83.

Article 10 then provides that "[w]ithout prejudice to point (b) of Article 15(1) [circumstances in which the reporting person's reasonable grounds of belief would support public disclosure], reporting persons shall report information on breaches using the channels and procedures referred to in Articles 11 and 12, after having first reported through internal reporting channels, or by directly reporting through external reporting channels." Articles 11, 12, 13, and 14 address, in turn, the obligation to establish external reporting channels and follow up on reports, the design of external reporting channels, information regarding the receipt of reports and their follow-up, and review of the procedures by competent authorities.

Finally, Article 15 provides for public disclosures. It states:

> 1. A person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled:
>
> (a) the person first reported internally and externally, or directly externally in accordance with Chapters II and III, but no appropriate action was taken in response to the report within the timeframe referred to in point (f) of Article 9(1) or point (d) of Article 11(2); or
>
> (b) the person has reasonable grounds to believe that:
>
> (i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
>
> (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.
>
> 2. This Article shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information.

Certain provisions are applicable to internal and external reporting: the duty of confidentiality (Article 16), processing of personal data (Article 17), and record keeping of the reports (Article 18).

In an article comparing the UK and US legislative regimes, Jenny Mendelsohn argues that a model law would be explicit in its preference for internal or external disclosure, and she suggests that internal reporting ought to be preferred. However, she also argues that while internal reporting should be afforded "almost automatic protection," this does not mean that external reporting should be subject to a multitude of preconditions.[84] Furthermore,

[84] Jenny Mendelsohn, "Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing" (2009) 8:4 Wash U Global Stud L Rev 723 at 743.

Mendelsohn's model law would allow for disclosures to the media only when reporting through internal and external channels has proven to be ineffective.[85]

After a disclosure is made, it may be appropriate to keep the reporting person informed of the outcome of the disclosure. A 2015 guide by the UNODC indicated that not only must all reports be assessed according to their merits, but also that those who disclose information should be informed of decisions made on the basis of their report (e.g., whether the matter will be investigated).[86] Similarly, Devine recommends that the corrective action process should be transparent, and that the reporting person who disclosed the issue "should be enfranchised to review and comment on the draft report resolving alleged misconduct, to assess whether there has been a good faith resolution."[87]

#### 4.3.3 Protection of Identity

Protection of identity is an area in which there is disagreement as to the appropriate best practice. There is widespread recognition of the need for ensuring whistleblower confidentiality; indeed, Devine suggests that channels of disclosure must protect confidentiality to ensure that the flow of information is maximized, including name protection and the protection of identifying information.[88] If the identity of a whistleblower must be revealed (e.g., because of the need for testimony in a criminal proceeding), the whistleblower should be provided with "as much advance notice as possible."[89] However, while there is general agreement with respect to the need for whistleblower confidentiality, there is controversy over the role of anonymous reporting.

TI suggests that not only should the identity of a whistleblower be protected (i.e., kept confidential), but that legislation should also allow for anonymous disclosure.[90] Similarly, Banisar argues that anonymity may have a place in a model whistleblower protection law, despite the general exclusion of anonymous disclosures from current legislation: for example, "[a]nonymity may be … useful (not to say essential) in some cases, such as in jurisdictions where the legal system is weak or there are concerns about physical harm or social ostr[a]cization."[91] The October 2015 G20 Report concluded that a central area of concern was the need for "clear rules that encourage whistleblowing by ensuring that anonymous disclosures can be made, and will be protected."[92]

In contrast, Latimer and Brown suggest that anonymous disclosures should be used only as something of a "last resort," given the perception that anonymity would discourage whistleblower accountability and might, in fact, encourage intentionally false reports.[93]

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[85] *Ibid* at 744.
[86] UN Good Practices, *supra* note 10 at 72.
[87] Devine, *Whistleblower Policies, supra* note 66 at 14.
[88] *Ibid* at 10. See also OECD, *supra* note 28 at 64, wherein it is noted that "[i]t is important that confidentiality extends to all identifying information."
[89] *Ibid* at 10. See also OECD, *supra* note 28 at 65, wherein the authors discuss the possibility of imposing sanctions for the disclosure of a whistleblower's identity.
[90] TI, *supra* note 76 at point 12. See also Terracol, *supra* note 67 at 18.
[91] Banisar, *supra* note 3 at 34.
[92] Wolfe et al, *supra* note 1 at 5.
[93] Latimer & Brown, *supra* note 51 at 774.

Allowing anonymous disclosures might, therefore, increase the volume of disclosures so as to make reporting systems less effective and increase the difficulty of investigations.[94] Paul Stephenson and Michael Levi, in a report commissioned by the Secretary General of the Council of Europe, similarly question the need for anonymous disclosures where confidentiality is protected:

> Legal and social problems stem from anonymous disclosures: anonymous information is rarely admissible as evidence in courts. There have been cases where, because the whistleblower has remained anonymous, another worker has been suspected and sacked … research results indicate that auditors attribute lower credibility and allocate fewer investigatory resources when the whistleblowing report is received through an anonymous channel.[95]

It has been suggested that it may be possible to address some of the concerns with respect to anonymous reporting (such as difficulty in assessing credibility and in seeking clarification) through the use of technology such as proxy emails, which allow two-way communication.[96] TI suggests that the practical difficulties associated with protecting anonymous persons, as well as the issues surrounding seeking further information and informing the whistleblower of the progress of the investigation, may be remedied by anonymous email, online platforms, or the use of an intermediary.[97]

#### 4.3.4 Protection Against Retaliation and Oversight of that Protection

Robust protection against retaliation is a cornerstone of effective whistleblower protection legislation. TI reports that fear of retaliation or unfair treatment is a leading reason influencing people not to make disclosures.[98] Effective protection from reprisals is required, as is a broad understanding of what reprisals might entail: "The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights."[99] A key element in ensuring the protection of whistleblowers is educating public employees on their rights and protections under whistleblower legislation, because "[w]histleblowers are not protected by any law if they do not know it exists."[100] Those in positions of power, who may be receiving protected disclosures or working with whistleblowers following disclosures, also need to be educated on their responsibilities under the law. In addition, it is important that protection against retaliation not be limited to a short period of time following the disclosure, as reprisals may occur months or even

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[94] OECD, *supra* note 28 at 63.

[95] Stephenson & Levi, *supra* note 78 at 32. The authors suggest that anonymous reporting systems may be a first step in the whistleblowing process: "The whistle-blowers' confidence may develop as the exchange progresses: if the intelligence is to be used effectively they will need to identify themselves to the authorities at some stage."

[96] UN Good Practices, *supra* note 10 at 50.

[97] Terracol, *supra* note 66 at 20.

[98] *Ibid* at 21. See also Artello & Albanese, *supra* note 1 at 10-11.

[99] Devine, *Whistleblower Policies*, *supra* note 66 at 4. The author also notes, at 6, that whistleblowers must be protected from unconventional harassment, considering that "[t]he forms of harassment are limited only by the imagination."

[100] *Ibid* at 7.

years after the initial disclosure.[101] The EU Directive 2019/1937 seems to provide the most robust protection against retaliation provisions to date.[102]

Protection within legislation is crucial, but in order to provide whistleblowers with effective shelter from retaliation the legislation must actually be put into practice. The Government Accountability Project, a US-based non-governmental organization, notes that whistleblower laws may actually prove to be counterproductive if they do not have any teeth:

> While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all.[103]

Adequate oversight is required to ensure that the legislation is doing the work that it was designed for, and this may be accomplished through independent bodies, an ombudsperson, sectoral bodies or courts and tribunals.[104]

#### 4.3.5 Remedies and Rewards

When retaliation cannot be prevented and whistleblowers face reprisals, adequate and timely compensation is necessary. Compensation "must be comprehensive to cover all the direct, indirect and future consequences of the reprisal."[105] This may include reinstatement, compensation for lost wages, awards for suffering, or a range of other reparations. It would be beneficial not to limit the amount of compensation, and "[c]ompensation should be broadly defined to cover all losses and seek to place the person back in an identical position as before the disclosure."[106] An effective compensation scheme may require interim relief, given the high costs of time delays to whistleblowers seeking the remedies promised in the whistleblowing legislation.[107] In addition, it is important that whistleblower protection laws offer reporting persons a "realistic time frame" within which to assert their rights: Devine

[101] OECD, *supra* note 28 at 81.
[102] EC Directive, *supra* note 49. The Directive, *inter alia*, requires member states to ensure that prescribed persons have access to appropriate support measures (Article 20). Further, the Directive establishes the duty for member states to take necessary measures to prohibit any type of whistleblower retaliation against prescribed persons, and provides an enumerated list of examples of prohibited forms of retaliation (Article 19). It also requires member states to provide for "effective, proportionate and dissuasive penalties" to persons that, *inter alia*, hinder or attempt to hinder reporting, or retaliate (Article 23).
[103] Devine, *Whistleblower Policies, supra* note 66 at 1.
[104] Banisar, *supra* note 3 at 38–43.
[105] Devine, *Whistleblower Policies, supra* note 66 at 10. See also Terracol, *supra* note 67 at 50.
[106] Banisar, *supra* note 3 at 56.
[107] Devine, *Whistleblower Policies, supra* note 66 at 10. See also Terracol, *supra* note 67 at 51.

suggests a one year limitation period, in contrast to the 30-60 days contained in some pieces of legislation.[108]

There has been significant debate over the role that rewards should play in model whistleblower legislation. In the US, discussed in more detail in Section 5.2, various pieces of legislation allow whistleblowers to collect cash rewards when the government recovers money as a result of the information disclosed. The value of the information is thought to outweigh any questions regarding the morality of the motivations behind disclosure.[109] And, if rewards are offered to whistleblowers, a further question may be: how much is appropriate?[110] However, these moral questions have not been so easily dismissed by everyone in the field. Protect (formerly Public Concern at Work), a UK-based non-governmental organization, did not recommend the introduction of financial incentives into *PIDA* for reasons related to the underlying philosophy of encouraging reporting in this way, as well as concerns regarding the practical implications of rewarding whistleblowers in this manner. The 2013 Report stated:

> The majority of respondents to our consultation (including whistleblowers) were not in favour of rewards. The reasons given were multiple and in summary were as follows:
>
> a) inconsistent with the culture and philosophy of the UK
>
> b) undermines the moral stance of a genuine whistleblower
>
> c) could lead to false or delayed reporting
>
> d) could undermine credibility of witnesses in future criminal or civil proceedings
>
> e) could result in the negative portrayal of whistleblowers
>
> f) would be inconsistent with the current compensatory regime in the UK.
>
> The provision of a reward may well incentivise those who would not normally speak out. However, it may also encourage individuals to raise a concern only when there is concrete proof and monetary reward. This could reduce the opportunity to detect malpractice early and prevent harm. Additionally, it is difficult to use the model in sectors other than the financial sector, such as care or health.
>
> Rewards are not a substitute for strong legal protection. There is no reason why whistleblowers should not be recognised and rewarded in the

[108] Devine, *Whistleblower Policies, supra* note 66 at 12.
[109] See discussion in Amanda M Rose, "Calculating SEC Whistleblower Awards: A Theoretical Approach" (2019) 72:6 Vand L Rev 2047 at 2062-2068.
[110] For example, see discussion in Yehonatan Givati, "Of Snitches and Riches: Optimal IRS and SEC Whistleblower Rewards" (2018) 55:1 Harv J Legis 105.

> workplace via remuneration structures, promotion or other recognition mechanisms including by society at large (e.g., the honours list).[111]

The view that monetary rewards are a valuable tool to encourage reporting misconduct has become widespread. An increasing number of research papers and notes have been published in recent years that tend to support the effectiveness of monetary incentives.[112] The National Whistleblower Center argues that monetary rewards are an effective tool to incentivize people to provide high-quality tips which result in successful prosecutions.[113]

As a final point, whistleblower protection is untenable if it saddles a victim of retaliation with an unwieldy burden of proof. Thus, the "emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a 'contributing factor' in challenged discrimination."[114] It may be possible to go even further and craft legislation that presumes that a detrimental act against a whistleblowing employee is, in and of itself, sufficient to shift the burden of proof to the employer to show that the act was not retaliatory.[115] This approach is reflected in the EU Whistleblower Directive. Article 21(5) states:

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[111] The Whistleblowing Commission, *Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK,* (London: Public Concern at Work, 2013) at 14, online (pdf): <https://s3-eu-west-1.amazonaws.com/public-concern-at-work/wp-content/uploads/images/2018/09/08222935/wbc-report-final.pdf>.

[112] For example, see discussion in Theo Nyreröd & Giancarlo Spagnolo, "Myths and Numbers on Whistleblower Rewards" (2019) 15:1 Regul Gov 82; Jason Zuckerman & Matt Stock, "One Billion Reasons Why The SEC Whistleblower-Reward Program Is Effective", *Forbes* (18 July 2017), online: <https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/?sh=79f243bb3009>; Masaki Iwasaki, "Effects of External Whistleblower Rewards on Internal Reporting" (2018) Harvard John M Olin Fellow's Discussion Paper Series No 76; and Justin Blount & Spencer Markel, "The End of the Internal Compliance World as We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provisions" (2012) 17:4 Fordham J Corp & Fin L 1023.

[113] "The Importance of Rewards" (last visited 1 February 2021), online: *National Whistleblower Centre* <https://www.whistleblowers.org/the-importance-of-rewards/#:~:text=Data%20shows%20that%20incentivizing%20whistleblowers,increased%20number%20of%20false%20reports>; Aiyesha Dey, Jonas Heese & Gerardo Perez Cavazos, "Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers"(2021) 59:2 J Accounting Research 1.

[114] Devine, *Whistleblower Policies, supra* note 66 at 9.

[115] OECD, *G20 Anti-Corruption Action Plan Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, (Paris: OECD, 2011) at 25, online (pdf): <http://www.oecd.org/daf/anti-bribery/48972967.pdf> states that high burdens of proof have been:

> [A]lmost impossible to provide as long as the employer has not explicitly mentioned this as the reason for termination. For that reason, several legislations provide for a flexible approach to the burden of proof, assuming that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified on management grounds unrelated to the fact or consequences of the disclosure.

> In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.[116]

Furthermore, it is important to consider how evidentiary rules may unduly burden whistleblowers seeking remedies for reprisals.[117] Finally, if mounting a claim of alleged retaliation is expensive and requires the assistance of a lawyer or other institutional advocate (such as an ombudsperson), then such assistance should be built into the scheme. TI suggests that legal and financial assistance may be required, as "[w]histleblowers should not be at a financial loss for having to bring a claim to enforce their rights or seek compensation for breaches."[118]

## 5. US: A PATCHWORK OF LEGISLATION

The US has a long history of whistleblower protection legislation. Section 5.1 gives an overview of the federal protections available to whistleblowers in the public sector, focusing on those working in the federal public sector, and the sections following after will briefly outline some of the protections available to private sector whistleblowers.

### 5.1 Whistleblower Protection in the Public Sector

The first whistleblower law in the US arguably appeared as early as 1863, with the introduction of false claims legislation.[119] However, the modern approach to whistleblower protection began in 1968 with the landmark case *Pickering v Board of Education*, which recognized the application of the First Amendment to protection of disclosures made in the public interest.[120] This was followed by the *Civil Service Reform Act of 1978*,[121] which "sought to vindicate these constitutional rights, but it substituted statutory standards for the vague balancing test under First Amendment law."[122] Unfortunately, the Office of Special Counsel and Merit Systems Protection Board, implemented by this legislation, did not prove to be very successful.[123] Today, the US has a plethora of laws on the local, state, and federal levels

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[116] EC Directive, *supra* note 49.

[117] Fasterling, *supra* note 8 at 336. The author argues, at 336, that "research should take burden of evidence rules into account when evaluating remedies."

[118] Terracol, *supra* note 67 at 54.

[119] Vaughn, *supra* note 5 at 4.

[120] *Pickering v Board of Education*, 391 US 563 (1968).

[121] *Civil Service Reform Act of 1978*, Pub L No 95-454, 92 Stat 1111.

[122] Vaughn, *supra* note 5 at 5.

[123] Terry Morehead Dworkin, "US Whistleblowing: A Decade of Progress?" in David B Lewis, ed, *A Global Approach to Public Interest Disclosure* (Cheltenham: Edward Elgar, 2010) 36 at 46.

that offer protection to whistleblowers. Although these laws purport to offer protection to whistleblowers in both the public and the private sector, there are problems "due to increased implementation difficulties, inefficiencies and regulatory burdens entailed in having multiple laws that have evolved in *ad hoc* ways over time."[124] A comprehensive, dedicated piece of legislation, such as *PIDA*, that covers both the public and the private sector at the federal level, with similar models at the state level, would be preferable in this sense. It would make it easier for whistleblowers to learn and understand their rights under the legislation, and it would likely decrease implementation and regulatory difficulties.

The legislation that is most relevant to disclosures in the federal public sector is the 1989 *Whistleblower Protection Act* (*WPA*)[125] (amended in 2012 by the *Whistleblower Protection Enhancement Act* (*WPEA*)).[126] The *Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s. 743* underscores the important role of public sector whistleblowers, and explicitly recognizes the need for strong whistleblower protection legislation:

> The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government. Whistleblowers play a critical role in keeping our government honest and efficient. Moreover, in a post–9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment.
>
> …
>
> S. 743 would address … problems by restoring the original congressional intent of the WPA to adequately protect whistleblowers, by strengthening the WPA, and by creating new whistleblower protections for intelligence employees and new protections for employees whose security clearance is withdrawn in retaliation for having made legitimate whistleblower disclosures.[127]

Under the *WPA*, the employer bears the burden of showing that the detriment faced by an employee was not connected to their whistleblowing:

> The employee only has to establish that he – 1. disclosed conduct that meets a specific category of wrongdoing set forth in the law; 2. made the disclosure to the right type of party; 3. made a report that is either outside of the

[124] Wolfe et al, *supra* note 1 at 70.
[125] *Whistleblower Protection Act of 1989*, Pub L No 101-12, 103 Stat 16 [*WPA*]. For further analysis, see Stephenson & Levi, *supra* note 78 at 22, noting that the *WPA* was introduced following the 1986 Challenger space shuttle disaster.
[126] *Whistleblower Protection Enhancement Act of 2012*, Pub L No 112-199, 126 Stat 1465 [*WPEA*].
[127] US, Committee on Homeland Security and Government Affairs, 112th Cong, *The Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s 743* (US Government Printing Office, 2012) at 1, online (pdf): <http://fas.org/irp/congress/2012_rpt/wpea.pdf>.

> employee's course of duties or communicated outside the normal channels; 4. made the report to someone other than the wrongdoer; 5. had a reasonable belief of wrongdoing; 6. suffered a personnel action. If the employee establishes these elements, the burden shifts to the employer to establish that it would have taken the same action in absence of the whistleblowing.[128]

In 2011, the Merit Systems Protection Board released a report that compared survey data of federal employees from 1992 with data from 2010. In regard to the rate of disclosures, the report stated:

> While observing wrongdoing is the first step in the whistleblowing process, not everyone who sees wrongdoing chooses to tell anyone else what they have observed. To blow the whistle, someone has to make some noise. In 2010, respondents were slightly less likely to report that they did not tell anyone about the wrongdoing that they observed compared with survey data from 1992, but in both years, a strong majority of employees told someone … [T]he percentage of respondents who told no one what they observed dropped from 40 percent in 1992 to 34 percent in 2010. In 2010, family, friends, and coworkers were less likely to be told about the wrongdoing than they were in 1992. However, this did not correspond to substantially more people reporting wrongdoing to management. Instead, it seems that venting to equally powerless people dropped, but the willingness of respondents to take action that could lead to change was not substantially changed.[129]

The report went on to conclude:

> We have seen some progress in the Federal Government with respect to effectively utilizing Federal employees to reduce or prevent fraud, waste, and abuse. Since 1992, the percentage of employees who perceive any wrongdoing has decreased, and for those who perceive wrongdoing, the frequency with which they observe the wrongdoing has also decreased. Additionally, in comparison to 1992, respondents in 2010 were slightly more likely to report the wrongdoing and less likely to think they have been identified as the source of the report.[130]

The *WPEA* reinforced the *WPA* by closing loopholes in the legislation, increasing the scope of protected disclosures and shielding "whistleblower rights against contradictory agency non-disclosure rules through an 'anti-gag' provision."[131] The October 2015 G20 Report states

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[128] Stephenson & Levi, *supra* note 78 at 22.

[129] US Merit Systems Protection Board (MSPB), Report to the President and the Congress of the United States, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* (Washington, DC: MSPB, 2011) at 8, online: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475>.

[130] *Ibid* at 27.

[131] Wolfe et al, *supra* note 1 at 70.

that in recent years there has been a positive increase in the favourable resolution of whistleblower retaliation cases: "From 2007 to 2012, the number of new disclosures reported by federal employees increased from 482 to 1,148, and the number of whistleblower retaliation cases that were favorably resolved rose from 50 to 223."[132] While these numbers indicate positive movement in terms of increased disclosures, it is impossible to determine whether the percentage of favourable resolutions of reprisal claims has increased as well without knowing the total number of reprisal claims. A 2015 study concluded that the *WPEA*, on paper, shows some potential, but that it is an open question whether it will translate to more robust whistleblower protection in practice:

> It remains to be seen if the clarifications in the WPEA regarding disclosures will, in fact, clarify what is and is not a covered disclosure. It is also uncertain whether the courts will broaden their interpretation of the protections for whistleblowers under the WPEA. The expanded jurisdiction written into the Act is really a 2-year experiment to test that notion. The cancelling of the 1999 precedent that translates "reasonable belief" to require irrefutable proof is another issue that may be subject to narrowing by the courts.
>
> There seems to be inherent confusion in the WPEA regarding the dictate that whistleblowers cannot claim protections for disclosing valid policy decision, but can claim protections for disclosing the consequences of a policy decision. Furthermore, the Act creates specific legal protections for scientific freedom, providing WPA rights to employees who challenge censorship, and makes it an abuse of authority to punish disclosures about scientific censorship. This begs the question: when is it censorship and when is it a valid policy decision to maintain the need for information to be classified due to national security or some other compelling reason. The main point here is that the WPEA may not have actually enhanced any protections or clarified the various aspects of whistleblower protections—again, time will tell.[133]

In addition, in October 2017 Congress enacted the *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017*,[134] which, inter alia:

> (1) requires agency heads to propose disciplinary action against supervisors who have engaged in whistleblower retaliation, related to 5 U.S.C. 2302(b)(8), (9), or (14); (2) provides certain whistleblower protections to probationary Federal employees; (3) provides guidelines to enhance Federal employee awareness of Federal whistleblower protections; (4) creates priority transfer rights for whistleblowers who are granted a stay of a

[132] *Ibid*.

[133] Shelley L Peffer et al, "Whistle Where You Work? The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Whistleblower Protection Enhancement Act of 2012" (2015) 35:1 Rev Pub Personnel Admin 70 at 78–79. The study concludes, at 78, that the *WPA* "failed in its basic purpose–protecting employees." The study also highlights weaknesses of the *WPEA*, such as the lack of protection for national security workers and government contractors.

[134] Pub L 115-73.

> personnel action by the MSPB; and (5) enhances access to information by OSC.[135]

A February 2015 Report from the US Merit Systems Protection Board indicates that the increased protections offered by *WPEA* have led to a strain on available resources. The report states:

> The WPEA provided additional rights to whistleblowers and those who engage in other protected activity in the Federal Government. The law expanded the scope of protected disclosures, broadened MSPB's whistleblower jurisdiction, expanded options for granting corrective action, and permitted review of MSPB decisions by multiple Federal Courts of Appeals. These changes have increased the number of whistleblower cases filed with MSPB and increased the complexity of MSPB's processing of whistleblower cases. The changes also may lead to more and lengthier hearings in whistleblower cases and more addendum appeals (e.g., claims for compensatory and other damages or for attorney's fees) for whistleblower cases. The WPEA also requires MSPB to track and report more detailed information about whistleblower cases in its performance reports. MSPB needs additional permanent resources to enable it to meet the requirements of the WPEA.[136]

The February 2016 *Annual Performance Results and Annual Performance Plan* Report from the US Merit Systems Protection Board provided an update on these concerns, stating:

> Many whistleblower cases are being resolved formally or informally at the Office of Special Counsel. The more complex and contentious cases that remain unresolved are often the cases filed with MSPB. Thus, based on what we have seen so far, we still anticipate that the WPEA may lead to more and lengthier hearings in these cases and more addendum appeals.[137]

Further, the February 2020 *Annual Performance Report for FY 2019* and *Annual Performance Plan for FY 2020 (Final) and FY 2021 (Proposed)* from the US Merit Systems Protection Board indicates that there have been organizational issues within the Merit Systems Protection Board, in that it had, at the time of the report, "been without a quorum of Board members

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[135] MSPB, *APR-APP for FY 2018-2020: FY 2018 Annual Performance Report (APR) and Annual Performance Plan (APP) for FY 2019 (Revised) and FY 2020 (Proposed)* (Washington, DC: MSPB, 2019) at 46, online: <http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1598039&version=1603838&application=ACROBAT>.

[136] MSPB, *Annual Performance Report for FY 2014 and Annual Performance Report for FY 2015 (Final) and FY 2016 (Proposed)* (Washington, DC: MSPB, 2015) at 1–2, online: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1133484&version=1137981&application=ACROBAT>.

[137] MSPB, *Annual Performance Results for FY 2014 and Annual Performance Plan for FY 2016 (Final) and FY 2017 (Proposed*) (Washington, DC: MSPB, 2016) at 38, online: <http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1268947&version=1274024&application=ACROBAT>.

since January 8, 2017, and without any presidentially-appointed Senate-confirmed Board members since March 1, 2019."[138] This has created a backlog of petitions for review and other cases, as well as preventing the Merit Systems Protection Board (MSPB) from releasing "reports of merit systems studies and promulgating substantive regulations."[139] The backlog of petitions for review totaled over 2,378 as of the end of September 2019, and was expected to take three years or more to process once the Board achieved a quorum.[140] "The lack of quorum prevented MSPB from setting FY 2018 and FY 2019 performance targets and rating results for several PGs and one strategic objective, including PFR processing timeliness, enforcement case processing, number of reports of merit systems studies published, and quality of initial decisions."[141] In addition, staffing and other challenges have or have the potential to impact the functioning of the Board.[142]

## 5.2 Encouraging through Rewards: *False Claims Act*

The *False Claims Act* (*FCA*)[143] offers a unique understanding of how to encourage whistleblowing, as it allows private citizens to make claims on behalf of the government (*qui tam* actions) in cases of contract fraud. The US Department of Justice reports that in the fiscal year ending September 30, 2020, it obtained more than $2.2 billion in settlements and judgments, and that recoveries since 1986 total more than $64 billion.[144] The *FCA* represents a prioritization of information rather than so-called ethical motives, and offers a different kind of remedy to wronged whistleblowers:

> The FCA is much more effective than merely protecting the whistleblower from retaliation or even giving the whistleblower a private cause of action for retaliation…. It is arguably the most protective of whistleblowers because a successful whistleblower recovers enough to withstand losing a job or suffering a stalled career…. The law values information over motive, and blowing the whistle to gain a large recovery is fine as long as the information is novel and leads to successful prosecution.[145]

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[138] MSPB, *APR-APP for FY 2019-2021: Annual Performance Report for FY 2019 Annual Performance Plan for FY 2020 (Final) and FY 2021 (Proposed)* (Washington, DC: MSPB, 2020) at 2, online: <http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1699796&version=1705740&application=ACROBAT>.

[139] *Ibid*.

[140] *Ibid* at 41.

[141] *Ibid* at 41.

[142] *Ibid* at 41-42. This report also provides recent data on the whistleblower appeals, from October 1, 2018 to September 30, 2019: *ibid* at 51.

[143] *False Claims Act*, 31 USC § 3729-3733.

[144] Department of Justice, Office of Public Affairs, Press Release, 21-55, "Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020" (14 January 2021), online: *Justice News* <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>.

[145] Dworkin, *supra* note 123 at 44. For further information on other mechanisms that support whistleblower protection, see Lisa J Banks & Jason C Schwartz, *Whistleblower Law: A Practitioner's Guide* (Lexis, 2021).

The ethical concern surrounding a whistleblower's motives has diminished in light of the *FCA*'s positive outcomes:

> The concern that whistleblowers might be motivated by gain rather than a desire to help is … no longer a major ethical consideration. The desire by the government to recover money and correct wrongdoing now trumps concerns regarding whistleblower motive. A "pure" motive is seen as secondary to the public good created by whistleblowers, regardless of motive.[146]

Some whistleblowers under the *FCA* have received large sums of money: "FCA settlements and judgments have totaled over $17 billion and virtually all whistleblowers have recovered $1 million or more—even though the majority of suits are settled."[147] For example, in August 2015, a former sales representative for NuVasive, a medical device producer, was awarded $2.2 million under the *FCA* in relation to kickbacks paid by the company to doctors. A Wisconsin pharmacist was awarded $4.3 million in 2015 after they blew the whistle on PharMerica. They were fired after reporting that their employer was dispensing dangerous drugs without a prescription.[148] In an even larger settlement, a former sales representative for Endo Pharmaceuticals Inc. received a $33.6 million award after blowing the whistle on the company. They served as an undercover informant for the FBI for five years and waited nine years between their first complaint and the 2014 settlement.[149] In addition, it has been argued that US legislation such as the *FCA* "leads the way" when it comes to the protection of whistleblowers that are based in a different jurisdiction.[150]

Long time delays between blowing the whistle and receiving recovery amounts can put whistleblowers in disadvantaged financial situations.[151] For example, in the Endo Pharmaceuticals case mentioned above, nine years passed between the whistleblower's first complaint and the settlement.[152] Despite this, many states have introduced similar legislation with varying amounts of recovery awarded to the *qui tam* plaintiff.[153] The state-level legislation has seen similar levels of success as the federal legislation.[154] The debate surrounding the morality of offering rewards was discussed in Section 4.3.5. The US is

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[146] Terry Morehead Dworkin & AJ Brown, "The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws" (2013) 11:2 Seattle J Soc Just 653 at 668.
[147] Dworkin, *supra* note 123 at 44.
[148] Richard L Cassin, "PharMerica Whistleblower Collects $4.3 Million" (21 May 2015), online (blog): *The FCPA Blog* <http://www.fcpablog.com/blog/2015/5/21/pharmerica-whistleblower-collects-43-million.html>.
[149] Richard L Cassin, "Jackpot: Pharma Whistleblower Awarded $33 Million" (17 July 2015), online: *The FCPA Blog* <http://www.fcpablog.com/blog/2015/7/17/jackpot-pharma-whistleblower-awarded-33-million.html>. See also Richard L Cassin, "Three SEC Whistleblowers Split $7 Million Award"(23 January 2017), online (blog): *The FCPA Blog* <http://www.fcpablog.com/blog/2017/1/23/three-sec-whistleblowers-split-7-million-award.html>.
[150] Richard Hyde & Ashley Savage, "Whistleblowing Without Borders: The Risks and Rewards of Transnational Whistleblowing Networks" in Lewis & Vandekerckhove, *supra* note 59, 20 at 24.
[151] *Ibid*.
[152] Cassin, *supra* note 149.
[153] Hyde & Savage, *supra* note 150 at 45.
[154] Dworkin & Brown, *supra* note 146 at 668.

mostly alone among the three countries discussed in this chapter in offering rewards. Generally speaking, the ethical or public service motive for whistleblowing in the UK is still favoured over motives related to private gain. The same may be said for Canada, with one exception: whistleblower rewards were created under the Ontario Securities Commission in 2016.

## 5.3 Federal Whistleblowing Protection in the Private Sector

In addition to the protections for public sector employees discussed above, the US is home to legislation protecting workers in the private sector. The *Sarbanes-Oxley Act of 2002* (*SOX*)[155] and the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (*Dodd-Frank Act*)[156] are examples that operate on the federal level. *SOX* was introduced in response to a number of scandals:

> Beginning in 2001, companies such as Enron, WorldCom, Global Crossing and Tyco became familiar names as accounting fraud and other business abuses became public…. Publicized abuses extended beyond accounting fraud, as reflected by Enron's manipulation of the energy markets in California, manipulation that stole millions of dollars from ratepayers and precipitated a crisis in that state…. Employees of these companies were aware of fraud and other abuses, but failed to come forward from fear of retaliation or found their warnings ignored. Some who came forward faced harassment. In response to the public outcry and the disclosed weaknesses in laws regulating corporate conduct, Congress enacted and George W. Bush signed the Sarbanes-Oxley Act of 2002.[157]

*SOX* applies to companies traded publicly, and it "calls for companies to establish a code of ethics and whistleblowing procedures."[158] This has international ramifications, as all countries traded publicly in the US must comply with the requirements of *SOX*. One of these requirements is that companies should have mechanisms allowing for anonymous disclosures, which many companies have complied with through the use of independent telephone hotlines.[159] This method of reporting has proven problematic in respect to difficulties maintaining anonymity and delays in following up on disclosures.[160]

In 2008, the global financial crisis prompted the enactment of the *Dodd-Frank Act*. The *Act* created the Securities and Exchange Commission and the Commodity Futures Trading Commission whistleblower incentive programs. Both programs reward individuals who provide information to the government relating to violations of federal securities or commodities exchange laws by giving whistleblowers a share of the money the government

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[155] *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745.
[156] *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111-203, 124 Stat 1376 [*Dodd- Frank Act*].
[157] Vaughn, *supra* note 5 at 150.
[158] Dworkin, *supra* note 123 at 37.
[159] *Ibid*.
[160] *Ibid*. For more information on anti-retaliation protections for whistleblowers, see Banks & Schwartz, *supra* note 145.

recovers. Under section 922 of the *Act* (which provides for amendments to the *Securities Exchange Act of 1934*), whistleblowers are entitled to a reward if they provide information for Securities and Exchange Commission (SEC) enforcement actions that lead to sanctions exceeding $1 million, including enforcement actions for *Foreign Corrupt Practices Act* (*FCPA*) violations. The making of awards is mandatory, but the amount is discretionary, within defined limits: "If one or more whistleblowers meet the eligibility criteria for an award and follow the required procedures for making a claim, the SEC is statutorily required to award them, in the aggregate, at least ten but not more than thirty percent of the monetary sanctions collected in the covered action."[161]

Section 922 (section 21F of the *Securities Exchange Act of 1934*) also protects those who provide information to the SEC from retaliation from employers. Retaliation claims under the *Dodd-Frank Act* can be brought within three years after the date when the facts material to the right of action became known or reasonably should have been known to the whistleblower. The *Dodd-Frank Act* allows the applicant to bring a lawsuit directly in the appropriate district court. In 2018, the US Supreme Court concluded that the anti-retaliation provisions in the *Dodd-Frank Act* do not extend to an individual who has not reported a violation of securities laws to the SEC.[162] This decision effectively curtails the protections for internal whistleblowing, including disclosures made to a corporate ethics or compliance program, unless the whistleblower also made the disclosure to the SEC. Disclosures "must rest upon a reasonable belief that the information relates to the violation of any consumer financial protection contained in the Dodd-Frank Act or any rule, order, standard, or prohibition prescribed or enforced by the Bureau [of Consumer Financial Protection]."[163]

The SEC reported that fiscal year 2020 broke records with respect to (at that time) the awards paid and claims processed, with over 6,900 whistleblower tips received, 197 final awards issued, 315 preliminary determinations issued, and $175 million awarded to 39 individuals.[164] Although the majority of awards have been for less than $2 million,[165] some very large awards have been issued; on October 22, 2020 (after the end of fiscal year 2020), the SEC issued the largest award to date at $114 million.[166] In 2020, the SEC voted to make certain amendments to the rules governing its whistleblower program, which, among other things, would create a presumption that potential awards of under $5 million (with certain requirements) would qualify for a presumption of receiving the maximum amount under the statute.[167]

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[161] Rose, *supra* note 109 at 2055.
[162] *Digital Realty Trust, Inc v Somers*, 138 S Ct 767 (2018).
[163] Vaughn, *supra* note 5 at 156.
[164] US Securities and Exchange Commission (SEC), *2020 Annual Report to Congress Whistleblower Program* (Washington, DC: SEC, 2020) at 2, online (pdf): <https://www.sec.gov/files/2020%20Annual%20Report_0.pdf>.
[165] Rose, *supra* note 109 at 2057.
[166] *Whistleblower Award Proceeding*, Exchange Act Release No 90247 (SEC File No 2021-2) (22 October 2020), online (pdf): <https://www.sec.gov/rules/other/2020/34-90247.pdf>.
[167] US SEC, Press Release,"SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program" (23 September 2020), online: <https://www.sec.gov/news/press-release/2020-219>; see also discussion of these amendments in Rose, *supra* note 109.

Although some commentators, such as Tim Martin,[168] predicted that the *Dodd-Frank Act* will increase the number of *FCPA* investigations, Mike Koehler predicts that its impact on *FCPA* enforcement will be negligible.[169] According to the SEC's report for the fiscal year of 2020, out of over 6,900 tips, only 208 related to the *FCPA*.[170]

In addition to these pieces of legislation, a number of other laws in the US protect whistleblowers in the private sector.[171] Robert Vaughn argues that private sector whistleblower legislation in the US has both positive and negative aspects:

> Relief under recent whistleblower laws is extensive, including reinstatement, back pay, compensatory damages, attorney fees and litigation costs, and specifically includes expert witness fees. The similarity between recent laws illustrates the application of a common model for their content. This similarity offers some advantages by tying them together and creating a body of federal private-sector whistleblower laws. For example, this similarity could empower some future reform such as a uniform federal law applying blanket protection to all private-sector whistleblowers. The similarity, however, has some disadvantages. Because the pedigree of these common elements rests on aspects of the Whistleblower Protection Act of 1989, applicable to federal employees, and of the Sarbanes-Oxley Act, these laws may be limited by restrictive interpretations of relevant statutory terms by the Federal Circuit in relation to the Whistleblower Protection Act and by the Department of Labor in relation to the Sarbanes-Oxley Act.[172]

## 6. UK: *PUBLIC INTEREST DISCLOSURE ACT 1998*

In the UK, whistleblowers are protected by *PIDA*. The passage of this legislation was preceded by a number of serious disasters that may have been prevented if employees had come forward with information; this "has been confirmed by the findings of the official inquiries … which found that staff had been aware of dangers but had not mentioned them for fear of retaliation, or had raised concerns and then been dismissed or led to resign."[173]

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[168] Tim Martin, *International Bribery Law and Compliance Standards* (Independent Petroleum Association of America, 2013) at 21, online (pdf): <http://timmartin.ca/wp-content/uploads/2016/02/Int-Bribery-Law-Compliance-Standards-Martin2013.pdf>.

[169] Mike Koehler, "Potpourri" (24 November 2014), online (blog): *FCPA Professor* <http://www.fcpaprofessor.com/potpourri-13>.

[170] US SEC, *supra* note 164 at 27-28.

[171] Vaughn, *supra* note 5 at 152, states that "[t]he whistleblower provision of SOX heralded a decade of congressional enactment of private-sector whistleblower laws." In addition, the author at 154–155 calls attention to the *American Recovery and Reinvestment Act* (123 Stat 115), which distributes funds to governments on the local and state level (and, through them, to private contractors) for use on public projects; under this legislation, "[e]mployees may disclose gross management, waste, fraud, and abuse of stimulus funds."

[172] *Ibid* at 159.

[173] Lucy Vickers, "Whistling in the Wind? The Public Interest Disclosure Act 1998" (2000) 20:3 LS 428 at 429.

For example, in 1987 a ship sank, killing 193 people, because its bow doors had been opened while sailing. Employees had raised concerns on five occasions about the risk that this caused, but the warnings were not heeded by management.[174] Prior to such tragedies and the subsequent introduction of *PIDA*, the cultural attitude in the UK strongly favoured loyalty to an employer and contractual obligations over disclosure of employment-related issues.[175] The common law did not provide much in the way of whistleblower protection, and what protection existed was superseded in many cases by the "implied duties of the employment relationship, which explicitly barred British employees from publicly discussing private employment matters."[176] Now, many years since the introduction of *PIDA*, whistleblowers in the UK are viewed more positively by individuals and by the media.[177]

As already noted, *PIDA* has been lauded as one of the most comprehensive pieces of whistleblower protection legislation in the world, and has often been cited as a "model" law due to its comprehensive coverage and tiered disclosure system. However, as discussed further below, there are now indications that *PIDA* has not been effective in realizing whistleblower protection, and that it may have been overtaken by global developments in whistleblower protection standards.

In Wim Vandekerckhove's 2010 examination of European whistleblower protection *PIDA* was used as a model against which various European laws were measured.[178] This is because *PIDA*'s "three-tiered model" of disclosure captures a preference for internal disclosure, while still accounting for the necessity of external disclosure in some situations. In doing so, it provides protection for both internal and external whistleblowing against a sliding scale of requirements:

> This legislation offers protection for internally raising concerns within and outside of the hierarchical line. It also offers protection for blowing the whistle to a prescribed regulator if the internal route failed. Finally, if that too was unsuccessful, wider disclosures are protected as well.[179]

*PIDA*'s three-tiered model thus offers a balance between the interests of the employer in maintaining confidentiality, and the interests of the public in having employees disclose information related to workplace malpractice or corruption.[180] When a worker makes an internal disclosure, there is a presumption of legislative protection against reprisal as long as the worker has acted in good faith.[181] However, there are more requirements in order to receive protection under *PIDA* when disclosure is made to an external regulator or to the media. In order to make a disclosure to an external source, it must be the case that the

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[174] The Whistleblowing Commission, *supra* note 111 at 7.
[175] Vickers, *supra* note 173 at 429.
[176] Mendelsohn, *supra* note 84 at 734.
[177]The Whistleblowing Commission, *supra* note 111 at 9.
[178] Wim Vandekerckhove, "European Whistleblower Protection: Tiers or Tears?" in Lewis, *supra* note 123, 15.
[179] *Ibid* at 17.
[180] Mendelsohn, *supra* note 84 at 738.
[181] *PIDA*, *supra* note 63, s 43C.

whistleblower "reasonably believes that the information disclosed, and any allegation contained in it, are substantially true."[182] The whistleblower must not have acted for the purposes of personal gain, and it must have been reasonable to make the disclosure.[183] *PIDA* thus imposes increasingly onerous requirements (especially in terms of level of knowledge and reasonableness of belief) the further that the whistleblower gets from internal disclosure. The Canadian *Public Servants Disclosure Protection Act* (*PSDPA*), discussed in Section 7.2, also has differing requirements depending on the recipient of the disclosure, but they are not as onerous. For example, disclosure to the public under the *PSDPA* is governed by section 16:

> **16.** (1) A disclosure that a public servant may make under sections 12 to 14 may be made to the public if there is not sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that
>
> (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
>
> (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.[184]

The requirements for similar disclosure under *PIDA* are lengthier, to say the least:

> **43G.** (1) A qualifying disclosure is made in accordance with this section if—
>
> (a) the worker makes the disclosure in good faith,
>
> (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) any of the conditions in subsection (2) is met, and
>
> (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
>
> (2) The conditions referred to in subsection (1)(d) are—
>
> (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
>
> (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the

[182] *Ibid*, s 43G(1)(b).
[183] *Ibid*, s 43G(1)(c) and (e).
[184] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 16 [*PSDPA*].

relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.[185]

Thus, while *PIDA* may benefit from greater clarity in its requirements (as compared to *PSDPA*), it imposes a very heavy burden on a whistleblower who makes a disclosure to a source beyond an employer, legal advisor, Minister of the Crown, or other prescribed person.

*PIDA*'s coverage is expansive: it protects employees in both the public and private sectors, and it is broad enough to capture private contractors.[186] In addition, the legislation covers a wide range of wrongdoing under the purview of a protected disclosure: a disclosure qualifies as protected where the person who makes the disclosure reasonably believes that a criminal offence has been or is likely to be committed, there has been a failure to comply with legal obligations, there has been or is likely to be a miscarriage of justice, there is a risk

[185] *PIDA*, *supra* note 63, s 43G.

[186] Wolfe et al, *supra* note 1 at 67.

to health, safety or the environment, or information relevant to one of these areas faces deliberate concealment.[187] Whether the wrongdoing occurred within or outside the UK or whether non-UK law applies to the wrongdoing, is irrelevant. However, critics have suggested that there are downsides to having an exhaustive list of wrongdoing. Instead, *PIDA*'s reach could be broadened by conferring some discretion on the courts: "PIDA might have provided better protection if it had included a list of matters automatically covered together with a final catch-all provision covering matters that, in the opinion of the court, are in the public interest."[188] The types of reprisals that whistleblowers are protected against are similarly broad, with the legislation stating that "[a] worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by this employer done on the ground that the worker has made a protected disclosure."[189] If a worker experiences reprisal, claims are made directly to the UK Employment Tribunal, rather than to a specialized body. Remedies for reprisal include reinstatement, unlimited compensation, or reengagement.[190] *PIDA*'s track record in its first ten years can be summarized as follows:

> In the first ten years of PIDA's operation, the number of claims made under it annually increased from 157 in 1999 to 1761 in 2009. This is still a small proportion (under 1%) of all claims made to Employment Tribunals. Over 70% of these claims were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won. There is only partial information on awards: in the known cases, the average compensation was £113,000 (the largest single award was over £3.8m) and the total known compensation was £9.5m.[191]

Despite the broad scope of *PIDA*, a review of the legislation by the non-profit Protect identified a number of opportunities for improvement.[192] Among these recommendations were the implementation of a code of practice, and the simplification of the legislative language. A code of practice would help to clarify the rights of whistleblowers and the appropriate procedural steps that whistleblowers should take when disclosing information internally:

> Such a code of practice must clearly set out principles enabling workers to raise concerns about a danger, risk, malpractice or wrongdoing that affects others without fear of adverse consequences. Any such arrangements must be proportionate to the size of the organisation and the nature of the risks faced. A code of practice should set out the requirements for arrangements

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[187] *PIDA*, *supra* note 63, s 43B.

[188] Vickers, *supra* note 173 at 434. Similarly, a report put forward by The Whistleblowing Commission, *supra* note 111 at 17, suggests that *PIDA* ought to be amended to include a "non-exhaustive list of the categories of wrongdoing, including gross waste or mismanagement of funds and serious misuse or abuse of authority."

[189] *PIDA*, *supra* note 63, s 47B(1).

[190] Vickers, *supra* note 173 at 432.

[191] Stephenson & Levi, *supra* note 78 at 20.

[192] The Whistleblowing Commission, *supra* note 111. See also David Lewis, "Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?" (2008) 82 J Bus Ethics 497 at 504 for a number of recommendations for reform.

> covering the raising and handling of whistleblowing concerns and should include a written procedure for the raising of concerns. This procedure should include: clear assurances about protection from reprisal; that confidentiality will be maintained where requested; and should identify appropriate mechanisms for the raising of concerns, as well as, identifying specific individuals with the responsibility for the arrangements.[193]

Protect (formerly Public Concern at Work) called for more research to be done by the government regarding the possibility of creating an ombudsman or similar independent agency. Such an agency may be able to raise public awareness, conduct investigations into alleged reprisals and conduct strategic litigation, among other things.[194]

More recently, in July 2018, the All Party Parliamentary Group (APPG) for Whistleblowing was launched. The APPG's objective was to "provide much stronger and more comprehensive protection for whistleblowers … to work to identify where the law fails to protect whistleblowers and, work with industry experts, whistleblowers, regulators and businesses, to recommend positive, effective and practical proposals for change."[195] Research was conducted into whistleblowing cases between 2015 and 2018 in England and Wales, and in 2020 the APPG concluded that significant reform was required:

> The APPG has concluded, using the evidence available that it is time for a root and branch reform of the legislation setting out a 10 point plan including the introduction of a body capable of tackling and challenging wrong-doing. This office will be tasked with the review of PIDA and the development of legislation that addresses the substantive issues to ensure that protecting those who speak up and wrong-doing is addressed at the earliest opportunity. This body will also need to review international best practice and look to make best practice our practice. The APPG calls for new whistleblowing legislation with an Office of the Whistleblower as the bearer of its implementation.[196]

Moreover, key findings of the research included that whistleblowing cases had a low success rate, whistleblowers suffered more and longer than before, fewer whistleblowers have legal representation than in the past, whistleblowing has a gender component, and whistleblowing cases often include a discrimination claim but these are the least successful cases.[197]

In addition, recent commentators have indicated that *PIDA* may have been overtaken as a "model" law. For example, Richard Hyde and Ashley Savage indicate that "PIDA, which was once considered an exemplar, has now arguably been overtaken by more

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[193] The Whistleblowing Commission, *supra* note 111 at 13.
[194] *Ibid* at 25.
[195] All Party Parliamentary Group for Whistleblowing, *Making Whistleblowing Work for Society*, (July 2020) at 2, online (pdf): <https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf>.
[196] *Ibid* at 2.
[197] *Ibid* at 3.

comprehensive whistleblowing laws," with particular reference to the EU Whistleblower Directive (then only a provisional agreement).[198]

# 7. CANADA

## 7.1 Development of the Common Law Defence

Prior to the introduction of dedicated whistleblower legislation, whistleblowers had to rely on protection provided by common law; in the employer-employee context, it was necessary to balance the duty an employee owed to their employer and an employee's right to freedom of expression. Slowly the balance began to shift, at least in theory, from prioritizing the duty of loyalty to one's employer, to protecting reasonable, good faith disclosures of alleged wrongdoing in the employer's organization. In *British Columbia v BCGEU*, arbitrator J.M. Weiler considered a matter wherein employees, who had taken an oath of office, publicly disclosed information that was critical of their public sector employer.[199] The arbitrator considered past decisions in the public sector context, and determined:

> These awards do not go so far as to prevent an employee, at the risk of losing his job, from making *any* public statements that are critical of his employer. An absolute "gag rule" would seem to be counter productive to the employer for it would inhibit any dissent within the organization. Employee dissidents can be a valuable resource for the decision-makers in the enterprise.[200]

However, Weiler went on to note that public criticism of this sort (that is, "going public") should be something of a last resort after internal processes have been exhausted.[201] This decision recognized that the disclosure of information may, in fact, benefit the public sector employer: "Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing."[202]

A few years later, in *Fraser v Public Service Staff Relations Board*, the Supreme Court of Canada considered a case wherein the appellant faced disciplinary measures and eventually lost his position at the Department of Revenue Canada after criticizing governmental policy (specifically, metric conversion) in a letter to the editor published in a newspaper. The Court

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[198] Richard Hyde & Ashley Savage, "The Halfway House is Only Halfway Built: Reforming the system of prescribed persons and the Public Interest Disclosure Act 1998" (2019) 25:2 Eur J Current Legal Issues.
[199] *British Columbia (Attorney General) v BCGEU*, [1981] BCCAAA No 9, 1981 CarswellBC 1176 (WL) [*BCGEU*].
[200] *Ibid* at para 39.
[201] *Ibid* at para 42.
[202] *Ibid* at para 43.

outlined three contexts in which it would be possible for a public servant to act against their duty of loyalty:

> As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances, a public servant may actively and publicly express opposition to the policies of a government. **This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability**. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government. [emphasis added][203]

Following this decision, different factors were identified within the jurisprudence as relevant considerations when determining if a public servant's conduct fit within one of the categories enumerated by the Supreme Court.

After the introduction of the *Canadian Charter of Rights and Freedoms*, and the enshrinement of freedom of expression therein, the Federal Court stated that "[t]he common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the *Charter*, and therefore constitutes a reasonable limit within the meaning of section 1 of the *Charter*."[204]

## 7.2 Federal Legislation: *Public Servants Disclosure Protection Act*

### 7.2.1 Legislation

This section focuses on federal whistleblower legislation. A description of provincial whistleblower laws is beyond the scope of this chapter. It should be noted, however, that a number of provinces have developed legislation to protect provincial public sector employees. In Quebec, for example, in its *Rapport de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction*, the Charbonneau Commission recommended improving the support and protection of whistleblowers by protecting confidentiality regardless of the method of reporting, providing support to whistleblowers,

[203] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 1985 CarswellNat 145 at para 46 (WL).
[204] *Haydon v R*, [2001] 2 FC 82, 2000 CarswellNat 2024 at para 89 (WL).

and offering financial support if necessary.[205] The Commission recognized that wrongdoing can be difficult to detect without the assistance of *lanceurs d'alerte*, and that people may not report wrongdoing due to a fear of reprisals.[206] The Commission noted the limitations of current whistleblower protections, which are limited in scope and may be difficult to understand, and advocated for a more general system of whistleblower protection.[207] Several of these concerns were addressed in *An Act to Facilitate the Disclosure of Wrongdoings related to Public Bodies*, which came into force on May 1, 2017.

Federal public sector employees have been governed by the *Public Servants Disclosure Protection Act* (*PSDPA*) since it came into force on April 15, 2007.[208] The *PSDPA* reflects the principles that have developed through the case law, but offers a more structured and robust approach to the protection of reporting persons; in other words, the legislation "maintains the integrity of the 'whistleblower' defence from the jurisprudence and builds upon it."[209] The Preamble sets out the guiding values underlying the legislation:

> Recognizing that
>
> the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;
>
> it is in the public interest to maintain and enhance public confidence in the integrity of public servants;
>
> confidence in public institutions can be enhanced by establishing effective procedures for the disclose of wrongdoings, and by establishing a code of conduct for the public sector;
>
> public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and that this Act strives to achieve an appropriate balance between those two important principles;
>
> the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct[.][210]

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[205] France Charbonneau & Renaud Lachance, "Stratagèmes, causes, conséquences et recommandations" in Quebec, Commission on the Awarding and Management of Public Contracts in the Construction Industry, *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction* (CEIC, November 2015) at 111, online (pdf): *Gouvernement du Québec* <https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Tome-3_c.pdf>. See Chapter 12, footnote 32, which provides the link to the English translation.

[206] *Ibid* at 109.

[207] *Ibid* at 110-111.

[208] *PSDPA*, *supra* note 184.

[209] *El-Helou v Courts Administration Service*, 2011 PSDPT 1 at para 45 [*El-Helou No 1*].

[210] *PSDPA*, *supra* note 184, Preamble.

The *PSDPA* dictates the parameters of what qualifies as a protected disclosure.[211] This means that if a public sector worker "blows the whistle" on issues that are outside of the purview of a protected disclosure, they will not have recourse to the legislation. Section 8 of the legislation enumerates the "wrongdoings" for which disclosure is protected, including contravention of legislation, misuse of public funds, gross mismanagement, acts or omissions creating "substantial and specific" danger to health and safety of people or the environment, breach of codes of conduct established under the *PSDPA* and counseling a person to commit one of these wrongdoings.[212] This definition signifies a legislative attempt to itemize the kinds of conduct that would be considered corrupt or undesirable within a public sector institution, and the provision makes it clear that not just *any* disclosure will trigger legislative protection. This is problematic, as whistleblowers must: (1) have enough knowledge of the legislative protection to know whether the wrongdoing of which they have knowledge falls within the purview of the legislation and (2) have enough knowledge of the wrongdoing *itself* to know if it falls within one of these categories. Thus, this approach is overly restrictive, and the legislation would be improved by a broader or open-ended understanding of wrongdoing.

The *PSDPA* covers those working in the federal public sector, but it does not extend to protect disclosures by those working in the Canadian Forces, the Communications Security Establishment, or the Canadian Security Intelligence Service.[213] However, these excluded groups are required to create internal disclosure mechanisms under section 52 of the *PSDPA*, which states:

> As soon as possible after the coming into force of this section, the person responsible for each organization that is excluded from the definition of "public sector" in section 2 must establish procedures, applicable to that organization, for the disclosure of wrongdoings, including the protection of persons who disclose the wrongdoings. Those procedures must, in the opinion of the Treasury Board, be similar to those set out in this Act.[214]

Again, only those disclosures that qualify will warrant the protection of the legislation.

The *PSDPA* also outlines the appropriate methods of disclosure. Section 12 provides for internal disclosure, section 13 allows for external disclosure to the Public Sector Integrity Commissioner (Commissioner or PSIC), and section 16(1) provides for limited circumstances under which the disclosure may be made to the public. This system was

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[211] Legislation often uses terms such as "protected disclosure" rather than the colloquial "whistleblowing." One reason for this may be, as suggested in David Lewis, AJ Brown & Richard Moberly, "Whistleblowing, Its Importance and the State of the Research" in Brown et al, *supra* note 8, 11 at 3, that the term whistleblower has "negative historical connotations, in many settings, alongside or overwhelming any positive ones, particularly in countries where oppressive governments have encouraged citizens to denounce the activities of political opponents."

[212] *PSDPA*, *supra* note 184, s 8.

[213] *Ibid*, s 2(1).

[214] *Ibid*, s 52. Section 53 also provides some limited and discretionary protection to these groups: "The Governor in Council may, by order, direct that any provision of this Act applies, with any modifications that may be specified in the order, in respect of any organization that is excluded from the definition of 'public sector' in section 2."

summarized by the Public Servants Disclosure Protection Tribunal in their first interlocutory decision, *El-Helou v Courts Administration Service* (*El-Helou No. 1*), as follows:

> The Act creates a much broader system for disclosure protection within the public service at several junctures and at different levels: internally to a supervisor or the departmental Senior Officer (section 12) of a department or agency; externally to the Commissioner (section 13); or where there is not sufficient time to disclosure a serious offence under Canadian legislation or an imminent risk of a substantial and specific danger, the disclosure may be made to the public (subsection 16(1)).[215]

This tiered system of disclosure attempts to operationalize the best practices principles discussed in Section 4.3.2. Internal disclosure is prioritized, but procedures and requirements are in place for disclosures externally and to the media.

Section 19 prohibits reprisals against public servants, and section 19.1 lays out the process through which a public service employee can complain about an alleged reprisal. "Reprisal" is a defined term within section 2 of the *PSDPA* to include actions such as disciplinary measures, demotion, employment termination, or "any measure that adversely affects the employment or working conditions of the public servant."[216] The *PSDPA* relies on a central agency, the Office of the Public Sector Integrity Commissioner appointed under section 39, to "receive reports from public servants of wrongdoing, to investigate them and to make recommendations to correct them."[217] The *PSDPA* also mandated the creation of the Public Servants Disclosure Protection Tribunal to adjudicate claims of reprisals that the Commissioner deems appropriate; arguably, "[t]he existence of an independent tribunal with quasi-judicial powers to adjudicate reprisals is reflective of Parliament's intention of emphasizing and addressing the gravity of retaliation against individuals who come forward to report suspected wrongdoing."[218] Broadly speaking, the complaint procedure is as follows. If a public servant or former public servant who made a protected disclosure has reasonable grounds for believing that a reprisal (as defined in section 2(1)) has been taken against them, they may file a complaint with the Commissioner (section 19.1(1)). The complaint must be filed within 60 days of when the complainant knew or ought to have known that the reprisal was taken (section 19.1(2)). The Commissioner may refuse to deal with a complaint (s. 19.3(1)) or designate a person as an investigator to investigate a complaint (section 19.7(1)); in any event, the Commissioner must decide whether or not to deal with a complaint within 15 days after it is filed and must provide written notice or reasons of that decision (section 19.4). If an investigation is initiated, the Commissioner might appoint a conciliator to try to settle the case (section 20(2)), and/or make an application to the Tribunal (section 20.4(1)). The Tribunal, consisting of judges of the Federal Court or a superior court of a province (section 20.7(1)), can grant remedies in favour of complainants (section 21.7(1)) and order disciplinary action against persons who take reprisals (section 21.8(1)).

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[215] *El-Helou No 1*, *supra* note 209 at para 47.
[216] *PSDPA*, *supra* note 184, s 2.
[217] Latimer & Brown, *supra* note 51 at 779.
[218] OECD, *supra* note 28 at 152.

Section 21.7 lays out the potential remedies that the Tribunal is able to order. Remedies include reinstating the whistleblower's employment, rescinding measures taken by the employer, and paying compensation to the complainant.[219] However, it is problematic that these remedies represent a closed list; in other words, the Tribunal has limited power to respond to the specific circumstances of the case, and must find an appropriate remedy from within the list. Furthermore, the remedies listed focus on rescinding detrimental actions, reinstating an employee, or paying compensation. If the reprisal faced by the complainant cannot be easily reduced to a dollar value (if, for example, the employee has been harassed or has missed opportunities for promotion), then it is unclear how the Tribunal could fashion an appropriate remedy.

### 7.2.2 Decisions of the Tribunal and the Federal Courts

As of February 2021, the Tribunal website lists eight cases.[220] Of these, five were settled between the parties in some manner. The other three files have seen a multitude of interlocutory decisions, judicial reviews to the Federal Court, appeals to the Federal Court of Appeal, and, finally, decisions on the merits. In no case has the Tribunal found that the complainant has made out their claim.

Early decisions by the Tribunal were all interlocutory in nature—indeed, the Tribunal did not render a final decision on the merits in any case until 2017. In *El-Helou No. 1*, the Tribunal affirmed the potential strength of this legislation: "The Tribunal recognizes that it must play its role to ensure that this new legislative scheme not be 'enfeebled'."[221] This approach was developed in *El-Helou v Courts Administration Service* (*El-Helou No. 3*), where the Tribunal noted that the goal of the legislation and of the adjudicative function of the Tribunal ought to be on the substantive content of the disclosure and the alleged reprisal, and not on the possible procedural defects of an Application. The Tribunal highlighted the principles of natural justice:

> It is in this context that an examination of the Act must be conducted. In considering the Act as a whole and the part of the Act pertaining to complaints of reprisal, it becomes clear that **Parliament focussed on the substance of the complaint**, and not on who may or may not have been identified as potential respondents in the original complaint. In addition, as discussed below, the processes for reprisal complaints demonstrate Parliament's intention to ensure that notice be provided to potential respondents, whether or not they were named in a complaint. This requirement of notice ought not to be considered as merely a procedural formality, but rather, as an important step in ensuring fairness to all of those affected by an investigation and, possibly, an Application before the Tribunal. In the course of an investigation, other parties might be identified

[219] *PSDPA*, *supra* note 184, s 21.7.
[220] "All Cases" (last visited 1 February 2021), online: *Government of Canada - Public Servants Disclosure Protection Tribunal* <https://www.psdpt-tpfd.gc.ca/Cases/AllCases-en.html>.
[221] *El-Helou No 1*, *supra* note 209 at para 49.

> and Parliament wanted to ensure that the principles of natural justice could be addressed as a complaint progressed. [emphasis added][222]

In line with this approach, the Tribunal in *El-Helou v Courts Administration Service* (*El-Helou No. 4*) recognized that it may be appropriate to adopt more relaxed standards regarding the admission of evidence. This represents the Tribunal's desire to deal with the substance of the reprisal, rather than evidentiary or procedural issues that may prevent a complainant from accessing justice. The Tribunal stated:

> In addition, there is flexibility in the Act as to how the Tribunal admits evidence, which strongly suggests that opinion evidence and hearsay could be subject to more relaxed standards. Nonetheless, **the Tribunal would need to ensure fairness in its proceedings for all the parties, and adopt a focused approach to its proceedings and the tendering of evidence**. In this manner, it can assure that its time and resources are utilized judiciously.
>
> The Tribunal recognizes that it must weigh evidence carefully, given the serious consequences of the proceedings. Nevertheless, the provisions of the Act pertaining to a more flexible approach to the admissibility of evidence guide the Tribunal, and suggest that **a formalistic approach ought not to be adopted**. This general stance is also supported by Supreme Court of Canada jurisprudence. Given the requirements of a hearing and the mandate of the Tribunal, it must be cautious in any request that asks that it rule in an anticipatory fashion on the admissibility of evidence. [emphasis added][223]

In this decision, the Tribunal also commented on the differing burden as between the Commissioner's threshold for referring an application to the Tribunal, and the Tribunal's determination of whether a reprisal has been made out:

> The "balance of probabilities" is generally the standard of proof used in civil proceedings and before administrative tribunals, unless otherwise expressed in the statute. This is the burden of proof upon which the Tribunal decides whether or not reprisal has been taken against the complainant, in relation to the disclosure of wrongdoing within the meaning of the Act. If Parliament had intended that the burden of proof not be the civil standard of proof, this would have been clearly articulated in the legislation. To meet the standard of proof of the balance of probabilities, the evidence presented will outweigh the evidence that disputes the allegations. It is sometimes stated that for the "balance of probabilities" to be satisfied, the evidence presented must show that the facts as alleged are more probable than they are not.

[222] *El-Helou v Courts Administration Service*, 2011 PSDPT 3 at para 29 [*El-Helou No 3*].
[223] *El-Helou v Courts Administration Service*, 2011 PSDPT 4 at paras 73-74 [*El-Helou No 4*].

> The Commissioner's threshold for the referral of an Application and the Tribunal's burden of proof is different. This can be understood by examining the wording as well as the structure of the Act.[224]

The Federal Court and the Federal Court of Appeal have grappled with certain sections of the *PSDPA* through judicial reviews of decisions made pursuant to the legislation. For example, judicial reviews have been conducted of decisions by the Commissioner, such as decisions that were not in the public interest to commence investigations into alleged wrongdoings,[225] or to dismiss complaints of reprisals and therefore not make applications to the Tribunal in respect of those complaints;[226] what follows is not an exhaustive review of the jurisprudence.

In *El-Helou v Canada (Courts Administration Service)*,[227] the Federal Court of Appeal considered an appeal and a cross-appeal of a Federal Court decision which allowed in part the application for judicial review against a decision of the Commissioner dismissing the appellant's reprisal complaints under the *PSDPA*. The facts of this case are unusual (and the path rather circuitous): the Commissioner, after an investigation, referred a complaint of reprisal to the Tribunal. Mr. El-Helou sought judicial review of the decision not to refer the other complaints to the Tribunal; this was allowed, and a second investigation was conducted into all of the complaints. Following that investigation, the Commissioner did not refer any other complaints to the Tribunal, and also concluded that the complaint that had previously been referred to the Tribunal was not founded. Mr. El-Helou sought judicial review of the decisions made following the second investigation; the Federal Court allowed the application in part, and this was then both appealed and cross-appealed to the Federal Court of Appeal.

The Court of Appeal found that the disclosure of the investigator's preliminary report into the reprisal complaints adequately informed the appellant of the case to be met in order to allow him to provide a full response.[228] Further, the Court of Appeal considered whether, as a result of the previous decision made by the Federal Court and the subsequent investigation, the Commissioner was *functus officio* with respect to a complaint that had already been referred to the Tribunal. The Court determined that he was, but also that the Commissioner could now adopt a position adverse to the application, stating:

> [E]ven though the Commissioner no longer believes that the appellant is entitled to the remedy claimed, he does not have the power to dismiss the complaint. Only the Tribunal retains the authority to deal with it, after hearing all the parties concerned. In this respect, the Commissioner's revised position is no more determinative of the outcome before the

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[224] *Ibid* at paras 34-35.

[225] See, for example, *Gordillo v Canada (Attorney General)*, 2019 FC 950.

[226] See, for example, *Biles v Canada (Attorney General)*, 2017 FC 1159.

[227] *El-Helou v Courts Administration Service*, 2016 FCA 273, leave to appeal ref'd.

[228] *Ibid* at paras 47-48. See also the earlier decision in *El-Helou v Canada (Courts Administration Service)*, 2012 FC 1111, in which Mactavish J found there to be a breach of procedural fairness in an earlier investigation, where Mr. El-Helou was not provided with a copy of the investigator's report.

Tribunal than was his support for the application at the time he filed it before the Tribunal.

Turning to section 21.6, the Commissioner proceeded on proper principle when he asked whether this provision authorized him to change his stance and adopt a position against the application that he filed. In holding that it did, the Commissioner was construing his home statute. In my view, reasonableness is the standard against which this aspect of the Commissioner's decision is to be reviewed (*Dunsmuir*, para. 54; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), para. 34).

Subsection 21.6(2) requires the Commissioner to "adopt the position that, in his or her opinion, is in the public interest". **In my view, it was reasonable for the Commissioner to hold that he could adopt a position adverse to the application that he had filed if, in his opinion, the circumstances no longer supported the granting of a remedy in the public interest.** Looking at the matter the other way, the Commissioner would be acting against the public interest if he were to support a complaint of reprisal even though he was of the view that no reprisal had taken place. It was therefore open to the Commissioner to reconsider his initial position and to adopt one before the Tribunal that is consistent with the facts revealed by the second investigation.

…

I accept that, as a general rule, the Commissioner should not allow a complaint that has been referred to the Tribunal to be investigated further. However, I do not believe that this renders the Commissioner's decision unreasonable on the facts of this case.

While as noted earlier, the appellant did object to complaint #3 being further investigated, he could not object to the investigation of the other complaints as they emanated from him. Given the extent to which they are intertwined, I do not see how these complaints could be investigated without eliciting information relevant to complaint #3. This is what Mactavish J. had in mind in *El-Helou #1* when she suggested that the further investigation that she ordered — specifically the interview of the former Chief Administrator of CAS — could impact the outcome of complaint #3 even if it was no longer in the hands of the Commissioner (*El-Helou #1*, para. 90).

Given the ongoing investigation into the other complaints, there is no principled reason by which the Commissioner should have turned a blind eye to the new information gathered in the course of the second investigation.

It was therefore reasonable for the Commissioner to rely on this new information when deciding under section 21.6 to adopt a position before the Tribunal that is adverse to the application that he had filed and to amend

> the statement of particulars to reflect his current position. [emphasis added][229]

Leave to appeal this decision to the Supreme Court of Canada was refused.

In *Therrien v Canada*, the Federal Court dismissed an application for judicial review of the Commissioner's decision not to investigate allegations of wrongdoing.[230] In this case, the whistleblower made disclosures both internally and publically regarding alleged pressures by Service Canada to deny or limit claims for Employment Insurance; their employment was ultimately terminated, and their reliability status was revoked.[231] The Court upheld the Commissioner's decision not to investigate the complaints because they were already the subject of a grievance process, and under section 19.3(2) the Commissioner was directed not to deal with such complaints.[232] This decision was subsequently reversed on appeal,[233] with Gleason J.A. concluding that the Commissioner violated the appellant's procedural fairness rights, as the appellant's counsel was told that the Commissioner would be assessing whether he would inquire into the reprisal complaint according to the factors enumerated in section 19.3(1)(a), but the Commissioner instead dismissed the complaint under section 19.3(2). The Court considered the difference between these as follows:

> There is a meaningful difference between the two statutory provisions. Paragraph 19.3(1)(*a*) of the *PSDPA* affords the Commissioner discretion to decline to deal with a complaint where the Commissioner is of the opinion that the subject matter of the complaint either has been or ought more appropriately be dealt with under a procedure provided under another Act of Parliament or a collective agreement. Subsection 19.3(2), on the other hand, is cast in mandatory terms and requires the Commissioner to dismiss a complaint where its subject matter is being dealt with by a body (other than a law enforcement agency) acting under another Act of Parliament or a collective agreement. Given these differences, a complainant may well make different submissions under the two provisions.[234]

The Court went on to examine the Commissioner's interpretation of section 19.3(2), finding the decision to be unreasonable: "in the context of a grievance, it is only where the Commissioner is satisfied that the substance of a reprisal complaint is being dealt with on its merits by the PSLREB that subsection 19.3(2) of the *PSDPA* might reasonably be found to apply. To ascertain whether this is so, it may often be necessary for the Commissioner to await the outcome of proceedings before the PSLREB prior to determining whether subsection 19.3(2) of the *PSDPA* is applicable."[235]

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[229] *Ibid* at paras 71-73, 75-78.
[230] *Therrien v Canada (Attorney General)*, 2015 FC 1351, rev'd 2017 FCA 14.
[231] *Ibid* at paras 3-5.
[232] *Ibid* at para 18.
[233] *Therrien v Canada (Attorney General)*, 2017 FCA 14.
[234] *Ibid* at para 5.
[235] *Ibid* at para 9.

In *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, the Federal Court considered section 23(1) for the first time.[236] This section indicates that the Commissioner cannot deal with a disclosure if the subject-matter of that disclosure is already being dealt with by "a person or body acting under another Act of Parliament."[237] In reaching its conclusion, the Court emphasized the need to consider the entirety of the *Act* and the context of the legislation, stating:

> The parties have focused on the phrases in subsection 23(1) but not necessarily in the context of the *PSDPA*. Given the importance of whistleblower legislation to "denounce and punish wrongdoings in the public sector" the phrase "dealing with" must take its meaning from this context. The phrase cannot be interpreted so broadly as to frustrate the scheme and purpose of the legislation. Simply bringing the wrongdoing to the attention of the CEO is but one aspect of the purpose of an investigation. Public exposure is mandatory whenever an investigation leads to a finding of wrongdoing.
>
> The legislation addresses wrongdoings of an order of magnitude that could shake public confidence if not reported and corrected. When the Commissioner is "dealing with" an allegation of wrongdoing, it is something that, if proven, involves a serious threat to the integrity of the public service. That is why, before an investigation is commenced, there is a period of analysis to determine there is some merit to the disclosure. That is also why the investigators are separate from the analysts.
>
> The focus of the disclosure provision of the *PSDPA* is to uncover past wrongs, bring them to light in public and put in place corrections to prevent recurrence.
>
> …
>
> The *PSDPA* is remedial legislation. As such, section 12 of the Interpretation Act, RSC 1985, c.I-21 requires it to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Parliament cannot have intended that subsection 23(1) be read so broadly that a procedure undertaken months after the Commissioner begins to deal with a disclosure, led by another body for a different purpose, headed toward the qualitatively different outcome of a private report, regardless of the finding, and examining only recent, very different, evidence should be sufficient to prevent the Commissioner from determining whether a serious past allegation of wrongdoing occurred and, if so, exposing it.[238]

The Court ultimately found that the Commissioner made a reasonable decision in not ending the investigation into the alleged wrongdoing when informed that Transport Canada was

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[236] *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886.
[237] *PSDPA*, *supra* note 184, s 23(1).
[238] *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 at paras 105-107, 113.

dealing with the same incidents (that is, the actions of the Ottawa Air Section of the RCMP Air Services Branch in making false log entries).

In *Gupta v Canada*, the Federal Court of Appeal considered a judicial review of the Commissioner's decision not to investigate a whistleblower's allegations that he faced reprisals and the threat of reprisals following a disclosure of wrongdoing.[239] The Court dismissed the whistleblower's appeal, finding that the Commissioner was reasonable in deciding that some of the appellant's allegations of reprisals were out of time according to section 19.1(2) of the *PSDPA* and in deciding not to grant an extension of time; in addition, the Court found it was reasonable to conclude that some of the allegations did not meet the definition of reprisals under the legislation.[240] When considering the limitation period in the *PSDPA*, the Court stated:

> The language of this subsection is clear – the sole criterion to determine whether a complaint is filed on time is one of knowledge or imputed knowledge of specific incidents of reprisal. The allegation that the most recent act of reprisal is part of an ongoing chain of reprisals does not bring the earlier events into the 60-day time limit.[241]

However, the Court did acknowledge that a victim of reprisal who is "reasonably confused or unaware of the nature of the conduct against her or him"[242] would not be captured by the limitations period, as the 60-day period begins when the victim "ought to have known" about a reprisal. In addition, a victim may be able to make a compelling case for the extension of time to file a complaint if the reprisals were a sequence of connected events; in this case, those were not the facts.[243]

Subsequently, in *Gupta v Canada*, the Federal Court of Appeal considered an appeal from the decision of the Federal Court dismissing the application for judicial review of the Commissioner's decision not to conduct an investigation into a disclosure by the appellant under the *PSDPA*, in which the appellant alleged that he had been harassed by senior managers and other employees.[244] The Commissioner had relied on section 24(1)(f) in declining to commence an investigation "if the Commissioner is of the opinion that there is a valid reason for not dealing with the subject-matter of the disclosure."[245] The Court found that there was no denial of procedural fairness in the circumstances, as

> [e]ven assuming that, as Dr. Gupta submits, persons making disclosures are entitled to notice of the grounds on which the Commissioner may rely in deciding not to investigate, the information made available to Dr. Gupta and his counsel provided adequate notice that the Commissioner might rely

[239] *Gupta v Canada (Attorney General)*, 2016 FCA 50.
[240] *Ibid* at para 2.
[241] *Ibid* at para 5.
[242] *Ibid* at para 7.
[243] *Ibid* at para 8.
[244] *Gupta v Canada (Attorney General)*, 2017 FCA 211.
[245] *Ibid* at para 2.

> on the availability of another recourse as a reason for deciding not to investigate the alleged harassment.[246]

The Court of Appeal stated:

> The Act does not prescribe the process for the Commissioner to follow before deciding whether to exercise what has been described as the "wide" discretion not to commence an investigation (*Detorakis v. Canada (Attorney General)*, 2010 FC 39, 358 F.T.R. 266 (Eng.) (F.C.) at para. 43). In particular, the Act does not specify that the Commissioner will communicate to persons who have made disclosures the basis on which the Commissioner is considering exercising this discretion. However, it includes among the Commissioner's duties (in paragraph 22(*d*)) the duty to "ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures."
>
> …
>
> Dr. Gupta submits that even if the content of procedural fairness at the stage of a decision whether to investigate is relatively limited, the person making the disclosure must still be given notice of the "threshold issues" or "factors" that the Commissioner may consider in deciding whether to refuse to investigate. Dr. Gupta submits that he was not given notice that the availability of alternate recourse was a potential "threshold issue." In reliance on this Court's decision in *Gladman v. Canada (Attorney General)*, 2017 FCA 109 (F.C.A.) at para. 40, he also submits that at a minimum procedural fairness must include "the right to be informed of undisclosed adverse material facts being considered by a decision-maker and to make submissions about them (in some form)."
>
> In my view, it is not necessary to decide in this appeal whether fairness in this context requires notice of this nature, or whether recognizing a requirement to this effect would risk complicating and over-judicializing a process that was intended to be informal and expeditious. In my view, even if procedural fairness requires this sort of notice in this context, in the circumstances here Dr. Gupta had adequate notice that the Commissioner might decide not to investigate his disclosure of alleged harassment based on the assessment that the subject-matter could more appropriately be dealt with through another process.[247]

The Tribunal issued its first final decision on the merits in 2017 in *Dunn v Indigenous and Northern Affairs Canada and Lecompte*.[248] This was an application pursuant to section 20.4(1)(b) of the *PSDPA* for a determination of whether a reprisal was taken against the complainant, and if such a reprisal was taken for an order issuing a remedy and disciplinary action.[249] In

[246] *Ibid* at para 4.
[247] *Ibid* at paras 9, 33-34.
[248] 2017 PSDPT 3.
[249] *Ibid* at para 1.

a 423-paragraph decision, the Tribunal dismissed the application and found that no measures had been taken against the complainant that would constitute a reprisal under the *PSDPA*, and that further there was no nexus between the alleged reprisals and any protected disclosure.

The complainant in this case, Ms. Dunn, made disclosures with respect to unjust hiring practices and a perceived conflict of interest.[250] The complainant submitted a first reprisal complaint in respect of a staffing process, which was dismissed as unfounded.[251] The second complaint, which was the subject of the instant decision, listed six allegations of reprisal; the two that were referred to the Tribunal involved claims that the complaint was singled out by monitoring of her work absences and segregation from her coworkers.[252]

The Tribunal identified the issues to be decided as follows:

> The Tribunal must decide on the following issues in respect of an application by the Commissioner pursuant to section 20.4(1)(b) for a determination pursuant to section 21.5 (1):
>
> 1. Did the Complainant make a "protected disclosure" under the Act?
>
> 2. Did the Complainant suffer a "reprisal" under the Act?
>
> a. Did the Respondent inappropriately monitor the Complainant's attendance?
>
> b. Did the Respondent attempt to segregate the Complainant?
>
> c. Should the Tribunal consider allegations of reprisal not submitted by the Commissioner?
>
> 3. Is there a nexus between the Complainant's protected disclosure of wrongdoing and the alleged reprisal measures such that it is determined that the Complainant has been subject to a reprisal?
>
> a. What is the applicable test?
>
> b. What is the appropriate mental element required to establish a reprisal taken by Ms. Lecompte that results in an order against her for disciplinary action?
>
> c. Does the evidence establish a nexus in this case?
>
> 4. If a reprisal was taken against the Complainant, whether Ms. Lecompte actually took it against the Complainant?
>
> 5. If it is determined that Ms. Lecompte took a reprisal against the Complainant, whether to direct a further proceeding to determine

[250] *Ibid* at paras 13-14.
[251] *Ibid* at para 20.
[252] *Ibid* at para 46.

> whether to order the Employer to take appropriate disciplinary measures against Ms. Lecompte?
>
> 6. Whether or not it is determined that Ms. Lecompte did not actually take the reprisal found to have been taken against the Complainant, what is the appropriate remedy pursuant to section 21.7 (1) of the Act of all necessary measures that the Employer should be ordered to provide the Complainant?[253]

The Tribunal, in its lengthy reasons, made numerous comments on the law, including, *inter alia*, on the process for determination of an application under section 20.4(1)(b),[254] the elements required to succeed on the application,[255] what constitutes a protected disclosure[256] (e.g., "I am of the view that such a disclosure must have some aspect of "whistleblowing" to be protected"[257]), what constitutes a reprisal[258] (e.g., "I find the meaning of reprisal and retaliation to be well understood by the general population as capturing the sense of the biblical adage of 'an eye for an eye,' or more colloquially 'a tit for a tat.' It is all about revenge, which is most certainly an intentional act"[259]), what constitutes a nexus between the disclosure and the reprisal and the sufficiency of the causal link (the nexus may be direct or indirect),[260] and the requisite intention for establishing the grounds for an order of a disciplinary measure[261] (e.g., "I do not conclude that the Commissioner must establish that the reprisal measures were taken in bad faith, only that they were intended as revenge for the protected disclosures"[262]).

As noted, in the result, the Tribunal found that no measure had been taken against the complainant that would constitute a reprisal under the *PSDPA*, and that even if such a measure had been proven there was no nexus with any protected disclosure. The application was dismissed.[263]

The complainant applied to the Court of Appeal for judicial review of the decision.[264] While the Court dismissed the application due to the factual and credibility findings made by the Tribunal, the panel (Stratas, Rennie, and Laskin J.J.A., *per curiam*) did offer a somewhat scathing commentary on the Tribunal's approach in this case:

> We wish to raise a larger concern with how the Tribunal proceeded in this case. In hundreds of paragraphs, it delved deeply into several legal issues and ventured opinions on them. This was not necessary to decide the case

[253] *Ibid* at para 60.
[254] *Ibid* at paras 61-65.
[255] *Ibid* at paras 66-67.
[256] *Ibid* at paras 69-72, 78-80.
[257] *Ibid* at para 79.
[258] *Ibid* at paras 107-121.
[259] *Ibid* at para 120.
[260] *Ibid* at paras 88-89, 96, 134.
[261] *Ibid* at paras 100-103, 122-130.
[262] *Ibid* at para 103.
[263] *Ibid* at paras 421-423.
[264] *Dunn v Canada (Attorney General)*, 2018 FCA 210, leave to appeal ref'd.

> before it. By acting in this way, the Tribunal ran counter to the imperative of expedition in subsection 21(1) of the Act, caused much waste and needless expense for the parties in this application, and greatly complicated our task of review.
>
> …
>
> Therefore, we decline to deal with these legal issues in this case. But we wish to add that many of the legal conclusions reached by the Tribunal in this case warrant critical scrutiny. As a matter of administrative law, other members of the Tribunal are not bound by the legal conclusions reached here: see, *e.g.*, *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257, [2017] 3 F.C.R. 123 (F.C.A.) at para. 40 and authorities cited therein. If the particular case requires it, and until this Court settles the matter, a member of the Tribunal is free to conduct her or his own analysis and reach different legal conclusions.[265]

A final example is the case of Me Agnaou, which has involved interlocutory decisions by the Tribunal (which will not be canvassed here), judicial reviews by the Federal Court and the Federal Court of Appeal, and finally in 2019 a final decision on the merits by the Tribunal. In *Agnaou v Canada (Agnaou FCA)*, the Federal Court of Appeal allowed the appeal of a whistleblower against a decision of the Deputy Public Sector Integrity Commissioner and declared his complaint of reprisal to be admissible.[266] In reaching its decision, the Court commented on the purpose of the *PSDPA* and the role of the Commissioner within the scheme set out in the legislation, stating:

> I think it is beyond doubt that Parliament chose to adopt a different approach to reprisal complaints and that, as is the case under section 41 of the CHRA, only plain and obvious cases must be rejected summarily because they cannot be dealt with. Allow me to explain.
>
> …
>
> The Commissioner clearly has very broad discretion to decide not to deal with a disclosure or not to investigate under section 24 of the Act. This stems not only from the grammatical and ordinary sense of the terms used, but also from the context, such as the type of reasons that the Commissioner may rely on to justify his decision. For example, under paragraph 24(1)(*b*), the Commissioner may decide not to commence an investigation because the subject-matter of the disclosure or the investigation is not sufficiently important, and under paragraph 24(1)(*f*), he or she may decide that there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation. This suggests a considered analysis rather than a summary review. The Act sets no time limit for deciding this question, or for filing a disclosure after a wrongdoing has been committed.

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[265] *Ibid* at paras 5, 7.

[266] *Agnaou v Canada (Attorney General)*, 2015 FCA 29; see also *Agnaou v Canada (Attorney General)*, 2015 FCA 30, released the same day.

> It is also clear that although the person making a disclosure has a certain interest in the case, the purpose of the Act is to denounce and punish wrongdoings in the public sector and, ultimately, build public confidence in the integrity of federal public servants. The public interest comes first, and it is the Commissioner's responsibility to protect it. This explains why, for example, the Commissioner may decide that the subject-matter of the disclosure is not sufficiently important; conversely, he or she may expand an investigation and consider wrongdoings uncovered in the course of that investigation without the need for any disclosure to have been made (section 33 of the Act).
>
> The role of the Commissioner is crucial. The Commissioner is the sole decision-maker throughout the process. He or she has the power not only to refuse to investigate, but also to recommend disciplinary action against public servants who engage in wrongdoings. Among other things, the Commissioner may also report on "any matter that arises out of an investigation to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council" (section 37 of the Act).[267]

The Court of Appeal also highlighted the differences between the Commissioner's discretion in deciding whether to deal with the subject matter of disclosures, as discussed above, and the Commissioner's discretion with respect to complaints of reprisals. The Court stated:

> Parliament has established a very different process for reprisal complaints. In fact, this process is similar to the one provided for in the CHRA. There too, the public interest is a major concern. The disclosure of wrongdoings must be promoted while protecting the persons making disclosures and other persons taking part in an investigation into wrongdoings. However, as is often the case for complaints filed under the CHRA, reprisals complained of have a direct impact on the careers and working conditions of the public servants involved. The Act provides that a specific tribunal shall be established to deal with such matters, and that the Tribunal will be able to grant remedies to complainants, as well as impose disciplinary action against public servants who commit wrongdoings, where the Commissioner recommends it.
>
> In the process applicable to these complaints, the role of the Commissioner is similar to that of the Commission. Like the Commission, he or she handles complaints and ensures that they are dealt with appropriately. To do so, the Commission reviews complaints at two stages in the process before deciding whether an application to the Tribunal is warranted to protect the public servants making disclosures.
>
> …
>
> Like Justice Rothstein (then of the Federal Court) in *Canada Post Corporation*, who had before him a decision dismissing a complaint under section 41 of

[267] *Ibid* at paras 57, 59-61.

> the CHRA, I find that at the admissibility stage, the Commissioner must not summarily dismiss a reprisal complaint unless it is plain and obvious that it cannot be dealt with for one of the reasons described in subsection 19.1(3) of the Act. This interpretation respects Parliament's intention that complaints be dealt with in a particularly expeditious manner (within 15 days) at this first stage in the process. It is also consistent with the principle generally applied when a proceeding is summarily dismissed, thereby depriving the complainant of his or her right to a remedy. Finally, a cursory review of the complaint at this preliminary stage also avoids duplicating the investigation and repeating the exercise set out in subsection 20.4(3) of the Act.[268]

Subsequently, in *Agnaou c Canada (Procureur general) (Agnaou FC),* the Federal Court considered that same whistleblower's application for judicial review of the decision of the Commissioner to dismiss the reprisal complaint filed at the Office of the Public Sector Integrity Commissioner.[269] Martineau J. provided the following summary of the process by which the commissioner may refer a reprisal complaint to the Tribunal if, after receipt of an investigation report, the Commissioner is of the opinion that the referral is warranted:

> In fact, disclosures can be made at various times and at various levels: internally, to a supervisor or senior officer in a department or organization (section 12); externally, to the Commissioner (section 13), or, if there is not sufficient time to make the disclosure of a serious offence under an Act of Parliament or an imminent risk of substantial and specific danger, the disclosure may be made to the public (subsection 16(1)). In this section, as an independent agent of Parliament, the Commissioner plays an essential watchdog role, investigating not only disclosures of wrongdoing that he or she has received from public servants (section 13), but also any other instance of wrongdoing of which he or she may have learned during the course of an investigation or as a result of information provided by a person who is not a public servant (section 33). However, the disclosure system would go ignored if the *Act* did not at the same time ensure the protection of the public servants who made the disclosures.
>
> Here is why, in a distinct manner, the *Act* allows the Commissioner to conduct investigations (sections 19.7 to 19.9), to conduct conciliation (sections 20 to 20.2), and to refer to the Public Servants Disclosure Protection Tribunal Canada [the Tribunal] a reprisal complaint made by a public servant pursuant to section 19.1 of the *Act* if, after receipt of the investigation report pursuant to section 20.3 of the *Act*, the Commissioner is of the opinion that it is warranted (section 20.4). In such cases, the Commissioner can apply to the Tribunal to determine whether a reprisal was taken, for: (a) an order respecting a remedy in favour of the complainant (paragraph 20.4(1)(*a*) of the *Act*); or (b) an order respecting a remedy in favour of the complainant and an order respecting disciplinary

[268] *Ibid* at paras 62-63, 66.
[269] 2017 FC 338.

action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal (paragraph 20.4(1)(*a*) of the *Act*). Clearly, the success of the protection system depends on the expeditiousness of the Commissioner's investigations and the confidence of stakeholders in the remedy mechanisms.

Furthermore, the creation of the Tribunal — a specialized and independent tribunal tasked with determining whether reprisals took place and providing the appropriate remedy, which may include taking disciplinary action against any person who carried out reprisals — is a very different approach from traditional labour relations models (in particular, see *El-Helou and Courts Administration Service, Power and Delage*, 2011 CanLII 93945 (CA PSDPT), 2011-TP-01 at para 48 [*El-Helou 1*]). The importance taken on by the Commissioner's application, once sent to the Tribunal, does not come from the fact that it proves the veracity of its contents, since that is not the case. Nevertheless, the Commissioner's application pursuant to section 20.4 of the *Act* is essential because it allows the Tribunal to carry out its decision-making function and, as required, provide an appropriate remedy (sections 21.7 and 21.8). With respect to reprisals, unlike the Commissioner, the Tribunal has the authority, in the same manner and to the same extent as a superior court of record, to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the application (paragraph 21.2(1)(*a*) of the *Act*). In addition, it is the judges of the Federal Court or other superior courts who sit on the Tribunal. These judges are therefore particularly well placed to decide on any issue of evidence or law that may arise as part of the Commissioner's application.

It must be remembered that the Commissioner's role is not to determine the credibility of the persons involved or to decide on delicate issues of law, but to decide whether there is an objective basis for justifying that the reprisal complaint be investigated on its merits by the Tribunal. Thus, by holding an investigation into a reprisal complaint (sections 19.3 to 19.7), the investigator, who submits a report and its recommendations to the Commissioner, must not undermine the Tribunal's adjudicative function (*El-Helou v. Courts Administration Service*, 2011 CanLII 93947 (CA PSDPT), 2011-TP-04 at para 43 [*El-Helou 4*]). At the risk of repeating myself, the Commissioner acts as a filter and not as a shield against otherwise allowable reprisal complaints. In fact, paragraph 20.4(3)(*a*) should be read in correlation with subsection 19.1(1), which states that a public servant or former public servant who has "reasonable grounds" for believing that a reprisal has been taken against him or her may file a complaint. It is in this context that the Commissioner must look at whether "there are reasonable grounds for believing that a reprisal was taken against the complainant" (paragraph 20.4(3)(*a*)). That being said, the expression "reasonable grounds to believe" refers to a threshold of proof that is less demanding that the "balance of probabilities" standard of proof, which typically applies to civil

> trials and before many administrative tribunals, including the Tribunal (*El-Helou 4* at paras 34-46).
>
> …
>
> On the other hand, the existence of "reasonable grounds" is not the only factor that affects the exercise of the Commissioner's discretion. Among the other relevant factors mentioned by lawmakers in subsection 20.4(3) of the *Act*, the Commissioner is asked to take into account whether the investigation into the complaint could not be completed due to a lack of cooperation on the part of one or more chief executives or public servants (paragraph 20.4(3)(*b*)); the complaint should be dismissed on any ground mentioned in paragraphs 19.3(1)(*a*) to (*d*) (section 19.3 and paragraph 20.4(3)(*c*)); and, having regard to all the circumstances relating to the complaint, it is in the public interest to make an application to the Tribunal.
>
> In the case at bar, the disputed decision was made under the authority of section 20.5 of the *Act*, which allows the Commissioner, after receipt of the investigation report prepared by an investigator under section 20.3 of the *Act*, to dismiss a reprisal complaint if the Commissioner "is of the opinion that an application to the Tribunal is not warranted in the circumstances, he or she must dismiss the complaint", hence the present application for judicial review.[270]

In this case, Martineau J. ultimately allowed the application for judicial review and set aside the Commissioner's decision (although it should be noted that the Commissioner had also decided that it was in the public interest to revoke that decision).[271] The Court ordered that the Commissioner apply under section 20.4(1) to the Tribunal to deal with the reprisal complaint.

The Tribunal issued a final decision on the merits in Me Agnaou's case in 2019, concluding that Me Agnaou had failed to prove, on a balance of probabilities, that they had made a protected disclosure within the meaning of section 12 of the *PSDPA* or that the alleged reprisal was taken against them because they had made a protected disclosure.[272] With respect to the complainant's burden, the Tribunal stated:

> The Federal Court and the Tribunal have already established that, in a reprisals complaint, it is for the complainant to demonstrate, on a balance of probabilities, that (1) he or she made a protected disclosure within the meaning of the Act; (2) he or she was the subject of one of the measures listed in the definition of "reprisal" in section 2 of the Act; and (3) the measure was taken against him or her <u>because</u> he or she has made a disclosure, which constitutes reprisals (*Agnaou* 2017 FC 338 at para 7; *Dunn v Indigenous and Northern Affairs Canada and Lecompte*, 2017 PSDPT 3 at

[270] *Ibid* at paras 4-7, 9-10.
[271] *Ibid* at paras 45, 47.
[272] *Agnaou v Public Prosecution Service of Canada et al*, 2019 PSDPT 3 at para 5.

> para 66 [*Dunn*]; *El-Helou 4* at para 34, 47-49). These elements flow directly from the definition of reprisals provided for in section 2 of the Act. […][273]

The Tribunal went on to consider the meaning of "disclosure" in the *PSDPA*, stating:

> The word "disclosure" is not defined in the Act. However, Le Petit Robert defines it as the act of disclosure which is to [translation] "bring to the attention of the public (that which was known to a few). – to unveil, to disclose, to proclaim, to publish, to spread, to reveal (cf. to bring to light; to shout from the rooftops)". As for the Larousse Dictionary, it defines this term as the [translation] "act of disclosing, of making information public: Disclosure of a secret code". And it defines *divulguer* (to disclose) as [translation] "to disseminate to the public information that was originally considered secret, confidential; to spread a rumour; to unveil, to uncover: Disclose the name of a suspect". What is more, in accordance with the context in which the Act was passed and the purpose stated in its preamble, it seems fair to point out that the objective of a disclosure is, for the public servant, to denounce an act that undermines the integrity of the public service, to reveal, to sound the alarm. A person who makes a disclosure is known in popular parlance as a "whistle-blower."
>
> The very text of section 12 of the Act provides for certain elements. Thus, a disclosure must be made to a supervisor or the designated senior officer. In this case, it is common ground that Me Boileau and Me Morin were indeed supervisors of Me Agnaou on April 1 and 2, 2009.
>
> Second, in my view, a disclosure should communicate any information that could objectively demonstrate that a wrongdoing has been or is about to be committed. To this end, section 8 sets out the categories of wrongdoings covered, including (c) a gross mismanagement in the public sector. Me Agnaou indicated in these emails that the PPSC's position not to prosecute is contrary to its own policies and to the public interest, and the Federal Court of Appeal determined in *Agnaou* 2015 FCA 29 at paras 78, 83–88, that Me Agnaou's references may refer to a case of gross mismanagement. I therefore accept that the objective criterion to which the respondents have referred has been met.
>
> …
>
> Even if I accepted Me Agnaou's argument that only his view counts in deciding whether he had made a disclosure under the Act by sending his

[273] *Ibid* at para 73. In the House of Commons, Standing Committee on Government Operations and Estimates, "Strengthening the Protection of the Public Interest within the Public Servants Disclosure Protection Act" (June 2017) [2017 Review] at 57, online (pdf): <https://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf>, the Committee noted that "Under the Act, the whistleblower must demonstrate in court that he or she was effectively the victim of reprisals. All witnesses that spoke about the burden of proof expressed this to be a daunting and quasi-impossible task or, at least, that a reverse onus would level the field for whistleblowers before the Tribunal."

> emails on April 1 and 2, he unfortunately did not prove that it was more likely than not that he himself wanted to make a disclosure under the Act.
>
> According to the evidence**, the element of denunciation, of revelation or of sounding the alarm to which I referred above is absent**. In this regard, I agree with Me Morin when he concludes that if Me Agnaou had wanted to sound the alarm, he would have sent his message to the disclosure protection coordinator at the PPSC, a third party, and not exclusively to the same persons that he alleged having wanted to denounce. It is difficult to conclude that Me Agnaou wanted to disclose, to sound the alarm, to reveal information or to denounce acts, by sending two messages to the exact same people he was accusing. [emphasis added][274]

The Tribunal has thus incorporated an element of "denunciation" or "sounding the alarm" into the determination of whether a disclosure has been made. This is not found in the text of the legislation, and may impose a heavy burden on complainants.

The Tribunal went on to consider whether, in the event it was wrong on the matter of whether there was a disclosure, the complainant had established that there was a link between the emails (i.e., the alleged disclosure) and the measure—that his staffing priority had not be respected, and he was "robbed"[275] of a job through the reclassification of two positions (i.e., the alleged reprisal). The Tribunal found that there was no evidence of a connection between these:

> It should first be noted that I do not agree with the proposition that Me Agnaou raised at the hearing, according to which it would suffice for the complainant to prove that the disclosure was only one of the reasons for taking the measure, and not the only reason, in order to conclude that there were reprisals (transcripts, volume 18, p. 5054).
>
> I also disagree with the other proposition that Me Agnaou set out in his reply, namely, that if we take the position that there must be a causal link between the disclosure and the measure, the protection regime against reprisals will not work (transcripts, volume 19, p. 5325). Me Agnaou did not file any authorities or arguments to support his propositions, while the text of the Act clearly requires that, in order to find reprisals, the measure had to have been taken against the public servant "because the public servant has made a protected disclosure."
>
> …
>
> Furthermore, even assuming that the Memorandum of Understanding could not have been opposed, or even that the reclassification was not valid, nothing in the evidence shows that it is more likely than not that the measure was taken, in September 2012, because Me Agnaou made a disclosure, in April 2009.

[274] *Ibid* at paras 104-106, 109-110.
[275] *Ibid* at para 114.

> …
>
> Furthermore, proof of the link between the measure and the disclosure also requires, first of all, proof of knowledge, by those who took the measure, of the existence of the disclosure. However, this proof has not been made.[276]

With respect to the external disclosure, the Tribunal found that Me Agnaou did not demonstrate the existence of a link between the disclosure to the Office of the Commissioner and the reclassification of the positions, and he therefore did not prove that a measure had been taken against him because he made a disclosure.[277]

#### 7.2.3 Is the *PSDPA* Effective? Commentary and Review

A 2011 Report that examined the legislation's effectiveness in its first three years by the Federal Accountability Initiative for Reform (FAIR),[278] a Canadian non-governmental organization, was scathing in its review of the federal legislation:

> When FAIR testified to Parliament we predicted that the legislation would fail, but we could not have imagined how badly. A combination of flawed legislation and improper administration created a system that in three years uncovered not a single finding of wrongdoing and protected not a single whistleblower from reprisals. The Commissioner appointed to protect government whistleblowers resigned in disgrace following a report by the Auditor General condemning her behaviour. The credibility of the entire system is currently in tatters: it needs a complete overhaul.
>
> …
>
> The basic approach of the Act – creating a complete new quasi-judicial process just for whistleblowers – is misguided and suspect, creating a secretive, unaccountable regime, hermetically sealed off from our courts and from the media. Experience has shown that watchdog agencies constituted like this are invariably protective of the establishment and indifferent or even hostile to whistleblowers.
>
> …
>
> The text of the law is a bloated, unwieldy mess. It creates a labyrinth of complex provisions, full of ambiguities, exceptions and repetition, which almost no-one can claim to understand fully. It stands in stark contrast to

[276] *Ibid* at paras 125-126, 136, 139.

[277] *Ibid* at para 152.

[278] The website for the Federal Accountability Initiative for Reform has been inactive since Executive Director David Hutton stepped down. The website included "3,000 pages of valuable whistleblower resource material … [including] original reference works such as 'The Whistleblower Ordeal' and 'How Wrongdoers Operate'." See Allan Cutler, Sean Bruyea & Ian Bron, Editorial, "Adieu to a Friend, Ally in Accountability Wars" (22 July 2014), online (blog): *Anti Corruption & Accountability Canada* <http://canadians4accountability.org/2014/07/22/adieu-to-a-friend-ally-in-accountability-wars/>.

> the brevity, simplicity and clarity that we find in whistleblower legislation that has proven to be effective.[279]

FAIR identified the narrow scope of the law (applying only to workers in the federal public sector), restriction of reporting avenues and exclusion from the courts, restrictions contained in the definition of wrongdoing, weak provisions for the investigation and correction of wrongdoing, and likelihood of complaint rejection as among the failures of the *PSDPA*.[280] In addition, it is possible to interpret the lack of any finding of wrongdoing differently; that is, it could be interpreted as a sign that little wrongdoing has actually occurred. In a 2010 article, for example, Kelly Saunders and Joanne Thibault state:

> There are so few real cases of wrongdoing that the public sector as a whole remains woefully unpracticed in working through an actual disclosure. Indeed, in the first two years after Canada's latest whistleblower legislation came into effect, not a single case of wrongdoing was uncovered. In the absence of practice, there are no lessons learned, no "sharpening of the saw" that normalizes the act of disclosure.
>
> …
>
> The limited volume of disclosures since the introduction of stronger mechanisms could mean one of two things. It could mean that the legislation has deterred wrongdoers who are convinced that the code of silence, which still lingers within the public service, will not hold in the face of disclosure protection. Alternatively, it could mean that there really are not many instances of wrongdoing to expose.[281]

The October 2015 G20 Report echoes many of FAIR's negative findings, albeit in less colourful language. The report notes that:

> As of September 2015 there are no active cases before the Public Servants Disclosure Protection Tribunal, where retaliation victims can seek remedies and compensation. All six cases recorded have either settled or have been withdrawn. Three of the cases involved long-term employees of Blue Water Bridge Canada who were all fired on 19 March 2013, including the vice president for operations. The PSIC says the former CEO misused public money and violated the code of ethics when he gave two managers severance payments worth $650,000.
>
> In five of six cases that the Integrity Commissioner has referred to the Tribunal, he has declined to ask the Tribunal to sanction those responsible for the reprisals. **In the one case in which the Commissioner called for**

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[279] FAIR, *What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the Public Servants Disclosure Protection Act (PSDPA),* (Ottawa: FAIR, 24 February 2011) at 2, online (pdf): <https://web.archive.org/web/20150306013638/http://fairwhistleblower.ca/files/fair/docs/psdpa/whats_wrong_with_the_psdpa.pdf>.

[280] *Ibid* at 5–13.

[281] Kelly L Saunders & Joanne Thibault, "The Road to Disclosure Legislation in Canada: Protecting Federal Whistleblowers?" (2010) 12:2 Pub Integrity 143 at 156.

> **sanctions, he has since reversed himself and now says there were no reprisals.** The whistleblower's lawyer has initiated a judicial review to contest this reversal.
>
> In April 2014 Canada's Auditor General found "gross mismanagement" in the handling of two PSIC cases. The audit criticized 'buck-passing' by top managers, slow handling of cases, the loss of a confidential file, poor handling of conflicts of interest, and the inadvertent identification of a whistleblower to the alleged wrongdoer. [emphasis added] [footnotes omitted][282]

A review of UNCAC implementation by TI, conducted in October 2013, emphasizes the critical need for a review of the Canadian legislation.[283] The review notes that the *PSDPA* does not make public interest the foremost concern in the protection of whistleblowers, and instead emphasizes the balance of rights between duty to one's employer and an employee's freedom of expression.[284] Furthermore, the TI review notes that access to justice issues are implicated in Canada's statutory regime:

> Whistleblowers often have to bear their own legal costs, while accused wrongdoers will typically have access to the financial and legal resources of the organization. The review also raises questions about the implementation of the *PSDPA*, raising concerns regarding the Commissioner's power to adequately investigate claims of reprisal, the first Commissioner's failure to investigate allegations of reprisals against her own staff, and statistics that show few inquiries by whistleblowers receive full investigations.[285]

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[282] Wolfe et al, *supra* note 1 at 29.

[283] Transparency International Canada Inc, *UNCAC Implementation Review Civil Society Organization Report*, (October 2013) at 15, online (pdf): <https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5e3b09ebfb8df43f9b31c4fb/1580927469051/20131219-UNCAC_Review_TI-Canada.pdf>.

[284] *Ibid*.

[285] *Ibid* at 16–18. Regarding investigatory powers, the review states at 16 that "[u]nder the PSDPA, the Integrity Commissioner has full powers under Part II of the *Inquiries Act* to investigate disclosures of wrongdoing [s 29]. However, when investigating complaints of reprisals against a whistleblower, the Commissioner is not given comparable powers [ss 19.7-19.9]." In regard to the first Commissioner's tenure, the report states at 17–18:

> In 2010, the Auditor General reported that the first Public Sector Integrity Commissioner, Christiane Ouimet, failed to finalize or implement operational guidance to enable investigations to be conducted. The Commissioner's Office failed to robustly investigate complaints: from 2007 to 2010, the Commissioner's Office received 228 disclosures of wrongdoings or complaints; out of these only seven received a formal investigation of the 86 closed operational files, in "many cases" the decision to not formally investigate or otherwise dismiss disclosures of wrongdoing and complaints was not supported by the material in the Commissioner's file. In addition, the Auditor General's investigation found that the Commissioner had engaged in retaliatory action against employees whom the

In 2015, research into the whistleblowing culture in the federal public sector in Canada found that when focus group participants were shown a short informative video about information disclosure, the "most frequently identified aspect of the video to which participants reacted negatively or which created some degree of concern was the prospect of appearing before a tribunal of judges in the case of reprisals."[286]

Section 54 of the *PSDPA* mandates a five year review of the legislation. Although long overdue, the first statutory review of the legislation was recently undertaken and in June 2017 the report of the Standing Committee on Government Operations and Estimates was released, titled *Strengthening the Protection of the Public Interest within the Public Servants Disclosure Protection Act*.[287] In the course of its review, the Committee held 12 meetings, heard from 52 witnesses, and received 12 briefs. The Committee identified six "main challenges," as follows:

1. The lack of clarity around the public interest purposes of the Act;
2. The disclosure mechanisms under the Act do not necessarily ensure the protection of the public interest;
3. The Act does not sufficiently protect whistleblowers from reprisals as most of them face significant financial, professional and health-related consequences;
4. The commonly held perception that the federal organizational culture towards the disclosure of wrongdoing seems to discourage it;
5. The mandatory annual reporting as prescribed under the Act is inadequate to provide a meaningful evaluation of the effectiveness of the disclosure mechanisms; and
6. Public servants and external experts lack confidence in the adequate protection of whistleblowers under the Act, notably due to the potential conflicts of interest of those administering the internal disclosure process.[288]

And made fifteen recommendations.[289] In sum, the Committee recommended:

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Commissioner believed had complained about her. A new Commissioner was appointed in December 2011.

The review notes, at 18, that between 2007-2013 the Commissioner "[r]eceived 1365 inquiries and 434 disclosures; Began 55 investigations; Completed 34 investigations; Found 5 instances of wrongdoing; and Sanctioned 0 wrongdoers." [emphasis removed]

[286] Phoenix Strategic Perspectives Inc (SPI), *Exploring the Culture of Whistleblowing in the Federal Public Sector*, Prepared for The Office of the Public Sector Integrity Commissioner of Canada (Ottawa: December 2015) at 21, online (pdf): <http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/office_public_sector_integrity_commissioner/2016/2015-12-e/report.pdf>.

[287] 2017 Review, *supra* note 273.

[288] *Ibid* at 1.

[289] *Ibid* at 95-99.

1. Expanding the definitions of the terms "wrongdoing" and "reprisal," and modifying the definition of the term "protected disclosure" under the Act;
2. Amending the legislation to protect and support the whistleblowers and to prevent retaliation against them;
3. Reversing the burden of proof from the whistleblower onto the employer in cases of reprisals;
4. Providing legal and procedural advice, as necessary, to public servants seeking to make a protected disclosure of wrongdoing or file a reprisal complaint;
5. Embedding in the legislation confidentiality provisions of witnesses' identities;
6. Making the Office of the Public Sector Integrity Commissioner responsible for training, education and oversight responsibilities to standardize the internal disclosure process; and
7. Implementing mandatory and timely reporting of disclosure activities.[290]

The government response to the report (dated October 16, 2017) stated, in part:

> I agree with the opinion of the Committee and its witnesses that improvements are required to the disclosure and protection regime under the *Public Servants Disclosure Protection Act*. We will move forward to implement improvements to the administration and operation of the internal disclosure process and the protection from acts of reprisal against public servants, which will include greater guidance for the internal disclosure process, increased awareness activities and training for public servants, supervisors and managers, and enhanced reporting related to the internal disclosure process and acts of founded wrongdoing. Additionally, within the Open Government Portal, we are implementing a central website where Canadians will be able to access information about acts of founded wrongdoing within federal institutions.
>
> The Government remains committed to providing public servants and the public with a secure and confidential process for disclosing serious wrongdoing in the federal public sector and enhancing protection from acts of reprisal. We remain committed to promoting and sustaining an ethical workplace culture, and to supporting and strengthening Canadians' confidence in the integrity of the federal public sector. The Government recognizes the importance of making continuous and meaningful

[290] *Ibid* at 2.

> improvements to the disclosure regime and to the protection from acts of reprisal.[291]

The 2019-2020 *Annual Report* produced by the Treasury Board of Canada, in compliance with section 38.1 of the *PSDPA*, "contains information on disclosure activities in the federal public sector, which includes departments, agencies and Crown corporations as defined in section 2 of the Act,"[292] but does not include information on anonymous disclosures or disclosures or complaints made to the Public Sector Integrity Commissioner of Canada. 2019-2020 saw the second lowest number of disclosures in a five year period, with 220 new disclosures received by federal public service organizations.[293] In 2019-2020, there were 216 disclosures received under the *PSDPA* (and four referrals resulting from a disclosure made in another public sector organization), as compared to 269 in 2018-2019 and 291 in 2017-2018.[294] Of the 133 active organizations reporting in this year, 24 reported disclosures and 33 reported enquiries.[295] And, of the 458 active disclosures in 2019-2020 (many of which being carried over from previous years), 280 (61%) were assessed this year; 116 (41%) of those met the definition of wrongdoing, and 58 (35%) were directed to other recourse processes.[296] Only 38 investigations were commenced in 2019-2020 as a result of disclosures received; 3 disclosures led to a finding of wrongdoing, and 11 led to corrective measures.[297] Organizations have reported that the increase in disclosures carried over from one year to the next "stems from of a lack of internal investigative capacity or available investigative services."[298] Since 2018, there has been a National Master Standing Order for investigative services made available to organizations in an attempt to mitigate this issue.[299]

It is difficult to determine what these numbers tell us about the success or failure of the *PSDPA*, beyond the fact that individuals are making internal disclosures of wrongdoing. Without data as to the number of individuals who *perceive* wrongdoing in the workplace, it is impossible to determine whether a high percentage of public sector workers actually blow the whistle on wrongdoing. In the past five years, the number of disclosures received under the *PSDPA* has ranged from a high of 291 in 2017-2018 to a low of 209 in 2016-2017.[300] These numbers may indicate that fewer public sector workers disclose wrongdoing in some years, or the numbers may demonstrate that less wrongdoing has occurred in those years. Data

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[291] Letter from the Honourable Scott Brison, PC, MP, to Tom Lukiwski, MP (16 October 2017), "Government Response to the Ninth Report of the Standing Committee on Government Operations and Estimates", online (pdf): *Parliament of Canada - House of Commons* <https://www.ourcommons.ca/content/Committee/421/OGGO/GovResponse/RP9156489/421_OGGO_Rpt09_GR/421_OGGO_Rpt09_GR-e.pdf>.

[292] Treasury Board of Canada Secretariat, *Annual Report on the Public Servants Disclosure Protection Act 2019-2020*, Catalogue No BT1-18E-PDF (Ottawa: Treasury Board of Canada, 2020) [*Annual Report*] at 1, online (pdf): <https://www.canada.ca/content/dam/tbs-sct/documents/psm-fpfm/ve/psdp-pfdar/psdpa-pfdar-1920-eng.pdf>.

[293] *Ibid* at 2.

[294] *Ibid* at 21.

[295] *Ibid* at 22.

[296] *Ibid* at 3-4.

[297] *Ibid* at 21-22.

[298] *Ibid* at 2.

[299] *Ibid* at 2.

[300] *Ibid* at 21.

gathered from the Public Service Employee Survey includes information related to the perception of an "ethical environment" in the workplace.[301] The results of the 2019 survey indicate that 50% of public servants felt that they could initiate a formal recourse process without fear of reprisal; generally, the *Annual Report* indicates that "while upward trends in the perception of ethical leadership are important, the downward trend in the rate of awareness about where to go for help in resolving ethical dilemmas or conflicts is a concern."[302]

## 7.3 Ontario Securities Commission Whistleblower Program

On July 14, 2016, the Ontario Securities Commission (OSC) launched a new enforcement initiative called the Office of the Whistleblower. This program is the first paid whistleblower program by a securities regulator in Canada, and largely resembles the Whistleblower Program of the US SEC.[303] The OSC Whistleblower Program allows eligible whistleblowers to report information regarding possible violations of Ontario securities law anonymously and, if the information results in an enforcement action, receive an award of up to $5 million.[304] Since its launch, the OSC Whistleblower Program has awarded more than $8.6 million to whistleblowers; recently, in November of 2020, it announced that it had awarded $585,000 to three whistleblowers, who included company outsiders.[305]

The next section describes in detail the features of the OSC Whistleblower Program, drawing attention to those features that elicited commentary prior to and following the launch of the initiative. This section will also compare features of the OSC and SEC whistleblower programs, drawing attention to significant differences between their eligibility criteria and award determination structures.

### 7.3.1 Confidentiality

The OSC Whistleblower Program allows individuals to submit information related to potential violations of Ontario securities law to the OSC online or by mail. Anonymous submissions may be made through the program by retaining a lawyer who submits

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[301] *Ibid* at 11.

[302] *Ibid* at 12, 14.

[303] Briefly described in Section 5.3. See, generally, "Frequently Asked Questions" (last modified 10 December 2020), online: *US SEC – Office of the Whistleblower* <https://www.sec.gov/about/offices/owb/owb-faq.shtml>. The SEC Whistleblower Program was launched following the passage of the *Dodd-Frank Act, supra* note 156, in July 2010. See also Steve Szentesi, "The Time Has Come to Reward Competition Act Whistleblowers", Opinion, *Canadian Lawyer* (23 January 2017), online: <https://www.canadianlawyermag.com/news/opinion/the-time-has-come-to-reward-competition-act-whistleblowers/270375>.

[304] Ontario Securities Commission, News Release, "OSC Launches Office of the Whistleblower" (14 July 2016), online: <http://www.osc.gov.on.ca/en/NewsEvents_nr_20160714_osc-launches-whistleblower.htm>.

[305] Ontario Securities Commission, News Release, "OSC awards over half a million to three whistleblowers" (17 November 2020), online: <https://www.osc.gov.on.ca/en/NewsEvents_nr_20201117_osc-awards-over-half-a-million-to-three-whistleblowers.htm>.

information on a whistleblower's behalf.[306] Before the OSC can submit an award to an anonymous whistleblower, the whistleblower will generally be required to provide their identity to the OSC to confirm that they are eligible to receive an award.[307] While the OSC policy includes a general commitment to make all reasonable efforts to keep a whistleblower's identity (and any potentially identifying information) confidential, there are specific exceptions. For example, during certain administrative proceedings under section 127 of the *Securities Act* (e.g., an order to terminate registration), disclosure of the whistleblower's identity may be required to allow the respondent an opportunity to make full answer and defence.[308]

The OSC Whistleblower Program also outlines the OSC's general policy of responding to requests for information relating to a whistleblower's identity (or other possibly identifying information) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).[309] While the OSC takes the position that information requests with respect to identifying information should be denied because specific *FIPPA* provisions protect such information, the ultimate decision to disclose in this context is made by the Information and Privacy Commissioner of Ontario or a court of competent jurisdiction.[310]

Taken together, the OSC's policies regarding the confidentiality of whistleblowers speak to the limits of whistleblower initiatives generally. Dedication to reasonable efforts to maintain confidentiality is important, but due to the nature of administrative law and freedom of information legislation, confidentiality is far from guaranteed in all circumstances. In other words, despite the protections afforded by the OSC Whistleblower Program, whistleblowers are taking some risk of having their identities ultimately disclosed as a result of the information they submit to the Commission.

#### 7.3.2 Eligibility Criteria for Awards

The OSC Whistleblower Program sets out criteria that must be fulfilled before the OSC will consider issuing an award, covering both the information provided by the whistleblower and the characteristics of the whistleblower themselves.

The eligibility criteria that information received from whistleblowers must meet are designed to ensure that awards are only given for novel information that leads to an enforcement action. The information must relate to a serious violation of Ontario securities law, be original information, be voluntarily submitted, be "of high quality and contain sufficient timely, specific and credible facts" relating to an alleged violation of securities law,

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[306] Ontario Securities Commission, "OSC Policy 15-601: Whistleblower Program" (4 October 2018) [unofficial consolidated version] [Policy Document], s 3, online (pdf): <https://www.osc.ca/sites/default/files/2021-02/pol_20181004_15-601_unofficial-consolidation.pdf>.

[307] *Ibid*, s 4.

[308] *Ibid*, s 11(a).

[309] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31 [*FIPPA*].

[310] Policy Document, *supra* note 306, s 12. The OSC cites two specific *FIPPA* provisions in support of its position that identifying information with respect to whistleblowers should be protected from disclosure under the *FIPPA, ibid*: s 14(1)(d) (protection of confidential sources of information in a law enforcement context) and s 21(3)(b) (protection of personal information compiled as part of an investigation into possible violations of the law).

and be "of meaningful assistance to Commission Staff in investigating the matter and obtaining an award-eligible outcome."[311] To be eligible for a whistleblower award, all of these criteria must be met.[312] Consequently, if, for example, a whistleblower voluntarily provides original information related to a violation that is not of meaningful assistance to the OSC in its investigation, the information will not be eligible for a reward. Simply put, these conditions restrict the availability of whistleblower awards to information that has a direct and tangible impact on an investigation or proceedings.

Section 14(3) of the Policy Document lists disqualifying criteria that will render a piece of information ineligible for a whistleblower award. These criteria reflect several policy goals underlying the OSC Whistleblower Program. If information is misleading, untrue, speculative, insufficiently specific, public or not related to a violation of Ontario securities law, it is ineligible for a whistleblower award. These requirements reflect the purpose of the program, which is to obtain high-quality information regarding potential violations of securities law. Further, information subject to solicitor client privilege is ineligible for a whistleblower award, given the broad systemic interest in maintaining solicitor client privilege.[313] Lastly, information obtained by a means that constitutes a criminal offence will

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[311] *Ibid*, s 14(1).

[312] *Ibid*, s 14(2).

[313] *Ibid*, s (1), defines "original information" to exclude information obtained by a whistleblower "through a communication that was subject to solicitor-client privilege," and s 15(1)(d) indicates that the following category is generally ineligible for an award:

> [T]hose who obtained information in connection with providing legal services to, or conducting the legal representation of, an employer that is, or that employs, the subject of the whistleblower submission, unless disclosure of that information would otherwise be permitted by a lawyer under applicable provincial or territorial bar or law society rules, or the equivalent rules applicable in another jurisdiction.

Paragraph 15(1)(d) was originally subject to the exceptions listed in s 15(2). However, changes were proposed in 2018: see "OSC Notice and Request for Comment Proposed Change to OSC Policy 15-601 *Whistleblower Program*" (18 January 2018), online: *Ontario Securities Commission* <https://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20180118_15-601_rfc-whistleblower-program.htm>, wherein the OSC described the proposed change as follows:

> The proposed change would mean that the exceptions from ineligibility set out in subsection 15(2) of the Policy would not apply to in-house counsel in respect of matters that arise while the in-house counsel is acting in a legal capacity. The change is also intended to further clarify that the Commission does not wish to receive information that is subject to solicitor-client privilege or the provision of which would otherwise be in breach of applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction. Specifically, the proposed change clarifies that in Ontario, in-house counsel acting in a legal capacity are ineligible for a whistleblower award because their duty to protect the confidentiality of their clients' information would preclude them from making a whistleblower submission under the rules governing the legal profession in the province.

These changes were implemented in 2018. For an in-depth discussion of the Policy Document as it stood prior to this change, see Connor Bildfell, "In-House Counsels' Eligibility for Whistleblower Awards: A Critical and Comparative Analysis" (2017) 49:2 Ottawa L Rev 373.

be ineligible for an award, as the OSC does not want to encourage or be complicit in theft, fraud or other illegal means of acquiring information. These common sense disqualifying criteria ensure that whistleblowers are encouraged to submit only information that is legally obtained and can be sufficiently relied upon to advance an investigation or proceedings.

Section 15 of the Policy Document describes categories of individuals who would "generally be considered ineligible for a whistleblower award."[314] Many of these categories refer to roles that render a person ineligible for an award, such as counsel for the subject of the whistleblowing submission or an employee of the Commission or a self-regulatory body. Other provisions disqualify a whistleblower from award eligibility on the basis of their conduct as a whistleblower. For example, section 15(1)(a) excludes individuals from eligibility if they "without good reason refused a request for additional information from Commission Staff."[315]

It should be noted that awards would generally not be given to "those who obtained or provided the information in circumstances which would bring the administration of the [Whistleblower Program] into disrepute."[316] This general language removes the incentive for individuals to engage in disputable activities in pursuit of a financial award, and limits eligibility of awards to those who voluntarily submit original, high-quality information without resorting to illegal means to acquire that information.

While individuals who fall into the categories listed under section 15(1) of the policy will generally be ineligible to receive a whistleblower award, section 15(2) recognizes limited exceptions regarding certain categories. Per section 15(2), a whistleblower who would generally be ineligible under sections 15(1)(e)-(h) may be eligible for awards under certain circumstances. These categories describe individuals who are generally ineligible because of their relationship with the subject of the whistleblower submission.[317] If a whistleblower who falls into these categories has a reasonable basis to believe that disclosure is necessary to prevent future or continuing substantial injury to the financial interests of the entity or investors, they may be eligible for an award. Further, if one of the excluded whistleblowers has a reasonable basis to believe the subject of the submission is engaged in conduct that will impede investigations, they may be eligible for a whistleblower award.

One unique and controversial feature of the OSC's whistleblower eligibility criteria is the lack of a requirement that whistleblowers avail themselves of internal reporting and compliance systems before contacting the OSC Whistleblower Program. While the OSC "encourages whistleblowers who are employees to report potential violations … through an internal compliance and reporting mechanism," this action is not a prerequisite to award

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[314] *Ibid*, s 15(1).

[315] *Ibid*.

[316] *Ibid*, s 15(1)(o).

[317] These provisions exclude the following categories, respectively, from award eligibility subject to the exceptions under s 15(2) of the Ontario Securities Commission, "OSC Policy 15-601: Whistleblower Program" (4 October 2018): e) providers of auditing/external assurance services to the subject of the submission, f) investigators or inquiry participants, g) directors or officers of the subject of the submission, and h) Chief Compliance Officers (or functional equivalents) for the subject of the submission.

eligibility. The decision not to require whistleblowers to report potential violations internally reflects the OSC's belief that "there may be circumstances in which a whistleblower may appropriately wish not to report" to an internal compliance mechanism.[318]

The decision to not include an internal reporting requirement has been criticized by the financial sector, which fears that the OSC Whistleblower Program (and the enticement of financial rewards) could undermine the sector's internal compliance and reporting programs. Critics, in particular issuers, have concerns that the OSC Whistleblower Program is structured such that employees will be tempted to bypass internal compliance systems in pursuit of a financial award.[319] Some fear that the lack of an internal reporting requirement will "disqualify registrants and reporting issuers from being able to self-identify, self-remediate and self-report in order to qualify for credit for cooperation."[320] While the OSC has attempted to assuage these concerns by considering participation in internal compliance processes as a factor that may increase an award's amount, it is unclear that this satisfies the concerns of issuers.

Another element of whistleblower award eligibility that is regarded as controversial is the issue of culpable whistleblower eligibility. The OSC Whistleblower Program does not disqualify whistleblowers from awards on the basis of their unclean hands, but rather lists culpability as a factor that can decrease the amount of the award offered.[321] For the purposes of calculating that the CDN$1 million threshold of "award eligible outcomes" has been met, any voluntary payments by or payments ordered against entities whose liability is "based substantially" on the conduct of the whistleblower will not be taken into account. Likewise, any portion of sanctions that are awarded against a whistleblower will be subtracted from the award that he or she is otherwise eligible to receive.

For the purpose of comparison, consider the position of the SEC with respect to culpable whistleblowers. Under the SEC Whistleblower Program, whistleblowers are precluded from award eligibility if they have been convicted of a securities-related criminal offence.[322] While the OSC regime does not absolutely preclude this class of whistleblower from receiving an award, it does limit the circumstances in which an individual can benefit from their own complicity. As described above, culpability will have an impact on both the determination of an "award eligible income" and the amount of any award given. Further, the submission of information by the whistleblower to the Commission does not preclude the possibility of

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[318] Policy Document, *supra* note 306, s 16(1).

[319] John Tuzyk & Liam Churchill, "Commenters Reiterate Concerns about OSC's Proposed Whistleblower Program" (9 May 2016), online: *Blake, Cassels & Graydon LLP* <https://www.blakes.com/insights/bulletins/2016/commenters-reiterate-concerns-about-oscs-proposed>.

[320] Jordan Deering and Linda Fuerst, "OSC Releases Further Changes to Proposed Whistleblower Program" (October 2015), online: *Norton Rose Fulbright LLP* <http://www.nortonrosefulbright.com/knowledge/publications/133609/osc-releases-further-changes-to-proposed-whistleblower-program>.

[321] Policy Document, *supra* note 306, s 17.

[322] Jennifer M Pacella, "Bounties for Bad Behavior: Rewarding Culpable Whistleblowers under the Dodd-Frank Act and Internal Revenue Code" (2015) 17 U Pa J Bus L 345 at 355.

action being taken against the whistleblower.[323] Together, these measures ensure that the program does not unduly restrict the OSC with respect to the actions it can take against culpable whistleblowers. Rather, it allows OSC staff to evaluate cases as they arise and make an appropriate determination regarding award eligibility and other enforcement actions in the circumstances.

### 7.3.3 Award Formula

An award eligible outcome can only occur when an order made under section 127 of the *Securities Act* or section 60 of the *Commodities Futures Act* requires the guilty party to pay more than CDN$1 million in voluntary payments to the OSC or in financial sanctions imposed by the OSC. If an eligible outcome results from a submission of income from an eligible whistleblower, an award of between 5% and 15% can be paid.[324] If the sanctions imposed and/or voluntary payments made amount to over CDN$10 million dollars, the maximum that will be awarded is generally CDN$1.5 million.[325] However, if over CDN$10 million dollars is, in fact, collected, the whistleblower may receive an award between 5% and 15% of the total, to a maximum of CDN$5 million.[326]

The fact that most awards under the OSC Whistleblower Program are not contingent on the actual collection of monetary sanctions has drawn ire regarding where the cost of the program will ultimately fall. The OSC Whistleblower Program allows for the possibility of a whistleblower receiving an award of up to CDN$1.5 million without any money actually being collected by the OSC. Commentators have, again, drawn a comparison to the SEC Whistleblower Program, which requires tips to result in the collection of monetary sanctions before a whistleblower is eligible for an award. By not tying awards to collection, some commentators fear that the Program's costs will ultimately be borne by compliant issuers (and, ultimately, their shareholders) through increased fees.[327] Whether these concerns will materialize remains to be seen, but it should be noted that any awards greater than CDN$1.5 million are contingent on collection of funds. Further, given the modest caps (discussed below) on the maximum awards available, the risk that the OSC Whistleblower Program will pass costs onto issuers and investors is necessarily limited.

Section 25 of the Policy Document outlines the factors that ought to be considered by the OSC in determining the award amount. Factors that may increase the amount of a whistleblower award include: the timeliness of the report, the significance of the information provided, the degree of assistance provided, the impact of the information on the investigation/proceeding, efforts to remediate harm caused, whether the whistleblower participated in internal compliance systems, unique hardships experienced by the

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[323] Policy Document, *supra* note 306, s 17.
[324] *Ibid*, s 18(1).
[325] *Ibid*, s 18(4).
[326] *Ibid*, s 18(5).
[327] Cristian Blidariu, et al, "OSC Proposes Large Financial Awards for Whistleblowers" (4 February 2015), online (blog): *McCarthy Tetrault: Canadian Securities Regulatory Monitor* <http://www.securitiesregulationcanada.com/2015/02/osc-proposes-large-financial-awards-for-whistleblowers/>.

whistleblower, and contributions made to the OSC's mandate.[328] Factors that may decrease the amount of a whistleblower award include: any erroneous or incomplete information, the whistleblower's culpability, any unreasonable delay in reporting, refusing to assist the OSC or interfering with its investigation, and interfering with internal compliance mechanisms.[329] This broad range of factors allows OSC staff to tailor whistleblower awards such that they are appropriate in all of the circumstances of a particular case and justly compensate a whistleblower who provides actionable information to the OSC.

The OSC Whistleblower Program range of 5% to 15% of imposed sanctions (and the CDN$1.5 million cap if sanctions are not collected) is relatively low compared to the SEC Whistleblower Program, which offers awards in the range of 10% to 30% of monetary sanctions collected. While this higher range can be attributed, in part, to the requirement of collection under the SEC regime, the OSC Whistleblower Program's financial incentives are arguably relatively modest. Further, the caps on award amounts under the OSC Whistleblower Program forestall excessively large payments being made, whereas the SEC Whistleblower Program (which does not include an award cap) is structured in a way that allows very large payments to be made in the event of a large financial penalty being collected.[330]

#### 7.3.4 Anti-Reprisal Provisions

Upon and following the introduction of the OSC Whistleblower Program, the *Securities Act* (Ontario) has been amended to introduce new anti-reprisal provisions for employees who provide information or cooperate with the OSC or other specified regulatory bodies. Part XXI.2 of the *Securities Act* consists of three major components: anti-reprisal protections, contract voiding provisions, and actions relating to reprisal.

First, Part XXI.2 prohibits reprisals against employees by employers in certain circumstances. Section 125.5(2) defines a reprisal, for the purposes of this Part, as "any measure taken against an employee that adversely affects his or her employment." The section further includes a non-exhaustive list of reprisals, including termination of employment, demotion, disciplining, or suspending of an employee, imposition of penalties on the employee, threat of any of the above reprisals, or intimidation or coercion of an employee in relation to their employment.

The anti-reprisal provisions at ss. 121.5(1)-(2) protect employees who provide information regarding potential violations of Ontario securities law, seek advice about providing such information, or express an intention to provide such information. The information can refer to activity that has occurred, is ongoing, or is "about to occur" and the employee's belief of a violation must be reasonable. Further, these provisions are not limited to information provided to the Commission itself, but also information provided to the employer, a law

[328] Policy Document, *supra* note 306, s 25(2).
[329] *Ibid*, s 25(3).
[330] See discussion above.

enforcement agency, or a "recognized self-regulatory organization."[331] In other words, the reach of Part XXI.2 goes beyond participants in the OSC Whistleblower Program and protects employees more generally from reprisals by their employers.

On July 21, 2020, the OSC announced that it had approved a settlement agreement in respect of manners involving, *inter alia*, a reprisal against an internal whistleblower.[332] The settlement included a requirement that the company create an internal whistleblower program:

> Additionally, Coinsquare and its subsidiary seeking registration with the OSC (Coinsquare Capital Markets Ltd.) must implement substantial corporate governance improvements. These include establishing independent boards of directors, appointing new CEOs and CCOs, creating an internal whistleblower program and implementing policies and procedures to monitor and assess compliance with Ontario securities law.
>
> "Despite several employees raising concerns about inflated trading volumes, Coinsquare not only stuck with the practice, but lied to investors about it and retaliated against a whistleblower," said Jeff Kehoe, Director of the Enforcement Branch at the OSC. "Being an innovator in our capital markets is not a free pass to disregard Ontario securities law. All market participants – including those in novel industries – must act honestly and responsibly."
>
> "This settlement holds the Respondents accountable for their misconduct and requires Coinsquare to implement significant changes to improve their corporate governance,["] added Mr. Kehoe. "**This case is also an important milestone, as it is the first action we have taken for a reprisal against a whistleblower since important protections for employee whistleblowers were added to Ontario securities legislation in 2016**." [emphasis added][333]

The second major feature of Part XXI.2, the contract voiding provision, is found in section 121.5(3). This subsection dictates that a provision of an agreement (including confidentiality agreements) between employers and employees is "void to the extent that it precludes or purports to preclude" the employee from providing information, cooperating with, or testifying before the Commission or a recognized self-regulatory organization. In other words, section 121.5(3) prohibits employers from requiring their employees to give up their

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[331] *Securities Act*, s 21.1, allows the Commission to recognize self-regulatory organizations (SROs) when "it is satisfied that to do so would be in the public interest." There are currently two SROs recognized by the Commission: The Investment Industry Regulatory Organization of Canada (IIROC), and the Mutual Fund Dealers Association of Canada (MFDA). See: "Self Regulatory Organizations" (last visited 30 June 2021), online: *Ontario Securities Commission* <https://www.osc.ca/en/industry/market-regulation/self-regulatory-organizations-sro>.

[332] Ontario Securities Commission, News Release, "OSC Panel approves settlement with Coinsquare, Cole Diamond, Virgile Rostand and Felix Mazer" (21 July 2020), online: <https://www.osc.gov.on.ca/en/NewsEvents_nr_20200721_osc-panel-approves-settlement-with-coinsquare-diamond-rostand-mazer.htm>. The settlement agreement dated July 16, 2020 is available online at <https://www.osc.ca/sites/default/files/2020-09/set_20200716_coinsquare.pdf>.

[333] OSC, News Release, *ibid*.

right to provide information regarding potential misconduct to regulatory bodies, including the Commission. The specific inclusion of confidentiality agreements in this section highlights a legislative commitment to prioritize the disclosure of information about potential violations of securities law by employees.

Finally, ss. 121.5(4)-(7) concern actions relating to reprisal. Subsection 121.5(4) states that where a person or company has taken a reprisal against an employee in contravention of subsection (1), without limiting the actions the employee may otherwise take, the employee may "(a) make a complaint to be dealt with by final and binding settlement by arbitration under a collective agreement; or (b) if final and binding settlement by arbitration under a collective agreement is not available, bring an action in the Superior Court of Justice." Subsection (5) speaks to the burden of proof in such an action, which lies on the person or company to establish that they did not take a reprisal against an employee. Subsection (6) and (7) speak to remedies, which may be one or more of the employee's reinstatement or "[p]ayment to the employee of two times the amount of remuneration the employee would have been paid by the employer if the contravention had not taken place between the date of the contravention and the date of the order, with interest."

#### 7.3.5 Future of Whistleblower Awards

In the first two years, the OSC Whistleblower Program generated about 200 tips and was reported to be "very effective in generating tips and shining a light on information that previously would have remained in the shadows."[334] As discussed, the OSC Whistleblower Program has paid out over CDN$8.6 million in awards. This includes CDN$7.5 million in 2019 and CDN$0.5 million in 2020.[335] Given its first-in-the-nation status, the success of the OSC program could potentially drive the expansion of paid whistleblower protection regimes in Canada, both within the financial sector and beyond it.[336]

## 8. CONCLUSION: WHERE DO WE GO FROM HERE?

An overview of best practices in whistleblower protection and legislation in the US, UK, and Canada prompts an important question: what constitutes "success" in whistleblower protection? Best practices are a measure against which we may judge the scope and

[334] Ontario Securities Commission, News Release, "OSC Whistleblower Program contributing to a stronger culture of compliance" (29 June 2018), online: <https://www.osc.gov.on.ca/en/NewsEvents_nr_20180629_osc-whistleblower-program-contributing-to-a-stronger-culture-of-compliance.htm>.
[335] Ontario Securities Commission, *Management's Discussion and Analysis 2020* (16 June 2020), online (pdf): <https://www.osc.ca/sites/default/files/2020-11/Publications_rpt_2020_osc-md-and-a_en.pdf>.
[336] It should be noted that the *Autorité des marchés financiers* (AMF), which regulates securities in Quebec, also launched a whistleblowing program in 2016. The AMF's regime does not, however, offer rewards to whistleblowers, citing "a review of various whistleblower programs around the world, including in the United Kingdom and Australia," which did not convince the AMF of the effectiveness of financial incentives. See Authorité des Marchés Financiers, Press Release, "AMF Launches Whistleblower Program" (20 June 2016), online: <https://lautorite.qc.ca/en/general-public/media-centre/news/fiche-dactualites/amf-launches-whistleblower-program-1>.

comprehensiveness of legislation, but it is impossible to draw conclusions about the true efficacy of whistleblower protection legislation without data on how the legislation is being enforced. In this sense, best practices are of limited use in determining the effectiveness of whistleblower protection, and enacting a law that reflects best practices on paper may not accurately reflect whether whistleblowers are adequately protected in practice.

There is a critical need for research and analysis as to how the law is actually being applied.[337] This has been noted by critics such as David Lewis, AJ Brown, and Richard Moberly, who call attention to academia's focus on the whistleblower as an individual rather than on the institutional response to disclosure:

> The vast bulk of whistleblowing research to date has focused on whistleblowers: what makes them report, what they report, how many and how often whistleblowers come forward, and what happens to them. But to understand whistleblowing in context, and especially how whistleblowing can be made more effective, it must be recognized that whistleblower and non-whistleblower behavior, characteristics and outcomes are only one part of the puzzle. Increasingly important is the behavior of those who receive whistleblowing disclosures, and what they do about them. Indeed, while the study of whistleblower behavior and outcomes may remain a necessary and often fascinating focus, from a public policy perspective it is the response to disclosures which is actually the more important field of study – but which is in its relative infancy.[338]

Furthermore, the authors emphasize the need for research that will shed light on the extent that whistleblower legislation is being effectively utilized:

> Most researchers, policy makers and managers know that legislation, in and of itself, is a blunt instrument for influencing organizational and behavioral change. The question of whether such legislative objectives are being implemented, or what strategies for whistleblower support and protection would be best supported and promoted by legal regimes, depends on knowledge of what actions are actually being taken by organizations and regulators to support whistleblowers in practice. Moreover, these questions depend on how whistleblowers are supported by managers and regulators in a proactive sense, once the disclosure is made, and not simply in reaction to any detrimental outcomes they may begin to suffer.[339]

"Successful" whistleblower laws will help to prevent and resolve wrongdoing by encouraging those who witness wrongdoing to disclose information, while also protecting whistleblowers from reprisals in any form. This is what whistleblower protection legislation in the US, UK, and Canada purports to do; however, the words of the legislation alone

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[337] The 2017 Review, *supra* note 273 at 91, stated: "Concerning the role of statistics, the Committee is of the view that meaningful and interpretable statistics should be produced with clear indicators to monitor the effectiveness of the Act."

[338] Lewis, Brown & Moberly, *supra* note 211 at 19.

[339] *Ibid* at 31.

cannot give us a complete picture of the effectiveness of whistleblower protection in these countries. Regular reviews of the legislation are required to determine the impact that the laws have had on encouraging reporting and protecting whistleblowers. Indeed, reviews conducted of Canada's *PSDPA* in 2017 and the UK's *PIDA* in 2020 indicate that the legislation, in both cases, is not fulfilling its potential or purpose.

One potential measure of success is the impact that whistleblower legislation has on encouraging public sector employees who witness wrongdoing to disclose this information. Research methods such as surveys can help us to understand how many employees witness wrongdoing, and of these how many actually submit reports. Changes in reporting rates may help us to evaluate the impact of legislation on information disclosure. Such data has been collected in the US by the Merit Systems Protection Board, discussed in Section 5.1. Another example of a large-scale survey was conducted in Australia: it suggests that 71% of Australian public sector workers observed one of the enumerated types of wrongdoing.[340] Of those respondents who observed wrongdoing, "[t]hose who reported the wrongdoing amounted to 39 per cent … or 28 per cent of all respondents. As shown, almost all these respondents also regarded the wrongdoing that they reported as being at least somewhat serious; very few said they had reported matters they regarded as trivial."[341] Similar survey data of Canadian public sector employees might help to gauge awareness of the protections offered in the *PSDPA* as well as rates of reporting among those who witness wrongdoing, and qualitative focus group research conducted in 2015 is a good first step in this regard.[342]

Careful attention also needs to be paid to access to justice issues; that is, are the systems that are being set up in the legislation actually protecting whistleblowers, and are they *accessible* to those who have faced retaliation as a result of disclosing information? In Canada, the track record of the Public Servants Disclosure Protection Tribunal is ambiguous, at best, with regard to the success of the *PSDPA* in protecting whistleblowers from reprisals. Of the only eight reprisal cases listed on the Tribunal website, five were settled between the parties or through mediation. The Tribunal has released two final decisions on the merits; neither found that reprisals had been taken against the complainants in those cases. In the UK, as mentioned in Section 6, claims that are adjudicated by the Employment Tribunals have a far from even chance of being successful: "Over 70% [of claims made in *PIDA's* first ten years] … were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won."[343] Thus, settlements are common in both the UK and Canada. It is difficult to assess whether the outcomes of these settlements represent successes or failures for the whistleblowers who have faced reprisals; it may be, in fact, that public sector employers readily accede to settlements where complainants have strong reprisal cases. Therefore, more in-depth research is required to understand these outcomes and what these numbers tell us regarding the efficacy of whistleblower protection laws.

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[340] AJ Brown, Evalynn Mazurski & Jane Olsen, "The Incidence and Significance of Whistleblowing" in AJ Brown, ed, *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (Canberra: ANU E Press, 2008) 25 at 28, online: <http://epress.anu.edu.au/whistleblowing_citation.html>.

[341] *Ibid* at 31.

[342] Phoenix SPI, *supra* note 286 at 21.

[343] Stephenson & Levi, *supra* note 78 at 20.

Overall, while more and different types of research are needed to adequately evaluate whistleblower protections, it is clear that there has been positive movement in the recognition and protection of whistleblowers in the past fifteen to twenty years. Internationally, agreements and conventions such as UNCAC place whistleblower protection at the forefront of the global fight against corruption. In Canada, the *PSDPA* represents the country's first legislative effort to protect federal public sector whistleblowers, and a plethora of other laws have been introduced worldwide in response to the global movement against corruption. In order to ensure that this global legislative movement fulfills its potential, these laws must be utilized by whistleblowers and their protections must be enforced by the relevant institutions and authorities.

CHAPTER 14

# CAMPAIGN FINANCE: CONTROLLING THE RISKS OF CORRUPTION AND PUBLIC CYNICISM

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* The 2018 version of this chapter was written by Madeline Reid under the supervision of Gerry Ferguson. The 2021 version was significantly updated and revised by Duff Conacher.

## CONTENTS



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

## 1. INTRODUCTION

Campaigning for public office generally requires money. The amount of money required depends on variables such as the size of the jurisdiction, the type of campaigning, the resources deployed, jurisdictional spending limits, and the level of funding that other candidates and/or parties have. While politicians and political parties across the spectrum claim that they need large sums of money to run campaigns and reach voters, their claim lacks evidence that such spending is necessary. While evidence shows that higher spending sometimes correlates with electoral success,[1] North American studies and analysis highlight the difficulty of establishing a causal connection between campaign spending and electoral success and whether other factors, such as being the incumbent candidate, have an equal or greater influence on election outcomes.[2]

Election campaigns have become increasingly expensive.[3] While campaigns at a local level may be volunteer-run with little funding, national campaigns of political party leaders necessitate significant spending. While some expenses, such as campaign and support staff, travel and events, may be justified, others, such as surveys and broadcast advertising, may be questionable. Media outlets often publish survey results during elections, some jurisdictions offer free broadcasting time for party advertisements, and several studies show that the advertising has only a small effect on voters.[4] The use of instantaneous

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[1] OECD, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*, OECD Public Governance Reviews, (Paris: OECD Publishing, 2016) at 22, online: <https://read.oecd-ilibrary.org/governance/financing-democracy_9789264249455-en#page1>.

[2] Among many other studies and analyses of campaign spending, see: Steven Sprick Schuster, "Does Campaign Spending Affect Election Outcomes? New Evidence from Transaction-Level Disbursement Data" (2020) 82:4 J Politics 1502; Brandon Barutt & Norman Schofield, "Measuring Campaign Spending Effects in Post-Citizens United Congressional Elections" in Maria Gallego & Norman Schofield, eds, *The Political Economy of Social Choices*, vol 2 (Cham: Springer, 2016) 205, DOI: <https://doi.org/10.1007/978-3-319-40118-8_9>; Yasmine Bekkouche & Julia Cagé, "The Price of a Vote: Evidence from France, 1993–2014" (2018) CEPR Discussion Paper 12614, online: <https://cepr.org/active/publications/discussion_papers/dp.php?dpno=12614>; Susan E Scarrow, "Political Finance in Comparative Perspective" (2007) 10:1 Annu Rev Polit Sci 193, DOI: <https://doi.org/10.1146/annurev.polisci.10.080505.100115>; "Did Money Win" (last visited 25 October 2021), online: *Open Secrets* <https://www.opensecrets.org/elections-overview/winning-vs-spending?cycle=2020>; Jordan Press & Joan Bryden, "Money a Factor in 2015 Election Results, But No Guarantee of Success: Analysis", *iPolitics* (3 April 2016), online: <http://ipolitics.ca/2016/04/03/money-a-factor-in-2015-election-results-but-no-guarantee-of-success-analysis/>.

[3] Ingrid van Biezen, "State Intervention in Party Politics: The Public Funding and Regulation of Political Parties" in Keith Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (London: Routledge, 2011) 191 at 200–201.

[4] Alexander Coppock, Seth J Hill & Lynn Vavreck, "The Small Effects of Political Advertising Are Small Regardless of Context, Message, Sender, or Receiver: Evidence From 59 Real-time Randomized Experiments" (2020) 6:36 Sci Advances; Jörg L Spenkuch & David Toniatti, "Political Advertising and Election Results" (2018) 133:4 QJ Econ 1981; Johanna Dunaway et al, *"The Effects of Political Advertising: Assessing the Impact of Changing Technologies, Strategies, and Tactics"* in Napoli, Philip, ed, *Mediated Communication*, vol 7 (De Gruyter Mouton: Berlin, 2018) 431; Joshua L Kalla & David E Broockman, "The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence From 49 Field Experiments" (2018) 112:1 Am Polit Sci Rev 148; Alan S Gerber et al, "How Large and

communications has also reduced the costs of reaching voters, including the phenomenon of political ads going viral on social media through a combination of sharing by the public and media coverage.[5]

Despite conflicting views on the efficacy of campaign spending, scholars propose several reasons for regulating and limiting campaign finance, including contributions and spending. The need for cash produces various threats to democratic systems, the first being corruption. Politicians may be inclined to reward wealthy campaign backers with favours, influence, or access. Campaign finance also carries other implications for equality and fairness. Unregulated financing may give well-resourced members of society disproportionate influence over electoral debate, electoral outcomes, and elected officials. In addition, without regulation, candidates and parties may face an unfair disadvantage if they lack personal wealth or wealthy supporters. Finally, campaign financing can affect public confidence in the integrity of government and policy-making. Cynicism creeps in when politicians accept hefty donations or benefit from expensive campaign advertising funded by corporations or wealthy individuals. Scandals involving political finance can further erode public confidence.

Campaign finance laws can help address the risks of corruption, inequality, unfairness, and public cynicism. Lawmakers may attempt to reduce these risks by promoting transparency, reducing politicians' reliance on large donors, and encouraging the financing of campaigns through small outlays from a wide range of individuals. Disclosure requirements, contribution limits, and other measures may further these goals. For example, Canada's 2003 spate of campaign finance reform, which restricted donations from individuals, corporations, unions, and other organizations, was likely an attempt to cushion the worst impacts of the sponsorship scandal, which erupted after Quebec advertising firms, that had donated to the federal Liberal Party, received lucrative government contracts in return for little work.[6] Public funding of election campaigns is another option. The US, UK, and Canada each provide some form of partial public funding. Private fundraising, however, remains indispensable to parties and candidates in all three countries.

Regulation generally targets not only parties and candidates but also third-party campaigners. Third-party campaigners, whether individuals or organizations, fund their own advertising and other activities in support of a candidate or party or issue that may or may not be associated with a specific candidate or party. If parties and candidates are regulated, and third parties are not, private money may shift to support unregulated third-party groups. Even with full public funding of parties and candidates, the use of private

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Long-lasting Are the Persuasive Effects of Televised Campaign Ads? Results from a Randomized Field Experiment" (2011) 105:1 Am Polit Sci Rev 135.

[5] Maria Petrova, Ananya Sen & Pinar Yildirim, "Social Media and Political Contributions: The Impact of New Technology on Political Competition" (2020) Manage Sci, forthcoming, online: <https://ssrn.com/abstract=2836323>.

[6] Lisa Young, "Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (Ann Arbor: University of Michigan Press, 2015) [Boatright, *Campaign Finance* Laws] 107 at 111.

money in third-party campaigns would raise concerns in terms of effects on corruption and equality of access and influence in election campaigns and policy-making.

Lawmakers face various stumbling blocks when designing campaign finance regimes. Campaign finance laws may infringe constitutional guarantees, such as freedom of expression, freedom of association, and voting rights. Courts may, however, be willing to allow infringements of constitutional rights for the sake of equality, fairness, public confidence, and the prevention of corruption. Lawmakers also must be careful not to enact regulations that inadvertently favour incumbents by, for example, imposing spending limits that disadvantage challengers.[7] Other difficulties include anticipating loopholes and defining the scope of regulated activities. Finally, lawmakers face the challenge of determining how to apply old regulatory approaches to new digital campaigning techniques.

Although the US, UK, and Canada impose transparency requirements for parties, candidates, and third-party campaigners, they each take a different approach to the regulation of campaign finance. In the US, freedom of speech jurisprudence has defeated various pieces of the federal campaign finance regime, including spending caps. Caps on contributions to candidates have survived (although they are very high compared to the average annual income level), along with a ban on corporate and union donations. Although transparency requirements in the US apply to parties, candidates, and third parties, transparency is weak for some types of institutional third-party campaigners.[8] The UK limits spending, but political contributions are uncapped. Further, unlike in Canada, corporations, labour unions, and other entities are permitted to make donations to parties and candidates. Canada caps both contributions and spending at the federal level and in almost every province and territory (although at relatively high levels compared to the average annual income level). Corporations and other organizations are prohibited from making contributions to parties and candidates in almost all Canadian jurisdictions. The federal regime also provides extensive public funding to parties and candidates.

This chapter begins with a summary of how election campaigns are financed and how campaign finance may be regulated. Next, rationales for campaign finance regulation and the challenges involved in designing regulatory measures are set out, followed by a discussion of the regulation of third-party campaigners. Subsequently, the provisions directed at campaign financing in the United Nations Convention Against Corruption (UNCAC) and OECD guidelines are summarized. Finally, the campaign finance laws in Canada, the UK, and the US are examined in detail. For each country, the leading cases on freedom of expression and campaign finance are summarized first, and then each country's regulatory regime and common criticisms of those regimes are set out.

[7] Yasmin Dawood, "Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context" (2006) 4:2 Intl J Con L 269 at 272.

[8] 52 USC §§ 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9); see also Diana Dwyre, "Campaign Finance Deregulation in the United States: What Has Changed and Why Does It Matter?" in Boatright, *Campaign Finance Laws*, *supra* note 6, 33 at 61.

# 2. METHODS OF FINANCING ELECTION CAMPAIGNS

## 2.1 Direct Contributions or Loans to Candidates and Political Parties

Campaigns may be financed by direct contributions to candidates or political parties. Contributions can take the form of cash, goods and services, or loans. In the US, if a political party or third party coordinates spending with a candidate, this spending is viewed as a contribution to the candidate.

## 2.2 Public Funding

The state may fund political parties and candidates through grants, funding that matches donations, reimbursement of election expenses, tax deductions for donors, per-vote funding, allocation of free or discounted broadcasting time, or other subsidies.

## 2.3 Independent Expenditures by Third Parties

Individuals and entities other than political parties and candidates may wish to fund advertising and other initiatives to support or oppose the electoral success of a party or candidate. This is referred to as third-party campaigning or outside spending. Individuals and organizations may choose to contribute to a third-party campaigner instead of a candidate or party. Third-party campaigners include individuals, corporations, labour unions, non-profit interest groups, or other organizations, such as the ubiquitous political action committee, or 'PAC,' in the US. Third-party campaign activities sometimes expressly support or oppose a candidate or party. In other instances, third parties advertise about an issue associated with a candidate or political party, often termed 'issue advertising.' Third-party campaigning can be entirely independent of parties and candidates, or third parties may work "in the shadow of political parties" or "in close concert with them."[9]

## 2.4 Self-Funding

Wealthy candidates for public office may wish to finance their own campaigns with personal resources. Canada imposes limits on candidate self-funding,[10] but jurisprudence on freedom of speech precludes such limits in the US.[11]

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[9] Anika Gauja & Graeme Orr, "Regulating 'Third Parties' as Electoral Actors: Comparative Insights and Questions for Democracy" (2015) 4:3 Interest Groups & Advocacy 249 at 251.

[10] *Canada Elections Act*, SC 2000, c 9 [*CEA*], s 367(5)—(7).

[11] *Buckley v Valeo,* 424 US 1 at 54 (1976) [*Buckley*]; *Davis v Federal Election Commission*, 554 US 724 (2008) [*Davis*].

## 3. TYPES OF CAMPAIGN FINANCE REGULATION

This section describes the tools used to regulate campaign finance. The regulatory approaches summarized below are often applied not only to general elections, but also to nomination contests, leadership campaigns, and referendums.

Campaign finance regulation should be complemented by other laws promoting integrity in politics, such as rules on lobbying, conflict of interest, and whistleblower protection.[12] Without these rules, the improper influence of money could simply be redirected from campaign finance to other activities like lobbying.[13]

### 3.1 Transparency Requirements

Justice Brandeis wrote in 1913 that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[14] Campaign finance regimes often attempt to prevent corruption through the disclosure of political contributions and spending. Disclosure may discourage large donations and deter politicians from rewarding donors or supportive third-party campaigners with favours.[15] Disclosure of contributions and third-party spending, if made before election day (which many jurisdictions do not require), can also help facilitate informed voting, as awareness of the "interested money behind a candidate may give voters insight into what interests the candidate will promote if elected."[16] Critics of disclosure requirements argue that revealing the identity of donors represents an unacceptable incursion on donors' privacy interests.[17]

### 3.2 Spending and Contribution Limits

Campaign finance regimes may attempt to curb demand for political money by imposing ceilings on spending by candidates, political parties, and third parties. The supply of political money can be limited by imposing ceilings on donations. Donation caps can help address corruption and equality concerns by encouraging candidates, parties, and third-party campaigners to seek small donations from a broad range of donors.

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[12] OECD, *supra* note 1 at 16.

[13] *Ibid*.

[14] Dwyre, *supra* note 8 at 59, citing Louis Dembitz Brandeis, *Other People's Money and How the Bankers Use It* (New York: Stokes, 1914).

[15] For example, in the UK, the introduction of disclosure requirements led to embarrassment and scandal, causing some changes in behaviour on the part of parties and donors: see Section 9.3; see also K D Ewing, "The Disclosure of Political Donations in Britain" in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (London: Bloomsbury Publishing, 2006) 57 at 67.

[16] Dwyre, *supra* note 8 at 35, 59; see also Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Surrey: Ashgate Publishing, 2010) at 178.

[17] Dwyre, *supra* note 8 at 62.

## 3.3 Public Funding

Some campaign finance regimes provide public funding to political parties and candidates. Public funding is intended to dilute the influence of wealthy supporters and level the playing field for small or new parties.[18] However, legislation sometimes favours large parties and incumbents by calibrating funding to electoral performance.[19] Public funding also compensates for falling party incomes and increasing campaign costs,[20] which have skyrocketed due to expensive mass media techniques and the professionalization of parties.[21] Meanwhile, revenues are declining because of falling party membership.[22] Public funding, in the form of an annual subsidy based on the votes received during the previous election, can supplement a party's annual income, even if public support and donations decrease.

Another means of reducing reliance on large donations is to allocate free broadcasting time to political parties and candidates. For example, the UK has imposed a blanket ban on paid political advertising on television and radio and provides free airtime to political parties during elections.[23] The scheme aims to reduce demand for money during election campaigns, level the playing field between competitors, and prevent distortion of electoral debate by the wealthy.[24] The question remains whether such measures are becoming irrelevant in the age of digital campaigning.

Opponents of public funding argue that taxpayers should not be forced to fund parties with whom they disagree.[25] They also point out that public funding of political parties diminishes their participatory character by replacing "labour and fund-raising efforts once provided by party members and interested citizens."[26]

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[18] van Biezen, *supra* note 3 at 200–201.

[19] For example, in *Figueroa v Canada (Attorney General)*, 2003 SCC 37, the Supreme Court of Canada struck down a law stipulating that parties must endorse at least fifty candidates in a general election to access public funding. In the Court's view, this requirement was an unjustifiable infringement of the right to vote in section 3 of the *Charter of Rights and Freedoms* because as the Court noted at para 54, it "exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public." The Court emphasized at para 39 that all parties have something meaningful to contribute to electoral debate, not simply those who are a "genuine 'government option.'" This set the stage for a later ruling by the Court concluding at para 91 that thresholds for some benefits that parties receive from the state were constitutional. Four years later, in *Longley v Canada (Attorney General)*, 2007 ONCA 852, the Ontario Court of Appeal ruled at para 54 that it was constitutionally justifiable to have a legal threshold that required political parties, in order to receive annual per-vote public funding, be supported by two percent of the total number of valid votes cast in the previous election or five percent of the votes cast in the districts in which the party ran candidates.

[20] van Biezen, *supra* note 3 at 200–201.

[21] *Ibid.*

[22] *Ibid.*

[23] *Communications Act 2003* (UK), c 21, s 321(2). The ban is discussed further in Section 9.2.2 and 9.3.

[24] Eric Barendt, *Freedom of Speech*, 2nd ed (Oxford: Oxford University Press, 2005) at 485.

[25] Young, *supra* note 6 at 119.

[26] Gauja, *supra* note 16 at 162–63. See also Navraj Singh Ghaleigh, "Expenditure, Donations and

# 4. RATIONALES FOR CAMPAIGN FINANCE REGULATION

## 4.1 Corruption and the Appearance of Corruption

If an individual or entity spends large sums supporting a politician's election campaign, the politician may feel obliged to repay the favour. Corruption could come in the form of *quid pro quos*, such as the provision of contracts, licenses, or tax breaks in exchange for large political donations.[27] Campaign financing may also produce more subtle yet pernicious forms of corruption. First, politicians often provide wealthy backers with special access.[28] As noted by the dissenting justices in *Citizens United v Federal Election Commission* (*Citizens United*), access is a precondition for influence in the legislative process.[29] Privileged access may also lead to public cynicism. Second, monetary support for a candidate's campaign could taint the candidate's judgment once elected and give wealthy supporters undue influence over lawmakers. There are many opportunities for influence and distortion throughout the legislative process, starting with the decision to introduce bills or amendments in the first place.[30] Samuel Issacharoff observes that, after the election, lawmakers may be influenced by gratitude to large donors and a desire to secure "future support in order to retain the perquisites of office."[31] This can produce a kind of "clientelism," in which private interests capture the powers of the state and obtain "legislation in the private interest."[32] Yet the subtlety of such influence may allow politicians to "feel as if nothing improper has occurred."[33] Aside from effective governance issues, the potential for the wealthy to exert undue influence on the legislative process raises obvious equality concerns.[34]

It may be impossible to separate the influence of large donors and supportive third-party campaigners over lawmakers from the influence of principles, constituents, and other factors.[35] An example of this difficulty is provided by *McCormick v United States* (*McCormick*), in which the US Supreme Court overturned an elected official's conviction for corruption

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Public Funding under the United Kingdom's *PPERA 2000* – And Beyond?" in Ewing & Issacharoff, *supra* note 15, 35 [Ghaleigh, "Expenditure, Donations and Public Funding"] at 56.

[27] OECD, *supra* note 1 at 23.

[28] For example, Sheldon Adelson and his wife donated $93 million to third-party campaigners in the American general election in 2012; in 2014, three Republican governors attended a donor conference in Las Vegas where each met one-on-one with Adelson: Jordan May, "'Are We Corrupt Enough Yet?' The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions" (2015) 54:2 Washburn LJ 357 at 357–58.

[29] *Citizens United v Federal Election Commission*, 558 US 310 at 455 (2010) [*Citizens United*].

[30] John P Sarbanes & Raymond O'Mara III, "Power and Opportunity: Campaign Finance Reform For the 21st Century" (2016) 53:1 Harv J Legis 1 at 6. Although some studies claim that monetary support does not influence policy outcomes in the US, Sarbanes & O'Mara argue that these studies focus on votes and ignore the potential for influence and distortion at earlier stages in the legislative process.

[31] Samuel Issacharoff, "On Political Corruption" (2010) 124:1 Harv L Rev 118 at 126.

[32] *Ibid* at 127.

[33] Sarbanes & O'Mara, *supra* note 30 at 12.

[34] The equality rationale for campaign finance regulation is discussed further in Section 4.2.

[35] OECD, *supra* note 1 at 22.

and struck down the law criminalizing the conduct.[36] The defendant politician had a long-standing reputation for favouring legislation beneficial to foreign doctors. The defendant was charged with corruption after accepting money from foreign doctors for his election campaign and subsequently sponsored legislation favourable to them. Because this was not a clear *quid pro quo*, the Court held that the defendant's actions did not constitute corruption. Dembitskiy criticizes this decision for its failure to address the appearance of corruption, which may be present even where an elected official is guided by their own principles, not their donors.[37]

Publicly funded election campaigns help address the risk of corruption, but comprehensive public funding requires public support and political will. If election campaigns continue to be financed wholly or partly through private funds, many argue that corruption can be reduced by encouraging smaller donations from more sources.[38] This approach also accords with the argument that contributions are a valid form of participation in electoral debate.[39] In the US, micro-donations have become increasingly important in elections.[40] For example, President Trump raised as much from small donors (contributing $200 or less) as Clinton and Sanders combined.[41] Ninety-nine percent of the $229 million raised by Sanders came from individual donors.[42] In 2008, 38% of contributions to major party candidates seeking nomination came from micro-donors, compared to 25% in 2000.[43] From the perspective of corruption, fairness, equality, and public confidence, this trend is promising. On the other hand, some point out that reliance on small individual donations could lead politicians to cater to groups of small donors on the fringes, as opposed to cultivating the electoral support of voters who are more centrist but unlikely to make a donation.[44]

The prevention of corruption is accepted by courts in the US, UK, and Canada as a legitimate justification for the burdens on freedom of expression involved in campaign finance

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[36] *McCormick v United States*, 500 US 257 (1991) [*McCormick*].

[37] Vladyslav Dembitskiy, "Where Else is the Appearance of Corruption Protected by the Constitution? A Comparative Analysis of Campaign Finance Laws after *Citizens United* and *McCutcheon*" (2016) 43:4 Hastings Const LQ 885 at 886.

[38] Issacharoff, *supra* note 31 at 118, 137. Quebec's *financement populaire* embodies this approach. At both the provincial and municipal levels, campaign finance scandals have led to the imposition of low contribution caps in the hopes of achieving the "popular financing" of political parties; the scheme is supplemented by public funding: see Maxime Pelletier, "Municipal Political Reform in Quebec: The Myth of 'Popular Finance'" (2014) 43 J Eastern Township Stud 63. Pelletier observes that only a small percentage of voters in Quebec make political contributions and suggests that popular finance will remain a pipe dream if few citizens are interested in donating money to parties and candidates.

[39] Sarbanes & O'Mara, *supra* note 30 at 11.

[40] Richard L Hasen, "The Transformation of the Campaign Financing Regime for US Presidential Elections" in Ewing, Rowbottom & Tham, *supra* note 3, 225 at 229.

[41] Fredreka Schouten, "President Trump Shatters Small-Donor Records, Gets Head Start on 2020 Race", *USA Today* (21 February 2017), online: <https://www.usatoday.com/story/news/politics/onpolitics/2017/02/21/president-trump-shattered-small-donor-records/98208462/>.

[42] Katelyn Ferral, "One Person, One Algorithm, One Vote: Campaigns are Doing More with Data, for Better or Worse", *The Capital Times* (4 January 2017) 24.

[43] Hasen, *supra* note 40 at 229.

[44] Young, *supra* note 6 at 124.

regulation. The US Supreme Court has further held that preventing corruption or the appearance of corruption is the *only* possible justification for the limits on political speech caused by contribution limits, spending limits, and other campaign finance laws. However, judicial definitions of corruption vary. The majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges, not undue influence and access. However, direct *quid pro quos* are almost impossible to prove and are already captured by bribery laws.[45] The dissenting judges of the US Supreme Court in *Citizens United* argued in favour of viewing corruption as a "spectrum," noting that "the difference between selling a vote and selling access is a matter of degree, not kind."[46]

Even under a broader conception of corruption, the anti-corruption rationale for campaign finance regulation fails, according to US courts, to justify some types of regulation.[47] For example, the majority of the US Supreme Court views the anti-corruption rationale as insufficient to justify restrictions on independent third-party expenditures, as the lack of coordination between the third party and the candidate reduces the value of the expenditure to the candidate, therefore reducing the risk of *quid pro quo* exchanges.[48] However, others argue that the absence of coordination does not prevent candidates from feeling grateful to third parties who have spent vast sums supporting their candidacies or from wishing to maintain their support for future elections.[49]

## 4.2 Equality, Fairness, and Participation

Campaign finance regulations are sometimes motivated by the desire to promote equality and fairness in the electoral system. This egalitarian model of campaign finance can be contrasted with the libertarian model. The libertarian model responds to fears that "a regulated marketplace of ideas may result in the entrenchment of the powerful."[50] The egalitarian model responds to concerns that "an unregulated marketplace of ideas may result in the entrenchment of the wealthy."[51] The Supreme Court of Canada has accepted the egalitarian model of campaign finance as a valid legislative choice.[52] The majority of the US Supreme Court has settled on the libertarian model.[53]

Various goals are tied to the equality and fairness rationale. First, many argue that campaign finance must be regulated to prevent the wealthy from drowning out other speakers and setting the issue agenda of electoral debate.[54] Otherwise, under-resourced viewpoints will be lost, and under-resourced citizens will be barred from meaningful participation in debate. In the House of Lords' decision in *Animal Defenders International v the United Kingdom* (*Animal*

[45] Sarbanes & O'Mara, *supra* note 30.
[46] *Citizens United*, *supra* note 29.
[47] Barendt, *supra* note 24 at 482.
[48] Issacharoff, *supra* note 31 at 123.
[49] See Hasen, *supra* note 40 at 237.
[50] Dawood, *supra* note 7 at 290.
[51] *Ibid*.
[52] *Harper v Canada (Attorney General)*, 2004 SCC 33 [*Harper*] at para 62.
[53] The libertarian model is discussed further in Section 5.1.
[54] See e.g. Janet L Hiebert, "Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise" in Ewing & Issacharoff, *supra* note 15, 269 at 269.

*Defenders* HL), Lord Bingham pointed out that, if "the playing field of debate" is not level, views "may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public have been conditioned to accept them."[55] The Supreme Court of Canada has similarly emphasized that "[t]o ensure a right of equal participation in democratic government, laws limiting spending are needed to ... ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others."[56]

Second, many argue that unregulated campaign finance allows the wealthy to disproportionately impact electoral outcomes.[57] This is sometimes seen as a form of corruption, but a corruption of voters and the electoral system rather than elected officials.[58] Third, as discussed above, in the context of the anti-corruption rationale, campaign finance regulation seeks to ensure the wealthy do not have disproportionate influence over policy outcomes after the election. Finally, the equality and fairness rationale calls for regulation to level the playing field for parties and candidates. Unregulated campaigns may give candidates with personal wealth or wealthy supporters an unfair advantage. For example, in the US, the so-called "wealth primary" can screen out candidates with insufficient financial heft, which bodes poorly for racial and gender diversity in public office.[59]

In attempting to ensure the wealthy do not wield disproportionate influence over debate, electoral outcomes, and post-election policy, the egalitarian model responds to concerns that wealthy donors and third-party campaigners are unrepresentative of wider society. In the US, studies have found the donor class to be "underrepresentative of most Americans."[60] Most donors are "wealthier and older than average Americans, and they are more likely to be white and male than the general population."[61] Martin Gilen and Benjamin Page found that the policy preferences of wealthy donors differ from non-donors and people of colour.[62] For example, an American study in 2016 found that 44% of donors giving $5,000 or more supported the *Affordable Care Act*, compared to 53% of American adults. Likewise, 39% of donors contributing $1,000 or more supported the Waxman-Markey clean energy bill, compared to 63% of non-donors.[63] Even if the policy preferences of the wealthy sometimes

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[55] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15 [*Animal Defenders* HL] at para 28.
[56] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 [*Libman*] at para 47.
[57] Raymond J La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (Ann Arbor, MI: University of Michigan Press, 2008) at 1.
[58] Issacharoff, *supra* note 31 at 122.
[59] Sarbanes & O'Mara, *supra* note 30 at 8.
[60] Hasen, *supra* note 40 at 238.
[61] Sean McElwee, "D.C.'s White Donor Class: Outside Influence in a Diverse City" (2016) at 1, online (pdf): *Demos* <https://www.demos.org/sites/default/files/publications/DC%20Donor%20Report%20%28Sean%29.pdf>.
[62] Martin Gilens & Benjamin I Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens" (2014) 12:3 Perspectives Polit 564.
[63] Sean McElwee, Brian Schaffner, & Jesse Rhodes, "Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections" (2016), online (pdf): *Demos* <https://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf>.

align with those of the general public, John Sarbanes and Raymond O'Mara argue we should not be distracted from the problematic nature of the outsized impact of the wealthy in policy outcomes.[64]

## 4.3 Informed Voting

Campaign finance regulation is often touted as a means of facilitating informed voting. Measures such as spending and contribution caps prevent well-resourced speakers from drowning out other speakers, thus making space for the effective dissemination of more information and viewpoints. Courts in Canada and Europe have upheld campaign finance regulations on the basis of the informed voting rationale. They interpret constitutional voting rights to include the right to an informed vote.[65] On the other hand, others argue that informed voting is better served by relaxing campaign finance and allowing unfettered dissemination of information. For example, the majority of the US Supreme Court views spending restrictions as a dangerous limitation on the quantity of information accessible to voters.[66]

## 4.4 Public Confidence

Various studies in the US, UK, and Canada show falling public confidence in the electoral system, risking the "decay of civic engagement."[67] In a UK study by Jennifer vanHeerde-Hudson and Justin Fisher, public opinion was characterized by the perception that "there is just 'too much money' in politics"[68] and the belief that wealthy donors have undue influence over politicians. In a 2012 survey in the US, 77% of respondents thought members of Congress were more likely to act in the interests of those who spent money supporting their election campaigns than they were to act in the public interest.[69] A 2014 poll indicated that three in four American voters think wealthy individuals have a better shot at influencing elections than the rest of the population has.[70] In Canada, after decades of corruption scandals at several levels of government, a national survey of 1,513 adult Canadians, released in October 2015, found that: 44% somewhat agreed and 19% completely agreed that "politics has a tendency to corrupt otherwise honest people"; 36% somewhat agreed and 15% strongly agreed with the statement that they would vote for a party that they didn't really support if the politician or party they support acted unethically; and 14% somewhat

[64] Sarbanes & O'Mara, *supra* note 30 at 6.
[65] See e.g., *Harper (Attorney General)*, *supra* note 52 at para 62.
[66] *Buckley*, *supra* note 11 at 19.
[67] Sarbanes & O'Mara, *supra* note 30 at 3.
[68] Jennifer vanHeerde-Hudson & Justin Fisher, "Public Knowledge Of and Attitudes Towards Party Finance in Britain" (2013) 19:1 Party Politics 41.
[69] "National Survey: Super PACs, Corruption, and Democracy: Americans' Attitudes about the Influence of Super PAC Spending on Government and the Implications for our Democracy" (24 April 2012), online: *Brennan Center for Justice* <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>.
[70] Sarah Dutton et al, "Americans' view of Congress: Throw 'em out", *CBS News* (21 May 2014), online: <http://www.cbsnews.com/news/americans-view-of-congress-throw-em-out/>.

agreed and 4% strongly agreed with the statement that political corruption had led them to stop voting.[71]

Arguments in favour of stricter campaign finance regulation often raise the issue of voter confidence. For example, in *Canada v Somerville* (*Somerville*), the government argued that third-party spending limits are necessary to prevent the perception that lawmakers are more accountable to their wealthy supporters than their electors.[72] In *Harper v Canada* (*Harper*), the Supreme Court of Canada cited public confidence as a permissible justification for third-party spending limits and their limits on freedom of expression.[73] The US Supreme Court also accepts that the government may limit free speech to prevent the appearance of corruption, but the majority defines corruption narrowly to include only direct *quid pro quo* exchanges.[74]

### 4.5 Other Rationales

Campaign fundraising is time-consuming for politicians. Limits on campaign spending may reduce the time politicians spend on fundraising, allowing them to focus on policy development and other valuable functions.[75] In addition, some argue that unrestrained campaign spending compromises the quality of public debate. For example, Ronald Dworkin argues that if electoral debate is simply a free-for-all, discourse may "be so cheapened as to altogether lose its democratic character."[76] Similarly, the Neill Committee in the UK justified a ban on paid political advertising on broadcast media by pointing to the undesirability of a "continuous barrage of party political propaganda."[77]

## 5. CHALLENGES IN REGULATING CAMPAIGN FINANCE

### 5.1 Freedom of Expression and Association

Campaign finance regulation often entails limits on freedom of expression. As the US Supreme Court remarked in *Buckley v Valeo* (*Buckley*), "virtually every type of communication in a modern mass democracy is dependent on expenditure."[78] Limiting

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[71] Ted Rogers Leadership Centre, "Public Perceptions of the Ethics of Canada's Political Leadership" (5 November 2014), online: *Gandalf Group* <https://www.gandalfgroup.ca/downloads/2014/Ryerson%20Ethics%20Survey%20-%20Final%20Report%20Nov%205%20-%20TC.PDF>.

[72] *Canada (Attorney General) v Somerville,* 1996 ABCA 217 [*Somerville*] at para 11.

[73] *Harper*, *supra* note 52.

[74] See e.g. *McCutcheon v Federal Election Commission,* 572 US 185 at 206 (2014) [*McCutcheon*].

[75] Barendt, *supra* note 24 at 481.

[76] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) at 369.

[77] UK, Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom,* vol 1 (London: London The Stationery Office, 1998) (Lord Nell of Bladen QC) at 174.

[78] *Buckley*, *supra* note 11 at 19.

spending and fundraising therefore limits the "quantity of expression."[79] Further, campaign finance regulations impact *political* speech, which enjoys a preferred position under US law and stronger protection under the European Convention on Human Rights.[80] Some regulations also hinder freedom of association by preventing individuals from freely pooling their resources to finance a political message. Governments attempting to restrict spending, fundraising, broadcasting, and other aspects of election campaigns must therefore show that restrictions are a justified infringement of freedom of expression and association.

As Dworkin observes, critics of campaign finance regulation view any restriction of political speech as harmful to democracy, even if that restriction is aimed at enhancing the quality of democracy.[81] These critics focus on the danger posed by government, rather than the wealthy, to democracy and individual freedom. The majority of the US Supreme Court follows this libertarian approach to freedom of speech. In *McCutcheon v Federal Election Commission*, for example, Chief Justice Roberts maintained that the government cannot be trusted to judge the value of certain speech over other speech, "even when the government purports to act through legislation reflecting 'collective speech.'"[82]

Dworkin dismisses this libertarian model as "prophylactic overkill."[83] Under Dworkin's "partnership" model of democracy, citizens participate in elections not only by voting, but by attempting to influence the opinions of others.[84] Dworkin argues that citizens who lose must be "satisfied that they had a chance to convince others … not merely that they have been outnumbered."[85] However, if the "admission price" to political debate is too high, citizens will be denied, based on wealth, the opportunity to make persuasive efforts, "a circumstance … remote from the substance of opinion or argument."[86]

Many commentators agree with Dworkin, that campaign finance regulation can be a justified limit on freedom of speech. Some proponents of campaign finance reform go further, arguing that restrictions on spending and fundraising, for example, may actually enhance free speech values. Restrictions may prevent the wealthy from drowning out other speakers and thus facilitate the dissemination of a wider range of perspectives. In this vein, Owen Fiss argues that the state can be "a friend of speech," not just its enemy.[87] According to Fiss, free speech should protect not only individual self-expression but also popular

[79] *Ibid.*
[80] Barendt, *supra* note 24 at 159.
[81] Dworkin, *supra* note 76 at 353.
[82] *McCutcheon*, *supra* note 74.
[83] Dworkin, *supra* note 76 at 369.
[84] *Ibid* at 358.
[85] *Ibid* at 364–65.
[86] *Ibid* at 364. Dworkin, at 176, also makes the argument that, in a society with a defensible distribution of wealth, "no one … could have the impact on political decisions, just in virtue of money spent in politics, that the rich can now have in the United States." In this sense, the campaign finance laws struck down by the US Supreme Court do not victimize anyone, as Dworkin notes, they do not make anyone's position "worse, with respect to the liberty in question, than it would most likely have been in a defensible distribution."
[87] Owen M Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996) at 83.

sovereignty.[88] To accomplish this, "the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech."[89]

## 5.2 Entrenching Incumbents and Differential Impacts on Political Parties

Campaign finance regulations tend to have disproportionate impacts on different parties and candidates. These impacts may be unintended. For example, in Canada, the federal Liberal Party introduced campaign finance measures, which ultimately turned out most favourable to the Conservative Party.[90] In other instances, partisan finagling may be at work. Raymond La Raja argues that the design of campaign finance regulation can often "be tied to partisan strategies for influencing the value of one faction's resources relative to one's rivals."[91]

Most concerning is the potential for campaign finance regulation that favours incumbents.[92] For example, ceilings on candidate spending may give incumbents an advantage because they already have publicity.[93] As a result, critics argue that spending caps "limit competition and undemocratically serve to preserve the *status quo*."[94] Such arguments are particularly salient in the US, where "elections are candidate-centered and big campaigns are sometimes needed to blast out incumbents."[95]

Campaign finance regulations may also have differential impacts depending on the ideology and fundraising methods of different political parties. For example, in the UK, restrictions on donations from labour unions would clearly disadvantage the Labour Party. In Canada, scholars pointed out that for years after they were established, "contribution limits have created a persistent funding advantage for the federal Conservative Party"[96] as it had greater success gathering many small donations from individuals. Because party expenditure is also limited, the Conservative Party often has money left over to spend on attack ads between elections.[97] The federal New Democratic Party, on the other hand, faced a greater disadvantage than the Liberals and Conservatives after the erosion of public funding in Canada in 2014, since the New Democrats derived a larger portion of their income from the public funding regime.[98]

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[88] *Ibid* at 3–4.
[89] *Ibid*.
[90] Colin Feasby, "Canadian Political Finance Regulation and Jurisprudence" in Ewing, Rowbottom & Tham, *supra* note 3, 206 at 217.
[91] La Raja, *supra* note 56 at 6.
[92] Richard A Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003) at 240.
[93] *Ibid;* Barendt, *supra* note 24 at 482.
[94] Gauja & Orr, *supra* note 9 at 250.
[95] *Ibid*.
[96] Feasby, *supra* note 90 at 217; see also Young, *supra* note 6 at 119.
[97] Feasby, *supra* note 90 at 217, 219.
[98] Young, *supra* note 6 at 118.

## 5.3 Loopholes

Loopholes are another challenge in crafting effective campaign finance regimes. The goals of ameliorating corruption, unfairness, and inequality will be subverted if donors simply find new ways to funnel money to politicians. Issacharoff points out that "the perverse 'hydraulic' of money finding its outlet" has caused many attempts at campaign finance reform to "backfire."[99] For example, after Congress tightened regulations governing party fundraising and spending in the US in 2002,[100] spending by third-party campaigners jumped, suggesting that money was simply redirected to a new outlet.[101] Even if campaign finance regulations are skillfully designed to minimize these shifts, prospective donors may direct money to other activities like lobbying to achieve their ends.[102]

## 5.4 Circumscribing the Scope of Regulated Activities

Another difficulty in designing campaign finance regulations is drawing the line between regulated and unregulated activities. Distinguishing between election activities and general political activities can be difficult, and entities and individuals will always try to fall on the unregulated side of the line.[103] Third parties might attempt to split costs between election-related spending and general expenses to avoid hitting the thresholds for regulatory requirements.[104] In addition, it may be unclear whether an advertisement on a contentious political issue during an election aims to improve the chances of a particular political party or is merely part of general political debate. Responding to this difficulty, Eric Barendt has argued that the Supreme Court of Canada's willingness to allow third-party spending limits[105] is based on the incorrect assumption that "a sensible line can be drawn between campaign expenditure on the one hand and expenditure on general political and social discussion"[106] on the other.

Lawmakers may also encounter difficulty in drawing the line between regulated and unregulated time periods. Campaign finance regulation often kicks in when an election begins. However, because election campaigning has become more or less permanent, some commentators argue that lawmakers should approach political finance as a whole rather than focusing on campaign finance alone.[107] Further, contemporary digital campaigning techniques have shifted the timing of expenses. Many costly activities, such as forming databases of voters, occur before the election period begins, allowing expenses for these

[99] Issacharoff, *supra* note 31 at 120.
[100] *Bipartisan Campaign Finance Reform Act of 2002*, Pub L No 107-155, 116 Stat 81 [*BCRA*].
[101] Dwyre, *supra* note 8 at 54.
[102] OECD, *supra* note 1 at 16.
[103] Keith D Ewing & Jacob Rowbottom, "The Role of Spending Controls" in Ewing, Rowbottom & Tham, *supra* note 3, at 85.
[104] *Ibid*.
[105] See e.g. *Harper*, *supra* note 52.
[106] Barendt, *supra* note 24 at 479–80.
[107] Gauja & Orr, *supra* note 9 at 259.

activities to slip through the regulatory net.[108] On the other hand, an overly broad cap on general party expenditures could impact valuable activities such as policy development.[109]

## 5.5 New Campaigning Techniques

The next challenge in campaign finance is the application of old regulatory regimes to new methods of campaigning. Traditionally, campaign finance regulation is designed with media like television and radio in mind. However, campaigns are increasingly reliant on digital techniques like "micro-targeting," which involves using data purchased from data companies to predict how particular voters might feel about certain issues and targeting small groups of voters with tailored advertisements.[110] Existing regulatory frameworks may be ill-suited to these new techniques. For example, spending caps may be undermined by the difficulty of tracking online and social media expenses.[111] Further, as discussed in Section 5.4, some activities involved in digital campaigning may take place before the election period begins, allowing expenses for these activities to escape unregulated.[112]

# 6. REGULATION OF THIRD-PARTY CAMPAIGNERS

## 6.1 The Role of Third-Party Campaigners

In this section the proper role of third-party campaigners in elections is debated. On one hand, third parties may provide helpful perspectives and additional information not offered by parties and candidates. As the Alberta Court of Appeal observed in *Somerville*:

> The citizenry looks to its community, political and religious leaders, and interest groups for input. Voters want the benefit of the independent advice and information on candidates and parties from others with similar ideologies and without the self interest involved in candidate and party advertising.[113]

The Alberta Court of Appeal noted further that, without third-party campaigners, voters would only receive the information politicians and the media choose to disseminate.[114] This is particularly problematic in relation to issues avoided by political parties as "non-winners" since their positions on such issues are "critical to the voter."[115] The dissent in *Harper* echoed these points, arguing that deliberative democracy necessitates giving a voice to unpopular

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[108] Damian Tambini et al, *Media Policy Brief 19: The New Political Campaigning* (London: London School of Economics & Political Science, 2017) at 5, online (pdf): <http://eprints.lse.ac.uk/id/eprint/71945>.
[109] Ewing & Rowbottom, *supra* note 103 at 81.
[110] Ferral, *supra* note 42.
[111] Tambini et al, *supra* note 108 at 5.
[112] *Ibid*.
[113] *Somerville, supra* note 72 at para 75.
[114] *Ibid* at para 48.
[115] *Ibid* at para 76.

views avoided by political parties or candidates.[116] In this conception of elections, "parties and third parties are on an equal footing" and third party "voices are seen to be in the interests of either open deliberation or competitive pluralism."[117]

On the other hand, many commentators argue that political parties and candidates should be the primary players in elections, rather than unaccountable third-party groups with narrow interests.[118] The Royal Commission on Electoral Reform and Party Financing (the Canadian Lortie Commission) summarized this argument:

> Parties remain the primary political organizations for recruiting and selecting candidates for election to the House of Commons, for organizing the processes of responsible parliamentary government, and for formulating policy that accommodates and reconciles competing regional and socio-economic interests. As legitimate as interest groups are in a free and democratic society, by their nature they cannot perform these crucial functions…. It is therefore imperative that electoral reform address the fundamental objective of strengthening political parties as primary political organizations.[119]

In addition, since third-party organizations, such as corporations, do not have the right to vote, some argue they should be barred "from exercising an undue voice within the electoral process."[120]

The growth of outside spending, suggest some commentators, can deteriorate the centrality of candidates and political parties in campaigns. Diana Dwyre argues that this deterioration is "detrimental to the overall health of American representative democracy" that can lead to a "democratic deficit"[121] and a disenchanted electorate. Parties "link voters to lawmakers" and provide an "accountability mechanism."[122] They also give voters an idea of what to expect from candidates.[123]

## 6.2 Reinforcing other Campaign Finance Controls

Third-party campaign regulations may help ensure the effectiveness of regulations governing parties and candidates. If party and candidate spending is limited without corresponding limits on third-party spending, parties and candidates may be forced to use their limited spending capacity to "fend off attacks" by third parties rather than advertising

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[116] *Harper*, *supra* note 52 at para 14.
[117] Gauja & Orr, *supra* note 9 at 263.
[118] See e.g. La Raja, *supra* note 57 at 7; Issacharoff, *supra* note 31 at 136, 141; dissenting judgment in *Citizens United*, *supra* note 29.
[119] Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, vol 1 (Ottawa: Minister of Supply and Services, 1991) (Pierre Lortie) at 13.
[120] Gauja & Orr, *supra* note 9 at 254.
[121] Dwyre, *supra* note 8 at 35, 53, 57–58.
[122] *Ibid* at 53, 57–58.
[123] Robert G Boatright, "US Interest Groups in a Deregulated Campaign Finance System" in Boatright, *Campaign Finance Laws*, supra note 6, 71 [Boatright, "US Interest Groups"] at 99–100.

their policy positions.[124] The regulation of third parties also prevents circumvention of regulations governing spending, contributions, and transparency for candidates and political parties. A failure to regulate third parties could produce a "waterbed effect" in which front groups are "used to channel spending for parties and candidates."[125] Anika Gauja and Graeme Orr add that third-party regulations must prevent organizations from proliferating to circumvent spending caps.[126]

## 6.3 Freedom of Speech

Third-party spending caps raise particularly potent freedom of expression concerns. Their constitutional validity is therefore controversial. As noted by the Alberta Court of Appeal in *Somerville*, limits on third-party spending "purport … to protect the democratic process, by means of infringing the very rights which are fundamental to a democracy."[127]

Third-party spending limits have survived freedom of expression challenges in Canada and the UK. However, in the US, caps on independent third-party expenditures have been struck down as an unjustifiable limit on freedom of speech.[128] Freedom of expression and third-party spending limits are discussed further below in the context of the Canadian cases of *Somerville*,[129] *Libman v Quebec*,[130] and *Harper*;[131] the British case of *Bowman v the United Kingdom*;[132] and the American cases of *Buckley*,[133] *Austin v Michigan Chamber of Commerce*,[134] *McConnell v Federal Election Commission*,[135] *Citizens United*,[136] and *SpeechNow.org v Federal Election Commission*.[137]

## 6.4 Spending and Corruption

A lack of consensus persists regarding the extent to which independent third-party campaigning entails a risk of corruption. Many argue that politicians may be inclined to reward third parties who fund advertising to support their campaigns, even if the third parties act independently. However, American courts, assisted in this conclusion by a narrow definition of corruption, have concluded that independent third-party campaign

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[124] Gauja & Orr, *supra* note 9 at 254. See also Ewing & Rowbottom, *supra* note 103 at 82.
[125] Gauja & Orr, *supra* note 9 at 254.
[126] *Ibid* at 263.
[127] *Somerville, supra* note 72 at para 65.
[128] See *Buckley, supra* note 11; *SpeechNow.org v Federal Election Commission*, 599 F (3d) 686 (DC Cir 2010) [*SpeechNow*]; *Citizens United*, *supra* note 29.
[129] *Somerville, supra* note 72.
[130] *Libman supra* note 56.
[131] *Harper, supra* note 52.
[132] *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4 [*Bowman*].
[133] *Buckley, supra* note 11.
[134] *Austin v Michigan Chamber of Commerce,* 494 US 652 (1989) [*Austin*].
[135] *McConnell v Federal Election Commission,* 540 US 93 (2003) [*McConnell*].
[136] *Citizens United*, *supra* note 29.
[137] *SpeechNow*, *supra* note 128.

expenditures entail no significant risk of corruption or the appearance of corruption. This debate is summarized in Section 8.3.

## 6.5 Institutional Third Parties

Institutional campaign spending may carry different implications for the quality of democracy depending on the type of institution in question. Jacob Rowbottom points out that "some institutions can be an important vehicle for participation…. Other institutions, however, may act as a conduit for wealthy individuals and organisations."[138] In some cases, the difference between an individual donation and an institutional donation may be meaningless, as when an individual controls the institution and lacks accountability to members.[139] For example, Robert Boatright notes that some interest groups in the US have a small membership to whom they are accountable, making them look more like for-profit corporations than vehicles for "representing citizens' views to politicians."[140] In other cases, institutional spending results from the "pooling of resources among lots of people,"[141] which reduces both corruption and equality concerns. This type of institutional spending is also a means of enhancing the effectiveness of small donations.[142] Some institutions may also require "internal debate" before making political expenditures, contributing to the deliberative process.[143]

Blanket prohibitions or caps on institutional political spending may close off healthy "channels for participation."[144] Rowbottom argues that the design of campaigning controls for institutions should not be based on their status as corporations, unions, or unincorporated associations, but rather on the "democratic credentials of the institution"[145] and its ability to provide an effective channel for citizen participation.

### 6.5.1 Corporations

For-profit corporations are an example of an institution in which members have little influence over political spending. Rowbottom points out that "since a company does not represent its shareholders (or anyone else) and has its own legal identity … it may be questioned why companies are legally permissible donors at all."[146] A corporation's money

[138] Jacob Rowbottom, "Institutional Donations to Political Parties" in Ewing, Rowbottom & Tham, *supra* note 3, 11 at 11.

[139] Hasen, *supra* note 40; Rowbottom, *supra* note 138 at 17.

[140] Boatright, "US Interest Groups", *supra* note 123 at 100.

[141] Rowbottom, *supra* note 138 at 16.

[142] *Ibid*.

[143] *Ibid* at 18.

[144] *Ibid* at 16.

[145] *Ibid* at 27.

[146] *Ibid* at 22. Note that corporations are impermissible donors to candidates and parties at the federal level in Canada and are also prohibited from making contributions to candidates at the federal level in the US: see Sections 8.2.2 and 10.2(b). Corporations may, however, engage in third-party campaigning in Canada and the US. For an opposing view on the role of corporations in elections, see the judgement of Kennedy J in *Citizens United*, *supra* note 29. At 364, Kennedy J maintained that "[o]n certain topics, corporations may possess valuable expertise, leaving them the best

is not the property of the shareholders. If a company makes a political donation or expenditure at odds with the views of a shareholder, the shareholder's only recourse may be, if they hold a small minority of shares, to sell their shares.[147] As noted by the dissent in the American case of *Citizens United*, corporate communications are "at least one degree removed from the views of individual citizens, and … may not even reflect the views of those who pay for it."[148] If a corporation is closely held or has a controlling shareholder, donations from the corporation could be viewed by candidates and by the public as donations from the controlling individual, raising issues related to corruption and public confidence.[149] Directors are somewhat restrained when directing money to political purposes by their duty to further the company's interests, but this restraint is vaguely defined and therefore not very effective.[150]

In the UK, companies are required to obtain a member resolution authorizing any political donations or expenditures in advance.[151] However, the resolution "must be expressed in general terms … and must not purport to authorize particular donations or expenditure."[152] Further, the resolution will have effect for four years.[153] As a result, this mechanism does little to promote accountability or attenuate the control of the company's management over political spending.

In contrast to for-profit corporations, incorporated interest groups could be a healthy means of participation for small donors wishing to act collectively. Individuals contribute money to the group because of its political agenda, as opposed to for-profit corporations, in which the company's political activities have nothing to do with investor support.[154] Thus, as Rowbottom points out, corporate status "says little about whether donations should be permissible or capped."[155]

Issacharoff maintains that for-profit corporations in the US lack the desire and ability to overwhelm elections.[156] Studies indicate that corporate spending is low compared to other third-party spending in the US.[157] Further, after a US Supreme Court decision struck down restrictions on corporate electioneering, there was no explosion in corporate spending.[158] Rather, money has come primarily from wealthy individuals.[159] Issacharoff explains this phenomenon by pointing out that corporations are probably unwilling to risk a backlash by supporting candidates with controversial positions.[160] For example, Target faced a boycott

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equipped to point out errors or fallacies in speech of all sorts."

[147] Rowbottom, *supra* note 138 at 22.

[148] *Citizens United*, *supra* note 29 at 419.

[149] Rowbottom, *supra* note 138 at 21.

[150] *Ibid* at 21.

[151] *Companies Act 2006* (UK), c 46, s 366.

[152] *Ibid*, s 367.

[153] *Ibid*, s 368.

[154] Rowbottom, *supra* note 138 at 23.

[155] *Ibid*.

[156] Issacharoff, *supra* note 31 at 130.

[157] *Ibid*.

[158] Boatright, "US Interest Groups", *supra* note 123 at 71.

[159] *Ibid*.

[160] Issacharoff, *supra* note 31 at 130.

in 2010 after contributing to a candidate that opposed same-sex marriage.[161] Issacharoff argues that for-profit corporations are more likely to direct their money towards lobbying, which is more effective and discreet.[162]

#### 6.5.2 Labour Unions

Labour unions[163] are often grouped with corporations in discussions of campaign finance. For example, the dissenting justices of the US Supreme Court in *Citizens United* discussed corporations and unions together, stating that both represent "narrow interests."[164] However, political spending by labour unions arguably differs from political spending by for-profit corporations in regards to its implications for corruption and equality. Ewing, commenting in the UK context, points out that "the trade union model of party funding is one that involves millions of people of modest means making a small annual contribution to sustain the political process."[165] In Ewing's view, "[t]his is precisely what we should be trying to encourage."[166] Rowbottom adds that unions often have some form of "internal democracy," such as requirements for internal debate on proposed political spending and measures to promote the accountability of union leaders.[167] For these reasons, Rowbottom argues that union spending is not problematic from the perspective of equality.[168] Nevertheless, unions are the most heavily regulated donors in the UK.[169] In contrast to the thin shareholder resolution requirement for UK corporations, unions in the UK must ballot their members to establish a separate political fund for any political spending.[170] Individual members must then opt in to payments into the fund.[171]

### 6.6 Incidence of Third-Party Electioneering in Canada and the UK

Gauja and Orr argue that "there is relatively little demand for 'big money' third-party campaigning in parliamentary democracies," especially those, like Canada and the UK, that are "culturally, rather than legally driven,"[172] to accept limits on third-party spending. In the UK, third parties rarely approach their spending limits, although this could be partly due to gaps in reporting requirements or cost splitting by third parties.[173] Similarly, third parties in Canada have not generally reached their spending limits.[174] Colin Feasby argues that third

[161] Dwyre, *supra* note 8 at 55.
[162] Issacharoff, *supra* note 31 at 131.
[163] According to Gauja and Orr, labour unions are the most active third-party campaigners in the UK, Canada, New Zealand, and Australia: Gauja & Orr, *supra* note 9 at 268.
[164] *Citizens United*, *supra* note 29 at 412.
[165] Keith D Ewing, "The Trade Union Question in British Political Funding" in Ewing, Rowbottom & Tham, *supra* note 3, 54 at 72.
[166] *Ibid*.
[167] Rowbottom, *supra* note 138 at 24.
[168] *Ibid* at 25.
[169] *Ibid* at 23.
[170] *Ibid*.
[171] *Ibid*.
[172] Gauja & Orr, *supra* note 9 at 268.
[173] Ewing & Rowbottom, *supra* note 103 at 82, 88.
[174] Feasby, *supra* note 90 at 212.

parties in Canada, up until 2012, have shown little "appetite … for big money campaigns," while the "lack of co-ordination between third parties suggests that third parties are not affecting electoral fortunes on a national level."[175] In Canada's 2008 federal general election, while political parties spent over CDN$58 million, third-party spending was relatively negligible at just under CDN$1.5 million.[176] In the 2015 federal general election, 104 third parties collectively spent over CDN$6 million on election advertising, but spending limits were much higher in 2015 because of the unusually long campaign.[177] Lawlor and Crandall add that third parties are probably not used to circumventing party and candidate contribution limits.[178] Based on these observations, they argue that third-party spending restrictions in Canada seem "to be a preventative rather than a responsive approach."[179]

However, Canada's 1988 federal general election suggests that third-party spending limits could play a significant role in elections in which a single issue dominates, although such elections are rare in Canada.[180] The 1988 election, during which third-party spending was unlimited, was essentially reduced to a referendum on free trade.[181] Most of the CDN$4.7 million spent by third-party campaigners was directed toward the free trade issue and four times more money went toward promoting free trade than opposing it.[182] This indirectly supported the ultimately successful Progressive Conservative Party, which campaigned on a platform supporting free trade. As the Supreme Court of Canada noted in *Libman v Quebec* (*Libman*), "[t]he 1988 federal election showed clearly how independent spending could influence the outcome of voting."[183]

# 7. INTERNATIONAL

## 7.1 UNCAC

The United Nations Convention against Corruption (UNCAC) addresses transparency in campaign finance. Article 7(3) of UNCAC states that "[e]ach States Party shall consider taking appropriate legislative and administrative measures … to enhance transparency in

[175] *Ibid*.
[176] *Ibid*.
[177] The top ten spenders were mainly labour unions: Joan Bryden, "Third Parties Spent $6-million to Influence 2015 Election", *The Globe and Mail* (1 April 2016), online: <http://www.theglobeandmail.com/news/politics/third-parties-spent-6-million-to-influence-2015-vote/article29491009/>.
[178] Andrea Lawlor & Erin Crandall, "Understanding Third Party Advertising: An Analysis of the 2004, 2006 and 2008 Canadian Elections" (2011) 54:4 Can Pub Pol'y 509 at 509.
[179] *Ibid* at 527.
[180] *Ibid* at 526.
[181] Desmond Morton, "Should Elections be Fair or Just Free?" in David Schneiderman, ed, *Freedom of Expression and the Charter* (Calgary, AB: Thomson Professional Publishing Canada, 1991) 460 at 463.
[182] Royal Commission on Electoral Reform and Party Financing, *supra* note 119 at 337.
[183] *Libman, supra* note 56 at para 51.

the funding of candidatures for elected public office and, where applicable, the funding of political parties."[184]

## 7.2 OECD

The OECD's *Guidelines for Multinational Enterprises* advise companies to follow local law on political contributions, stating that "enterprises should … [n]ot make illegal contributions to candidates for public office or to political parties or other political organizations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management."[185] Political financing is also mentioned in the *Recommendation for Further Combating Bribery*, which recommends that companies develop measures to prevent bribery in a range of areas, including "political contributions."[186]

The OECD is showing an increased interest in campaign finance and its consequences for integrity in government. This interest is demonstrated in its 2016 report, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*.[187] The report outlines a recommended policy framework with four "pillars." First, policy-makers should encourage transparency and accountability through "[c]omprehensive disclosure of income sources of political parties and candidates" and "user-friendly"[188] organization of disclosed information. Second, policy-makers should promote a level playing field through measures such as public funding, spending limits, bans on certain types of private contributions (e.g., contributions from corporations, unions, and other organizations), and rules to limit abuse of state resources.[189] Third, policy-makers should foster a culture of integrity by developing rules in areas like conflict of interest and whistleblower protection.[190] Standards of integrity for private donors are also important in creating a culture of integrity.[191] Finally, policy-makers should encourage regular review of campaign finance regimes and ensure compliance through dissuasive sanctions, independent oversight, and the provision of support to political parties to assist in compliance.[192]

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[184] *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005), online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.
[185] OECD, *Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011) at 48, online (pdf): <http://mneguidelines.oecd.org/guidelines/>.
[186] OECD, *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (Paris: OECD Publishing, 2010), online (pdf): <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>.
[187] OECD, *supra* note 1.
[188] *Ibid* at 65.
[189] *Ibid* at 30.
[190] *Ibid*.
[191] *Ibid*.
[192] *Ibid* at 31.

# 8. US

In the US, freedom of speech jurisprudence has led to the demise of various campaign finance regulatory measures.[193] Commenting on this deregulatory bent, Boatright observes that the US "begins from a different place"[194] compared to some other countries when it comes to the regulation of campaign finance. This "different place" involves a long-standing reluctance to regulate campaign finance and the recognition of third-party campaigner organizations as an integral part of the electoral process.[195] Despite these cultural tendencies and the American courts' fierce protection of freedom of speech, limits and source restrictions on political contributions and transparency requirements for political spending have survived. However, it should be noted that the amount limits on contributions, ranging from $2,900 up to $109,500 in 2021, are high compared to the average annual income in the US.[196] Further, transparency requirements for some types of third parties are weak, allowing political money to be funnelled through non-transparent organizations.[197]

The next section focuses on the interaction between free speech and campaign finance regulation, followed by a brief overview of the federal regulatory scheme in the US.

## 8.1 Constitutional Rights and Campaign Finance Regulation

### 8.1.1 First Amendment

The First Amendment of the US *Constitution* (the First Amendment) states:

> Congress shall make no law … abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[198]

Political speech enjoys a "preferred position"[199] in American constitutional law. According to the US Supreme Court, "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[200] In the context of campaign finance regulation, the US Supreme Court has generally held, beginning with a ruling in 1976, that

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[193] Dwyre notes that recent rulings and regulations made by the Federal Election Commission have contributed further to the relaxation of regulation: Dwyre, *supra* note 8 at 35.
[194] Boatright, "US Interest Groups", *supra* note 123 at 71.
[195] *Ibid*.
[196] "Contribution Limits for 2021-2022 Federal Elections" (last visited 26 October 2021), online: *Federal Election Commission* <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/>.
[197] See Section 8.3.
[198] US Const amend I.
[199] Barendt, *supra* note 24 at 154. See also *Buckley*, *supra* note 11 at 14.
[200] *Citizens United*, *supra* note 29 at 340, quoting *Federal Election Commission v Wisconsin Right to Life Inc*, 551 US 449 at 464 (2007); see also Deborah A Roy, "The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?" (2015) 46:1 U Mem L Rev 1.

the only permissible governmental interest in restricting political speech is the prevention of corruption.[201] Further, the majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges.[202] In the majority's view, influence and access alone do not raise the spectre of corruption.[203] Kang calls this approach to corruption "disappointingly underdeveloped."[204]

By narrowly circumscribing the possible justifications for campaign finance regulation, the majority of the US Supreme Court guards against the risk of governmental influence over voters' thoughts and decisions while overlooking the potential for undue influence by the wealthy over public discourse and elected officials. Other interests, such as equality and fairness, are considered insufficiently compelling to justify burdens on First Amendment rights. Thus, the protection of individual freedom is arguably accomplished at the expense of equality between individuals. This libertarian approach to campaign finance accords with the view that the First Amendment is "premised on mistrust of governmental power."[205] In line with this mistrust, Chief Justice Roberts of the US Supreme Court maintains that the public must be left to "determine for itself what speech and speakers are worthy of consideration."[206]

The US Supreme Court's adoption of a libertarian campaign finance model has resulted in the rejection of campaign expenditure limits. However, the Court has concluded that contribution limits are permissible because they pursue the legitimate governmental interest of anti-corruption.[207] The Court has also upheld transparency requirements for both expenditures and contributions, although loopholes in statutes allow for both secret donations and spending.[208]

A contingent of justices on the US Supreme Court has accepted a wider range of justifications for the burdens on political speech associated with campaign finance regulations. At one point, these justices formed the majority of the Court, leading to decisions upholding various campaign finance controls.[209] However, from 2006 to 2016, in a series of cases decided by five-four split rulings, that contingent was in the minority in every case. Their earlier decisions were overruled, and several restrictions on donations and spending were removed and public funding systems were ruled unconstitutional.[210]

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[201] See e.g. *Buckley, supra* note 12.

[202] See e.g. *Citizens United*, *supra* note 29.

[203] *Ibid*.

[204] Michael S Kang, "The Brave New World of Party Campaign Finance Law" (2016) 101:3 Cornell L Rev 531 at 534.

[205] *Citizens United*, *supra* note 29 at 340.

[206] *Ibid* at 341.

[207] See e.g. *Buckley, supra* note 11.

[208] *Ibid*; "Dark Money Basics" (last visited 26 October 2021), online: *Open Secrets* <https://www.opensecrets.org/dark-money/basics>.

[209] See e.g. *Austin*, *supra* note 134; *McConnell*, *supra* note 135. See Section 8.1.2.2.

[210] Lawrence Norden, Brent Ferguson & Douglas Keith, *Five to Four* (New York: Brennan Center for Justice, 2016), online (pdf): <https://www.brennancenter.org/sites/default/files/2019-08/Report_Five_to_Four_Final.pdf>.

### 8.1.2 Jurisprudence on the Constitutional Validity of Campaign Finance Regulation

#### 8.1.2.1 *Buckley v Valeo*

*Buckley v Valeo* (*Buckley*) is a foundational case for American campaign finance regulation and represents the beginning of the end for expenditure limits in the US.[211] In *Buckley*, the US Supreme Court found that ceilings on independent, uncoordinated third-party campaign expenditures were an unacceptable restriction on political speech under the First Amendment.[212] In the majority's view, the impugned spending ceiling precluded anyone other than candidates, parties, and the press from making "any significant use of the most effective modes of communication."[213] The Court observed that "virtually every type of communication in a modern mass democracy is dependent on expenditure."[214] Thus, restricting spending "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[215]

In the Court's view, the government's interest in preventing corruption did not justify the third-party expenditure limits.[216] The Court held that independent third-party campaign expenditures do not pose the same risk of corruption as large contributions to candidates.[217] The Court explained that "[t]he absence of prearrangement and coordination of an expenditure with the candidate … alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[218]

The Court also rejected the argument that independent expenditure caps were justified by a governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections."[219] According to the Court, the idea that "government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[220] Rather, the First Amendment was intended to promote unfettered dissemination of information and ideas.[221] The Court cited similar concerns in striking down a limit on candidate self-funding.[222]

The Court did, however, uphold limits on direct contributions to candidates. First, unlike expenditure ceilings, contribution caps impose only a "marginal," indirect restriction on the contributor's right to free speech.[223] According to the Court, a "contribution serves as a

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[211] *Buckley, supra* note 11.
[212] "Uncoordinated" refers to not being coordinated with candidates. In other words, the spending ceiling at issue applied to independent third-party campaigners.
[213] *Buckley, supra* note 11 at 19–20.
[214] *Ibid* at 19.
[215] *Ibid.*
[216] *Ibid* at 44.
[217] *Ibid* at 46.
[218] *Ibid* at 47.
[219] *Ibid* at 48.
[220] *Ibid* at 49.
[221] *Ibid.*
[222] *Ibid* at 54.
[223] *Ibid* at 20.

general expression of support for the candidate and his views"[224] and this symbolic expression does not depend on the size of the contribution. Further, the eventual speaker will be someone other than the contributor.[225] Second, the Court found that the contribution limits pursued the permissible objective of preventing corruption and its appearance. According to the Court, contribution limits address the risk that large donations will be "given to secure a political *quid pro quo* from current and potential office holders."[226] Equally important, contribution limits address "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[227]

In *Buckley*, the US Supreme Court established several principles that continue to influence American jurisprudence on campaign finance regulation. First, the Court rejected the egalitarian rationale for regulation. Only the anti-corruption rationale was accepted as a legitimate justification for limits on political speech during election campaigns. Second, the Court held that independent expenditures by third parties do not raise a significant risk of corruption. This holding set the stage for the growth of independent third-party spending in American elections by groups such as super-PACs (discussed further below). Finally, the Court distinguished between the First Amendment implications of contributions and expenditures. This explains why the concept of coordination is important in American campaign finance law. If spending by a third party or political party is coordinated with a candidate, it is viewed as a contribution to the candidate. As a result, coordinated expenditures, like contributions, are subject to caps and other restrictions. Only truly independent expenditures are unregulated. Various commentators have criticized this distinction between expenditures and contributions as unworkable in practice.[228] Chief Justice Burger's dissenting opinion in *Buckley* argued that "contributions and expenditures are two sides of the same First Amendment coin."[229]

#### 8.1.2.2 *Austin v Michigan Chamber of Commerce* and *McConnell v Federal Election Commission*

The cases of *Austin v Michigan Chamber of Commerce* (*Austin*)[230] and *McConnell v Federal Election Commission* (*McConnell*)[231] are no longer in line with the US Supreme Court's approach to campaign finance regulation. The views expressed in the majority judgements in both cases reflect the views of the dissenting justices in more recent cases on campaign finance regulation.

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[224] *Ibid* at 21.
[225] *Ibid*.
[226] *Ibid* at 26.
[227] *Ibid* at 27.
[228] See e.g. Gauja, *supra* note 16 at 182; *Colorado Republican Federal Campaign Committee v Federal Election Commission*, 518 US 604 (1996).
[229] *Buckley, supra* note 12 at 241. Burger CJ would have struck down both the expenditure limits and the contribution limits.
[230] *Austin*, *supra* note 134.
[231] *McConnell*, *supra* note 135.

In *Austin*, the majority of the US Supreme Court upheld a Michigan law that prohibited corporations from using general funds for independent expenditures in support of or opposition to a candidate's election. Corporations could still pay for political advertising, but were required to use a separate fund.[232] Although the majority appeared to accept the idea, originating in *Buckley*, that political speech may only be burdened in the name of preventing corruption, the majority broadened the concept of corruption to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[233] Thus, the majority appeared to blend the equality rationale for campaign finance regulation with the anti-corruption rationale. The majority's decision also accepted that the speech of corporations and natural persons may be treated differently since corporate status confers "special benefits … and present[s] the potential for distorting the political process."[234] This decision was overturned in *Citizens United*, discussed further in Section 8.1.2.4.

In *McConnell*, the majority of the US Supreme Court upheld the ban on "soft money" in the *Bipartisan Campaign Finance Reform Act* (*BCRA*) of 2002.[235] Soft money referred to unregulated donations to political parties for the purpose of party-building activities, such as issue advertising and voter-turnout efforts. Before the *BCRA*, political parties could raise unlimited funds for these activities.[236] In *McConnell*, the majority held that contributions may be restricted for anti-corruption purposes, as in *Buckley.* However, it expanded the definition of "corruption" beyond the *quid pro quo* to include the risk of undue influence on lawmakers. In the majority's view, the soft money ban was directed toward the legitimate goal of preventing corruption, as it prevented the circumvention of contribution limits. The soft money ban is still in place.

In accordance with *Austin*, the majority in *McConnell* also upheld a provision prohibiting corporations and trade unions from using general funds for independent expenditures on "electioneering communications." Electioneering communications are a category of election advertisements created by the *BCRA* that refer to a candidate in the period before the election. The category is broader than the category of "express advocacy," which involves words like "vote for" or "vote against." The Court noted that corporations were allowed to establish segregated funds to pay for electioneering communications. Further, the same rationale for prohibiting corporations from spending general funds on express advocacy, discussed in *Austin*, also applied to the broader category of electioneering communications. This part of the judgment was overturned in *Citizens United*.

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[232] Corporations could only solicit contributions to the segregated political fund from certain persons: *Austin*, *supra* note 134 at 656.

[233] *Ibid* at 660.

[234] *Ibid* at 661.

[235] *BCRA*, *supra* note 100.

[236] Boatright, "US Interest Groups", *supra* note 123 at 74. For more on soft money see Richard Briffault, "Soft Money, Congress and the Supreme Court" in Ewing & Issacharoff, *supra* note 15, 191.

#### 8.1.2.3 *Davis v Federal Election Commission*

*Davis v Federal Election Commission* (*Davis*) aligns with current US Supreme Court jurisprudence on campaign finance regulation and freedom of speech.[237] In *Davis*, the majority of the US Supreme Court struck down the "millionaire's amendment," a provision of the *BCRA* stipulating that candidates could benefit from a higher donation ceiling if facing a self-funded opponent whose spending reached a certain threshold. The Court found that the impugned provision was an unjustifiable burden on the freedom of speech of self-funded candidates. In *Buckley*, the Court had already struck down an attempt to cap candidates' use of personal funds since the cap interfered with candidates' right to advocate intensively for their election and lacked an anti-corruption purpose.[238] In *Davis*, the Court emphasized "the fundamental nature of the right to spend personal funds for campaign speech" and observed that the millionaire's amendment imposed "an unprecedented penalty on any candidate who robustly exercises that First Amendment right."[239] This penalty was not justified by an anti-corruption interest, as using personal funds actually decreases the risk of corruption by reducing candidates' dependence on donations. Relying on *Buckley*, the Court rejected the idea that egalitarian concerns could justify a burden on First Amendment rights.[240] The Court warned that allowing the state to limit political speech for the purpose of furthering equality "would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."[241] The majority likened wealth to other "strengths" candidates may have, such as fame or "a well-known family name," and emphasized that "[t]he Constitution … confers upon voters, not Congress, the power to choose"[242] officeholders.

#### 8.1.2.4 *Citizens United v Federal Election Commission*

In *Citizens United*,[243] the majority of the US Supreme Court departed from its earlier decisions in *McConnell* and *Austin*. Although the Court upheld a ban on direct contributions to candidates from corporations and unions, along with various transparency requirements, the majority struck down limits on independent expenditures by corporations and unions. Under the *BCRA*, corporations and unions were prohibited from using general treasury funds for independent expenditures on express advocacy and electioneering communications. As mentioned above, express advocacy involves the use of "magic words" like "vote for" or "vote against." Electioneering communications, a category of communications created by the *BCRA*, refer to a candidate in the period before the election, but fall short of express advocacy. The majority of the Court held that the First Amendment precludes the government from prohibiting the use of general funds for either express advocacy or electioneering communications.

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[237] *Davis*, *supra* note 11.
[238] *Ibid* at 738.
[239] *Ibid* at 738–39.
[240] *Ibid* at 741.
[241] *Ibid* at 742.
[242] *Ibid*.
[243] *Citizens United*, *supra* note 29.

Writing for the majority, Justice Kennedy began by asserting that the First Amendment restrains government from treating speakers differently based on their identity. Thus, corporations, including for-profit corporations, cannot be treated differently from natural persons in the context of political speech. Restricting some speakers but not others would "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[244] In Justice Kennedy's view, the "governing rule" should be "more speech, not less."[245]

In response to the majority's decision on this point, Justice Stevens quipped that "American democracy is imperfect, [but] few … would have thought its flaws included a dearth of corporate money in politics."[246] Justice Stevens disagreed that corporations and natural persons must be treated identically in the electoral context. Rather, in this context, "the distinction between corporate and human speakers is significant."[247] Corporations are not part of "We the People" and carry a special risk of corrupting the electoral process.[248] Unlike human speech, corporate speech is "derivative," and restrictions on corporate speech do not prevent individuals from speaking themselves.[249] Further, the amount of money in a corporation's general account does not reflect public or even shareholder support for the corporation's political activities.[250]

The majority went on to find that the impugned provisions amounted to content-based "censorship" and an outright ban on corporate speech.[251] The dissent disagreed, pointing out that, far from banning corporate speech, the *BCRA* continued to allow corporations to fund political speech by forming separate segregated fund accounts. However, in Justice Kennedy's view, creating these accounts was too administratively "burdensome" to be an adequate alternative.[252] The dissent also argued that an exception to the prohibition could be carved out for non-profit corporations that raise funds almost exclusively from individuals, like Citizens United. However, to Justice Kennedy, the alternatives suggested by the dissent were unworkable because they would nonetheless "chill … political speech."[253] Further, according to Justice Kennedy, the "purpose and effect [of the ban on corporate independent expenditures] are to silence entities whose voices the Government deems to be suspect."[254] Although the impugned prohibition was not overtly content-based,

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[244] *Ibid* at 341.
[245] *Ibid* at 361.
[246] *Ibid* at 479.
[247] *Ibid* at 394.
[248] *Ibid* at 465, 454. At 454, Stevens J noted that "[b]usiness corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort … make *quid pro quo* corruption and its appearance inherently more likely when they … spend unrestricted sums on elections." Stevens J then pointed, at 455, to past instances in which corporations received something from elected officials in exchange for funding independent, uncoordinated issue advertisements.
[249] *Ibid* at 466.
[250] *Ibid* at 419, 465.
[251] *Ibid* at 337.
[252] *Ibid*.
[253] *Ibid* at 329.
[254] *Ibid* at 339.

Justice Kennedy noted that restrictions "based on the identity of the speaker" can be "a means to control content."[255]

The majority and the dissent also disagreed on the governmental interests capable of justifying limits on electoral speech. Following *Buckley*, Justice Kennedy held that the government may only limit campaign expenditure in the name of preventing corruption or its appearance. In Justice Kennedy's view, independent, uncoordinated expenditures do not give rise to corruption or the appearance of corruption. Justice Kennedy reached this conclusion by defining corruption narrowly to encompass only direct *quid pro quo* exchanges. According to the majority, the provision of "influence or access" is not corruption and "will not cause the electorate to lose faith in our democracy."[256] Justice Kennedy attempted to support this proposition by explaining that "[d]emocracy is premised on responsiveness," and the only reason to vote for or contribute to a candidate is to ensure the candidate "will respond by producing those political outcomes the supporter favors."[257] This seems to suggest that, in Justice Kennedy's view, big donors *should* benefit from greater influence, or "responsiveness," than non-donors.

The dissent disagreed with Justice Kennedy's definition of corruption. First, in the dissident's view, Justice Kennedy defined *quid pro quo* corruption too narrowly. Justice Stevens argued that *quid pro quo* exchanges need not "take the form of outright vote buying or bribes…. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder."[258]

Second, the dissent would have expanded the definition of corruption beyond the *quid pro quo* exchange:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.[259]

Further, the dissent observed that, even if "ingratiation and access" are not corruption, they create the opportunity for and the appearance of *quid pro quo* exchanges.[260]

The dissent and the majority also disagreed on the validity of *Austin*'s "anti-distortion" rationale for regulating corporate campaign finance. The majority rejected the idea from *Austin* that the state may limit corporate speech to prevent the distortion of electoral debate

[255] *Ibid* at 340.
[256] *Ibid* at 359–60.
[257] *Ibid* at 360.
[258] *Ibid* at 452.
[259] *Ibid* at 447–48.
[260] *Ibid* at 455.

by well-resourced corporations. Relying on *Buckley*, Justice Kennedy held that Congress cannot restrict political speech based on the speaker's wealth or with the goal of equalizing the relative ability of people and entities to influence electoral outcomes.[261] In Justice Kennedy's view, attempts by Congress to regulate electoral speech for these equality-related purposes would constitute an impermissible attempt to influence voters' choices.[262]

The dissent argued in favour of the "anti-distortion" rationale from *Austin*. In the dissident's view, the impugned law represented an acceptable attempt to balance the First Amendment rights of listeners against those of speakers.[263] Corporations amass funds that natural persons cannot, allowing them to flood broadcast media with their communications. Since citizens do not have unlimited time to consider all speech transmitted during an election, "corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints."[264] Further, corporate domination of electoral debate could lead individuals to feel cynicism about their own ability to be heard.[265] The dissent concluded that *Austin*'s "anti-distortion" rationale was intended to "*facilitate* First Amendment values by preserving some breathing room around the electoral 'marketplace' of ideas."[266]

Although the majority struck down the prohibition on the use of corporate and union general funds, they upheld disclaimer and disclosure requirements for entities funding express advocacy and electioneering communications. According to Justice Kennedy, these transparency requirements were justified burdens on speech because they allow "the electorate to make informed decisions and give proper weight to different speakers and messages."[267]

In October 2014, the Federal Election Commission (FEC) approved new rules in response to *Citizens United*. The rules permit corporations and unions to make independent expenditures on express advocacy and electioneering communications.[268] The regulations were also revised to allow corporations and unions to finance partisan voter registration and get-out-the-vote initiatives, as long as these activities are uncoordinated with parties or candidates.[269] Funds used for these activities are required to be disclosed if express advocacy is involved and the reporting threshold of $2,000 is exceeded.[270] The FEC further clarified that foreign nationals, national banks, and corporations created by a law of Congress continue to be prohibited from contributing to accounts used to fund electioneering communications.[271]

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[261] *Ibid* at 350.
[262] *Ibid*.
[263] *Ibid* at 473. The idea that the First Amendment protects both listeners and speakers is echoed in Fiss' arguments in favour of campaign finance regulation: Fiss, *supra* note 87.
[264] *Citizens United*, *supra* note 29 at 472.
[265] *Ibid* at 470.
[266] *Ibid* at 473.
[267] *Ibid* at 371.
[268] 11 CFR § 114.4 (2021).
[269] *Ibid*, § 114.3(c)(4).
[270] *Ibid*, § 114.3(c)(4).
[271] *Ibid*, § 104.20(c)(7).

#### 8.1.2.5 *SpeechNow.org v Federal Election Commission*

Political action committees, or PACs, are organized under section 527 of the *Internal Revenue Code*.[272] So-called "traditional PACs" coordinate at least some of their spending with candidates. This coordinated spending is treated as a contribution to the candidate. Prior to the US Supreme Court's decision in *SpeechNow.org v Federal Election Commission* (*SpeechNow*), contributions to all PACs were subject to the same restrictions as contributions to candidates.[273] For example, PACs could not accept donations over $5,000, just like candidates. These restrictions were intended to prevent donors from circumventing caps on donations to candidates, as prospective donors could, in the absence of such restrictions, simply create a PAC, donate large amounts to the PAC, and direct the PAC to engage in coordinated spending with the candidate.

In *SpeechNow*, a PAC organized solely to make uncoordinated expenditures challenged the contribution cap.[274] The District of Columbia Circuit Court sided with SpeechNow.org on the basis that restricting independent expenditures does not serve the governmental interest of preventing corruption or its appearance. This decision hatched the "super-PAC," or "independent-expenditure-only PAC," which engages solely in uncoordinated spending and therefore has unlimited fundraising and spending capacity. The Court did, however, uphold registration and disclosure requirements for super-PACs. After this decision, the FEC released an advisory opinion clarifying that the combined effect of *Citizens United* and *SpeechNow* is to allow corporations and unions to contribute unlimited amounts to super-PACs.[275]

#### 8.1.2.6 *McCutcheon v Federal Election Commission*

In *McCutcheon v Federal Election Commission* (*McCutcheon*), the US Supreme Court struck down the *BCRA*'s aggregate limits on contributions from a single contributor to different candidates, national party committees, and traditional PACs.[276] However, the Court upheld the base limits on contributions per election to a single candidate and the base limits on contributions per year to national party committees and traditional PACs. The Court also upheld disclosure requirements for contributions. The majority pointed out that disclosure serves a valuable informational role for the electorate and deters corruption. In the majority's view, disclosure requirements are preferable to contribution caps, as limiting contributions could provoke the movement of money into less transparent campaigning vehicles.[277]

Chief Justice Roberts, for the majority, found that the aggregate limits imposed a significant infringement on freedom of speech and association since a "donor must limit the number of candidates he supports and may have to choose which of several policy concerns he will

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[272] 26 USC § 527 (2019).
[273] *SpeechNow*, *supra* note 128.
[274] *Ibid*.
[275] Dwyre, *supra* note 8 at 41–42. See 11 CFR § 114.2(b) (2021). Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs. Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs.
[276] *McCutcheon*, *supra* note 74.
[277] *Ibid* at 223–224, Roberts CJ.

advance."[278] The government argued that donors could support a large number of candidates and stay within the aggregate limits by simply contributing less to each candidate or committee. However, Chief Justice Roberts found this option inadequate because it would impose a "special burden on broader participation" in support of a wide range of candidates or causes.[279] This conclusion flowed from Chief Justice Roberts' conviction that all forms of political expression, regardless of whether that expression involves handing out a few leaflets or spending vast sums on a national advertising campaign, are deserving of equal protection.[280]

Chief Justice Roberts confirmed that the sole governmental interest capable of justifying restrictions on campaign finance is the prevention of *quid pro quo* corruption or its appearance. Chief Justice Roberts also confirmed that corruption does not include "ingratiation and access," but is limited to a "direct exchange of an official act for money."[281] Each contribution is subject to base limits, meaning the aggregate limits do not, in themselves, prevent corruption.[282] Therefore, the First Amendment bars Congress from imposing contribution limits to prevent parties and candidates from rewarding donors with privileged access and influence. In Chief Justice Roberts' view, it is a "central feature of democracy" that "constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[283] To prohibit this support would, in Chief Justice Roberts' view, "dangerously broaden … the circumscribed definition of *quid pro quo* corruption" to include "general, broad-based support of a political party."[284] Chief Justice Roberts also rejected the argument that aggregate limits prevent circumvention of base limits, finding fears of circumvention too speculative. Owing to other provisions in the *BCRA*, such as restrictions on earmarking, Chief Justice Roberts argued that it would be difficult for a donor to channel large sums to a candidate and still get credit for the donation. If the donor receives no credit for their donation, there is no risk of a *quid pro quo*.

Thus, like Justice Kennedy in *Citizens United*, Justice Roberts appeared comfortable with the idea that officeholders would be particularly responsive to wealthy backers. The dissent criticized this approach for failing to differentiate "between influence resting upon public opinion and influence bought by money alone."[285] As in *Citizens United*, the majority also confirmed that the government must not "restrict the political participation of some in order to enhance the relative influence of others."[286] The majority emphasized that the First Amendment is intended to ensure that public debate is left in the hands of the public, not the government.[287] In accordance with the libertarian approach to freedom of speech, Chief Justice Roberts maintained that government cannot be trusted to judge the value of certain

[278] *Ibid* at 204, Roberts CJ.
[279] *Ibid* at 204–205, Roberts CJ.
[280] *Ibid* at 205–206, Roberts CJ.
[281] *Ibid* at 192, Roberts CJ.
[282] *Ibid* at 204, Roberts CJ.
[283] *Ibid* at 192, Roberts CJ.
[284] *Ibid* at 225, Roberts CJ.
[285] *Ibid* at 261, Breyer J, dissenting.
[286] *Ibid* at 191, Roberts CJ.
[287] *Ibid* at 203, Roberts CJ.

speech over other speech, "even when the government purports to act through legislation reflecting 'collective speech.'"[288] In Chief Justice Roberts's view, by attempting to level the playing field through aggregate limits, Congress was meddling impermissibly in electoral debate and trying "to help decide who should govern."[289] Thus, Congress must not intervene even if non-interference means the wealthy decide who governs.

As in *Citizens United*, the dissent, written by Justice Breyer, argued for a broader conception of corruption that goes beyond "act[s] akin to bribery" to capture the influence that large contributions may exert over elected officials' judgement, as the government had argued.[290] The dissent concluded that candidates who solicit large cheques for their party "will be deeply grateful to the checkwriter, and surely could reward him with a *quid pro quo* favor."[291] Further, Justice Breyer suggested that corruption encompasses the tendency of money to drown out the "voices of the many" and disrupt the responsiveness of elected officials to the people.[292] This conception of corruption echoes the equality rationale for campaign finance regulation.

## 8.2 Regulatory Regime

This section provides a brief overview of federal campaign finance regulations in the US.[293]

### 8.2.1 Expenditures

Because of the jurisprudence discussed above, campaign expenditures are unlimited in the US for candidates, political parties, and third parties. Third parties, such as corporations, unions, and independent-expenditure-only PACs (or "super-PACs"), may spend unlimited amounts in support of a candidate, party, or issue associated with a candidate or party, as long as that spending is not coordinated with a candidate. Candidates may also spend unlimited personal funds on their own campaigns.

### 8.2.2 Contributions and Coordinated Spending

Contributions to candidates are defined as including money and in-kind services and are subject to caps and source restrictions.[294] Candidates are prohibited from accepting direct

[288] *Ibid* at 206, Roberts CJ.
[289] *Ibid* at 192, Roberts CJ.
[290] *Ibid* at 235, 237, 241, Breyer J, dissenting.
[291] *Ibid* at 251, Breyer J, dissenting.
[292] *Ibid* at 239, Breyer J, dissenting.
[293] For more detail on the federal regulatory regime, see: 52 USC §§ 30101–30146; 11 CFR; "Legal Resources" (last visited 27 October 2021), online: *Federal Election Commission* <https://www.fec.gov/legal-resources/>; "Resource Center" (last visited 27 October 2021), online: *Open Secrets* <https://www.opensecrets.org/resources/>; Samuel Issacharoff et al, *The Law of Democracy: Legal Structure of the Political Process*, 5th ed (New York: Foundation Press, 2016);"Campaign Finance" (last visited 27 October 2021) online: *Campaign Legal Center* <https://campaignlegal.org/issues/campaign-finance>; "Campaign Finance Law" (last visited 27 October 2021), online: *The Campaign Finance Institute* <http://www.cfinst.org/law.aspx>.
[294] 52 USC § 30116; 11 CFR §§ 110.1–110.4 (2021); Federal Election Commission, *supra* note 196.

contributions from corporations, unions, foreign nationals, national banks or federal government contractors.[295] Coordinated spending with a candidate is viewed as a contribution to the candidate. As a result, these prohibited contributors may not engage in coordinated spending with a candidate.[296] Further, to prevent circumvention of the rules governing contributions to candidates, donations to entities that engage in coordinated spending with candidates, such as political party committees and traditional PACs, are also subject to caps and source restrictions.[297] Before the *BCRA* was enacted, limits on contributions to political party committees could be circumvented by donating "soft money" to the party. Soft money was used for "party-building activities" and was unregulated.[298] However, the *BCRA* closed this loophole, stipulating that political parties may only raise money for permitted purposes under federal regulation.[299]

Super-PACs, which engage solely in "independent expenditures," are not subject to these caps or source restrictions. Super-PACs, therefore, have unlimited spending and fundraising capacity. Hybrid-PACs, which engage in both coordinated and independent spending, are required to maintain a separate fund for independent expenditures, which will not be subject to contribution caps or source restrictions. All expenditures by single-candidate PACs are considered contributions to their candidate, even if some of the PAC's spending is technically uncoordinated.

A relatively new political finance phenomenon in the US remains unaddressed by legislation, namely when an advisor or former advisor to a politician establishes a non-profit organization that raises and spends money to back their politician's agenda and actions while in office. These non-profits evade legislation in four ways:

1. they don't lobby and so are not subject to the disclosure requirements in lobbying registration laws;
2. they are not making financial contributions or giving gifts to the politician and so are not restricted by contribution limits;
3. they don't campaign during election periods and so are not subject to disclosure requirements that apply during those periods; and
4. loopholes in conflict of interest laws can allow an advisor to also play a role in such a non-profit, and a politician essentially to work in coordination with the non-profit and his or her former advisors.[300]

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[295] 52 USC §§ 30118, 30119, 30121; 11 CFR § 110.20 (2012). Issacharoff notes this rule may be up for grabs in relation to corporations after *Citizens United*, in which the majority of the US Supreme Court frowned upon making distinctions between corporations and natural persons: Issacharoff, *supra* note 31 at 132.

[296] See e.g. 11 CFR § 114.10(a) (2021).

[297] See 52 USC § 30116 for contribution limits to political party committees.

[298] Boatright, "US Interest Groups", *supra* note 123 at 74. For more on soft money see Briffault, *supra* note 236 at 191.

[299] *BCRA*, *supra* note 100.

[300] Chisun Lee, Douglas Keith & Ava Mehta, *Elected Officials, Secret Cash: How Politicians Use Nonprofits To Cloak Spending After Election Day* (New York: Brennan Center for Justice, 2018), online

A criminal case filed in Ohio in July 2020 will test elements of whether such a "contribution" scheme is legal. Larry Householder, Speaker of the House in Ohio, his advisor, two lobbyists, and a non-profit 501(c)(4) entity established in 2017 by the advisor, called Generation Now, were charged for participating in an alleged racketeering conspiracy.[301] The conspiracy involved approximately $60 million paid to Generation Now by a power utility company. Generation Now, effectively controlled by Householder and his advisor, used the money to campaign in support of legislation that provided a billion-dollar bailout of two nuclear plants owned by the power utility company and against a referendum that would have overturned the legislation.[302] Part of the money was allegedly also used to support a slate of 21 state election candidates connected to Householder who, after being elected, would support him becoming Speaker, and also $400,000 was allegedly given directly to Householder to pay for various personal expenses.[303] The advisor and one of the lobbyists pleaded guilty on October 29, 2020,[304] and Generation Now pleaded guilty in February 2021.[305] The case will take into account the US Supreme Court's ruling in *McCormick* concerning whether contributions can amount to corruption.[306]

In March 2021, the US House of Representatives passed a Democrat-backed bill entitled the *For the People Act* that contains several changes to the US federal election and government ethics laws, including restrictions on contributions and coordination. A version of the bill was introduced in the Senate where it was blocked by Republican senators in June 2021. A similar Democrat bill was blocked in 2019.[307] A subsequent *Freedom to Vote Act*, which

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(pdf): <https://www.brennancenter.org/sites/default/files/2019-08/Report_Elected_Officials_Secret_Cash.pdf>.

[301] Department of Justice, News Release, "Ohio House Speaker, Former Chair of Ohio Republican Party, 3 Other Individuals & 501(c)(4) Entity Charged in Federal Public Corruption Racketeering Conspiracy Involving $60 Million" (21 July 2020), online: <https://www.justice.gov/usao-sdoh/pr/ohio-house-speaker-former-chair-ohio-republican-party-3-other-individuals-501c4-entity>.

[302] *Ibid*.

[303] *Ibid*.

[304] Department of Justice, News Release, "Political Strategist & Lobbyist Each Plead Guilty in Federal Public Corruption Racketeering Conspiracy Involving More Than $60 Million" (29 October 2020), online: <https://www.justice.gov/usao-sdoh/pr/political-strategist-lobbyist-each-plead-guilty-federal-public-corruption-racketeering>.

[305] Department of Justice, News Release, "Purported 501(c)(4) Admits to Being Used to Conceal Corrupt Payments Related to Passage of Legislation" (19 February 2021), online: <https://www.justice.gov/usao-sdoh/pr/purported-501c4-admits-being-used-conceal-corrupt-payments-related-passage-legislation>.

[306] Elkan Abramowitz & Jonathan S Sack, "Where's the Quid? DOJ Tests the Limits Of Public Corruption Law" (8 March 2021), online (blog): <https://www.lexology.com/library/detail.aspx?g=8bf29948-6e3d-4147-968b-18f32810d9ef>. See also *McCormick*, *supra* note 36.

[307] Karl Evers-Hillstrom, "House Democrats Pass Campaign Finance Overhaul, Senate GOP to Block Bill" (4 March 2021), online: *Open Secrets* <https://www.opensecrets.org/news/2021/03/for-the-people-act-gop-block/>; "The For the People Act: How Key H.R. 1 Provisions Would Fix DemocracyProblems" (24 December 2020), online (pdf): *Campaign Legal Center* <https://campaignlegal.org/sites/default/files/2021-01/FINAL%20HR%201%20Document%2012.24%2010.40am.pdf>; "Annotated Guide to the For the People Act of 2021" (last updated 18 March 2021), online: *Brennan Center for Justice* <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>;

mirrored the *For the People Act* but rolled back various provisions to address concerns of Republican Senators, was also blocked by the Senate in October 2021.[308] Among many other changes to federal US law, the *For the People Act* proposed to restrict super-PACs by expanding the type of spending that will be considered a contribution to a candidate. Further, people with connections to a candidate would have been categorized as "coordinated spenders" so that if they worked with a super-PAC, all of its spending will be considered a contribution to the candidate.[309]

### 8.2.3 Transparency Requirements

The US Supreme Court's rulings on the country's political finance system are somewhat based on the premise that transparency is enough to combat corruption. Disclosure of donors and supporters allows voters to determine which parties and candidates they want to support and makes it more difficult for politicians and governments to return the favour of the donations and support. However, US statutes and regulations have loopholes that allow for what has come to be called "dark money" to be donated in support of various political actors and organizations without disclosing the source.[310]

Generally, candidates, parties, and super-PACs are all required to disclose their donors and campaign expenditures regularly (annually, quarterly, or monthly, depending on the year.) However, spending during the pre-election period does not require disclosure. Further, some donations are not required to be disclosed before election day, simply because of deadlines for filing disclosure reports.[311] For example, in reports to the FEC, super-PACs are required to include the source, amount, and date of contributions to the super-PAC for any purpose, along with the amount, purpose, date, and recipient of disbursements over $200 in a calendar year.[312] Super-PACs are also required to disclose separately their spending on express advocacy, but this rule means spending that does not explicitly support or oppose a candidate or party is not required to be disclosed.[313]

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Barbara Sprunt "Senate Republicans Block Democrats' Sweeping Voting Rights Legislation", *NPR* (22 June 2021), online: <https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate>.

[308] Juana Summers & Deirdre Walsh, "Democrats' Biggest push for Voting Rights Fails with No Republicans on Board", *NPR* (20 October 2021), online: <https://www.npr.org/2021/10/20/1040238982/senate-democrats-are-pushing-a-voting-rights-bill-republicans-have-vowed-to-bloc>.

[309] US, Bill S 1, *For the People Act of 2021,* 117th Congress, 2021, s 6191–6103.

[310] "Dark Money Basics", *supra* note 208.

[311] US, Congressional Research Service, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress* (R41542) (2021), online (pdf): <https://crsreports.congress.gov/product/pdf/R/R41542>; "Help for Candidates and Committees" (last visited 31 October 2021), online: *Federal Election Commission* <https://www.fec.gov/help-candidates-and-committees/>.

[312] 52 USC §§ 30104(b)(3), 30104(b)(5)(A); 11 CFR § 104.3(a)(4).

[313] 52 USC § 30104(b)(6)(B)(iii); 11 CFR §§ 104.3(b)(3)(vii), 104.4, 109.10(a) (2021). As discussed above, express advocacy uses words like "vote for" or "vote against."

Corporations, unions, and groups organized under 26 USC § 501(c), often termed "501(c) organizations,"[314] are required to disclose expenditures made for the purpose of express advocacy and electioneering communications.[315] However, corporations, unions, and 501(c) organizations are not required to report the source of their donations to the FEC, unless the donations were made specifically for the purpose of funding express advocacy or electioneering communications.[316] The same general rules apply to groups organized under 26 USC § 527, or "527 organizations" that are not candidate or party committees or political action committees, meaning their main activities are not political.[317]

Some entities also have disclosure obligations to agencies other than the FEC, such as tax-exempt charities and other organizations reporting to the Internal Revenue Service (IRS).[318] In April 2021, the US Supreme Court heard a case in which a charity challenged as unconstitutional a California legal requirement that it disclose its significant donors to the state government. The charity claimed this requirement restricts their donors' freedom of expression rights by possibly exposing their donation to the public.[319] If the Court rules that the requirement is unconstitutional, it will likely derail any future statutory measure that requires 501(c) organizations that are charities or tax-exempt to disclose their donors.

The blocked *For the People Act* included measures to strengthen and close loopholes in donor and spending disclosure requirements.[320] If fully enacted, the bill would have, among many

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[314] 501(c) organizations may engage in political campaigning activity so long as it is not their primary activity; however, Dwyre notes that the Internal Revenue Agency has done little to investigate whether 501(c) organizations are making campaigning activity their primary activity: Dwyre, *supra* note 8 at 48–50. The most relevant types of 501(c) organizations in the context of election campaigns are labour organizations (organized under 26 USC § 501(c)(5)), trade associations or business leagues like the Chamber of Commerce (organized under 26 USC § 501(c)(6)), and "social welfare organizations" (organized under 26 USC § 501(c)(4)): Dwyre, *supra* note 8 at 48–50.

[315] 52 USC §§ 30104(c),(f); 11 CFR §§ 104.20, 109.10(b), 114.10(b)(1)–(2). "Electioneering communications" are defined in 11 CFR § 100.29(a). As discussed above, the category of "electioneering communications" was created by the *BCRA* and captures a broader range of advertising than the category of "express advocacy" does.

[316] 52 USC §§ 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9). See also Dwyre, *supra* note 8 at 61. "Dark Money Basics", *supra* note 208. Note that labour unions organized under 26 USC 501(c)(5) must disclose the source of all contributions of $5,000 or more to the Department of Labor: see note 318.

[317] 52 USC §§ 30104(c),(f); 11 CFR §§ 109.10(b)–(e), 104.20(b).

[318] Congressional Research Service, *supra* note 311. Another example is that labour organizations organized under 26 USC § 501(c)(5) are required, in reports to the Department of Labor, to disclose the identity of any contributor giving $5,000 or more in the twelve-month reporting period, along with the purpose, date, and amount of the contribution: 29 USC § 431; 29 CFR § 403. Labour organizations are also required to disclose to the Department of Labor any political disbursements intended to influence elections and referendums: 29 USC § 431, 29 CFR § 403.

[319] *Americans for Prosperity v Rodriquez*, 594 US (2021), online: <https://www.supremecourt.gov/opinions/20pdf/19-251_p86b.pdf>; Ciara Torres-Spelliscy, "The Supreme Court's Looming Dark Money Decision" (23 April 23 2021), online: *Brennan Center for Justice* <https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-looming-dark-money-decision>.

[320] "Annotated Guide to the For the People Act of 2021", *supra* note 307.

other changes, allowed the IRS to require tax-exempt organizations to disclose their donors[321] and also would have required:

1. disclosure of offers from representatives of foreign governments of significant contributions or collaboration to affect an election;[322]
2. certification that no foreign nationals are involved in decision-making concerning contributions and spending by a corporation or other entity;[323]
3. disclosure of donors who donate $10,000 or more to 501(c) organizations in support of the organization spending more than $10,000 on campaign-related advertisements, and disclosure of disbursements of more than $1,000 that support or oppose a candidate;[324]
4. disclosure in the advertisement of who paid for any online advertisement in the last 30 days of a primary and last 60 days of a general election, and a requirement that large online sites establish a registry of all such ads;[325]
5. disclosure in the advertisement by outside groups like super-PACs of the most significant donors paying for any advertisement, and the groups' top official;[326]
6. consultation with shareholders by publicly traded companies concerning their preferences concerning political expenditures, if the company is allowed to engage in such expenditures;[327] and
7. a report by the FEC to Congress on how to ensure disclosure of all political donations before election day.[328]

### 8.2.4 Public Funding

The US has used an egalitarian opt-in public funding system for candidates in parties' presidential candidate nomination races, known as "primaries," and for general presidential election candidates since 1976. However, the Republican Party presidential candidates have not opted into the system since John McCain's candidacy in 2008. This is mainly due to funding amounts for major party candidates that have not increased in decades and are significantly less than what candidates are able to raise. For example, the 2020 general election amount for presidential candidates was $103.7 million.[329]

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[321] *For the People Act*, *supra* note 309, s 4501.
[322] *Ibid*, ss 4001—4006.
[323] *Ibid*, ss 4101—4106, 4401—4404.
[324] *Ibid*, ss 4111—4113.
[325] *Ibid*, ss 4201—4210.
[326] *Ibid*, ss 4301—4305.
[327] *Ibid*, s 4602.
[328] *Ibid*, ss 4301—4305.
[329] "Public Funding of Presidential Elections" (last visited 27 October 2021), online: *Federal Election Commission* <https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/>; Dwyre, *supra* note 8 at 35; Hasen, *supra* note 40 at 225.

To qualify for public funding in the primaries, a candidate must raise $5,000 in a minimum of 20 states in donations of no more than $250 each.[330] Candidates who opt in are required to limit their spending in each state primary and overall, and limit spending of their own funds to $50,000. In return, the candidate receives public funding that matches the first $250 of each donation they receive.[331]

In the general presidential election, candidates are automatically qualified for a lump-sum public funding grant that varies in amount depending on whether the candidate is from a major party (whose candidate received more than 25% of the vote in the previous election), minor party (whose candidate received between 5% and 25% of the vote in the previous election) or new party (whose candidate receives the funding after the election if the candidate obtains more than 5% of the votes), along with a few other detailed provisions. However, to receive funding, a candidate is required to:

1. limit their spending (the limit increases by the cost of living allowance amount (COLA) each election cycle, and exempts some core expenses);
2. limit spending of their own funds to $50,000;
3. not receive private contributions other than into a special account only to be used to pay for legal and accounting expenses incurred to comply with the law;
4. keep records of spending and cooperate with an FEC audit; and
5. use closed-captioning in all TV commercials.[332]

The blocked *For the People Act* bill would have replaced the lump-sum public funding grants for presidential candidates in primaries and the general election with a system that provides $6 for every $1 that a candidate raises, up to a maximum of $250 million in public funding for the general election. If a candidate participated in the public funding program during their party's primaries and won the party nomination, they must also use the program during the general election. The bill would have also eliminated the cap on spending by participating candidates and increased the amount national party committees can spend in coordination with their candidate.[333]

From 1976 to 2012, the US government also provided public grants to federal political party committees for party conventions,[334] but this funding was terminated in 2014.[335] Public funding has been proposed several times for federal elections for members of Congress, but

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[330] *Ibid.* A contributor may contribute up to that election's candidate contribution limit, but only $250 of their donation counts towards qualifying for the system. The public funding comes from taxpayers who indicate on their annual tax form that they would like $3 of their taxes to be diverted to the fund.

[331] *Ibid*.

[332] "Receiving a Public Funding Grant for the General Election" (last visited 27 October 2021), online: *Federal Election Commission* <https://www.fec.gov/help-candidates-and-committees/understanding-public-funding-presidential-elections/receiving-public-funding-grant-for-general-election/>.

[333] "Annotated Guide to the For the People Act of 2021", *supra* note 307; US, Bill S 1, *For the People Act of 2021,* 117th Congress, 2021, ss 5212, 5214.

[334] Gauja, *supra* note 16 at 158.

[335] *The Gabriella Miller Kids First Research Act*, Pub L No 113-94, 128 Stat 1085 (2014).

has never been enacted.[336] The blocked *For the People Act* bill, would have provided public funding of six times the amount of any donation of $200 or less received by a candidate. The source of the public funding was proposed to be a small surcharge on some criminal fines and civil and administrative penalties collected by the federal government, primarily from corporate defendants and their executives, as well as wealthy individuals who commit tax fraud and are in the highest tax bracket. As well, the bill would have established pilot "voucher" donation system programs in three states.[337] Finally, to encourage parties to seek small donations, the bill would have allowed parties to establish special accounts for donations of $200 or less and then transfer up to $10,000 from the account to any candidate or spending unlimited amounts from the account in coordination with any candidate.[338]

Several states provide public funding in the form of lump sums for candidates who raise a specific amount in small donations or matching donations and for party conventions and voter turnout activities.[339] These, along with tax deductions for donations, and "voucher" systems (where each voter is provided with a voucher of an amount of public funds which the voter can donate to one or more candidates) are the only public funding systems that the courts have ruled are constitutional in the US. The majority ruling in the US Supreme Court's 2007 ruling in *Davis* (summarized in Section 8.1.2.3) was echoed in *Arizona Free Enterprise Club's Freedom Club PAC v Bennett* (*Bennett*),[340] which struck down Arizona's "millionaire's amendment" system. The system, as in the measures in the federal *BCRA* that were struck in *Davis*, provided an initial amount of public funding to a candidate who opted into the system, and then dollar-for-dollar matching funding to that candidate if they faced a privately financed candidate whose expenditures, combined with support from the expenditures of independent groups, exceeded the publicly financed candidate's initial public funding. The candidate would receive matching funds up to twice the amount of the candidate's initial public funding. In *Bennett*, as in *Davis*, the Supreme Court rejected arguments that the system levelled the playing field for candidates and instead criticized it for inhibiting the freedom of the privately financed candidate to spend as much as they want. The ruling chilled and derailed similar public funding systems in other states.

### 8.2.5 Role of the Federal Election Commission

The FEC is responsible for disclosing information on campaign finance, monitoring compliance with legislative requirements, and administering public funding of presidential

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[336] Congressional Research Service, *Public Financing of Congressional Campaigns: Overview and Analysis* (RL33814) (2011) online: <https://www.everycrsreport.com/reports/RL33814.html>. Congressional Research Service, *supra* note 311.

[337] *For the People Act*, *supra* note 309, s 5101.

[338] *Ibid*, s 5401; Gareth Fowler & Daniel I. Weiner, "Small Donor Matching in the 'For the People Act'" (last updated 11 February 2021), online: *Brennan Centre for Justice* <https://www.brennancenter.org/our-work/research-reports/small-donor-for-the-people-act>; "Annotated Guide to the For the People Act of 2021", *supra* note 307.

[339] "Public Financing of Campaigns: Overview" (8 February 2019), online: *National Conference of State Legislatures* <https://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx>.

[340] *Arizona Free Enterprise Club's Freedom Club PAC v Bennett*, 564 U.S. 721 (2011), consolidated with *McComish v Bennett*.

campaigns.[341] To assist in promoting compliance, the FEC promulgates rules and regulations and issues advisory opinions, of which there are over 1,000.[342] The FEC is only responsible for civil enforcement of campaign finance laws, not criminal enforcement, which falls under the Justice Department's mandate.[343]

## 8.3 Criticisms of Campaign Finance Regulation

The American regulatory regime is often criticized for encouraging the movement of campaign money away from relatively transparent political parties to unaccountable and less transparent outside spending groups, such as 501(c) organizations.[344] The dissenting justices in *Citizens United* deplored this trend, noting that political parties represent "broad coalitions" while corporations and unions, the third parties at issue, in that case, represent "narrow interests."[345] Other types of third parties may also represent narrow interests. For example, in the 2012 general election, 93% of the money spent by super-PACs came from 0.0011% of the population, raising significant equality concerns.[346]

The growth of outside spending is driven by the absence of independent expenditure limits for third parties, the *BCRA*'s prohibition on soft money for political parties, the limits on coordinated spending in support of political parties and candidates, and the less stringent transparency requirements for outside spenders like corporations, unions, 501(c) groups, and 527 non-political organizations. Although the lack of mandatory disclosure makes confirmation impossible, Dwyre speculates that many corporations direct their election campaign spending through 501(c) organizations to avoid revealing their support for particular candidates or parties.[347]

According to a majority of US Supreme Court cases, like *Citizens United*, all this outside spending raises no risk of corruption or even the risk of the appearance of corruption, as long as the spending is independent and uncoordinated with candidates. Yet this premise is highly debatable. Many question whether 'independent expenditures' are truly 'independent' in the current environment of pervasive outside spending. Dwyre observes that many super-PACs are run by "former party officials, Congressional staff, and partisan operatives,"[348] and candidates and elected officials are allowed to speak at super-PAC fundraisers. Boatright argues that there is "implicit coordination between groups and between groups and candidates and parties."[349] He suggests that some party functions have

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[341] Thomas E Mann, "The FEC: Administering and Enforcing Campaign Finance Law" in Anthony Corrado et al, eds, *The New Campaign Finance Sourcebook* (Washington, DC: Brookings Institution Press, 2005) 232 at 234.
[342] *Ibid* at 235–36.
[343] *Ibid* at 236
[344] See, for example, Hasen, *supra* note 40 at 225.
[345] *Citizens United*, *supra* note 29 at 412.
[346] Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* (New York: Demos, 2013) at 8, online (pdf): <http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>.
[347] Dwyre, supra note 8 at 55.
[348] *Ibid* at 46.
[349] Boatright, "US Interest Groups", *supra* note 123 at 73.

been *de facto* outsourced to outside groups because of the restrictions on party financing, creating a "network" of parties and outside groups that is guided by "mechanisms of coordination."[350] Boatright bolsters this argument by pointing out that personnel tend to move between interest groups, candidate campaigns, and political party committees, suggesting there is "informal" coordination.[351] This can have the effect of reducing the responsiveness of parties to voters, and also raises the spectre of corruption, since parties and candidates may wish to show gratitude toward the outside groups in their "network."[352]

Even if outside spending is truly independent, many argue that independent expenditures nonetheless give rise to the risk or appearance of corruption. Based on the record before Congress in the lead-up to the *BCRA*'s enactment, the dissent in *Citizens United* pointed out that "corporate independent expenditures … had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements."[353] The record indicated that candidates' campaigns are generally aware of who is behind independent advertisements on the candidates' behalf.[354] Further, even if independent outside spending does not produce direct *quid pro quo* corruption, Richard Hasen argues that it may lead to the sale of access to candidates.[355] Hasen makes the common sense observation that "[p]residential candidates are likely to notice and appreciate when an individual spends millions of dollars supporting or opposing the candidate through an independent effort," which may lead to "special access … after the election."[356] The record cited by the dissent in *Citizens United* supported this argument since it demonstrated that "the sponsors of … advertisements were routinely granted special access after the campaign was over."[357]

Some commentators argue that political party financing in the US should be deregulated to reduce outside spending and restore the role of the political parties in elections. Boatright has suggested raising contribution caps for political parties, relaxing restrictions on coordinated spending of parties and candidates, providing more public funding to political parties, and tightening disclosure requirements for third parties.[358] However, Sarbanes and O'Mara argue that deregulating contributions to political parties would only exacerbate the disproportionate influence of wealthy donors in American politics.[359] Others agree that deregulating party finance is not the answer, as allowing "parties to engage in the same type of courting and solicitation of the very wealthy as Super PACs" is unlikely to "mitigate the ongoing distributional shift of the campaign finance system toward the interests of the very wealthy."[360]

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[350] *Ibid*.
[351] *Ibid* at 87.
[352] *Ibid* at 73.
[353] *Citizens United*, *supra* note 29 at 455.
[354] *Ibid*.
[355] Of course, the majority of the US Supreme Court does not recognize this kind of exchange as "corruption": see *Buckley*, *supra* note 11; *SpeechNow*, *supra* note 137; *Citizens United*, *supra* note 29; *McCutcheon*, *supra* note 74.
[356] Hasen, *supra* note 40 at 237.
[357] *Citizens United*, *supra* note 29 at 455.
[358] Boatright, "US Interest Groups", *supra* note 123 at 100.
[359] Sarbanes & O'mara, *supra* note 30 at 33.
[360] Kang, *supra* note 204 at 536.

Campaign finance legislation in the US is criticized for a variety of other problems. For example, the *BCRA*'s ban on soft money was intended to reduce the risk of corruption by preventing political parties from accepting unregulated, unlimited contributions. However, Hasen argues that the practice of "bundling" has replaced, to some extent, the use of soft money to gain access to politicians.[361] Bundling involves one individual soliciting many donations from their acquaintances. Bundlers who reach certain thresholds are rewarded with access and other perquisites.[362] Others criticize the regulatory regime for falling behind new developments in campaign finance. The public funding regime for presidential candidates provides an example of this "policy drift."[363] Dwyre calls the presidential public funding regime a "quaint remnant of a bygone era when public funding provided a way to level the playing field between presidential contenders."[364] Hasen agrees that the scheme is "no longer viable."[365] For example, in 2008, former President Obama opted out of the public funding regime and raised $745.7 million for his presidential campaign.[366] If he had opted in, he would have received $84.1 million in public funding, and his spending would have been limited to that amount.[367]

The FEC is also criticized for its lack of success in imposing "serious sanctions on high-stakes violations."[368] Enforcement problems are exacerbated by a complicated and slow enforcement process.[369] Further, the FEC's endless advisory opinions and other policy documents have led to an unwieldy and overly complex regime.[370] Dwyre also notes that political deadlock among the Commissioners has prevented the FEC from keeping up with changing practices and newly discovered loopholes, thus feeding policy drift.[371]

## 9. UK

Campaign finance-related scandals in past decades have led to increasing regulation of political financing in the UK.[372] The UK's campaign finance regime imposes spending limits and transparency requirements on parties, candidates, and third-party campaigners. However, unlike in Canada and the US, contributions to parties and candidates are

[361] Hasen, *supra* note 40 at 234.
[362] *Ibid* at 229.
[363] Dwyre, *supra* note 8 at 34.
[364] *Ibid* at 35.
[365] Hasen, *supra* note 40 at 225.
[366] *Ibid*.
[367] Adam Nagourney & Jeff Zeleny, "Obama Forgoes Public Funds in First for Major Candidate", *The New York Times* (20 June 2008), online: <http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html>; Fredreka Schouten, "Obama Opts Out of Public Funds" *USA Today* (20 June 2008), online: <https://abcnews.go.com/Politics/story?id=5208695&page=1>.
[368] Mann, *supra* note 341 at 237.
[369] *Ibid.*
[370] The problem of complexity was pointed out in *Citizens United*, *supra* note 29 at 335-6.
[371] Dwyre, *supra* note 8 at 34.
[372] See Justin Fisher, "Britain's 'Stop-Go' Approach to Party Finance Reform" in Boatright, *Campaign Finance Laws*, *supra* note 6, 152.

uncapped, although contributions are only allowed from permissible sources. In other words, demand is limited, but supply is not. Paid political broadcasting is also prohibited in the UK. The UK's limits on political spending and broadcasting have survived challenges based on freedom of expression, providing a stark contrast to American freedom of speech jurisprudence.[373]

## 9.1 Freedom of Expression and Campaign Finance Regulation

In two cases dealing with the UK's campaign finance laws, the European Court of Human Rights (ECtHR) accepted that states may impose some limits on campaign financing without falling afoul of the guarantees of freedom of expression and free elections.[374] Article 10 of the European Convention on Human Rights (the Convention)[375] provides as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 3 of Protocol 1 to the Convention provides that contracting parties shall "undertake to hold free elections … under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[376]

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[373] See Section 8.1.2 for a discussion of freedom of speech jurisprudence in the US. Issacharoff points out that the UK has a tradition of treating elections as "an administrative tallying of preferences as they exist", which could play a part in the courts' willingness to allow limits on freedom of expression during elections: Samuel Issacharoff, "The Constitutional Logic of Campaign Finance Regulation" (2009) 26:2 Pepperdine L Rev 373 at 384.

[374] Brexit does not directly affect the weight of the Convention and ECtHR decisions in the UK. The ECtHR is a judicial body of the Council of Europe, which is separate from the European Union, and the Convention is incorporated into UK law through the UK *Human Rights Act*. For more information, see Chloe Smith, "Lawyers Fear for UK's Future in ECHR After Brexit Vote", *The Law Society Gazette* (24 June 2016), online: <https://www.lawgazette.co.uk/law/lawyers-fear-for-uks-future-in-echr-after-brexit-vote/5056112.article>.

[375] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

[376] *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* 1952, ETS No 009.

### 9.1.1 *Bowman v the United Kingdom*

In *Bowman v the United Kingdom* (*Bowman*), the ECtHR considered a provision of the *Representation of the People Act, 1983* (*RPA*), providing that third parties could spend no more than £5 on publications promoting the election of a particular candidate in any one constituency in the six weeks before a general election.[377] The applicant was charged under the *RPA* after distributing some 1.5 million leaflets in various constituencies to inform voters about candidates' views on abortion.[378]

Although the spending limit infringed freedom of expression, the ECtHR accepted that it had the legitimate aim of protecting the rights and freedoms of others, as required by Article 10(2) of the Convention. The ECtHR identified the "others" as other candidates, since the provision aimed to promote "equality between candidates" and the electorate.[379] However, the ECtHR found that the impugned provision was disproportionate to its goal. The spending cap formed a "total barrier" for third parties wishing to inform people in their area about a candidate's views on a particular issue, even though the limit applied only in the four to six weeks before a general election.[380] In response to this decision, Parliament raised the third-party spending cap at the constituency level for general parliamentary elections.[381]

In *Bowman*, the ECtHR discussed the interaction between the right to free elections and the right to free expression. According to the ECtHR, these two guarantees are the "bedrock" of democracy and reinforce one another, but they may also come into conflict.[382] The ECtHR accepted that states may need to limit freedom of expression during elections to ensure "free expression of the opinion of the people," as required by the right to free elections. However, information must nonetheless be permitted to "circulate freely" during an election.[383] Like the Supreme Court of Canada in *Harper*,[384] the ECtHR thus acknowledged the usefulness of third-party spending limits in enhancing electoral debate, but warned against stifling the flow of information through too restrictive spending caps.

### 9.1.2 *Animal Defenders International v the United Kingdom*

In *Animal Defenders International v the United Kingdom* (*Animal Defenders*), the ECtHR confirmed its willingness to allow limits on free expression of opinion during elections for the sake of fairness and robust debate.[385] In this case, the applicant challenged a blanket ban on paid political advertising on broadcast media for political parties, candidates, and third

[377] *Bowman*, *supra* note 132.
[378] *Ibid* at paras 11–12.
[379] *Ibid* at para 38.
[380] *Ibid* at para 45.
[381] See Section 9.2.3.3 for current rules on third-party spending limits at the constituency level.
[382] *Bowman*, *supra* note 132 at para 42.
[383] *Ibid* at para 42.
[384] *Harper, supra* note 52. See Section 10.1.2.3, for a summary of the ruling.
[385] *Animal Defenders International v the United Kingdom* [GC], [2013] ECHR 362, [*Animal Defenders* ECHR].

parties under the *Communications Act 2003*.[386] The UK House of Lords and the ECtHR upheld the ban.

In its decision, the House of Lords emphasized that a level playing field in public debate enables citizens "to make up their own minds on the important issues of the day."[387] According to the House of Lords, the blanket ban on paid political advertising "avoid[s] the grosser distortions [in electoral debate] which unrestricted access to the broadcast media will bring."[388] In recognizing the need to prevent the wealthy from distorting electoral debate, the House of Lords accepted the egalitarian rationale for campaign regulation and acknowledged that limiting electoral speech can actually enhance the exchange of information and ideas. Speaking bluntly, Baroness Hale bolstered the majority's conclusions by warning against "the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America" and the "[e]normous sums"[389] spent on such advertising.

At the ECtHR, the parties agreed that the legislative objective of the ban on paid political advertising was to preserve the "impartiality of broadcasting on public interest matters and, thereby … protect … the democratic process."[390] The majority of the ECtHR accepted that this objective fell within the legitimate aim of protecting the rights of others, as required by Article 10(2) of the Convention. The ECtHR also concluded that the ban could reasonably be considered necessary in a democratic society. According to the majority, without the ban, the wealthy could "obtain competitive advantage in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor."[391]

Finally, on the issue of proportionality, the majority of the ECtHR found the ban to be properly tailored to the "risk of distortion."[392] The ban applied to media with "particular influence," those media being television and radio, and a narrower ban could lead to abuse and uncertainty.[393] The ECtHR also pointed out the availability of alternatives to paid political advertising for third-party groups, such as participation in radio or television programs or the formation of a charitable arm to fund non-political paid advertising.[394]

By concluding that the state is the "ultimate guarantor" of robust debate, the ECtHR revealed a significant divergence from the US Supreme Court's approach to freedom of speech. In campaign finance cases, the majority of the US Supreme Court has demonstrated an unwavering suspicion of state power and has emphasized the role of constitutional rights in shielding the individual from that power.[395] In *Animal Defenders*, by contrast, the ECtHR's

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[386] *Communications Act 2003*, *supra* note 23, ss 321(2)–(3). Broadcasters are required to provide free airtime to political parties for political and campaign broadcasts: *Communications Act 2003*, *supra* note 23, ss 319(2)(g), 333.
[387] *Animal Defenders* HL, *supra* note 55 at para 48.
[388] *Ibid*.
[389] *Ibid* at para 47.
[390] *Animal Defenders* ECHR, *supra* note 385 at para 78.
[391] *Ibid* at para 112.
[392] *Ibid* at paras 117–22.
[393] *Ibid*.
[394] *Ibid* at para 124.
[395] See Section 10.1.2.

approach recalls Fiss' theory that the state may enhance free speech, not merely threaten it.[396]

## 9.2 Regulatory Regime

The UK's campaign finance regime attempts to level the playing field for parties and candidates by limiting demand for, but not supply of, political money. In the UK, parties, candidates, and third parties are subject to expenditure limits, but contributions to all three are uncapped, although contributions are only allowed from permissible sources. The UK's ban on paid political advertising on broadcast media is intended to further curb political parties' demand for money.

Under the UK's scheme of uncapped contributions, parties and candidates could rely solely on a small number of large donors to finance their campaigns. This raises obvious corruption concerns. The system includes disclosure requirements which, it is argued, address the risk of corruption by discouraging large contributions, as big donors may find themselves the subject of unwanted media attention, and ensuring the public knows what support parties and candidates have received.

In the UK, different legislation applies to the campaigning of political parties and candidates. Registered parties are governed by the *Political Parties, Elections and Referendums Act 2000* (*PPERA*),[397] while candidates are governed by the *RPA*.[398] Both acts also regulate third-party campaigning in general parliamentary elections, with *PPERA* addressing national third-party campaigns and *RPA* addressing third-party campaigns at the constituency level. The campaign finance provisions in both acts were amended by the *Electoral Administration Act 2006*,[399] the *Political Parties and Elections Act 2009*,[400] and the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (the *Transparency of Non-Party Campaigning Act*).[401] The next section will focus on the rules in *PPERA* and the *RPA* in relation to general parliamentary elections. The UK also regulates campaign financing in referendums and local government elections.

### 9.2.1 Campaign Financing for Political Parties and Candidates

#### 9.2.1.1 Spending Limits for Registered Parties and Candidates

In the UK, ceilings on candidate spending date back to 1883 and were extended to political parties and third parties in 2000 by *PPERA*.[402] In *Attorney General v Jones*,[403] the Court of

[396] Fiss, *supra* note 87. See Section 5.1 for more on Fiss' arguments regarding freedom of speech and campaign finance regulation.
[397] *Political Parties, Elections and Referendums Act 2000* (UK), c 41 [*PPERA*].
[398] *Representation of the People Act 1983* (UK), c 2 [*RPA*].
[399] *Electoral Administration Act 2006* (UK), c 22.
[400] *Political Parties and Elections Act 2009* (UK), c 12.
[401] *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4 [*Transparency of Non-Party Campaigning Act*].
[402] Ewing & Rowbottom, *supra* note 103 at 77.
[403] *Attorney General v Jones*, [1999] EWHC 837, [2000] QB 66.

Appeal explained that the purpose of spending caps is to promote "a level financial playing field between competing candidates, so as to prevent perversion of the voters' democratic choice between competing candidates within constituencies by significant disparities of local expenditure."[404] By contrast, American courts view the objective of levelling the playing field as an insufficient basis for restricting campaign spending.[405]

*a) Expenses Captured by Spending Limits*

*(i) Registered Parties: Definition of "Campaign Expenditure"*

Registered parties are subject to ceilings on "campaign expenditure" under *PPERA.* Campaign expenditure is defined as an expense incurred by a party for election purposes that falls within Schedule 8 of *PPERA*, which lists such matters as advertising, publishing documents with the party's policies, market research, and rallies or other events.[406] The phrase "for election purposes" is defined as "for the purpose of or in connection with (a) promoting or procuring electoral success for the party … or (b) otherwise enhancing the standing"[407] of the party or its candidates. This includes attempts to prejudice the chances or standing of other parties or candidates.[408] Further, an activity could be done "for election purposes" even if no express mention is made of any party or candidate.[409] Finally, a registered party's campaign expenditure does not include expenditures that are to be included in a candidate's election expenses return, which prevents the same expenses from counting toward the spending limits of both a candidate and its party.

Even if an expense falls within the definition of campaign expenditure, it will not count towards the party's spending limit under *PPERA*, unless it was incurred in the 365 days before a general parliamentary election.[410]

*(ii) Candidates: Definition of "Election Expenses"*

The *RPA* limits the amount candidates may spend on "election expenses." The definition of election expenses is similar to the definition of campaign expenditure for political parties. Election expenses are defined in the *RPA* as:

- any expenses incurred at any time
- in respect of any matter specified in Part 1 of Schedule 4A
- which is used for the purposes of the candidate's election
- after the date when he becomes a candidate at the election.[411]

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[404] *Ibid* at 255.
[405] See e.g. *Buckley, supra* note 11.
[406] *PPERA*, *supra* note 397, s 72(2).
[407] *Ibid*, s 72(4).
[408] *Ibid*, s 72(5)(a).
[409] *Ibid*, s 72(5)(b).
[410] *Ibid*, Schedule 9, para 3(7).
[411] *RPA*, *supra* note 398, s 90ZA(1).

The matters in Part 1 of Schedule 4A include advertising, distributing unsolicited material to electors, transport, public meetings, and accommodation and administration costs. The phrase "for the purposes of the candidate's election" is defined as "with a view to, or otherwise in connection with, promoting or procuring the candidates election," which includes "prejudicing the electoral prospects of another candidate."[412] Exclusions are made for certain expenses, such as those related to the publication of non-advertising material in newspapers and periodicals.[413] Further, the value of volunteer services provided on the volunteer's own time is not considered an election expense.[414]

*b) Spending Limits*

*(i) Registered Parties*

In the 365 days before a general parliamentary election, registered parties' campaign expenditure is limited to £30,000 per constituency contested by the party, or £810,000 in England, £120,000 in Scotland, and £60,000 in Wales, whichever is greater.[415] Constituency-level branches of registered parties are not subject to limits on spending in support of candidates in their constituencies.[416] However, if a constituency-level branch spends money promoting the party as a whole, this spending will count toward the national party's spending limit.[417]

It should be noted that, while general election dates are somewhat fixed every four years by statute in the UK, an election can occur at any time in two scenarios: First, the Prime Minister can propose a resolution calling an election and two-thirds of the members of the House of Commons approve the resolution, or second, a majority of members approve a resolution stating non-confidence in the government, and do not vote to withdraw that resolution in the two-weeks after it is approved. The Queen can approve the calling of the election instead of approving an opposition party or combination of parties to attempt to govern after the government has resigned.[418] As a result, if such a vote occurs and an election is called with only two weeks of notice, the spending limits do not apply retroactively for the period of the previous 365 days.

*(ii) Candidates*

Candidate spending limits are determined by adding a base amount and a "top up" that depends on the number of registered electors in the candidate's constituency.[419] There are

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[412] *Ibid*, ss 90ZA(3),(6).
[413] *Ibid*, Schedule 4A, para 8.
[414] *Ibid*, Schedule 4A, para 10.
[415] *PPERA*, *supra* note 397, Schedule 9, paras 3(2)–(3),(7).
[416] Ron Johnston & Charles Pattie, "Local Parties, Local Money, and Local Campaigns: Regulatory Issues" in Ewing, Rowbottom & Tham, *supra* note 3, at 92.
[417] *Ibid*.
[418] *Fixed-term Parliaments Act 2011* (UK), c 14.
[419] UK, The Electoral Commission, *UK Parliamentary General Election 2017: Guidance for Candidates and Agents* (Guidance Document) vol 3 [Electoral Commission, *Guidance for Candidates and Agents*], online (pdf): <https://www.electoralcommission.org.uk/sites/default/files/pdf_file/UKPGE-Part-3-Spending-and-donations.pdf>.

two relevant time periods for candidate spending under the *RPA*. One limit applies to post-candidacy election expenses, while a separate limit applies to pre-candidacy election expenses under certain circumstances. The limit for post-candidacy expenses covers all election expenses incurred for things used after the person becomes a candidate, even if the expenses were actually incurred before they became a candidate, as indicated by the definition of election expenses.[420] In the 2017 general parliamentary election, the post-candidacy spending limit consisted of a base amount of £8,700 with a top up of 9p per elector in county constituencies.[421]

A separate spending cap applies to pre-candidacy election expenses in some circumstances. If Parliament is not dissolved for 55 months, election expenses will be capped between the end of the 55-month period and the day a person becomes a candidate.[422] In other words, if an expense is incurred for something used during this pre-candidacy window, it will count toward the pre-candidacy spending limit. This window could last up to four months. In the 2015 general parliamentary election, spending during this period was limited to a base amount of £30,700 with a top up of 6p per elector.[423] The addition of this pre-candidacy limit in 2009 was presumably directed toward preventing the circumvention of pre-existing post-candidacy spending limits.

#### 9.2.1.2 Contributions to Registered Parties and Candidates

As mentioned, contributions to candidates and political parties in the UK are subject to source restrictions and disclosure requirements, but the amount of each contribution is unlimited. The source restrictions and disclosure requirements apply to all donations to political parties, regardless of whether donations are specifically intended for the purpose of election campaigning, although disclosure is required more frequently during election periods.

*a) Definition of "Donation"*

*(i) Definition of "donation" for parties: PPERA*

"Donation" is defined in section 50(2) of *PPERA* to include gifts of money or property; membership fees; payments of the party's expenses by a third person; and the provision of property, services, or facilities "otherwise than on commercial terms." "Sponsorship" is also included in the definition and is defined in section 51 of *PPERA* as the transfer of money or property to the party to help the party meet expenses for events, research, or publications.

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[420] *RPA*, *supra* note 398, s 90ZA.

[421] *Ibid*, s 76; *Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014* (UK), SI 2014/1870, art 4. See also Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 7. In the 2017 parliamentary general election, there was no pre-candidacy spending limit, since Parliament was dissolved before the 55 month period expired.

[422] *RPA*, *supra* note 398, s 76ZA. Note that, for the purposes of section 76ZA, the definition of "election expenses" in section 90ZA(1) is changed to omit the words "after the date when he becomes a candidate at the election": s 76ZA(1).

[423] *Ibid*, s 76ZA(2); *Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014* (UK), SI 2014/1870, art 4. See also Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 7.

However, sponsorship does not include the price of admission to events and payments to access party publications.[424] The definition of donation also excludes various things, such as the provision of volunteer services on one's own time free of charge.[425] In addition, donations of £500 or less are excluded from the definition of donation and are therefore exempt from source restrictions and disclosure requirements.[426]

Loans with a value over £500 are included within the regulatory scheme.[427] After the self-explanatory "loans for peerages" scandal of 2006, the *Election Administration Act 2006* amended *PPERA* to ensure loans could not be used to circumvent source restrictions and disclosure requirements for donations.[428]

*(ii) Definition of "donation" for candidates: the RPA*

The definition of donation under the *RPA* is similar to the definition under *PPERA*. Donation is defined to include gifts; sponsorship; money lent on non-commercial terms; and the provision of property, services, or facilities on non-commercial terms.[429] Donations of £50 or less are excluded.[430] Volunteer services provided free of charge on the volunteer's own time are also excluded.[431]

*b) Source Restrictions*

Source restrictions are similar for candidates and registered parties.[432] As indicated by the definitions of donation, these restrictions are triggered by donations and loans over £500 for parties and by donations over £50 for candidates. Donations and loans over these thresholds are only allowed from permissible donors whose identities are disclosed.[433] Permissible donors include individuals registered in the electoral register in the UK, companies and limited liability partnerships that carry on business in the UK, unincorporated associations that carry on their activities primarily in the UK and have their main office in the UK, and trade unions listed under UK legislation.[434] Charities are not allowed to make political donations.[435] An additional restriction applies to donations and loans to political parties.

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[424] *PPERA*, *supra* note 397, s 51(3).
[425] *Ibid*, s 52(1).
[426] *Ibid*, s 52(2).
[427] *Ibid*, ss 71F(3), 71F(12)(b).
[428] Fisher, *supra* note 372 at 155; Gauja, *supra* note 16 at 179. *Parties and Elections: Legislating for Representative Democracy* (Ashgate Publishing, 2010) at 179.
[429] *RPA*, *supra* note 398, Schedule 2A, para 2(1). "Sponsorship" is defined in para 3 of Schedule 2A.
[430] *Ibid*, Schedule 2A, para 4(2).
[431] *Ibid*, Schedule 2A, para 4(1)(b).
[432] Third-party campaigners are subject to these same source restrictions under *PPERA*, as discussed in Section 9.2.3.2.
[433] *PPERA*, *supra* note 397, s 54(1)(a); *RPA*, *supra* note 398, Schedule 2A, para 6(1)(b).
[434] *Ibid,* Schedule 2A, para 6(1)(a). By contrast, under the federal regime in Canada, only individuals may contribute to political parties and candidates: see Section 8.2.1.2.
[435] UK, The Electoral Commission, *Permissibility Checks for Political Parties*, (Guidance Document), [Electoral Commission, *Permissibility Checks*] at 4, online (pdf): <https://www.electoralcommission.org.uk/sites/default/files/2021-01/sp-permissibility-rp_0.pdf>; Rowbottom, *supra* note 138 at 26.

Individuals contributing or lending more than £7,500 to a registered party are required to be resident, ordinarily resident, and domiciled in the UK for tax purposes.[436]

When accepting a donation from an unincorporated association, the Electoral Commission advises party officers to ascertain whether the association has an identifiable membership, a set of rules or a constitution, and a separate existence from its members.[437] If these criteria are met, the party officer may accept the donation without inquiring further into the identity of the individuals funding the association, even if those individuals might be impermissible donors. The party officer is required simply to record the association's name and the address of its main office, in accordance with *PPERA*'s transparency requirements.[438] If the above criteria are not met, party officers are directed to "consider whether the donation is actually from individuals" within the association "or if someone within the association is acting as an agent for others."[439] If so, the officer is required to ensure the individuals in question are permissible donors.[440]

*c) Disclosure Requirements*

Donations and loans to registered parties, along with donations to candidates, are subject to disclosure requirements. These transparency requirements will be discussed next.

#### 9.2.1.3 Transparency Requirements for Registered Parties and Candidates

*a) Registered Parties*

The treasurer of a registered party is required to submit a campaign expenditure return to the Electoral Commission within six months after a general election.[441] The return is required to contain all campaign expenditures in the 365 days before the election, along with supporting invoices and receipts.[442] The treasurer is also required to submit a declaration that the return is complete and correct and, if the party's campaign expenditure exceeds £250,000, an auditor's report.[443] The Electoral Commission is required to make the campaign expenditure returns available for public inspection "as soon as reasonably practicable,"[444] but may destroy returns two years after receiving them.

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[436] *PPERA*, *supra* note 397, ss 54(2)(a), (2ZA), 71HZA(1)–(2).
[437] Electoral Commission, *Permissibility Checks*, *supra* note 435 at 9.
[438] *Ibid*. However, some additional transparency is provided by the reporting requirements for unincorporated associations. If an unincorporated association donates or lends over £25,000 in a year to a registered party, the association is required to report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the donation or loan: *PPERA*, *supra* note 397, Schedule 19A, para 2.
[439] Electoral Commission, *Permissibility Checks*, *supra* note 435 at 9.
[440] *Ibid*.
[441] *PPERA*, *supra* note 397, ss 80, 82(1). The treasurer commits an offence if they fail to submit the report on time without reasonable excuse: s 84(1).
[442] *Ibid*, ss 80(3), (4).
[443] *Ibid*, ss 83(2), 81.
[444] *Ibid*, s 84.

Party treasurers are required to also submit quarterly donation reports.[445] As mentioned, only contributions over £500 meet the definition of donation and only loans of a value of over £500 count as regulated transactions under *PPERA*. Donation reports are required to include donations or loans over £7,500, donations or loans from the same source that add up to £7,500 in a calendar year, and donations or loans over £1,500 that come from a source already reported in that year.[446] Further, the treasurer is required to include donations or loans over £1,500 to the party's accounting units or constituency-level branches.[447] If one person makes several donations to different branches of the party, the donations will be treated as a donation to the central party and is required to be reported if over £7,500 in the aggregate.[448] Reports are required to include information about the donor or lender, such as name and address.[449] During a general election, these reports are required to be submitted weekly.[450] If there is nothing to report, the treasurer is required to submit a nil return.[451] The Electoral Commission maintains a register of donations and loans reported under *PPERA*, which is required to includes the amount and source of each donation or loan.[452] Donations are to be entered into the register "as soon as reasonably practicable."[453]

*b) Candidates*

Candidates are required to submit a spending return within 35 days after the election result is declared.[454] The return is required to include all election expenses incurred and payments made, along with a statement of the amount of money provided from the candidate's own resources to cover election expenses.[455] Even if the candidate has incurred no election expenses, they are required to submit a nil return.[456] The return is required to also list donations received and information about the donations, such as the date of acceptance, the amount of the donation, and the name and address of the donor.[457] As noted above, these requirements only apply to donations over £50, as donations under this threshold do not meet the definition of donation in the *RPA*.[458] If a candidate fails to deliver their return on time and is a Member of Parliament, the candidate is prohibited from sitting or voting in the

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[445] *Ibid*, ss 62(1), 71M(1).
[446] *Ibid*, ss 62, 71M; UK, The Electoral Commission, *Overview of Donations to Political Parties* (Guidance Document) at 6, online (pdf): <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0014/102263/to-donations-rp.pdf>; UK, The Electoral Commission, *Overview of Loans to Political Parties* (Guidance Document) at 6, online: <https://www.electoralcommission.org.uk/sites/default/files/pdf_file/to-loans-rp.pdf>.
[447] UK, The Electoral Commission, *Reporting Donations and Loans: Parties With Accounting Units* (Guidance Document) at 4, online: <https://www.electoralcommission.org.uk/sites/default/files/pdf_file/sp-reporting-with-au-rp.pdf>.
[448] *Ibid*.
[449] *PPERA*, *supra* note 397, ss 62(13), 71M(13); Schedule 6, para 2; Schedule 6A, para 2.
[450] *Ibid*, ss 63, 71Q.
[451] *Ibid*, ss 62(10), 71M(10).
[452] *Ibid*, ss 69, 71V.
[453] *Ibid*, ss 69(5), 71V.
[454] *RPA*, *supra* note 398, s 81(1).
[455] *Ibid*, ss 81(1), (3).
[456] Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 16.
[457] *RPA*, *supra* note 398, Schedule 2A, para 11; *PPERA*, *supra* note 397, Schedule 6, para 2.
[458] *RPA*, *supra* note 398, Schedule 2A, para 4(2).

House of Commons until delivery is complete.[459] The *RPA* also requires a candidate's donation returns to be published in at least two newspapers in their constituency.[460]

### 9.2.2 Public Funding

The UK's campaign finance regime provides little in the way of public funding for parties or candidates. There are no tax credits for political donations and no reimbursements or allowances. Justin Fisher notes that a tradition of "voluntarism as the basis for party finance" may explain the absence of robust public funding for election campaigns in the UK.[461]

#### 9.2.2.1 Policy Development Grants

Policy development grants for political parties are intended to help fund long-term research, thus encouraging parties to become a source of ideas in politics, not just electoral campaigning machines.[462] The Electoral Commission is not authorized to make more than £2 million in policy grants per year.[463]

#### 9.2.2.2 Broadcasting Regulations

The *Communications Act 2003* prohibits paid political advertising on television and radio and requires broadcasters to provide free airtime to registered political parties for political and campaign broadcasts.[464] Licensed broadcasters are required to allocate political broadcasting time in accordance with the minimum requirements set out by Ofcom, the UK's communications regulator.[465] As long as these minimum requirements are met, broadcasters

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[459] *Ibid*, s 85(1). If a Member of Parliament contravenes this prohibition, they will be fined £100 for every day they sit or vote without submitting the return.

[460] *Ibid*, s 88.

[461] Fisher, *supra* note 372 at 169.

[462] Ghaleigh, "Expenditure, Donations and Public Funding", *supra* note 26 at 53.

[463] *PPERA*, *supra* note 397, s 12(8).

[464] *Communications Act 2003*, *supra* note 23, ss 319(2)(g), 333. For more information on the ban on paid political broadcasting, see Jacob Rowbottom, "Access to the Airwaves and Equality: The Case against Political Advertising on the Broadcast Media" in Rowbottom, *supra* note 138, at 77. Rowbottom argues in favour of broadcasting restrictions by pointing out that access to broadcast media is always limited, but should not be limited on the basis of wealth: 96. See also Andrew Geddis, "The Press: The Media and the 'Rupert Murdoch Problem'" in Ewing, Rowbottom & Tham, *supra* note 3, at 136. For criticism of the ban on paid political advertising, see Section 9.3.

[465] "Ofcom Rules on Party Political and Referendum Broadcasts" (31 December 2020), online (pdf): *Ofcom* <https://www.ofcom.org.uk/__data/assets/pdf_file/0035/99188/pprb-rules-march-2017.pdf>. Ofcom advises at paragraph 14 that, before general elections, licensed broadcasters and the BBC should allocate one or more Party Election Broadcasts to each registered party "having regard to the circumstances of a particular election, the nation in which it is held, and the individual party's past electoral support and/or current support in that nation." At paragraph 15, Ofcom clarifies that registered parties should qualify for an election broadcast if contesting one sixth or more of the seats in a general election (in jurisdictions using proportional representation voting a formula determines whether a party qualifies). Further, Ofcom states at paragraph 16 that licensed broadcasters and the BBC "should consider making additional allocations of … [election broadcasts] to registered parties … if evidence of their past electoral support and/or current support at a particular election or in a relevant nation/electoral area means it would be appropriate to do so." Paragraph 24 to 26 stipulates

have the discretion to set their own rules on the length, frequency, allocation, and scheduling of political broadcasts.[466]

Under section 321(2) of the *Communications Act 2003*, an advertisement will contravene the prohibition on paid political advertising if it is inserted by a body whose objects are wholly or mainly of a political nature or if it is directed towards a political end. Objects of a political nature and political ends include attempts to influence the outcome of elections or referendums, among other non-election-related purposes.[467]

The regulation of political broadcasting is motivated by the "fear of the societal consequences of unbridled private control of an especially potent form of communication,"[468] although the potency of television and radio is arguably being diluted by other media. The prohibition on paid political broadcasting also aims to reduce demand for campaign funds among political parties and candidates, which theoretically helps to address corruption, equality, and fairness concerns.

As discussed above, the European Court of Human Rights upheld the ban on paid political advertising in *Animal Defenders*.[469] A "strong cultural antipathy to political advertising"[470] in the UK also supports the continuing existence of the ban.

### 9.2.3 Third-Party Campaign Financing

The *RPA* governs third-party campaigns in relation to candidates in either a ward for a local municipal government election or a constituency for a UK general election. Broader campaigns for or against a political party or category of candidates, or on policies or issues associated with a party or category of candidates, are governed by *PPERA*.[471]

The regulation of third-party campaigners in the UK mirrors the regulation of political parties and candidates. Third-party campaigners are subject to spending limits and, if they spend above a certain amount, they are required to comply with reporting requirements and source restrictions for donations.

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that registered parties may choose for each television broadcast a length of 2'40", 3'40", or 4'40" and a length of up to 2'30" for each radio broadcast, and that political broadcasts are required to be aired between 5:30 pm and 11:30 pm on television and between 6:00 am and 10:00 pm on radio. In the context of general elections, paragraphs one and eight state that the relevant licensed broadcasters are "licensed public service television channel[s]" and "national (i.e., UK-wide, commercial) analogue radio service[s]."

[466] *Ibid* at paras 3–4.

[467] *Communications Act 2003*, c 21, s 321(3).

[468] Geddis, *supra* note 464 at 146.

[469] *Animal Defenders* ECHR, *supra* note 385.

[470] Stephanie Palmer, "The Courts: Legal Challenges to Political Finance and Election Laws" in Ewing, Rowbottom & Tham, *supra* note 3, at 184.

[471] UK, The Electoral Commission, *Northern Ireland Assembly Election March 2017: Non-party Campaigners* (Guidance Document) [Electoral Commission, *Northern Ireland Assembly Election*] at 5, online (pdf): <https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Northern-Ireland-Assembly-NPC-2017.pdf>.

#### 9.2.3.1 Activities Captured by Third-Party Campaign Regulations

*a) PPERA*

*(i) Meaning of "Recognised" Third Party*

"Third party" is defined in *PPERA* as "any person or body other than a registered party,"[472] or a registered party if it campaigns to promote the electoral success of other parties or candidates from other parties.

*PPERA* creates a scheme of unregistered and registered, or "recognised" third parties for general national elections. Unregistered third-party campaigners can only spend up to a certain amount on controlled expenditures during the regulated period and are then required to register. Once registered, they become a "recognised third party" with a much higher spending limit, and are subject to various other requirements, such as reporting requirements.[473]

*(ii) Definition of "Controlled Expenditure"*

As mentioned above, once a third party reaches a certain threshold of "controlled expenditure," they must register and meet various requirements. The definition of controlled expenditure in section 85 of *PPERA* has two components. First, a controlled expenditure is an expense incurred by or on behalf of the third party that falls under Part 1 of Schedule 8A, which includes expenses incurred for the "production or publication of material … made available to the public in whatever form and by whatever means,"[474] canvassing or market research, press conferences, and public rallies other than annual conferences of the third party, among other things. Various expenses are excluded from the definition, such as expenses incurred by an individual to provide volunteer services on their own time.[475] Second, a controlled expenditure must be capable of being reasonably "regarded as intended to promote or procure the electoral success"[476] of a party and its candidates or of a particular category of parties or candidates. A category of parties or candidates may be characterized by, for example, a policy position.[477] A third party promotes the electoral success of parties or candidates if it engages in "prejudicing the electoral prospects … of other parties or candidates.[478]

Promoting electoral success also does not require express mention of any party or candidate,[479] nor does the expenditure need to be solely for the purpose of promoting a party

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[472] *PPERA*, *supra* note 397, ss 85(8)–(9).
[473] For registrations see "Registrations" (last visited 31 October 2021), online: *The Electoral Commission* <http://search.electoralcommission.org.uk/Search/Registrations?currentPage=1&rows=20&sort=RegulatedEntityName&order=asc&open=filter&et=tp&register=none&regStatus=registered&optCols=EntityStatusName>.
[474] *PPERA*, *supra* note 397, Schedule 8A, para 1.
[475] *Ibid*, Schedule 8A, para 2(1)(a)(i).
[476] *Ibid*, s 85(2).
[477] *Ibid*, s 85(2)(b).
[478] *Ibid*, s 85(4)(b).
[479] *Ibid*, s 85(4)(c).

or candidate's electoral success in order to fit within the definition of controlled expenditure.[480]

In its guidance for non-party campaigners, the Electoral Commission has superimposed an alternative or additional two-step test for determining whether spending on an activity is a controlled expenditure under *PPERA*. The first step is the "purpose test," which involves asking whether the activity can reasonably be regarded as intended to influence voters to vote for or against a party or category of candidates.[481] The purpose test will be met if the activity promotes or opposes policies so closely associated with the party or category of candidates that it can reasonably be regarded as intended to influence voters.[482] The second step is the "public test," which involves asking whether the activity is aimed at, seen by or heard by the public or involves the public.[483] The "public" does not include members of the non-party campaigner organization or its "committed supporters."[484]

*b) The RPA*

Under the *RPA*, persons other than the candidate, the candidate's election agent, and those authorized by the election agent are subject to regulations if they incur expenses for matters such as public meetings or advertising with a view to promoting or procuring the election of a candidate.[485]

#### 9.2.3.2 Contributions to Recognised Third Parties under *PPERA*

Under *PPERA*, donations to recognised third parties are not capped but are subject to other requirements if their value exceeds £500, such as reporting requirements.[486] The reporting requirements are discussed in Section 9.2.3.4. Donations of over £500 to recognised third parties for the purpose of controlled expenditures are only allowed from permissible donors, just like donations to political parties.[487] In relation to a recognised third party, donations are defined as gifts; sponsorship; membership fees; and the provision of goods, services, and facilities, among other things, but volunteer services do not count as a donation.[488]

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[480] *Ibid*, s 85(4A).
[481] Electoral Commission, *Northern Ireland Assembly Election*, *supra* note 471 at 8.
[482] UK, The Electoral Commission, *Overview of Regulated Non-party Campaigning* (Guidance Document) [Electoral Commission, *Regulated Non-party Campaigning*] at 6, online: <https://www.electoralcommission.org.uk/sites/default/files/2020-12/Overview%20of%20regulated%20non-party%20campaigning%20May%202021.pdf>; UK Electoral Commission, *Non-Party Campaigners: Where to Start* (Guidance Document), online: <https://www.electoralcommission.org.uk/non-party-campaigners-where-start>.
[483] Electoral Commission, *Northern Ireland Assembly Election*, *supra* note 471 at 8.
[484] Electoral Commission, *Regulated Non-party Campaigning*, *supra* note 482 at 7.
[485] *RPA*, *supra* note 398, s 75.
[486] *PPERA*, *supra* note 397, Schedule 11, para 4(2).
[487] *Ibid*, Schedule 11, para 6. See section 54(2) of *PPERA* for the list of permissible donors.
[488] *Ibid*, Schedule 11, paras 2(1), 4(1). "Sponsorship" is defined in para 3.

#### 9.2.3.3 Spending by Third Parties

*a) PPERA*

The spending limits for recognised third parties in different parts of the UK apply for 365 days before a parliamentary general election,[489] but expenses incurred before the regulated period will count toward the limit if they are incurred for property, services or facilities that are used during this regulated period.[490] Again, under the *Fixed-term Parliaments Act 2011*, if approval for an election occurs before the standard four years date, the spending limits do not apply retroactively for the period of the previous 365 days.[491]

Recognised third parties have a higher spending limit than unregistered third parties. In England, the limit on controlled, non-targeted expenditures by a recognised third party is 2% of the maximum campaign expenditure limit for England.[492] The "maximum campaign expenditure limit" refers to the maximum amount a political party is allowed to spend in a particular part of the UK.[493] A recognised third party may not spend more than 0.05% of the maximum campaign expenditure limit in any one constituency.[494] If a recognised third party exceeds the spending limit, they will commit an offence under *PPERA* if they reasonably ought to have known that their expenditures would exceed the limit.[495]

If a registered third party's spending is "targeted" at convincing voters to vote for a specific party, and the spending is approved by that party, the third party can spend whatever amount the party approves up to the maximum limit. However, if the spending is targeted in favour of one party but not approved by that party, then the spending limit is much lower (approximately 6% of the maximum limit).[496] This allowance for express, authorized coordination of campaigning by a party and third party raises obvious questions concerning the party's political feeling. If they win the election, they may have a sense of obligation to return the favour of the third party's targeted support.

Unregistered third parties can spend up to £20,000 in England and up to £10,000 in each of Scotland, Wales, and Northern Ireland on controlled expenditures in the 365 days before a parliamentary general election.[497] Like recognised third parties, unregistered third parties are prohibited from spending more than 0.05% of the maximum campaign expenditure in a

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[489] *Ibid*, Schedule 10, para 3(3).
[490] *Ibid*, s 94(8).
[491] *Fixed-term Parliaments Act 2011*, *supra* note 418.
[492] *PPERA*, Schedule 10, para 3. In 2019, the spending limit in effect for non-targeted third-party spending across England was £479,550. UK, The Electoral Commission, *UK Parliamentary General Election 2019: Non-Party Campaigners* (Guidance Document) [Electoral Commission, *Non-Party Campaigners*] at 11, online (pdf): <https://www.electoralcommission.org.uk/sites/default/files/2019-11/Non-party%20campaigner%20UKPGE%202019.pdf>.
[493] *PPERA*, s 94(10)(e).
[494] *Ibid*, Schedule 10, para 3(2A).
[495] *Ibid*, s 94(2).
[496] Electoral Commission, *Non-Party Campaigners*, *supra* note 492 at 13.
[497] *PPERA*, ss 94(3)–(5).

particular constituency.[498] If a third party exceeds these limits without registering, they will commit an offence under *PPERA*.[499]

*b) The RPA*

Under the *RPA*, third parties can spend up to £700 campaigning for the election of a candidate after the date the person becomes a candidate.[500] Expenses incurred before the person becomes a candidate will count toward this limit if incurred for something to be used after the candidacy begins.[501] A person becomes a candidate the day Parliament is dissolved. If a person's intention to become a candidate is not expressed until after dissolution, they will become a candidate on the date this intention is declared or the date of the person's nomination, whichever is earlier.[502]

#### 9.2.3.4 Transparency Requirements for Third-Party Campaigners

*a) Attribution*

Under *PPERA*, published election material is required to contain the names and addresses of the printer, promoter, and person on whose behalf it is published.[503] The "promoter" is defined as "the person causing the material to be published."[504] "Election material" is defined as "material which can reasonably be regarded as intended to promote or procure electoral success"[505] for a registered party, for a category of registered parties or for a category of candidates. For example, if a company causes material to be published in support of a registered party, the company's name and address is required to appear on the material.

*b) Reporting Requirements*

*(i) PPERA*

Unregistered third parties have no disclosure obligations. However, recognised third parties are required to prepare a return if they incur any controlled expenditures during the 365 days before polling day.[506] The return is required to include a statement of payments made in respect of controlled expenditures and a statement of donations received for the purpose of controlled expenditures for the relevant election.[507] For donations from permissible donors with a value of more than £7,500, the return is required to state the amount or nature of the donation, the date it was received, and information about the donor.[508] The total value of all donations worth more than £500 and that do not exceed £7,500 is also required to be

[498] *Ibid*, s 94(5ZA).
[499] *Ibid*, s 94.
[500] *RPA*, *supra* note 398, ss 75(1),(1ZZB),(1ZA).
[501] *Ibid*, s 75(8).
[502] *Ibid*, s 118A(2); Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 6.
[503] *PPERA*, *supra* note 397, s 143.
[504] *Ibid*, s 143(11).
[505] *Ibid*, s 143A.
[506] *Ibid*, s 96(1).
[507] *Ibid*, s 96(2).
[508] *Ibid*, Schedule 11, paras 10(1)–(2).

reported.[509] If a recognised third party incurs more than £250,000 for controlled expenditures during the 365 days before polling day, they are required to also submit an auditor's report with their return.[510]

*(ii) The RPA*

If a third-party campaigner incurs expenses that require authorization by a candidate's election agent, such as expenses totalling over £700, the third party is required to submit a return stating the amount of the expenses and the candidate for whom they were incurred.[511] The return is required to be submitted within 21 days after the election results are declared.[512] If the expenses are under £700, meaning the candidate's election agent need not authorize the expenses, the Electoral Commission may nonetheless require the third party to submit a return that either shows the expenses incurred or contains a statement that the expenses were £200 or less.[513]

#### 9.2.3.5 Rules Governing Specific Types of Third Parties

*a) Companies*

Companies are required to obtain a resolution from their members authorizing political donations or expenditures in advance.[514] A resolution is not required unless the donation exceeds £5,000 by itself or in combination with other political donations made in the 12-month period leading up to the donation.[515] The resolution "must be expressed in general terms … and must not purport to authorize particular donations or expenditure."[516] The resolution is in effect for four years.[517]

*b) Trade Unions*

Trade unions are required to ballot their members to establish a separate political fund for political donations and expenditures.[518] Members are required to opt in to contribute to the union's political fund and may withdraw their opt-in notice at any time.[519] Further, the trade union is required to take all reasonable steps to notify members of their right to withdraw from contributing to the political fund.[520]

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[509] *Ibid*, Schedule 11, para 10(3).
[510] *Ibid*, s 97.
[511] *RPA*, *supra* note 398, s 75(2).
[512] *Ibid*, s 75(2)(a).
[513] *Ibid*, s 75ZA.
[514] *Companies Act 2006*, *supra* note 151, s 366.
[515] *Ibid*, s 378(1).
[516] *Ibid*, s 367(5).
[517] *Ibid*, s 368.
[518] *Trade Union and Labour Relations (Consolidation Act) 1992* (UK), c 52, s 71.
[519] *Ibid*, s 84(1).
[520] *Ibid*, s 84A(1).

Trade unions are required to provide detailed information in annual returns regarding payments out of their political fund if those payments exceed £2,000 in a calendar year.[521] For example, if a union contributes to a third-party campaigning organisation, the union's annual return is required to include the name of the organisation, the amount paid to that organisation, the names of the political parties or candidates that the union hoped to support through the expenditure, and the amount of the expenditure spent in relation to each political party or candidate.[522]

*c) Unincorporated Associations*

If an unincorporated association donates or lends over £25,000 in a year to a registered party or recognised third party, the association is required to report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the political contribution.[523] The Electoral Commission is required to maintain a register of gifts reported to them by unincorporated associations.[524]

### 9.2.4 Role of the Electoral Commission

The Electoral Commission supervises compliance with *PPERA* and other electoral law statutes, such as the *RPA*.[525] It has the power to demand the production of documents or records of income and expenditure, copy those documents and records, and enter the premises of an individual or organization to retrieve those documents and records.[526] Failure to deliver documents to the Electoral Commission can lead to civil penalties.[527] The police, however, are responsible for initiating enforcement actions for criminal offences under *PPERA*.[528]

Since 2009, four out of nine commissioners on the Electoral Commission have been nominated by the political parties.[529] This was introduced in response to criticisms that the commissioners, who formerly could not be members of parties or have held political office in the last ten years, were too apolitical and did not understand the "practical workings of political parties."[530]

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[521] *Ibid*, s 32ZB.
[522] *Ibid*, s 32ZB(6).
[523] *PPERA*, *supra* note 397, Schedule 19A, para 2.
[524] *Ibid*, Schedule 19A, para 7.
[525] Ghaleigh, "Expenditure, Donations and Public Funding", *supra* note 26 at 42; *PPERA*, *supra* note 397, s 145.
[526] *PPERA*, *supra* note 397, s 146.
[527] *Ibid*, s 147; Navraj Singh Ghaleigh, "The Regulator: The First Decade of the Electoral Commission" in Ewing, Rowbottom & Tham, *supra* note 3, 153 [Ghaleigh, "The Regulator"] at 157.
[528] *Ibid* at 157.
[529] *Ibid* at 158.
[530] *Ibid*.

## 9.3 Criticisms of Campaign Finance Regulation

A heavily criticized aspect of the UK's campaign finance regime is the absence of donation caps.[531] Even though most campaign finance scandals in the UK involve donations, only spending is capped.[532] Uncapped donations allow reliance on a small number of large donors, which raises concerns regarding corruption, equality, fairness, and public confidence.[533] Admittedly, the UK's spending limits might relieve the need for big donations to some extent by reducing the demand for money. In addition, transparency requirements supposedly deter large donations through negative press attention. For example, after the disclosure requirements in *PPERA* came into force in 2000, the media seized on instances in which large donors to the Labour Party obtained some benefit from the government around the same time they made donations.[534] The resulting scandal may have deterred future large donors.[535] However, Fisher notes this deterrence did not appear to be at work in the 2008 and 2010 elections.[536] Fisher argues further that, in spite of *PPERA*'s spending limits, the demand for money among parties has continued unabated, especially after the devolution of power to Scotland, Wales, and Northern Ireland and associated extra elections.[537] The major parties' reliance on large donations could also be exacerbated by "the decline of other forms of party income."[538]

Others criticize *PPERA*'s spending limits for leaving out local, constituency-level party branches.[539] As noted by Ron Johnston and Charles Pattie, candidates are subject to stricter regulation than parties at the constituency level.[540] They argue in favour of stricter regulation for local party units, particularly in light of the importance of local party branches in campaigning for marginal seats and the apparent effectiveness of local campaigning.[541] Fisher adds that spending at the constituency level will only become more important as volunteer campaigning drops with falling party membership.[542]

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[531] According to Fisher, one reason for the UK's failure to impose a donation ceiling is the Labour Party's structure of affiliated trade unions: see Fisher, *supra* note 372 at 161.

[532] Ewing & Rowbottom, *supra* note 103 at 77.

[533] For example, in the Brexit referendum, which was subject to similar rules as general elections, ten donors were responsible for over half of donations to the campaigns and 100 donors were responsible for 95% of all reported donations: Steve Goodrich, *Take Back Control: How Big Money Undermines Trust in Politics*, ed by Duncan Hames (London: Transparency International UK, 2016) at 1.

[534] Ewing, *supra* note 165 at 63.

[535] The scandals also led the Labour Party to set up extra "safeguards," for example, the party instituted a requirement that donors sign a statement declaring that they are not seeking personal or commercial benefits: *ibid* at 67.

[536] Fisher, *supra* note 372 at 167.

[537] *Ibid* at 153.

[538] *Ibid*.

[539] However, expenses incurred by local party branches to promote the party as a whole count toward the national party's spending limits. See Section 9.2.1.1.

[540] Johnston & Pattie, *supra* note 614 at 92.

[541] *Ibid*.

[542] Justin Fisher, "Legal Regulation and Political Activity at the Local Level in Britain" in Ewing, Rowbottom & Tham, *supra* note 3, at 121.

Criticism has also been directed toward the source restrictions and transparency requirements for political donations. Rowbottom argues that the permissible donor scheme can be circumvented through the use of corporate vehicles.[543] For example, a foreign national could effectively make a political donation through a company carrying on business in the UK, as long as the company did not act as an agent for the foreign national.[544] Lesser transparency requirements in Northern Ireland, where donors need not be disclosed, may also allow circumvention of *PPERA*'s transparency rules. For example, the Democratic Unionist Party of Northern Ireland caused controversy after accepting a £425,000 donation for the purpose of pro-Brexit advertising in England and Scotland.[545] The party was not required by the law of Northern Ireland to disclose the source of the donation, even though the advertising took place outside of Northern Ireland.

Complexity is another problem plaguing the UK's campaign finance regime. Navraj Ghaleigh observes that *PPERA*'s labyrinthine intricacy "impose[s] a regulatory burden that risks unintended consequences."[546] Volunteers at the local party level are unlikely to fully understand the requirements of *PPERA*'s "heavily amended" provisions, which could lead to fears of liability and a chilling effect.[547] Gauja and Orr also note that the introduction of stricter third-party campaigning regulations in 2014 could hinder the ability of voluntary organizations to "speak on issues of concern," creating a "chilling effect on democracy."[548] Some organizations may be unable to pay for independent legal advice to sort out the complex third-party rules, although the Electoral Commission releases guidance for third-party campaigners under section 3 of the *Transparency of Non-Party Campaigning Act*.[549] Small political parties may also lack the resources to meet reporting requirements, although the Electoral Commission may provide some assistance.[550]

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[543] Rowbottom, *supra* note 138 at 18.

[544] *Ibid*.

[545] Peter Geoghegan & Adam Ramsay, "The Strange Link Between the DUP Brexit Donation and a Notorious Indian Gun Running Trial", *Open Democracy* (28 February 2017), online: <https://www.opendemocracy.net/uk/peter-geoghegan-adam-ramsay/mysterious-dup-brexit-donation-plot-thickens>; "DUP Confirms £435,000 Brexit Donation", *BBC News* (24 February 2017), online: <http://www.bbc.com/news/uk-northern-ireland-39075502>; Fintan O'Toole, "What Connects Brexit, the DUP, Dark Money and a Saudi Prince?", *The Irish Times* (16 May 2017), online: <https://www.irishtimes.com/opinion/what-connects-brexit-the-dup-dark-money-and-a-saudi-prince-1.3083586>; Ian Johnston "The strange tale of the DUP, Brexit, a Mysterious £425,000 Donation and a Saudi Prince", *The Independent* (9 June 2017), online: <http://www.independent.co.uk/news/uk/politics/election-dup-brexit-donations-saudi-arabia-tale-tories-theresa-may-a7782681.html>. Facing political pressure, the DUP eventually revealed the source of the donation to be an organization called the Constitutional Research Council. However, the ultimate source of the donation remains unclear. Even under *PPERA*'s disclosure requirements, the ultimate source of this type of donation could remain murky. As discussed in Section 9.2.1.2(b), under *PPERA*, parties may, under certain circumstances, accept donations from an unincorporated association without inquiring into the identities of the individuals funding the unincorporated association.

[546] Ghaleigh, "Expenditure, Donations and Public Funding", *supra* note 26 at 167.

[547] *Ibid*.

[548] Gauja & Orr, *supra* note 9 at 250.

[549] *Ibid* at 259; *Transparency of Non-Party Campaigning Act*, *supra* note 401, s 3.

[550] Gauja, *supra* note 16 at 179.

The UK's ban on paid political advertising on broadcast media has drawn criticism for its impact on freedom of expression, particularly in relation to public interest organizations.[551] Critics argue the ban is overbroad since it captures "not just political parties but social advocacy groups seeking to take part in debate about matters of controversy."[552] Using Amnesty International as an example, Barendt explains that the ban may preclude charities from running short advertisements on radio or television.[553] To Barendt, this constitutes "a monstrous and unjustifiable infringement of freedom of expression."[554] The case of *Animal Defenders*, which involved advertisements funded by an animal welfare organization, arguably provided an example of overbreadth. As noted by three of the dissenting justices in that case, nobody was suggesting that Animal Defenders International "was a financially powerful body with the aim or possibility of … unduly distorting the public debate."[555] Five other dissenting justices in *Animal Defenders* argued further that "the prohibition applied to the most protected form of expression (public interest speech), by one of the most important actors in the democratic process (an NGO) and on one of the most influential media (broadcasting)."[556]

Critics also observe that the ban on paid political advertising prevents public interest groups from responding to commercial advertising on broadcast media. As Lewis points out, "under the current state of affairs a car manufacturer may advertise its SUVs on television without limit (finances permitting), but an NGO wishing to publicize the impact of such vehicles on the environment is prohibited, by law, from doing so."[557] Similarly, in Barendt's view:

> It can make no sense to allow commercial ads for automobiles and gas and other products associated with driving, or to allow the government to insert public service adverts … but not to allow groups to pay for political adverts to make the opposite case.[558]

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[551] The ban's impact on political parties is less extreme, since broadcasters are required to provide parties with airtime for party political broadcasts. See *Animal Defenders* ECHR, *supra* note 385, dissenting judgement of Tulkens J at para 14.

[552] Tom Lewis, "*Animal Defenders International v United Kingdom:* Sensible Dialogue or a Bad Case of Strasbourg Jitters?" (2014) 77:3 Mod L Rev 460 at 462.

[553] Joint Committee on The Draft Communications Bill, *Minutes of Evidence,* Sess 2001-02 (17 June 2002) 478–502 (Professor Eric Barendt) [Minutes of Evidence], online: <https://publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2061701.htm>.

[554] *Ibid*.

[555] *Animal Defenders* ECHR, *supra* note 385, dissenting judgement of Tulkens J at para 19.

[556] *Ibid*, dissenting judgement of Ziemele J et al at para 2. Ziemele J also argued that the majority's decision was inconsistent with *VgT Verein gegen Tierfabriken v Switzerland*, No 32772/02, [2001] VI ECHR 243, in which the ECtHR held that a similar prohibition on political advertising in Switzerland contravened the European Convention on Human Rights because it violated freedom of expression and was not necessary in a democratic society.

[557] Lewis, *supra* note 552 at 473.

[558] Minutes of Evidence, *supra* note 553.

Critics of the ban on paid political advertising maintain that less restrictive options exist to level the playing field of public debate.[559] Barendt argues that lawmakers can prevent "the domination of politics by ultra rich … groups" through spending limits on advertising and restrictions on "the number of spots which could be purchased."[560] Both supporters and critics of the ban also question why it applies only to broadcast media.[561] Television and radio are declining in importance, while digital advertising, particularly on social media websites, is growing in importance. As a result, the goal of promoting a level playing field is undermined by the lack of regulation governing digital political advertisements, leading some commentators to argue that regulation should be extended to non-broadcast media.[562]

Other criticisms of UK campaign finance law include the parsimoniousness of the public funding regime, which derives partly from public hostility toward the public funding of election campaigns.[563] Keith Ewing and Jacob Rowbottom also point to holes in the reporting requirements for third parties. Regulations do not cover internal communications between organizations and their members, while some third parties, like newspaper companies, are excluded altogether.[564] In addition, Ghaleigh criticizes the lack of sanctioning options for contraventions of *PPERA*. The Electoral Commission may either issue a reprimand, which is essentially "nothing," or refer the matter to the criminal prosecution authorities, which may be overly heavy-handed in some cases.[565] Finally, because of the Electoral Commission's "broad range of duties," some critics warn against the "risk of overburdening."[566]

## 10. CANADA

Canada's federal campaign finance regime is more extensive than the regulatory regime in the US or the UK. In Canada, both contributions and expenditures are capped. A "remarkable degree of consensus"[567] exists regarding the need for campaign expenditure ceilings for parties and candidates, with no constitutional challenges or significant legislative proposals targeting caps. Third-party spending limits have been challenged but upheld by the Supreme Court of Canada (SCC).[568] Further, in 2003, Parliament introduced

[559] Andrew Scott, "'A Monstrous and Unjustifiable Infringement'?: Political Expression and the Broadcasting Ban on Advocacy Advertising" (2003) 66:2 Mod L Rev 224; Sarah Sackman, "Debating 'Democracy' and the Ban on Political Advertising" (2009) 72:3 Mod L Rev 475; Minutes of Evidence, *supra* note 553.

[560] Minutes of Evidence, *supra* note 553. See also Sackman, *supra* note 559 at 482. Barendt also suggests that radio and television can be distinguished from each other in designing a regulatory regime, as the price of advertising on radio "would not be extortionate." Thus, the potential for distortion by the wealthy is smaller in the context of radio advertising: Minutes of Evidence, *supra* note 553.

[561] See e.g. Sackman, *supra* note 559 at 484.

[562] Tambini et al, *supra* note 108 at 4, 8, 21.

[563] Fisher, *supra* note 372 at 165.

[564] Ewing & Rowbottom, *supra* note 103 at 82.

[565] Ghaleigh, "The Regulator", *supra* note 527 at 157.

[566] Ghaleigh, "Expenditure, Donations and Public Funding", *supra* note 26 at 43.

[567] Young, *supra* note 6 at 121.

[568] *Harper*, *supra* note 52.

"one of the most generous schemes for public funding of political parties that has been seen in a liberal democracy,"[569] although an important element of that scheme was repealed in 2014.

## 10.1 Constitutional Rights and Campaign Finance Regulation

### 10.1.1 Freedom of Expression

Freedom of expression is enshrined in section 2(b) of the Canadian *Charter of Rights and Freedoms* (the *Charter*). In *R v Keegstra*,[570] the SCC stated that "[t]he connection between freedom of expression and the political process is perhaps the linchpin of the section 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy." The test for determining whether legislation infringes section 2(b) is found in *Irwin Toy Ltd v Quebec*.[571] First, a court will ask whether the activity in question fits within the sphere of activities protected by freedom of expression. This first step is established easily in regards to election-related communications, as political expression "lies at the core of the guarantee of free expression."[572] Second, a court will ask whether the legislation's purpose or effect is to restrict freedom of expression.

Freedom of association is protected under section 2(d) of the *Charter.* According to the SCC, section 2(d) facilitates the exercise of other freedoms and guarantees the ability to exercise *Charter* rights collectively.[573] The right to vote is protected under section 3 of the *Charter*.

Once an infringement of a *Charter* right is established, courts consider section 1 of the *Charter.* Section 1 allows the impugned law to stand if the limit on the right in question is reasonable and demonstrably justifiable in a free and democratic society. At the section 1 stage of the analysis, courts ask whether the objective of the impugned law is pressing and substantial and whether the means chosen by the legislature are proportionate to its ends. In considering proportionality, the courts ask whether the means are rationally connected to the law's objectives, whether the impairment of *Charter* rights is as little as is reasonably possible and whether the deleterious and salutary effects of the law are proportionate.[574]

### 10.1.2 Constitutional Validity of Campaign Finance Regulation

#### 10.1.2.1 *Canada v Somerville*

Spending limits for third-party campaigners (individuals, businesses, unions, and other organizations) have been challenged several times in Canada. Although the SCC upheld limits in *Harper*,[575] discussed further below, the Alberta Court of Appeal earlier struck down

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[569] Young, *supra* note 6 at 107.
[570] *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1.
[571] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.
[572] *Harper, supra* note 52 at para 66.
[573] *Libman, supra* note 56 at para 36.
[574] *R v Oakes*, [1986] 1 SCR 103; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 94.
[575] *Harper, supra* note 52.

a CDN$1,000 cap on third-party spending on election advertising in *Somerville*.[576] According to the Alberta Court of Appeal in *Somerville*, third-party spending limits "severely limit[ed]" the communicative power of third parties, thus violating their right to freedom of expression.[577] The spending limits also constituted a limit on freedom of association since they prevented people from combining "resources to pursue common goals, influence others, exchange ideas and effect change."[578] Further, the Alberta Court of Appeal found that the impugned provisions violated the right to vote under section 3 of the *Charter*. In the Court's view, the limits had "the effect of obstructing citizens' access to information to such an extent that the right to cast an 'informed vote' is breached."[579]

The Court held that the impugned provisions could not be justified under section 1 of the *Charter*. Without effective third-party advertising, citizens would only be as informed "as the news media, the parties and the candidates themselves want the citizens to be."[580] The Court rejected the government's argument that the law was intended to prevent distortion of the political process. Rather, in the Court's view, the spending limits had the unacceptable objective of preserving the preferential position of political parties by preventing third parties from being "heard in any effective way."[581]

#### 10.1.2.2 *Libman v Quebec*

In *Libman*, the SCC struck down a provision in the province of Quebec that restricted third-party campaigning in referendums.[582] The statutory provisions at issue in the *Libman* case allowed only minimal spending by individuals or groups that did not become affiliated organizations of the official, registered committees in a referendum. These restrictions led the SCC to conclude that the entire law was unconstitutional as it did much more than "minimally impair" the freedom of expression of these individuals and groups, and therefore failed that part of the section 1 *Charter* analysis.[583]

However, in *Libman*, the SCC accepted in principle the constitutionality of third-party spending limits in referendums and elections. The SCC found that the three objectives of the legislation were pressing and substantial. The first objective was the egalitarian goal of ensuring the wealthy do not have a "dis-proportionate influence by dominating the referendum debate."[584] Second, the spending limits aimed to facilitate informed voting "by ensuring some positions are not buried by others."[585] The third objective was to encourage

[576] *Somerville, supra* note 72.
[577] *Ibid* at para 48.
[578] *Ibid* at para 26.
[579] *Ibid* at para 48.
[580] *Ibid*.
[581] *Ibid* at para 76.
[582] *Libman, supra* note 56.
[583] *Ibid* at paras 74–77.
[584] *Ibid* at para 41.
[585] *Ibid*.

public confidence by demonstrating that the political process is not "dominated by the power of money."[586]

Moving to the next stage of the section 1 analysis, the SCC found that the third-party spending limits were rationally connected to their three objectives.[587] Based on the report of the Lortie Commission,[588] the SCC remarked that third-party spending must be limited to ensure the effectiveness of party and candidate spending limits, which are, in turn, key to electoral fairness.[589] The SCC also accepted that third-party spending limits must be lower than limits for candidates and parties because private resources are unlikely to be spread equally across candidates and policy positions.[590] If limits are too high, third-party spending could produce "disproportionate" and unfair advantages for certain candidates.[591]

The SCC stated in *Libman* that it was up to the legislature to decide what larger amount non-affiliated groups and individuals should be allowed to spend on paid advertising during a referendum. However, it strongly suggested that it agreed with the Lortie Commission's proposal of a CDN$1,000 limit at the national level and a proportionally lower amount at a provincial level.[592] In doing so, the SCC explicitly rejected the Alberta Court of Appeal's ruling in *Somerville* that found a limit of CDN$1,000 on ad spending by a third party during a federal election (along with a requirement to disclose the sponsor of each ad and a prohibition on colluding with anyone else to exceed the limit) to be unconstitutional because it was much lower than the spending limit for parties and candidates.[593]

#### 10.1.2.3 *Harper v Canada*

Despite the *Libman* precedent, in the subsequent *Harper* case filed in the fall of 2000, the courts in Alberta continued to reject a limit on third-party advertising spending even though the limit had been increased by the federal government significantly, leading through appeals to the SCC's 2004 ruling in the case. *Libman* set the stage for *Harper*, in which the SCC upheld third-party spending limits and accepted that Parliament may choose an "egalitarian model of elections."[594] The impugned provisions of the *Canada Elections Act* (the *CEA*) limited third-party spending on "election advertising" to CDN$150,000, of which only CDN$3,000 could be spent in a given electoral district.[595] Election advertising includes taking a position on an issue with which a candidate is associated, otherwise known as issue advertising. The SCC also upheld registration and disclosure requirements for third parties.

Although the impugned spending limits infringed freedom of expression, the majority of the SCC found the infringement was justified. The spending limits had the pressing and

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[586] *Ibid*.
[587] *Ibid* at para 57.
[588] Royal Commission on Electoral Reform and Party Financing, *supra* note 119.
[589] *Libman, supra* note 56 at paras 43–54.
[590] *Ibid* at para 50.
[591] *Ibid*.
[592] *Ibid* at paras 80–81.
[593] *Ibid* at paras 55, 79.
[594] *Harper, supra* note 52 at para 62.
[595] See Section 10.2.3.1(b) for the definition of "election advertising" and the current third-party spending limits under the *CEA*.

substantial objectives of reducing the domination of political discourse by the wealthy, preventing circumvention of candidate and party spending limits, and enhancing public confidence in the electoral system.[596] The spending limits also satisfied the proportionality test under section 1 of the *Charter*. At this stage of the analysis, the majority emphasized the need for "deference to the balance Parliament has struck between political expression and meaningful participation."[597]

The challenger, Stephen Harper, who would later win the 2006 election and become Prime Minister of Canada, led a third-party group called the National Citizens Coalition. Harper argued that the impugned third-party spending limits unjustifiably infringed the right to vote in section 3 of the *Charter* by hindering electoral debate. However, the majority of the SCC held that the impugned provisions actually enhanced the right to vote. Section 3 imports the "right to play a meaningful role in the electoral process,"[598] but this does not confer the right "to mount a media campaign capable of determining the outcome"[599] of an election. Rather, the right to "play a meaningful role in the electoral process" encompasses the right to an informed vote. Since "unequal dissemination of points of view undermines the voter's ability to be informed," measures that promote "equality in the political discourse,"[600] such as the impugned spending limits, facilitate informed voting and meaningful participation.

The majority of the SCC framed *Harper* as a clash between the right to meaningful participation under section 3 and the right to freedom of expression under section 2(b).[601] In this case, the right to meaningful participation prevailed. The majority warned, however, that spending limits must not be so low that conveying information becomes impossible, as this could jeopardize the "informational component of the right to vote."[602] Parliament must therefore find a middle road between overly stringent restrictions on the dissemination of information and overly permissive spending ceilings that allow some speakers to drown out others.

The dissent disagreed on the location of this middle road, but did not explicitly reject the constitutionality of all third-party spending limits. In light of the expense involved in mass communication, the dissent viewed the impugned spending ceiling as so low that it "effectively denies the right of an ordinary citizen to give meaningful and effective expression to [their] political views during a federal election campaign."[603] As a result, "effective communication" during elections was "confined to registered political parties and their candidates."[604] This could lead to inadequate coverage of viewpoints and issues

[596] *Harper, supra* note 52 at para 92.
[597] *Ibid* at para 111. Dawood argues that, in light of the risk of "partisan self-dealing" in the design of campaign finance laws, courts "should not automatically defer to Parliament when reviewing laws that govern the democratic process": Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62:4 UTLJ 499 at 505.
[598] *Harper, supra* note 52 at para 70.
[599] *Ibid* at para 74.
[600] *Ibid* at paras 71-72.
[601] *Ibid* at para 50.
[602] *Ibid* at para 73.
[603] *Ibid* at para 1.
[604] *Ibid* at para 2.

unpopular with parties and candidates.[605] The spending caps, therefore, undermine "the right to listen" and "curtail the diversity of perspectives heard."[606]

Feasby notes that the *CEA*'s third-party spending limits could be vulnerable to a fresh *Charter* challenge. In *Harper*, the majority held that evidence of a reasoned apprehension of harm is sufficient to justify an infringement of freedom of expression in cases involving "inconclusive or conflicting social science evidence of harm."[607] However, since *Harper*, more evidence on third-party spending has become available owing to the accumulation of data from third-party disclosure requirements.[608] The disclosed information suggests there is little "appetite amongst third parties for big money campaigns."[609]

#### 10.1.2.4 *Reference re Election Act (BC)*

Advertising spending limits for third parties between elections have been set in a few jurisdictions in Canada, but only for 40-60 days before a fixed date election campaign period begins. In the only two rulings on a pre-election limit, both by the Court of Appeal in the province of British Columbia (BC), the limit was rejected as unconstitutional based on the overbroad definition of advertising in the statutory provision.[610] The definition covered not only advertising that promoted or opposed a candidate or party, but also advertising about issues. As a result, the limit did not minimally impair freedom of expression. In the first case, the provision was also ruled unconstitutional because the advertising restriction period overlapped with the sitting of the legislature which, the court concluded, is an important time period for allowing third parties to advocate their views.[611]

In November 2017, the BC legislature again amended its provincial election law to limit third-party ad spending (including on canvassing by phone or in person and on mailings) during the 60-day period before the election campaign period and during election campaigns. However, for the pre-election period, the law attempts to address the concerns expressed in the court rulings with a more specific limit that only applies to advertising that "directly promotes or opposes"[612] a party or candidate (during the election campaign period,

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[605] *Ibid* at para 14.

[606] *Ibid* at para 19. The dissenting justices on the US Supreme Court have also turned to the idea that free speech protects both a right to speak and a right to hear. However, they have used this idea in support of spending limits. See e.g. *Citizens United*, *supra* note 29 at 473.

[607] *Harper*, *supra* note 52 at para 77.

[608] Feasby, *supra* note 90 at 211.

[609] *Ibid* at 211–12.

[610] *Reference re Election Act (BC)*, 2012 BCCA 394; *British Columbia Teachers' Federation v British Columbia (Attorney General)*, 2011 BCCA 408 [*BC Teachers' Federation*].

[611] *Reference re Election Act (BC)*, *supra* note 610 at paras 36–37, refers back to the ruling in *BC Teachers' Federation, supra* note 611. See discussions of this issue in: Tom Flanagan, "Political Communication and the 'Permanent Campaign,'" in David Taras & Christopher Waddell, eds, *How Canadians Communicate IV: Media and Politics* (Edmonton: Athabaska Press, 2012).

[612] *Election Act*, RSBC 1996, c. 106, ss 1(1)–(3), Part 11. In the province of Manitoba, *The Election Financing Act*, CCSM 2012, c E27, ss 115 and 82–83 limit ad spending by third parties to CDN$100,000 during the 90 days before the election campaign period and to CDN$25,000 during the campaign.

issue-related advertising is also limited). The new BC statutory provisions have not, as of spring 2021, been challenged in court.

## 10.2 Regulatory Regime

This section describes the campaign financing regime for federal parliamentary elections in Canada. Federal campaign financing is governed by the *CEA*,[613] which was most recently amended by Bill C-50[614] and Bill C-76, in ways that affect the political finance system.[615] Both bills were enacted in December 2018, with some provisions of Bill C-76 coming into effect in spring 2019. Each province has also enacted its own regime in relation to campaign financing for elections to the provincial legislative assemblies.

The primary features of the federal regime are:

a) contribution limits for political parties and candidates, including nomination contest candidates and political party leadership candidates;

b) source restrictions on contributions to political parties and candidates, and to third-parties only in terms of a prohibition on foreign funding;

c) spending limits for third-parties, political parties, and candidates, including nomination race contestants, but not party leadership contestants as a party is allowed to set its own limit for its leadership race;

d) transparency requirements for third-parties, political parties, and all types of candidates; and

e) a public funding scheme involving reimbursements and tax credits and free broadcast advertising time.

Unlike regulatory regimes in the UK and the US, the federal regime in Canada limits both the supply of and demand for money in elections, as politicians are subject to limits on the size of donations they may receive and the amount of money they may spend on election campaigns. By contrast, the federal regime in the US imposes caps only on political contributions, not spending. The UK, on the other hand, imposes spending caps on politicians and third-party campaigners, but has no contribution ceilings.

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[613] *CEA*, *supra* note 10.

[614] Bill C-50, *An Act to Amend the Canada Elections Act (political financing)*, 1st Sess, 42 Parl, 2018, online: <https://www.parl.ca/LegisInfo/en/bill/42-1/C-50>.

[615] Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess, 42 Parl, 2018, online: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9808070>.

### 10.2.1 Campaign Financing

#### 10.2.1.1 Spending Limits

The provisions discussed in this section apply to expenditures by candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

*a) Expenses Captured by Spending Limits*

The spending limits in the *CEA* apply to "election expenses," which are defined in section 376(1). Election expenses include any costs incurred or non-monetary contributions received by a registered party or candidate for goods or services used to directly promote or oppose a party, its leader, or a candidate during an election period. The definition also expressly includes some specific types of expenses, such as costs incurred or non-monetary contributions provided for the production of promotional material and for the publication or broadcast of that material.[616] Other specific types of expenses include: expenses to make campaign activities and materials accessible to people with disabilities, travel and living expenses for the candidate, personal expenses of the candidate, and some litigation expenses.[617] "Expenses" are defined in section 349 to include the commercial value of products (property) or services that are donated or provided, other than volunteer labour.[618] The "election period" begins when the writ is issued and ends on polling day.[619] Expenses outside of this period are not included in the definition of election expenses. Given their campaigns are different from general elections, with often a more extended campaign period, slightly different definitions of "expenses" apply to nomination race contestants[620] and party leadership race contestants.[621] Still, the categories of exclusions are the same other than the exclusion for accessibility expenses.

Bill C-76, established a new, pre-election period. If an election is held on the fixed date (the third day in October every four years) the pre-election period begins June 30th and ends the day the election period begins.[622] During this period, spending by parties on partisan advertising[623] is limited.[624] However, the limit is so high that it is essentially meaningless as

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[616] *CEA*, *supra* note 10, s 376(3).
[617] *Ibid*, ss 376(3.1), 377.2, 378(1), 377.1.
[618] *Ibid*, s 349. See also Canada, *Elections Canada, Political Financing Handbook for Nomination Contestants and Financial Agents*, (Guideline) OGI 2018-08 at 21, online: <https://www.elections.ca/res/gui/app/2018-07/2018-07_e.pdf>.
[619] *CEA*, *supra* note 10, s 2(1).
[620] *Ibid*, ss 374.1–374.4.
[621] *Ibid*, ss 379.1–379.4.
[622] *Ibid*, s 2(1).
[623] Partisan advertising is defined as advertising that promotes or opposes a party, nomination contestant, candidate, or party leadership contestant (if a party happens to be having a leadership race at that time).
[624] *Ibid*, s 429.1, 429.2.

no party will likely spend that much on advertising during the pre-election period.[625] In 2019, the limit was slightly more than CDN$2 million and it increases annually at the rate of inflation. If the election is not held on the fixed election date, then the provisions concerning the pre-election period are not in force.

*b) Spending Limits*

*(i) Registered Parties*

A registered party's election expenses limit is calculated by multiplying an amount of money per registered voter (CDN$1.06 in 2019, increased annually at the rate of inflation) by the number of voters in all electoral districts in which the party has candidates.[626] If the election period lasts longer than 36 days, the limit is increased by a certain amount for each day beyond the 36 day period. Typically, the election period is between 36–42 days. For example, in the 40 day pre-election period of the 2019 election, expense limits for parties with candidates in every district was a typical amount of approximately CDN$29 million. However, in the 2015 general election that lasted 78 days, parties that had candidates in every electoral district had spending limits of approximately CDN$54.9 million.[627] Bill C-76 amended the *CEA* to limit the election period to 50 days maximum.[628] Transfers of funds from a registered party to its candidates do not count toward the spending limit under the *CEA*.[629] The *CEA* also expressly prohibits a registered party and a third party from colluding to circumvent the spending limit[630] and from sharing information to coordinate campaign activities.[631]

*(ii) Candidates*

The election expense limit for each candidate in each electoral district is calculated by multiplying the number of voters in the district by amounts of money per registered voter (with higher amounts for the initial 15,000, and then 10,000, voters in the district). Amounts increase annually at the rate of inflation.[632] The expense limit is higher in districts with low population density because of increased costs of travel to reach voters.[633]

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[625] "Partisan Advertising Expenses Limit for Registered Political Parties" (last visited 31 October 2021) online: *Elections Canada* <https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limpol_partisan&lang=e>.

[626] *CEA*, *supra* note 10, s 430(1).

[627] "Final Election Expenses Limits for Registered Political Parties: 42nd General Election October 19 2015" (last visited 31 October 2021) online: *Elections Canada* <http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/pollim&lang=e>.

[628] *CEA*, *supra* note 10, s 57(1.2)(c).

[629] *Ibid*, s 430(3). See also Elections Canada, *Irregular Transfers Between Affiliated Political Entities*, (Interpretation Note), OGI 2020-07, online (pdf): <https://www.elections.ca/res/gui/app/2020-07/2020-07_e.pdf>.

[630] *CEA*, *supra* note 10, s 431(2).

[631] *Ibid,* s 351.01(1).

[632] *Ibid*, ss 477.49(1), 477.5.

[633] *Ibid*, s 477.5(6).

For example, in the 2019 election, the approximate limits for districts across Canada varied from a low of CDN$86,000 to a high of CDN$145,000, with an average of CDN$110,000.[634] The limit is increased if the election period lasts longer than 36 days up to the maximum election period of 50 days.[635] Like registered parties, candidates, and their agents and associates are prohibited from colluding with third parties to circumvent the spending limit[636] and from sharing information to coordinate campaign activities.[637] The Chief Electoral Officer may also establish categories of personal expenses and fix maximum amounts that may be incurred by election candidates.[638] However, at the time of writing, no personal expense limits appear to exist.

For a contestant in a nomination contest to become an election candidate, the expense limit is 20% of the limit for a candidate in the previous election in that district (unless the district boundaries have changed since the last election).[639]

As noted above, spending limits for political party leadership contests are set by the party's governing body. A party is required to give the Chief Electoral Officer (CEO) notice of when the contest will begin and end.[640]

*(iii) Electoral District Associations*

During the election period, electoral district associations of registered parties are prohibited from transmitting election advertising or incurring any expenses for election advertising.[641] Associations are only permitted to produce and place partisan advertising messages during the pre-election period (if the pre-election period provisions apply) if they are limited substantially to the district or if they are provided or sold to the association's party.[642]

#### 10.2.1.2 Contributions

The provisions discussed in this section apply to contributions to candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

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[634] "Final Election Expenses Limits for Candidates, 43rd General Election October 21, 2019" (last visited 31 October 2021), online: *Elections Canada* <https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limitcan&lang=e>.

[635] *CEA*, *supra* note 10, s 477.49(2).

[636] *Ibid*, s 477.52(2).

[637] *Ibid*, s 351.01(2)–(3).

[638] *Ibid*, s 378(2). "Personal expenses" are defined in section 378 of the *CEA*.

[639] *Ibid*, s 476.67. See "Limits on Nomination Contest Expenses: Nomination Contests Held to Select a Candidate after the October 21, 2019, General Election," (last visited 31 October 2021), online: *Elections Canada* <https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limitnom&lang=e>.

[640] *CEA*, *supra* note 10, s 478.1.

[641] *Ibid*, s 450(1). Election advertising is defined in section 319 of the *CEA*. The definition of election advertising is discussed in Section 10.2.3.1, in the context of third-party campaigners.

[642] *CEA*, *supra* note 10, ss 449.1–449.2.

*a) Definition of "Contribution"*

Under the *CEA*, a "contribution" can be monetary or non-monetary (property, use of property, and services) and includes money from a candidate's own funds.[643] Non-monetary transactions or contributions are required to be at fair market value.[644] Loans are only allowed from registered financial institutions and individuals, and the outstanding amount of a loan from an individual cannot exceed an individual's contribution limit when combined with any other contributions made by that individual.[645] Transfers and loans between the party, its electoral district associations, and its candidates are not included under the definition of contribution.[646] Thus, the *CEA* targets "money being transferred from the private to the political domain,"[647] not transfers within the political domain. Other exclusions from the definition of contribution include annual party membership fees of CDN$25 or less.[648] However, the *CEA* expressly includes fees for party and leadership conventions within the definition of contribution.[649] The *CEA* also clarifies that, if a candidate or party sells tickets to a campaign fundraising event, the amount of the contribution will be the difference between the price of the ticket and its fair market value.[650]

*b) Source Restrictions*

Contributions are only permitted from individuals who are Canadian citizens or permanent residents.[651] Similarly, loans are permitted only from certain financial institutions or from individuals who are Canadian citizens or permanent residents.[652] This means corporations (other than financial institutions), unions, and other non-natural legal persons cannot donate or make loans to a political party or candidate. However, these entities can make contributions to third parties for the purpose of election advertising, as discussed further below, or engage as a third party in campaigning themselves.

Members of Parliament (MPs) are prohibited by various provisions and Elections Canada's enforcement policy from using the MP resources or staff time to contribute in support of their own campaign during the pre-election period (if they are running for re-election) or to support nomination or party leadership contestants when those contests occur.[653]

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[643] *Ibid*, ss 2(1), 364(1).
[644] Elections Canada, *Contributions and Commercial Transactions*, (Interpretation Note), OGI 2017-06, online (pdf): <https://www.elections.ca/res/gui/app/2017-06/2017-06_e.pdf>.
[645] *CEA*, *supra* note 10, s 373.
[646] *Ibid*, ss 364(2)–(4), 373(5).
[647] Feasby, *supra* note 90 at 208. Although some transfers within the political domain are prohibited, see Elections Canada, *Irregular Transfers Between Affiliated Political Entities*, (Interpretation Note), OGI 2020-07, online (pdf): <https://www.elections.ca/res/gui/app/2020-07/2020-07_e.pdf>.
[648] *CEA*, *supra* note 10, s 364(7).
[649] *Ibid*, s 364(8).
[650] *Ibid*, s 377.
[651] *Ibid*, s 363(1).
[652] *Ibid*, ss 373(3)–(4).
[653] Elections Canada, *The Use of Member of Parliament Resources Outside of an Election Period*, (Interpretation Note), OGI 2020-04, online (pdf): <https://www.elections.ca/res/gui/app/2020-04/2020-04_e.pdf>.

Attempts to conceal the identity of the source of a contribution are prohibited by section 368 of the *CEA.* Indirect contributions and loans are also prohibited, as source restrictions and contribution limits could otherwise be circumvented.[654] This means an individual cannot make a contribution using money from another person or entity that was provided for the purpose of making a contribution.[655]

*c) Contribution Limits*

In 2021, individuals may contribute (in money, property, use of property and/or services the individual would usually charge for) no more than a total of CDN$1,650 per calendar year to a particular registered party and no more than CDN$1,650 per calendar year as an overall combined total to the registered electoral district associations, candidates, and nomination contestants of a registered party.[656] The limit automatically increases by $25 annually.[657] The same limit applies to contributions to political party leadership contestants.[658]

As mentioned above, the outstanding amount of any loans made by an individual counts toward their contribution limit.[659] However, banks and other federally regulated financial institutions are allowed to loan an unlimited amount of money to district associations, candidates, contestants, and political parties. This is, arguably, one of the most unethical aspects of Canada's system. Since, usually, every party has a bank loan to finance its election campaign, MPs may have a conflict of interest when addressing proposals concerning financial institutions and financial services issues.[660]

Candidates are allowed to contribute up to CDN$5,000 to their own campaign, and leadership contestants are allowed to contribute up to CDN$25,000 to their own campaign.[661] Section 368(1) of the *CEA* prohibits attempts to circumvent contribution limits.

#### 10.2.1.3 Transparency Requirements

*a) Registered Parties*

Registered parties are required to submit an election expenses return to the Chief Electoral Officer after a general election, along with an auditor's report and a declaration by the party's chief agent that the return is complete and accurate.[662] The return is required to set out all election expenses incurred and non-monetary-contributions used as election expenses.[663] Aside from this election-expense reporting requirement, registered parties are

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[654] *Canada Elections Act,* SC 2000, c 9, ss 370, 373.
[655] *Ibid*, s 370(1).
[656] *Ibid,* ss 367(1)–(1.1). "Limits on Contributions: Limits on Contributions, Loans and Loan Guarantees" (last visited 31 October 2021) [Limits on Contributions], online: *Elections Canada* <https://www.elections.ca/content.aspx?section=pol&dir=lim&document=index&lang=e>.
[657] *Ibid*, ss 367(1)–(1.1); Limits on Contributions, *supra* note 656.
[658] *CEA*, *supra* note 10, s 367(1)(d).
[659] *Ibid*, s 373.
[660] *Ibid*, s 373(3).
[661] *Ibid*, ss 367(6)–(7).
[662] *Ibid*, s 437(1).
[663] *Ibid*, s 437(2).

also subject to ongoing reporting requirements. Each quarter, and annually by July 1st of each year covering the previous calendar year, the party's chief agent is required to provide the Chief Electoral Officer with a financial transactions return, along with an auditor's report and a declaration by the chief agent that the return is complete and accurate.[664] The financial transactions return is required to set out contributions received by the party during the quarter or year; the number of contributors; the name and address of contributors who gave more than CDN$200; the value of goods, services, or funds transferred by the registered party to a candidate or electoral district association (and vice versa); and a statement of election expenses incurred in by-elections during the fiscal period, among other things.[665]

Parties are also required to disclose in or on an election advertising message that the message has been authorized by the official agent of the party.[666]

Bill C-50 in 2018 added a new disclosure requirement for parties in-between election periods. The requirement applies to a fundraising event that will be attended by a Cabinet minister or the leader, interim leader or leadership contestant of a registered party and an event that is organized by a party or anyone or any entity to raise money for the party, an electoral district registered association, nomination contestant, candidate or leadership contestant of a registered party.[667] The requirement does not apply to events that are held during an election period at a party leadership race debate or events at a party convention with a ticket price that amounts to a contribution of less than CDN$200 or that are to "express appreciation" for individuals who have made a contribution to the party.[668]

Events that meet the disclosure requirement must be published "in a prominent location" on the parties website prior to the event. The publication is required to include: the date, time, and location of the event; who or what entity it is benefitting; which leader and/or minister(s) are attending; the ticket price (and amount of the price that is a contribution); and the event contact person.[669] Within 30 days after the event, the party is required to file a report with the Chief Electoral Officer (CEO) containing all the same information, as well as the name and municipality of all attendees (subject to named exceptions) and a list of every person or entity "that organized the event or any part of it."[670] The CEO maintains a registry of the events on Elections Canada's website.[671]

For all such fundraising events that are held during an election period, a party is required, within 90 days after election day, to file with the CEO one report covering all the events and containing the required information listed above.[672]

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[664] *Ibid*, s 432(1).
[665] *Ibid*, s 432(2).
[666] *Ibid*, s 320.
[667] *Ibid*, s 384.1(1).
[668] *Ibid*, ss 384.1(2)–(4).
[669] *Ibid*, s 384.2.
[670] *Ibid*, ss 384.3(1)–(7). See "Regulated Fundraising Events Registry" (last visited 31 October 2021) [Regulated Fundraising], online: *Elections Canada* <https://www.elections.ca/content.aspx?section=fin&dir=reg&document=index&lang=e>.
[671] *Ibid*, ss 384.3(1)–(7). Regulated Fundraising, *supra* note 670.
[672] *Ibid*, ss 384.4(8)–(12).

*b) Candidates*

Election candidates are required to disclose in or on an election advertising message that the message has been authorized by the official agent of the candidate.[673] A candidate's official agent is also required to provide the CEO with an electoral campaign finance return within four months of election day, along with an auditor's report and declaration by both the official agent and the candidate that the return is complete and accurate.[674] The return is required to set out the candidate's election expenses, loans, contributions, and the identity of contributors who gave more than CDN$200, among other things.[675] The return is also required to state any "electoral campaign expenses" not already reported as election expenses.[676] Electoral campaign expenses are defined as any "expense reasonably incurred as an incidence of the election,"[677] including personal expenses, travel and living expenses, accessibility expenses, and litigation expenses. Further, the candidate is required to send their official agent a written statement setting out personal expenses paid by the candidate.[678]

For a nomination contest to select a party's election candidate in an electoral district, a party or the district association is required to file a report with the CEO within 30 days after the selection vote date. The report is required to set out the date of the selection vote, the contestants' names and addresses, and the name of the winner.[679] A person is considered to be a contestant as soon as they accept a contribution, incur an expense, or borrow money, and is required at that time to appoint a financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments.[680] Nomination race contestants who accept more than CDN$1,000 in contributions or spend more than CDN$1,000 on their campaign are also required to file with the CEO, within four months after the conclusion of the selection vote day, a campaign return that lists all campaign expenses (including personal expenses), loans, contributions, and the identity of contributors who gave more than CDN$200, among other things.[681]

Party leadership race contestants are required to register with the CEO as soon as they receive a contribution or incur a campaign expense, including appointing and identifying their financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments, and their auditor for the campaign account.[682] Unlike nomination contest and election candidates, leadership contestants who accept more than CDN$10,000 in contributions or spend more than CDN$10,000 on their campaign are required to file a return with the CEO covering the period from the start of their campaign up to four weeks before the leadership voting day, and a second return one week before

[673] *Ibid*, s 320.
[674] *Ibid*, s 477.59(1).
[675] *Ibid*, s 477.59(2).
[676] *Ibid*, ss 477.59(2)(b), 477.64.
[677] *Ibid*, s 375.
[678] *Ibid*, s 477.64(1).
[679] *Ibid*, s 476.1.
[680] *Ibid*, ss 476.2–476.66.
[681] *Ibid*, s 476.75(1).
[682] *Ibid*, ss 478.2–478.3, 478.5–478.66, 478.71–478.73, 478.83, 478.85.

voting day that covers the three-week period after the first report. Both reports are required to list loans, contributions, and the identity of contributors who gave more than CDN$200, among other things.[683] Leadership contestants are also required to file with the CEO, within six months after the leadership voting day, an audited campaign return that lists all campaign expenses (including personal expenses), loans, contributions, and the identity of contributors who gave more than CDN$200, among other things.[684]

*c) Electoral District Associations*

Electoral district associations are subject to annual reporting requirements, not election-specific reporting requirements. This is because they are not allowed to spend money during election periods other than transferring money to the campaign account of the association's registered candidate. Associations are required to submit a financial transactions return to the CEO by June 1st of each year for transactions during the previous calendar year. The return is required to state contributions, the identity of donors who give more than CDN$200, expenses, loans, and other items.[685] The report is required to be accompanied by an auditor's report and a declaration by the association's financial agent that the return is complete and accurate.[686]

### 10.2.2 Public Funding

#### 10.2.2.1 Quarterly Allowances

Quarterly allowances for registered parties, based on the number of votes received by a party in the previous election (the amount in 2014 was approximately CDN$2 per vote) were phased out by the Conservative federal government beginning in 2014. The phasing-out process ended in 2016.[687]

#### 10.2.2.2 Reimbursement of Election Expenses

In the 2015 general election (which lasted 78 days) reimbursements of election expenses for all registered parties and candidates totalled approximately CDN$104 million.[688] On the other hand, in the 2019 general election, reimbursements totaled CDN$64.4 million.[689] Registered parties are reimbursed for 50% of their election expenses if the candidates endorsed by the party receive at least 2% of the votes cast in the election or 5% of the votes

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[683] *Ibid*, s 478.81.
[684] *Ibid*, ss 478.8, 478.86–478.93.
[685] *Ibid*, s 475.2(1).
[686] *Ibid*, s 475.4(1).
[687] *Ibid*, s 445(2). A private member's bill was proposed to reintroduce quarterly allowances, but was not enacted. See Sess Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess, 42 Parl, 2018.
[688] "Remarks of the Chief Electoral Officer of Canada Before the Committee on General Government: July 26, 2016" (last visited 31 October 2021) [CEO Remarks], online: *Elections Canada* <http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>.
[689] "Estimated Cost of the 43rd General Election" (last visited 31 October 2021, online: *Elections Canada* <https://www.elections.ca/content.aspx?section=res&dir=rep/off/cou&document=index43&lang=e>.

cast in electoral districts in which the party ran candidates.[690] If a candidate gets at least 10% of the vote but only spends 30% or less of their total spending limit, they will be reimbursed for 15% of the total amount they were permitted to spend under section 477.49 of the *CEA*.[691] If a candidate receives at least 10% of the vote and incurred more than 30% of the total amount they were allowed to spend, they will be reimbursed for 60% of their paid election expenses or 60% of the total amount they were allowed to spend, whichever is less.[692] Electoral district associations may also be reimbursed up to CDN$1,500 for auditing expenses incurred to meet the requirements of the *CEA*.[693]

#### 10.2.2.3 Tax Deductions

Monetary contributions to registered parties, registered electoral district associations, and candidates entitle the donor to a tax credit under the *Income Tax Act*.[694] The amount of the credit is based on the size of the donation. Donations up to CDN$400 entitle the donor to a 75% tax credit. Donations over CDN$400 entitle the donor to a CDN$300 tax credit plus 50% of the amount by which the donation exceeds CDN$400. The tax credit is decreased further for donations over CDN$750.[695] This scheme is intended to encourage small contributions from a broad range of donors.[696]

#### 10.2.2.4 Free Broadcasting Time

Free broadcasting time is reserved and allocated to political parties for political broadcasts during elections.[697] The allocation is based on performance in the last election, but the Broadcasting Arbitrator can modify the allocation if necessary for fairness or the public interest.[698] The allocation scheme was challenged in *Reform Party of Canada v Canada* on the basis that it entrenched incumbents and therefore breached the rights of smaller parties to freedom of expression and equality.[699] However, the allocation system was upheld, although the Broadcast Arbitrator subsequently adopted a practice of allocating one-third of the available time equally among all registered parties.[700] The Court also held that a prohibition on the purchase of additional broadcasting time by political parties was an unjustifiable limit on freedom of expression. This can be contrasted with the UK, in which the House of Lords and the European Court of Human Rights have upheld a blanket ban on paid political advertising.[701]

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[690] *CEA*, *supra* note 10, s 444.
[691] *Ibid*, s 477.73(1).
[692] *Ibid*, s 477.74.
[693] *Ibid*, s 475.8.
[694] *Income Tax Act,* RSC 1985, c 1 (5th Supp), s 127(3).
[695] "The Electoral System of Canada: Political Financing" (last visited 31 October 2021), online: *Elections Canada* <http://www.elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e>.
[696] Gauja, *supra* note 16 at 157.
[697] *CEA*, *supra* note 10, s 345.
[698] *Ibid*, ss 345, 338(1),(5); Feasby, *supra* note 90 at 200.
[699] *Reform Party of Canada v Canada (Attorney General)* (1995), 123 DLR (4th) 366 (Alta CA).
[700] Feasby, *supra* note 90 at 213–14.
[701] *Animal Defenders* HL, *supra* note 55; *Animal Defenders* ECHR, *supra* note 385.

### 10.2.3 Regulation of Third-Party Campaign Financing

Canada's federal campaign finance regime subscribes to the idea that political parties are the "principal vehicles for communal political organization and expression,"[702] which is reflected in spending limits for third-party campaigners under the *CEA*. The Supreme Court of Canada has echoed this idea, stating in *Libman* that, although third parties have an important contribution to make, "it is the candidates and political parties that are running for election."[703]

#### 10.2.3.1 Activities Captured by Third-Party Campaign Regulations

*a) Definition of "third party"*

"Third party" is defined in section 349 of the *CEA* as "a person or a group, other than a candidate, registered party or electoral district association of a registered party." Thus, a third-party campaigner could be any individual, corporation, or other organization that promotes or opposes a candidate or political party during a pre-election or election period, promotes an election-related issue or promotes or opposes a candidate or party.[704]

*b) Definition of "election advertising," "partisan advertising," "partisan activity," and "election surveys"*

If a third party engages in "election advertising" as defined in the *CEA*, they will be subject to the *CEA*'s requirements in regard to spending limits, contributions received by the third party, and transparency. The components of the election advertising include:

- transmission to the public by any means
- during an election period
- of an advertising message that promotes or opposes a registered party or the election of a candidate.[705]

The definition includes an advertising message "that takes a position on an issue with which a registered party or candidate is associated,"[706] also known as issue advertising. The election period begins when the writ is issued and ends on polling day.[707]

Various communications are excluded. For example, election advertising does *not* include:

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[702] Feasby, *supra* note 90 at 207.
[703] *Libman, supra* note 56 at para 50.
[704] See Elections Canada, *Political Financing Handbook for Third Parties, Financial Agents and Auditors*, (Guidebook), EC 20227 [*Political Financing Handbook*], online (pdf): <https://www.elections.ca/pol/thi/ec20227/ec20227_e.pdf>.
[705] *CEA*, *supra* note 10, s 2(1), definition of "election advertising."
[706] *Ibid*.
[707] *Ibid*, s 2(1), definition of "election period."

- news releases, editorials, debates, interviews, columns and books that were to be published even if an election was not held;[708]
- the transmission of documents by an organization to its members, employees, or shareholders;
- the transmission of an individual's personal political views on a non-commercial basis on the Internet; and
- the making of phone calls to encourage people to vote.[709]

During the pre-election period, the spending limit, contribution and transparency requirements apply to third-party "partisan advertising" and other activities described below.[710] If a snap election is called (i.e., no third party is notified in advance that an election is going to occur), the provisions concerning the pre-election period are not in force.

Elections Canada has clarified that communications on the Internet will only be considered election advertising or partisan advertising if they have, or normally would have, a placement cost.[711] Elections Canada explains this requirement by pointing out that such communications give the well-resourced an unfair advantage, while communications without a placement cost do not. However, this means that the cost of producing Internet material will not be considered an advertising expense unless there is a placement cost for the material, even if production is costly and the communication meets all other criteria of advertising.

In addition, Bill C-76 added two other new categories of regulated third-party activity called "partisan activity" and "election survey." Partisan activity is defined similarly to partisan advertising but includes non-advertising activities like door-knocking, telephone calls, and events. An election survey is a survey conducted by a third party in order to plan and undertake partisan activities.[712]

*c) Definition of expenses for election advertising, partisan advertising, partisan activity, and election survey*

An "election advertising expense" is incurred to produce an election advertising message during the election or to acquire the means of transmitting that message and a "partisan advertising expense" has the same meaning for such advertising during the pre-election period.[713] "Partisan activity expense" is defined as an expense of a third party in undertaking a partisan activity. An "election survey expense" is defined as an expense incurred in conducting the survey.[714] "Expenses" are defined in section 349 of the *CEA* to include the

[708] *Ibid*, s 2(1), definition of "election advertising; *Ibid*, s 319(a).
[709] *Ibid*, s 2(1), definition of "election advertising."
[710] *Ibid*, definition of "partisan advertising." See also Political Financing Handbook, *supra* note 704 at 9–16.
[711] Elections Canada, *Partisan and Election Advertising on the Internet*, (Interpretation Note), OGI 2020-05, online (pdf): <https://www.elections.ca/res/gui/app/2020-05/2020-05_e.pdf>.
[712] *CEA*, *supra* note 10, s 349, definition of "partisan activity" and "election survey."
[713] *Ibid*, s 2(1) definition of "election advertising expense" and "partisan advertising expense."
[714] *Ibid*, s 349 definition of "partisan activity expense" and "election survey expense."

commercial value of property or services that are donated or provided, other than volunteer labour.

#### 10.2.3.2 Contributions to Third-Party Campaigners

Contributions to third parties of money, property, use of property, or services are subject to source restrictions, but not limits. Third parties can accept contributions of any amount from anyone or any entity for the purpose of partisan advertising, partisan activities, or election surveys during the pre-election or election period. However, they are prohibited from accepting contributions for these activities from foreign nationals, corporations that do not carry on business in Canada, unions that do not have bargaining rights in Canada, foreign political parties, or foreign governments or their agents.[715] Further, third parties cannot use a contribution from an anonymous donor for the purpose of these activities.[716]

If a third party is a union, corporation, or other entity with a governing body it is not permitted to undertake the above activities if they involve spending more than CDN$500 in either of the periods. An exception to this prohibition is if its governing body passes a resolution authorizing it to undertake the activities in either or both of the periods. It is required to include a copy of the resolution in the third-party registration forms it submits to Elections Canada. [717]

#### 10.2.3.3 Spending on Partisan Advertising, Partisan Activities, Election Surveys, and Election Advertising

During the pre-election period, combined total spending by third parties on partisan advertising, partisan activities, and election surveys is limited. However, the base limit of CDN$700,000, plus inflation since 2004, is so high (surpassing CDN$1 million in 2019)[718] that it is essentially meaningless. It is unlikely that a third party will reach that limit in the pre-election period. Bill C-76 also set a CDN$7,000 limit (CDN$10,234 in 2019 due to inflation) for combined total spending on these pre-election period activities in a single district.[719] However, if an election is called before the fixed election date the provisions concerning the pre-election period are not in force.

The spending limit on election advertising also covers partisan activities and election surveys undertaken during the election period. Individuals who are not citizens or permanent residents who do not reside in Canada and corporations that do not carry on business in Canada are not permitted to spend on these activities during the pre-election[720] or the election period.[721]

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[715] *Ibid*, ss 349.01–349.03.
[716] *Ibid*, ss 349.94, 357.1.
[717] *Ibid*, ss 349.6(5) (pre-election period), 352(5) (election period).
[718] *Ibid*, ss 349.1(1)–(4). See also "Limits on Expenses Incurred by Third Parties – 43rd General Election" (last visited 31 October 2021), online: *Elections Canada* <https://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/43ge/thilim&lang=e>.
[719] *CEA*, *supra* note 10, s 349.1(2)–(4).
[720] *Ibid*, s 349.4.
[721] *Ibid*, s 351.1.

Since Bill C-76 extended the spending limit for the election period to a wider range of third-party activities, the federal government increased the combined total limit for national spending from CDN$150,000 to CDN$350,000, multiplied by an inflation adjustment factor with the baseline year of 2004.[722] This meant that the election period spending limit for a third party in the 2019 election was CDN$511,700. The bill did not increase the third-party spending limit of CDN$3,000 (CDN$4,386 in 2019 with inflation) for activities that promote or oppose the election of candidates in a single electoral district, an amount that counts towards the national limit if a third party undertakes both national and local campaign activities (the same CDN$3,000 limit, adjusted for inflation, also applies for by-elections).[723] Unlike for parties and candidates, there is no provision in the statute to increase the spending limit for third parties if the election period lasts longer than 36 days.

Third parties are prohibited from attempting to circumvent spending limits by splitting themselves into multiple third parties or by acting in collusion with other third parties or with parties' potential candidates/candidate or their agents or associates, during both the pre-election[724] and election periods.[725] Anti-collusion rules also prohibit sharing information in order to coordinate activities, including organizing events.[726]

#### 10.2.3.4 Transparency Requirements for Third-Party Campaigners

*a) Registration*

Third parties are required to register once their incurred expenses on partisan advertising, election advertising, partisan activities, and election surveys reach a combined total of CDN$500 during the pre-election and/or election period.[727] The CEO is required to publish registered third parties' names and addresses as they are registered.[728]

Registered third parties have several notable obligations. First, they are required to set up a separate bank account to accept contributions and pay for the expenses for all of pre-election and election period activities.[729] Second, they are required to appoint a financial agent to accept contributions for activities during the pre-election and/or election period.[730]Third, parties that spend more than CDN$10,000 during the pre-election period are required to appoint an auditor and provide the auditor's name and contact information to the CEO.[731]

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[722] *Ibid*, s 350(1).
[723] *Ibid*, ss 350(2)–(4). Unlike the overall limit, the limit for each electoral district does not use the term "election advertising expenses."
[724] *CEA*, *supra* note 10, s 349.2.
[725] *Ibid*, s 351.
[726] *Ibid*, ss 349.3 (pre-election period), 351.01 (election period). See also Elections Canada, *Participating in Third Party Campaign-Style Events During Pre-Election and Election Periods*, (Interpretation Note), OGI 2021-01, online (pdf): <https://www.elections.ca/res/gui/app/2021-01/2021-01_e.pdf>.
[727] *CEA*, *supra* note 10, s 349.6.
[728] *Ibid*, s 362(a).
[729] *Ibid*, s 358.1.
[730] *Ibid*, ss 349.6(3)–(4), 349.7, 349.9, 354(1), 357(1). The third party is required to identify its financial agent in its application for registration, which is submitted to the CEO: *ibid*, s 353(2).
[731] *Ibid*, s 349.8 (the pre-election period), s 355 (the election period).

*b) Attribution*

Third parties are required to identify themselves in any partisan and election advertising that they produce and to indicate they have authorized the advertisement during the pre-election or election periods.[732]

*c) Reporting*

Third parties may be required to file several interim expense returns with the CEO during the pre-election and election period, depending upon whether their contributions or spending amounts exceed specified thresholds at certain times. A third party is required to file a return:

1) within five days of registration if it receives contributions over CDN$10,000 specifically for pre-election period activities or spends over CDN$10,000 on pre-election activities since the previous election;[733]
2) on September 15th if it receives contributions over CDN$10,000 specifically for pre-election period activities or spends over $10,000 on pre-election period activities between the previous election day and either September 14th or the end of the pre-election period, whichever is earlier;[734]
3) 21 days before the general election day if it receives contributions over CDN$10,000 specifically for election period activities or spends CDN$10,000 on election activities between the previous election day and 23 days before the election day;[735] and
4) seven days before the general election day if it receives contributions over CDN$10,000 specifically for election period activities or spends over CDN$10,000 on election activities between the previous election day and nine days before the election day.[736]

Interim expense returns are required to include:

- Partisan activity expenses by the date and location of the activity;
- Partisan and/or election advertising expenses by the date and location they were placed/transmitted;
- Election survey expenses by the date each survey was conducted;
- The amount by class of contributor (individual, corporation, government, union, non-profit, citizen association) of donations and loans;

[732] *Ibid*, s 349.5 (partisan advertising), s 352 (election advertising).
[733] *Ibid*, s 349.91.
[734] *Ibid*, s 349.92(1).
[735] *Ibid*, s 357.01.
[736] *Ibid*, s 357.02.

- For each contributor who made contribution(s) or loan(s) totalling more than CDN$200, their name, address (including president or CEO of any numbered company) and class, and the amount and date of each contribution;
- The amount of the third-party's own funds that were used to pay for the activities.[737]

If a third party cannot identify which contributions (donations and loans) it has received for the pre-election period activities, it is required to identify in the return all of its contributors since the previous election day.[738] Third parties that file multiple interim returns are not required to repeat information already filed in a previous return.[739]

Third parties are also required to file final third party expense returns four months after the election day. These returns are required to include the same information as interim expense returns. However, unlike interim returns, previously filed information is not omitted.[740] The third party's auditor is required to confirm that the return is a fair reflection of the third party's accounting records.[741]

The CEO is required to publish all pre-election third party interim expense reports as soon as feasible and all post-election third party expense reports within one year of the start of the election period.[742] If the information is not released until a year after the writ drops, the delay could undercut the anti-corruption goals of disclosure, as the potential for undue influence may not be discovered until irrevocable decisions have been made by lawmakers. The public and the media could therefore be temporarily deprived of potentially relevant information in evaluating lawmakers' proposals and decisions.

### 10.2.4 Role of the Chief Electoral Officer and the Commissioner of Canada Elections

The CEO directs and supervises elections and elections officers; issues guidelines, interpretation notes, and advisory opinions on the application and interpretation of the statute and regulations; may undertake voter education initiatives and voting studies; and assists other countries with election processes.[743] The CEO also publishes disclosed information on political financing in searchable online databases.[744]

The Commissioner of Canada Elections is responsible for compliance with the requirements of the statute and regulations, including investigating non-compliance and prosecuting,

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[737] *Ibid*, ss 349.91, 349.93, 357.01(2), 357.02(2). See also *Political Financing Handbook*, *supra* note 704 at 9–16.
[738] *Ibid*, ss 349.91(8), 349.92(2), 357.01(8), 357.02(2), 359(7).
[739] *Ibid*, ss 349.92(3), 357.01(5), 357.02(2).
[740] *Ibid*, s 359, 359(4.1) (exceptions).
[741] *Ibid*, ss 349(8), 355, 360.
[742] *Ibid*, s 362.
[743] *Ibid*, ss 16–18.1.
[744] For disclosed information see "Political Financing" (last visited 31 October 2021), online: *Elections Canada* <http://www.elections.ca/content.aspx?section=fin&&document=index&lang=e>.

imposing fines or entering into compliance agreements (which can include fines).[745] Bill C-76 amended the *CEA* to give the Commissioner the power to require the production of evidence when investigating election expenses or seek a court order.[746]

## 10.3 Criticisms of Campaign Finance Regulation

The Canadian political finance regime has apparently had some success in reducing reliance on large donors. Before the regulations limiting contributions were introduced in 2004, 2% of donors were responsible for 54% of funds raised annually by politicians.[747] From 2004 to 2008, when the individual donation limit was CDN$5,000, the 1% of donors who gave more than CDN$1,200 per year accounted for only 17% of the total amount contributed to all parties (parties only, not including donations to their candidates or electoral district associations).[748] However, several issues raise serious questions of how much the Canadian federal political finance system fulfills egalitarian principles.

Recent donation figures show that federal parties continue to rely on a relatively small number of donors for a significant percentage of their annual funding. For example, in 2015, only 4.37% of donors donated CDN$1,100 or more to the federal Liberal Party, but they provided 22.87% of the Party's total funds that year.[749]

One concern is the increased access to Party leaders and top party officials that are offered in exchange for donations. For example, the Liberal Party offers donors who donate the maximum annual amount entry into its Laurier Club, which offers events and special access to the Party's leader and top party officials. (who, since November 2015, have been the Prime Minister and Cabinet ministers). Only 0.85% of donors donated the maximum in 2015, 790 people out of the 93,429 people who donated to the Party that year.[750] In spring 2016, the Liberal Party also launched a new "Leader's Circle" for donors that both donated the maximum annual amount and recruited ten other people who each donated the maximum amount. The Leader's Circle provided even greater access to the Prime Minister and Cabinet ministers, although the scheme was cancelled after media coverage and public criticism.[751]

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[745] *CEA*, *supra* note 10, ss 509–509.2, 511. See also "Commissioner of Canada Elections (last visited 31 October 2021), online: *Commissioner of Canada Elections*<https://www.cef-cce.ca>.

[746] *Ibid*, ss 510.001, 510.01.

[747] CEO Remarks, *supra* note 688.

[748] *Ibid*.

[749] Democracy Watch, News Release, "Trudeau Liberals' Political Finance Bill a Charade That Doesn't Stop Cash-For-Access" (5 October 2017), online: <https://democracywatch.ca/trudeau-liberals-political-finance-bill-a-charade/>.

[750] Robert Fife & Steven Chase, "Donation Stats Indicate Liberal Fundraisers are Exclusive Events", *The Globe and Mail* (31 October 2016), online: <https://www.theglobeandmail.com/news/politics/donation-stats-indicate-liberal-fundraisers-are-exclusive-events/article32588273/>.

[751] Democracy Watch, News Release, "DWatch Files Complaints with Ethics Commissioner and Lobbying Commissioner About Trudeau Cabinet Giving Preferential Access to 'Bundler' Fundraisers, Especially Lobbyists" (28 November 2018), online:

Several other Liberal Party fundraising events from 2014 to 2017 offered top donors access to top Party officials or were hosted by business executives whose business has lobbied the federal government, with significant amounts of money raised for the Party at each event.[752]

In addition, there is evidence from Canada's federal system, and from several provincial systems across Canada, that banning corporate and union donations and limiting individual donations result in executives and their families, mainly from businesses who lobby the government, begin to donate the maximum individual amount allowed.[753] Questions remain whether some of these donations were from business funds illegally funneled through executives and their families.

A key problem inhibiting the analysis of donation patterns such as these is that donations to nomination race contestants, election candidates, parties, and third parties made during elections are not required to be disclosed before election day. However, as noted above, third parties are often required to file interim returns before election day listing their donors, contestants for party leadership are required to disclose details concerning their donors and donations during and just before the contest vote, and parties are required to disclose that information quarterly. If this is possible, and given that many donations are now made electronically, it should be possible to require parties, electoral district associations, candidates, and third parties to disclose details of donors and donations soon after they are received, instead of months later.

Inequality continues to exist in spending limits in Canada. It is questionable whether the spending limit that applies to single voters who become third parties and closely held private corporations should apply to citizen groups with tens of thousands of supporters. This allows wealthy individuals and corporate executives to spend as much on trying to influence issues, candidates, and parties as tens of thousands of voters spend together. As well, election candidates are allowed to donate CDN$5,000 to their own campaign, and party leadership contestants are allowed to donate CDN$25,000 to their own campaign. These amounts, which are much higher than the current CDN$1,650 donation limit (as of spring 2021) that applies to all other donations from individuals, favour wealthy candidates who can afford to make these donations.

In 2011, the Canadian province of Quebec implemented several reforms after a corruption scandal revealed similar donation patterns. In response, Quebec decreased the limit on individual donations from CDN$2,000 annually down to CDN$100 annually[754] and created a requirement that a donation of more than CDN$50 to a party be routed through the

<https://democracywatch.ca/dwatch-files-complaints-with-ethics-commissioner-and-lobbying-commissioner-about-trudeau-cabinet-giving-preferential-access-to-bundler-fundraisers-especially-lobbyists/>.

[752] Democracy Watch, News Release, "New Report on Possibly Funneled Donations to Trudeau Liberals Shows Need to Lower Donation Limit to $100, as Quebec Did" (12 June 2019), online: <https://democracywatch.ca/new-report-on-possibly-funneled-donations-to-trudeau-liberals-shows-need-to-lower-donation-limit-to-100-as-quebec-did/>.

[753] "List of Sham Political Donation Systems" (last visited 9 December 2021), online (pdf): *Democracy Watch* <https://democracywatch.ca/wp-content/uploads/ListOfShamCanPoliticalDonationSystems-1-1.pdf>.

[754] See details in note 38.

provincial elections agency, Elections Quebec, to verify whether the money is legitimately coming from the individual donor, rather than a corporation, union, or other organization.[755]

There have also been criticisms of the phasing out of quarterly per-vote funding allowances for registered political parties.[756] Before the quarterly allowances were eliminated, the public funding regime adequately offset losses to party income caused by contribution caps.[757] Without the quarterly allowance system, the CEO has warned that contribution caps may lead parties to resort to "illicit and undisclosed funding strategies."[758] The CEO has also argued that combining contribution caps with inadequate public funding may produce a state of perpetual campaigning, as parties attempt to inspire more contributions from more donors.[759] Permanent campaigning could negatively impact "the overall tone of political discourse and the level of public cynicism."[760] On the other hand, some point out that less public funding might have the "merciful consequence" of reducing attack ads and restricting campaign advertising to the actual election period.[761]

In contrast to the cancellation of direct public funding of parties at the federal level in Canada, Quebec [762] also provides annual public funding to match the amounts that parties raise in between elections and the matching amounts are based on donations made to parties during election campaigns.[763] The funding is weighted to match the first CDN$20,000 of contributions at a higher rate (CDN$2.50 per dollar raised) than contributions above that amount up to CDN$200,000 (at rate of CDN$1.00 per dollar raised), which increases the equalization effect of the funding.[764] It is important to note, however, that despite its egalitarian characteristics, Quebec disadvantages independent members of the legislature and independent candidates, as it offers them only the relatively small amount of up to

[755] Quebec's provincial law allows an additional CDN$100 to be donated to each party and independent candidate during each election campaign. Donations above CDN$50 annually must be routed through Elections Quebec. See "Contributions" (last visited 31 October 2021), online: *Elections Quebec* <http://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/contributions.php/>.

[756] See Section 10.2.2.1.

[757] CEO Remarks, *supra* note 688.

[758] *Ibid*.

[759] *Ibid*.

[760] *Ibid*.

[761] Young, *supra* note 6 at 123.

[762] The annual amount started in 2013 at CDN$1.58 per vote obtained in the last general election, and is adjusted annually based on the Consumer Price Index rate: "Allowance to Political Parties" (last visited 31 October 2021), online: *Elections Quebec* <https://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/allowance-paid-to-political-parties.php>.

[763] "Matching Sums" (last visited 31 October 2021) ["Matching Sums"], online: *Elections Quebec* <https://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/matching-sums.php>.

[764] For example, if donations were matched dollar for dollar, and one party raised CDN$10,000 and the other CDN$30,000, the first party would end up with CDN$20,000 while the second ended up with CDN$60,000 (six times as much). Under Quebec's system, however, the first ends up with CDN$35,000 while the second ends up with CND$60,000 (less than twice as much).

CDN$800 in matching funding annually and, for a candidate, up to CDN$800 during the election campaign period.[765]

An additional area of Canada's federal political finance system that raises questions is enforcement. After one actual illegal funneling scheme was revealed in 2016, the Commissioner of Canada Elections reached compliance agreements with involved parties, instead of prosecuting.[766] The single individual charged pleaded guilty, ending the possibility of disclosing others involved in the scheme, although a media outlet revealed a confidential document that listed many of the donors involved.[767]

In 2013, Elections Canada promised a full audit to determine the extent of top donations from businesses and organizations and their families, and whether donations from businesses and other organizations were being funneled through their executives and family members. However, Elections Canada never undertook the audit and further refused to undertake the audit when requested to do so by an advocacy group in May 2019.[768] In addition, the Commissioner allowed a third-party citizen group to violate the provisions that prohibit collusion between third parties and candidates in the 2019 election without imposing any penalty.[769] The Commissioner is yet to rule on another alleged collusion situation from the 2019 election involving several third parties.[770]

Bill C-76 amended the statute to allow the federal Commissioner of Canada Elections to fine violators up to CDN$1,500 for persons and CDN$5,000 for entities instead of prosecuting,

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[765] "Matching Sums," *supra* note 763.

[766] "SNC-Lavalin Violated Election Rules With Campaign Donations, Commissioner Rules", *The Canadian Press* (9 September 2016), online: <https://www.cbc.ca/news/business/snc-lavalin-campaign-donations-1.3752869>.

[767] Elizabeth Thompson, "Key Figure in Illegal Election Financing Scheme Quietly Pleads Guilty", *CBC* (19 January 2019), online: <https://www.cbc.ca/news/politics/election-financing-snclavalin-charbonneau-1.4984823>; Harvey Cashore & Frédéric Zalac, "Names of SNC Employees, Executives Behind Thousands of Dollars in Illegal Liberal Party Donations Revealed", *CBC* (30 April 2019), online: <https://www.cbc.ca/news/politics/snc-lavalin-liberal-donors-list-canada-elections-1.5114537>. See also "Charges/Outcomes" (last visited 31 October 2021), online: *Commissioner of Canada Elections* <https://www.cef-cce.ca/content.asp?section=charg&document=index&lang=e>.

[768] Democracy Watch, News Release, "DWatch Calls on Elections Canada, Commissioner of Elections and Commissioner of Lobbying to Audit Political Donations to Find Illegal Funneling and Unethical Donation Bundlers" (1 May 2019), online: <https://democracywatch.ca/dwatch-calls-on-elections-canada-commissioner-of-elections-and-commissioner-of-lobbying-to-audit-political-donations-to-find-illegal-funneling-and-unethical-donation-bundlers/>.

[769] Democracy Watch, News Release, "Commissioner of Canada Elections Rolls Over and Lets RightNow Anti-abortion Group off for Election Law Violations" (27 April 2021), online: <https://democracywatch.ca/commissioner-of-canada-elections-rolls-over-and-lets-rightnow-anti-abortion-group-off-for-election-law-violations/>.

[770] Democracy Watch, News Release, "Democracy Watch Calls on Commissioner of Canada Elections to Investigate Manning Centre and Five 'Proud' Groups it Funded for Possible Third Party Election Disclosure and Collusion Violations" (17 October 2019), online: <https://democracywatch.ca/democracy-watch-calls-on-commissioner-of-canada-elections-to-investigate-manning-centre-and-five-proud-groups-it-funded-for-possible-third-party-election-disclosure-and-collusion-vio/>.

and also to include payments as part of a negotiated compliance agreement.[771] In August 2019, instead of prosecuting, as part of a compliance agreement the Commissioner used this new power to fine two companies involved in an illegal donation funneling scheme. The fine was three times the amount of the illegal donations made, and the Commissioner stated that "Canadians should expect to see us make full use of this new tool from this point on"[772] which will hopefully act as a warning to those planning to violate the law and encourage compliance.

While the above ruling may be a sign of stronger enforcement of the federal election law, another problem area is that the full enforcement record of Elections Canada and the Commissioner remains largely hidden. The Commissioner is permitted to release any information about an investigation if, in the Commissioner's opinion, it is in the public interest.[773] However, Elections Canada and the Commissioner have resisted disclosure in the past, including the ruling in more than 3,000 complaints filed from 1997 to 2011.[774] Without this information, it is impossible to determine whether the Commissioner is enforcing the provisions fairly, impartially, or effectively.

In contrast, when questionable donation patterns like those revealed at the federal Canadian level were revealed in Quebec in 2011, Elections Quebec undertook an audit within months. The audit examined donations made to provincial parties between 2006 and 2011 and found CDN$12.8 million in likely funnelled donations.[775] As well, an extensive public inquiry was undertaken[776] and dozens of people were subsequently prosecuted and convicted for participating in illegal donation and bribery schemes.[777] While these enforcement actions

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[771] *CEA*, *supra* note 10, ss 508.4–508.6, 517(2), 521.11–521.34. See also, "Penalties (AMP)" (last visited 30 November 2021), online: *Commissioner of Canada Elections* <https://www.cef-cce.ca/content.asp?section=amp&document=index&lang=e>.

[772] Peter Zimonjic, "2 Montreal Companies Admit to Making $115,000 in Illegal Donations to Liberals, Conservatives", CBC (29 August 2019), online: <https://www.cbc.ca/news/politics/axor-liberals-conservatives-donations-1.5263576>. See also: Commissioner of Canada Elections, Compliance Agreements, online: <https://www.cef-cce.ca/content.asp?section=agr&dir=ca&document=index&lang=e>.

[773] *CEA*, *supra* note 10, ss 510.1(2)(g), (3).

[774] Democracy Watch, News Release, "DWatch Calls on Elections Canada, Commissioner of Elections and Commissioner of Lobbying to Aduit Political Donations to Find Illegal Funneling and Unethical Donation Bundlers" (12 January 2019), online: <https://democracywatch.ca/elections-canada-decides-to-keep-its-rulings-secret-on-more-than-3000-complaints-because-the-rulings-may-make-commissioner-of-elections-look-bad-group-complains-to-information-commissioner/>.

[775] "Sectoral Financing of Political Parties in the Amount of Nearly $13M" (13 April 2013), online: *Elections Quebec* <https://www.electionsquebec.qc.ca/english/news-detail.php?id=5387>.

[776] Melinda Dalton, "Charbonneau Commission Report: A Deeper Look at the Recommendations", *CBC* (25 November 2015), online: <https://www.cbc.ca/news/canada/montreal/charbonneau-commission-report-recommendations-1.3335460>.

[777] Les Perreaux, "Quebec's Anti-Corruption Crusade Has Resulted in Many Arrests but Few Convictions. Here's What has Happened So Far", *The Globe and Mail* (4 July 2018), online: <https://www.theglobeandmail.com/canada/article-quebecs-anti-corruption-crusaders-have-been-swift-to-arrest-but-slow/>. However, delays resulted in many charges being dropped. For example, see: Jason Magder & Linda Gyulai, "High-Ranking Liberals, Including Nathalie Normandeau, Arrested by UPAC on Fraud Charges" *Montreal Gazette* (12 July 2020), online:

undertaken in Quebec, along with the changes summarized above, made Quebec one of the most egalitarian political finance systems in the world, it should be noted that the province's government has only implemented half of the public inquiry's 60 recommendations for preventing corruption.[778]

## 11. CONCLUSION

Campaign finance is a high-profile issue, and scandals break out regularly.[779] Frustration and cynicism arise when wealthy individuals, corporations, unions, or other organizations support a candidate's election campaign and benefit from favourable policies after the candidate is elected. Even when it is impossible to determine whether policies and decisions result from a politician's own principles or from the need to maintain future financial support by rewarding past support, the relationship between politicians and their financial backers can be toxic for public confidence.[780] Further, aside from the risk of corruption of elected officials, many argue that unregulated campaign finance may corrupt the electoral

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<https://montrealgazette.com/news/local-news/high-ranking-liberals-including-nathalie-normandeau-arrested-by-upac-on-fraud-charges>.

[778] "Quebec Implements Less Than Half of Corruption-Busting Solutions", *CTV Montreal* (23 November 2016), online: <https://montreal.ctvnews.ca/charbonneau-commission/quebec-implements-less-than-half-of-corruption-busting-solutions-1.3173405>.

[779] For examples, see Tony Paterson, "Bought by BMW? German Chancellor Angela Merkel Forced on to Defensive Over €700,000 donation from Carmaker to her Christian Democratic Party", *The Independent* (16 October 2013), online: <http://www.independent.co.uk/news/world/europe/bought-by-bmw-german-chancellor-angela-merkel-forced-on-to-defensive-over-700000-donation-from-8884777.html> (Angela Merkel's party accepted a large donation from BMW shortly before European environment ministers caved "to German demands to scrap an agreement to cap car emissions after Berlin argued that the measure would adversely affect its car industry and create job losses"); Alice Walton & David Zahniser, "Politicians and Activists Demand Answers on Mystery Donations Tied to 'Sea Breeze' Developer", *Los Angeles Times* (31 October 2016), online: <http://www.latimes.com/local/lanow/la-me-ln-seabreeze-reaction-20161030-story.html> (the authors discuss the corrosive effects of campaign finance at the municipal level in Los Angeles, noting that "[c]ritics have long accused city leaders of being too willing to change local planning rules for well-connected developers, particularly those who make campaign donations"); Dom Phillips, "Brazil President Michel Temer Accused of Soliciting Millions in Illegal Donations", *The Guardian* (12 December 2016), online: <https://www.theguardian.com/world/2016/dec/12/brazil-president-michel-temer-illegal-campaign-donations> (in a plea bargain, a former executive at construction company Odebrecht "alleged in colourful detail how leading lawmakers from Temer's and other parties across the political spectrum were paid millions in bribes and both legal and illegal campaign donations to defend the company's interest in Congress"); Dan Levin, "British Columbia: The 'Wild West' of Canadian Political Cash", *The New York Times* (13 January 2017), online: <https://www.nytimes.com/2017/01/13/world/canada/british-columbia-christy-clark.html> (Levin discusses allegations that British Columbia's provincial government headed by former premier Christy Clark rewarded generous campaign donors, turning government "into a lucrative business, dominated by special interests that trade donations for political favors"; as an example, the author notes that, in the interim between the provincial government's public opposition to the Trans Mountain pipeline project in 2016 and its subsequent approval of the pipeline in 2017, Ms. Clark's party received $718,000 in donations from the company proposing the pipeline).

[780] See e.g. *McCormick*, *supra* note 36.

process itself by allowing the wealthy to set the electoral debate agenda and exert disproportionate influence over the outcome of elections.[781] This influence arguably undermines the foundational principle of "one person, one vote."[782]

Tension exists between the goal of alleviating the potentially poisonous effects of wealth in politics and the goal of facilitating free and open debate. This tension is often framed as a clash between equality and freedom, and it makes campaign finance regulation a controversial and partisan issue, particularly in the US.

The jurisprudence in this chapter demonstrates that the US, UK, and Canada each have different approaches to resolving this tension. Courts and governments in all three countries strive to construct a middle path between the goals of freedom and equality, accepting political finance regulations with equality-related objectives as long as open debate is not overly restricted. However, parts of the systems in all three countries tilt either towards freedom of expression or equality. The US system overall tilts more in favour of freedom of expression for wealthy individuals, businesses, and organizations. The UK's ban on paid political advertising by parties or third parties during election campaign periods provides an example of a tilt towards equality, but its lack of donation limits, which favours wealthy donors, is a tilt towards freedom of expression.

Meanwhile, in Canada individuals and private corporations controlled by a few people, as third parties, are allowed to spend or donate disproportionate amounts and some election candidates and party leadership candidates are allowed to donate a disproportionate amount to their own campaign. Both of these measures greatly favour wealthy individuals.

Different cultural, political, and judicial approaches to campaign finance regulations have led to the divergent regulatory regimes in the three countries. Criticisms of each regime demonstrate that lawmakers and courts continue to grapple with the ongoing challenge of developing and evaluating political finance regulations that effectively constrain unethical influence of excessive donations and spending on parties, politicians, and governments, without unduly constraining participation in public and elections debate in all sectors of society.

[781] See e.g. Hiebert, *supra* note 54 at 269.
[782] La Raja, *supra* note 57 at 3.

CHAPTER 15

# COLLECTIVE ACTION

JOE WEILER, PAUL TOWNSEND, JOHN RITCHIE, ALEXANDER KOMAROV, AND MARK BAKHET

## CONTENTS



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

# 1. INTRODUCTION

Taking "collective action" against corruption is considered by many to be the optimal approach to combatting corruption in a variety of contexts, especially where corruption is pervasive at a systemic level. The leading anti-corruption NGO, Transparency International, asserts that:

> [T]o root out corruption, we need to hold those entrusted with power to account using both prevention and punishment mechanisms. The key to making prevention and punishment more effective is to work with people, as individuals and as part of collective action, to take part in anti-corruption efforts. Increasingly there must be a popular rejection of corruption – a refusal to bribe, vote for the corrupt or turn a blind eye to corruption – if we are to create sustained public pressure for change.[1]

Collective action can be initiated in any location by any group of motivated stakeholders, rather than depending solely on the actions of government or law enforcement to combat corruption. Instead, collective action can be used to attract support from governments and law enforcement and exert pressure on them to play their part more effectively.

The World Bank describes collective action as "a collaborative and sustained process of cooperation amongst stakeholders. It increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organizations and levels the playing field between competitors."[2]

After examining the current rise in the use of collective action in the private sector, this chapter surveys five broad categories in the field, ranging from relatively passive public education and awareness raising to activities that are intended to have a direct impact on corruption in specific circumstances. A group of interested stakeholders can begin at the 'passive' level and move towards a more 'active' level of collective action. The suggested five broad categories are:

1. **Education and awareness raising programs**—from local to international. The example provided in this chapter is the Vancouver, BC based Anti-Corruption Law Program (ACLP);
2. **Development and promotion of anti-corruption tools** that can be adopted by 'bribe payers' (the supply side of corruption). The example provided in this chapter is the International Federation of Consulting Engineers (FIDIC) Integrity Management System;

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[1] "Strategy 2020: Together Against Corruption" (15 December 2015), online: *Transparency International* (TI) <https://www.transparency.org/en/strategy-2020>.

[2] World Bank Institute, *Fighting Corruption and Fraud through Collective Action: A Guide for Business*, (Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2008) at 4, online: <https://baselgovernance.org/publications/fighting-corruption-and-fraud-through-collective-action-guide-business>.

3. **Agreement among 'bribe payers' to refrain from participating** in corruption. The example provided in this chapter is the Maritime Anti-Corruption Network (MACN);
4. **Actions by International Organizations, Financiers, and/or Event Sponsors** to establish integrity frameworks for their projects. The example provided in this chapter is the International Olympic Committee (IOC); and
5. **Active participation by civil society in government procurement** and monitoring of infrastructure project construction. The example provided in this chapter is The CoST Infrastructure Transparency Initiative.

This chapter provides examples of each of the above types of collective action, citing the contributing factors to their success and also identifying the critical factors for sustainability. The concluding section of this chapter presents lessons learned and recommendations for success.

## 2. GROWTH OF COLLECTIVE ACTION IN THE PRIVATE SECTOR

Through collective action—a process of cooperation between various stakeholders with the aim of jointly countering corruption—companies can together take concrete steps to scale-up efforts and strengthen good business practices.[3]

The UN Global Compact outlines a variety of incentives or reasons for companies to take part in collective action in the fight against corruption. Collective action will enable them to:

a) create a deeper understanding of corruption issues;
b) consolidate knowledge and financial and technical resources to achieve greater impact;
c) create solutions that are perceived as more credible, acceptable and are more sustainable;
d) help ensure fair competition and a level playing field for all stakeholders;
e) create a more stable and enabling business environment; and
f) complement existing anti-corruption efforts in vulnerable regions and sectors, where industry or government-led regulations are not robust.[4]

[3] UN Global Compact Office, *Promoting Anti-Corruption Collective Action through Global Compact Local Networks*, (New York: UN Global Compact Office, September 2013) [UN Global Compact Office], online (pdf): <www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/AC_CAP.pdf>.
[4] "Anti-Corruption Collective Action" (last visited 20 October 2021), online: *United Nations Global Compact* <https://www.unglobalcompact.org/take-action/action/anti-corruption-collective-action>.

Similarly, Mark Pieth, the world's leading scholar on collective action, asserts that "there could be a strong *business case* for collectively combating corruption" as "collective risk management is always, at least in part, expectation management: with similar levels of regulation amongst all competitors, companies are also better able to limit costs."[5] This points to the need to establish a level playing field as a way of overcoming the dilemma often faced by many well-intentioned corporations–that is, "even large companies are uneasy about 'going it alone'. They are uncertain whether their competitors are following the same virtuous path and they are aware they may be sidelined by ministers 'on the take' and replaced by less scrupulous suppliers."[6] Of course, the success of such collective action will depend on the genuine effort made by individual players to enforce a particular agreement that has been reached in the industry. And while some remain skeptical as to the true potential of such agreements being reached, research has shown that the private sector is becoming much more active in combatting corruption:

> First, it [i.e., the private sector] is very much interested in extending the anti-corruption standards to other exporting nations, especially Brazil, Russia, India, and China (the BRIC countries). Here, the G20 format is proving very handy. Second, the private sector has become even more insistent than the peer countries that anti-corruption standards are applied equally. Third, companies have acknowledged that they are dependent on the evolution of a reliable body of common standards.[7]

Similar findings in support of a collective action approach to fighting corruption are also noted by Elizabeth Dávid-Barret:

> [T]here are indications that the G20's goals [of engaging the private sector in the fight against corruption] are not so pie-in-the-sky. A recent flurry of corporate activity to start and join anti-corruption clubs signals a major shift in norms about bribery in business. Collective action initiatives, in which companies make voluntary commitments above and beyond the legal requirements for anti-bribery compliance, have proliferated in recent years. Everybody seems to want to be part of an anti-corruption club.[8]

As the author of this article suggests, it is likely that this changing behaviour is a response to rapid change in norms about bribery in international business: "bribery is no longer 'business as usual.'"[9]

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[5] Mark Pieth, "Collective Action and Corruption" (2012) Basel Institute on Governance Working Paper No 13 at 8, online (pdf): <https://baselgovernance.org/sites/default/files/2018-12/biog_working_paper_13.pdf>.

[6] *Ibid* at 6.

[7] *Ibid* at 8.

[8] Elizabeth Dávid-Barret, "Anti-Corruption Clubs: How the Private Sector is Leading the Way in the Fight against Bribery" (6 April 2017), online (blog): *German Development Institute* <https://blogs.die-gdi.de/2017/04/06/anti-corruption-clubs-how-the-private-sector-is-leading-the-way-in-the-fight-against-bribery/>.

[9] *Ibid*.

In spite of this upward trend in private sector engagement in the fight against corruption, it remains true that companies rarely end up cooperating on their own: "competitors usually trust each other little and they usually fear being perceived as 'trusting' each other too much. In other words, many companies are wary of anti-corruption compacts lest they be regarded as engaging in anti-competitive behavior."[10] As a result, collective action has repeatedly been promoted first by "an ad hoc group of representatives from one or more non-governmental organizations (NGOs), together with select private sector protagonists."[11] The following excerpt outlines in greater detail the process by which collective action initiatives will most likely take hold—though the author also cautions that there is no set model for these initiatives:

> These consortia [an ad hoc group of representatives from one or more non-governmental organizations (NGOs), together with select private sector protagonists] perform a crucial task in the early days of a Collective Action initiative by bringing together a group of industry representatives that is able to generate its own momentum. Together, they attempt to convince other major players to participate. At the outset, the participants avoid committing to anything beyond a preliminary exchange of views. It takes time to convince the participants of the benefits of the initiative, and much depends on the subtlety of the mediators. Once the initiative has taken off, however, the collaboration is publicized and corporate exponents take their share of the responsibility. In the meantime, it is also the task of the NGO representatives to ensure that the members of the group do not embark on anti-competitive behavior. Thus, in starting a particular Collective Action initiative, the key factor is not (simply) the size of the group, as frequently suggested in academic debates about the conditions for overcoming Collective Action problems. It is assumed that a few, especially strong, players achieve more than a multitude of small actors–the larger the number, the greater the risk of truancy.[12]

This demonstrates that there remains an important role to be played by many actors in industry-wide anti-corruption initiatives which require a *collective* effort. In this context, NGOs and not-for-profits can also provide guidance: "[t]here can be great advantage in hearing those messages from an organization that stands to gain nothing in terms of business or revenues. Likewise, regulators have a proven interest in hearing what independent anti-bribery and corruption experts view as best practice standards and what best works in tackling corruption."[13] Moreover, because "the anti-corruption field is moving fast across the world, with new corruption trends, new legislation, changing enforcement patterns, and

[10] Pieth, *supra* note 5 at 11.
[11] *Ibid*.
[12] *Ibid* at 12.
[13] Robert Barrington, "Yes, Not-For-Profits Have a Big Role in Compliance" (22 June 2017), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2017/6/22/robert-barrington-yes-not-for-profits-have-a-big-role-in-com.html>.

the emergence of tech-related challenges and solutions,"[14] an emphasis on raising awareness and education industry-wide is increasingly critical.

As noted, education and training initiatives are an important part of collective action, and companies are increasingly turning to these mechanisms to ensure more robust internal compliance in order to prevent individual actors from engaging in corrupt practices. While much work remains to be done, this is a promising step, and one that should prove feasible for many corporations.

When asked in June 2017 about the biggest change in the compliance landscape, Joe Spinelli, who has been involved in *FCPA* enforcement and compliance for over 30 years, replied "it's the deep engagement of boards and senior management. Today they understand the risks of reputational damage and want to stay a step ahead of the compliance process."[15] In a similar vein, companies are increasingly looking for ways of facilitating this compliance and internal awareness of potential corrupt practices. Richard Bistrong, a contributor to the *FCPA Blog* notes:

> Companies often ask me to record video for internal training. They want real-world stories of corruption and commerce which they can embed into an existing on-line anti-bribery compliance training."[16] Karen Griffin, executive vice president and chief compliance officer at Mastercard [which was involved in the production of the video], said: "we recognized the need to move beyond the traditional classroom exercise to help our teams understand the potential impact of bribery and compliance events."[17]

## 3. PUBLIC EDUCATION AND AWARENESS RAISING

The Vancouver, Canada-based Anti-Corruption Law Program (ACLP)[18] (the Program) is an ongoing series of public education events—including keynote public lectures, seminars, partial-day and full-day invited conferences, and colloquium format sessions—open to lawyers, business-people, law enforcement officials, government representatives and bureaucrats, students, and academics alike. These public education events are designed to provide a fertile setting for learning and informed discussion among participant panelists and registrants regarding the law's role in the global fight against corrupt business practices.

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[14] *Ibid*.

[15] Richard L Cassin, "Joe Spinelli: Boards, C-Suites Now Want Daily Compliance Reports" (21 June 2017), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2017/6/21/joe-spinelli-boards-c-suites-now-want-daily-compliance-repor.html>.

[16] Richard Bistrong, "Resource Alert: New Real-World Compliance Training Video" (20 June 2017), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2017/6/20/resource-alert-new-real-world-compliance-training-video.html>.

[17] *Ibid*.

[18] "Anti-Corruption Law Program" (last visited 18 September 2021): online: *Peter A Allard School of Law* <https://allard.ubc.ca/research/research-centres-and-programs/centre-business-law/anti-corruption-law-program>.

The Program is a collaborative effort founded by three organizations: The Peter A. Allard School of Law (Allard School of Law) at the University of British Columbia (UBC), Transparency International Canada (TI Canada), and the International Centre for Criminal Law Reform and Criminal Justice Policy at UBC (ICCLR). In 2016, these stakeholders combined forces and engaged in collective action to bring together anti-corruption experts. The Program focused on having such experts teach each other (and registrants) about best practices, policies, and enforcement strategies to fight corruption. The three founding organizations each had core competencies and experiences in research and scholarship, teaching, raising awareness, and advocating in the fight against corruption, both within Canada and abroad. Rather than combatting corruption as individual organizations, these three founding partners of the ACLP combined resources to work together, providing a clear example of the power of collective action in advancing the anti-corruption movement in Canada. The Program attracted support from a number of public and private organizations, including law firms, accounting/consulting firms, engineering firms, resource extraction companies, NGOs, government organizations, and interdisciplinary academic units at UBC, as well as other universities in Canada and abroad.

The need for robust and easily accessible public education, applied research, and scholarship in the area of anti-corruption was evident; sophisticated ongoing professional education in this area was underdeveloped in Canada, and rigorous applied research in anti-corruption in the Canadian context was severely lacking. In order to be effective in the fight against corruption, legal practitioners, public policy-makers, and business-people alike needed an accessible learning forum in which to cultivate a deeper understanding of the potential use of law; the Program set out to fulfill this unmet need.

## 3.1 Anti-Corruption Law Program Outcomes

The key intended outcomes of the Program include:

(1) Forming and nurturing collaborative relationships, including working partnerships among the Peter A. Allard School of Law, the legal profession, leading organizations in the business community, credible and respected NGOs (such as TI Canada), research institutions (such as ICCLR), and other academic units at UBC and other universities in Canada;

(2) Providing new support for collaborative learning opportunities for leading academic scholars, legal practitioners, business-people, and J.D. and MBA students;

(3) Creating enhanced opportunities for future applied collaborative and interdisciplinary research and academic scholarship; and

(4) Attracting additional funding and support for research and learning opportunities from Program partners and other organizations who wish to

> participate in and support the goals and objectives of the Program, as well as its interdisciplinary, collaborative, and interactive pedagogical approach.[19]

## 3.2 Anti-Corruption Law Program: Public Education Events

The Program ran as a 'pilot project' in its first year (from fall of 2016 to the fall of 2017). This pilot project consisted of nine professional education events that were organized in collaboration with various partner organizations between September 2016 and December 2017. Several of these professional education sessions were designed to recur on an annual or semi-annual basis, providing informed and inspired yearly-updated content to reflect current developments in this rapidly evolving and dynamic area of law reform. The Program's content has been vetted, critiqued, and revised on an ongoing basis by the very audience of business-people, lawyers, lawmakers, and regulators who are the drivers and architects of the anti-corruption legal systems at play.

Prior to the educational sessions in the Program, attendees were provided with current reading materials from leading experts in the field which reflect the latest developments and insights in each subject area. These materials help prepare participants in advance of each session, better equipping participants to engage in an interactive dialogue. This participatory component helps foster a learning environment where participants learn from one another in an iterative, real-time process.

By the end of 2019, 20 educational events had been organized and hosted by the Program. The COVID-19 pandemic prevented face-to-face meetings, resulting in the suspension of the Program in 2020. The Program was relaunched in 2021 as monthly online webinars that are archived on the websites of the three partner founding organizations for future reference by registrants and other interested parties.[20]

The range of topic areas presented in the Program include (among other areas):

- Government procurement;
- Money laundering in the casino industry, real estate industry, and luxury vehicle industry;
- Internal corporate compliance systems;
- Enhanced law enforcement strategies and resources;

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[19] See *The Anti-Corruption Law Program*, (2016), online (pdf), <https://cityhallwatch.files.wordpress.com/2016/09/anti-corruption-law-program-brief-description-2016-17.pdf> as linked on Urbanzta, "'Follow the Money: Corruption, Money Laundering & Organized Crime' (Oct 28) Among Topics of New Anti-Corruption Law Program" (6 September 2016), online (blog): *CityHallWatch* <https://cityhallwatch.wordpress.com/2016/09/06/anti-corruption-law-program/>.

[20] See for example, "The Anti-Corruption Law Program: Integrity and Anti-Corruption for Small and Medium Enterprises - Getting it Right" (29 January 2021), online: *Peter A Allard School of Law* <https://allard.ubc.ca/about-us/events-calendar/anti-corruption-law-program-integrity-and-anti-corruption-small-and-medium-enterprises-getting-it>.

- Financing of P3 infrastructure projects;
- Mandatory reporting of payments to government by companies in the extractive industry;
- Whistle-blower systems for the public and private sectors;
- The Maritime Industry Anti-Corruption Network (MACN) (further discussed below); and
- The role of the Integrity Vice Presidency of the World Bank in global development financing.

The emergence of virtual meeting technology has enabled the Program to tap into both expert panelists and audiences from around the globe. The Program provides an excellent example of how like-minded organizations and individuals can take collective action to raise awareness and teach one another best practices in fighting corruption.

## 4. DEVELOPMENT AND PROMOTION OF ANTI-CORRUPTION TOOLS

The engineering and construction industries were singled out in the TI 2005 *Global Corruption Report*.[21] The introduction to this report, written by Peter Eigen, founder of Transparency International, included the following important statements:

> Nowhere is corruption more ingrained than in the construction sector…. [T]ransparency in public contracting is arguably the single most important factor in determining the success of donor support in sustainable development. Corrupt contracting processes leave developing countries saddled with sub-standard infrastructure and excessive debt.[22]

Although they are over 15 years old, these comments remain valid.

The International Federation of Consulting Engineers (FIDIC),[23] founded in Europe in 1913, has since grown to become "[t]he global representative body for national associations of consulting engineers."[24] FIDIC is unlike many global organizations, in that it is an "association of associations" and its members are national associations of consulting engineers. Individual engineering firms are typically members of their national association, and so they are not direct members of the global organization. FIDIC now indirectly represents 40,000 engineering firms that employ about 1 million engineers and other

[21] TI, *Global Corruption Report 2005: Corruption in Construction and Post-Conflict Construction,* (London; Ann Arbour; Berlin: Pluto Press/TI, 2005), online (pdf): <https://images.transparencycdn.org/images/2005_GCR_Construction_EN.pdf>.
[22] *Ibid* at 1.
[23] The acronym is based on the French language name of the Federation. "History" (last visited 18 September 2021), online: International Federation of Consulting Engineers (FIDIC) <https://fidic.org/history>.
[24] "About Us" (last visited 18 September 2021), online: FIDIC <https://fidic.org/about-us>.

professional and support staff.[25] The national associations of 102 countries—from Albania to Zimbabwe—are members of FIDIC, and elect representatives to the Board of Directors at each annual meeting.[26]

Since 1957, FIDIC has published model contracts that have been adopted in many countries for use on international infrastructure projects. FIDIC model contracts all follow a standard format, using a standard set of General Conditions, which are only to be modified using customized clauses called Particular Conditions.

Current FIDIC contracts include:

- *Red Book – Construction – Design by Owner*;
- *Yellow Book – Plant and Design Build*;
- *Silver Book – EPC/Turnkey Contracts*;
- *White Book – Client/Consultant Model Services Agreement*;
- *Sub-Consultancy Agreement*; and
- *Model Representative Agreement*.[27]

Several Multilateral Development Banks (MDBs—also known as International Lending Agencies or IFIs), including the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the World Bank, have created in cooperation with FIDIC, a special version of the *Red Book* for use on MDB-financed projects called the *MDB Harmonised Edition*.[28] This illustrates the importance of the relationship between FIDIC and the MDBs, particularly in the area of contract management on major infrastructure projects.

The consulting engineering industry has grown dramatically in importance over the past 50 years, particularly in emerging countries. There are many examples of cooperative working relationships between firms based in developed countries and smaller and newer firms based in developing countries. Furthermore, the MDBs have emphasized the importance of allowing developing country firms to have a fair level of access to consulting opportunities in their own country and in the broader region in which they are located. Barriers to entry

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[25] *Ibid*.

[26] Member Associations" (last visited 18 September 2021), online: FIDIC <https://fidic.org/membership/membership_associations>.

[27] "Publications" (last visited 18 September 2021), online: FIDIC <https://fidic.org/bookshop>. See also "Why Use FIDIC Contracts?" (last visited 18 September 2021), online: FIDIC <https://fidic.org/node/7089>.

[28] "FIDIC MDB Harmonised Construction Contract" (last visited 18 September 2021), online: FIDIC <https://fidic.org/MDB_Harmonised_Construction_Contract>; FIDIC, *Conditions of Contract for Construction for Building and Engineering Works Designed by Employer: MDB Harmonized Edition*, (Geneva: FIDIC, 2010), online (pdf): <https://fidic.org/sites/default/files/cons_mdb_gc_v3_unprotected.pdf>. Note also that this may be referred to as the "Pink Book": Frederic Gillion, *FIDIC Pink Book: The MDB Harmonised Edition of the Red Book*, (Fenwick Elliott, Reproduced from Practical Law Company), online (pdf): <https://www.fenwickelliott.com/sites/default/files/FIDIC%20Pink%20Book%20The%20MDB%20Harmonised%20Edition%20of%20the%20Red%20Book.pdf>.

to the consulting engineering industry can be low in many developing countries. While this encourages innovation and opportunities for engineers and related professionals, it can also encourage corrupt behavior if firms are able to dissolve and reform upon allegations of corruption.

Maintaining a strong and cooperative working relationship between the global consulting engineering industry, the World Bank, and other MDBs is important to FIDIC, its member associations and firms, and the MDBs. In 1996, following the World Bank's establishment of an internal system in the mid-1990s to combat corruption on World Bank projects, FIDIC issued its first formal policy statement on corruption.[29] For the first time FIDIC, as a leading international organization, identified corruption as a serious issue affecting the global consulting engineering industry. This led to further actions to develop a "Business Integrity Management System" (BIMS) that would address the needs and business practices of consulting engineering firms, modeled on the established format of quality management systems and incorporating many of the features of corporate anti-corruption compliance systems.[30] The term "integrity management" was deliberately chosen to emphasize the positive aspects of behaving with integrity, and is seen as a logical complement to the development of strong and ethical relationships between consulting engineering firms and their clients, based on the aspiration of serving as a "trusted advisor" to the client.[31]

BIMS, the FIDIC approach to integrity management, was outlined in 1997-98 and presented to the International Lending Agencies (ILAs) at the 1999 Biennial Meeting of International Lending Agencies and the Consulting Industry (BIMILACI).[32] The FIDIC approach to integrity management was assessed in a paper prepared by Georg Engeli and Mark Pieth—two well-known authorities on this topic.[33] This paper was reviewed at the FIDIC 2000 conference, and led to the issue of three important FIDIC documents:

- *Guidelines for Business Integrity Management in the Consulting Industry* (2001);[34]
- *Business Integrity Management System Training Manual* (2002);[35] and

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[29] J M Boyd & J D Padilla, "FIDIC and Integrity; A Status Report" (2009) 9:3 Leadership & Mgmt Engineering 125 at 125. See also *Handbook for Curbing Corruption in Public Procurement*, (Berlin: TI, 2006) at 72, online: <https://www.transparency.org/en/publications/handbook-for-curbing-corruption-in-public-procurement>.

[30] Boyd & Padilla, *ibid*. See also UN, UNESCO Report: Engineering: Issues, Challenges and Opportunities for Development, (Paris: UNESCO, 2010) at 195-196, online (pdf): <https://www.acofi.edu.co/wp-content/uploads/2013/08/Issues-challenges.pdf>.

[31] Boyd & Padilla, *ibid* at 125-126.

[32] Ahmed Haj Stifi, *Development of an Anti-Corruption Toolkit with Components from Lean Construction* (PhD Dissertation, Karlsruhe Institute of Technology, 2017) at 105, online (pdf): <https://publikationen.bibliothek.kit.edu/1000070740/4202707>.

[33] Georg Engeli & Mark Pieth, "Developing an Integrity Programme for FIDIC: A Private Sector Initiative to Prevent Corruption in IFI-Funded Public Procurement" (Background Paper prepared for the Annual Meeting of FIDIC, Honolulu, 2000) [unpublished].

[34] FIDIC, *Guidelines for Business Integrity Management in the Consulting Industry*, (Lausanne, Switzerland: FIDIC, 2001).

[35] FIDIC, *Business Integrity Management System Training Manual*, (Geneva: FIDIC, 2002).

- *Model Representative Agreement – Test Edition* (2004).[36]

Since 2010, FIDIC has replaced the acronym BIMS with FIMS (FIDIC Integrity Management System) to eliminate confusion with unrelated systems that use the acronym BIMS. New documents to describe FIMS and the recommended approach to implementing a flexible and scalable FIMS within a consulting engineering firm have been issued since 2010:

- *Guidelines for Integrity Management in the Consulting Industry – Part I – Policies and Principles* (2011);[37]
- *Guidelines for Integrity Management in the Consulting Industry – Part II – FIMS Procedures* (2015);[38]
- *Model Representative Agreement – First Edition* (2013);[39] and
- *Guidelines for Integrity Management in the Consulting Industry – Part III – FIMS and ISO 37001* (2019) (*FIMS III*).[40]

The FIDIC *Model Representative Agreement* deserves special emphasis, as experience has shown that actions by "third parties" often constitute the greatest integrity risk to any firm, including a consulting engineering firm that is operating in a country outside of its home jurisdiction.[41] The use of a "Representative" or an "Agent" by consulting engineering firms operating in foreign countries is relatively common. While the use of a Representative is often justified by the firm's lack of understanding of local business practices and legal requirements, bribery by Representatives can often occur without the knowledge or participation of the firm's own staff. However, numerous court cases have shown that third party actions will create liability for the firm that retains a Representative who acts in a corrupt manner.[42] In the past, Representatives were often engaged with agreements that contained very limited information regarding scope of work, basis of remuneration, and any limits to their duties and obligations. The common practice of paying the Representative on the basis of a percentage of the fees paid by the client created opportunities for the Representative to pay bribes with a portion of the commission income.

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[36] FIDIC, *Model Representative Agreement*, Test ed (Geneva: FIDIC, 2004).
[37] FIDIC, *Integrity Management System (FIMS) Guidelines - Part I - Policies and Principles*, 1st ed (Geneva: FIDIC, 2011).
[38] FIDIC, *Integrity Management System (FIMS) Guidelines - Part I - FIMS Procedures*, 1st ed (Geneva: FIDIC, 2011).
[39] FIDIC, *Model Representative Agreement*, 1st ed (Geneva: FIDIC, 2013) [*Model Representative Agreement*].
[40] FIDIC, *Guidelines for Integrity Management System in the Consulting Industry - Part III - FIMS and ISO 37001 Procedures*, 1st ed (Geneva: FIDIC, 2019) [*FIMS III*].
[41] See "Managing Third Party Corruption Risk" (last visited 18 September 2021), online: *Norton Rose Fulbright* <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/8d332cdc/managing-third-party-corruption-risk> and "Managing Third Parties" (last visited 18 September 2021), online: *Transparency International UK* <https://www.antibriberyguidance.org/guidance/13-managing-third-parties/guidance>.
[42] For more on the impacts of third party actions and related court cases, see the discussions on jurisdiction and agents in Chapter 3.

The *Model Representative Agreement*,[43] which follows the established format of FIDIC contracts (standard General Conditions, Particular Conditions to name the Parties and countries of operation, etc.), spells out the Representative's anti-corruption obligations, training and reporting requirements, and the limits to the Representative's scope of work and authority. The *Model Representative Agreement* is available to all FIDIC member firms at low cost, in either digital or hard copy form.

The most recent document, known as *FIMS III*,[44] compares and contrasts the provisions of a typical FIMS and the requirements of the ISO 37001 anti-bribery standard. *FIMS III* explains how a firm's FIMS can be expanded to allow eventual certification of an anti-bribery system in accordance with the requirements of ISO 37001. This standard is narrowly focused on bribery activities; a FIMS provides the consulting firm with a broader framework for protection against corrupt acts.

Following the publication of these resource documents and the adoption of FIMS or similar systems by some engineering firms, FIDIC, acting primarily through its Integrity Management Committee (IMC), has continued to explain and promote its recommended approach to integrity management within consulting engineering firms. FIDIC has also encouraged pilot projects within a variety of international engineering firms, both large and small.

The indirect nature of firm representation by FIDIC has made it difficult to track the adoption of FIMS or related integrity management systems by engineering firms. Most large, multinational engineering firms typically maintain in-house legal resources. Many such firms have developed and adopted relatively rigorous compliance-type systems to suit their needs. However, small to medium sized firms have appeared to be reluctant to commit to the overhead cost resources needed to implement a comprehensive FIMS. Therefore, FIDIC initiated a pilot program in 2010 involving six member firms, to test the FIMS concepts and identify the strengths and weaknesses of the FIMS approach to integrity management.[45] The pilot program concluded that:

1. Firm size can be a challenge—smaller firms may believe that they lack the resources and understanding of the key issues. In response, the pilot program recommended that smaller firms begin with a well-worded Code of Conduct and expand their FIMS over time.
2. Endemic corruption, if present in the home market, often leads to fear of losing business and business failure. In response, the pilot program recommended that firms review their business, their aspirations to operate ethically, and their clients—it may be necessary to "fire a client."
3. Employees may see the proposed FIMS as a threat from management—"you don't

[43] *Model Representative Agreement*, *supra* note 39.

[44] *FIMS III*, *supra* note 40.

[45] Norman Baldwin et al, "Integrity and Anti-Corruption for Small and Medium Enterprises - Getting it Right" (Panel at the Anti-Corruption Law Program, Peter A Allard School of Law, 29 January 2021) at Part 7, online (pdf): <https://allard.ubc.ca/sites/default/files/2021-02/January%2029%20Anti-Corruption%20Law%20Program%20Presentation%20for%20Distribution.pdf>.

trust us." In response, the pilot program recommended the involvement of employees in the design and implementation of the firm's FIMS, to avoid establishing a top-down "them and us" atmosphere within the firm.

4. A firm (especially a larger firm) may already have a compliance system, and may argue that it is unnecessary to adopt a FIMS. The pilot program noted that a FIMS can be used to expand into integrity areas not covered by a typical compliance system (e.g., corporate and personal conflict of interest). ISO 37001 certification may also be a desirable outcome of a robust compliance system; *FIMS III* provides a roadmap for that process.
5. The need for high level support (known as "tone from the top") may mean that a leadership change can cause the FIMS to be abandoned or to fail. The pilot program acknowledged that all such initiatives require continuous top level support, which can spell the end of an ambitious program if this support is ever withdrawn.[46]

The FIDIC Integrity Management Committee continues to promote the adoption of FIMS and related anti-corruption measures by member firms. The following near-term initiatives to expand adoption are under consideration:

- Aggressive promotion of integrity management through the FIDIC Member Associations, which would allow more direct access to member firm key decision-makers;
- Integration of integrity management measures into other FIDIC programs that are intended to assist firms to improve their businesses by targeting higher value-added services;
- Development of a searchable database that would allow interested parties (existing and potential clients, ILAs, existing and potential employees) to determine which engineering firms have established a FIMS, other type of compliance system, or an ISO 37001 anti-bribery system; and
- Development of targeted integrity guidance documents to assist smaller and medium-sized consulting firms with moving forward in the creation and management of their own FIMS.

## 5. A SECTOR-WIDE INITIATIVE TO REFRAIN FROM CORRUPTION

The Maritime Anti-Corruption Network (MACN)[47] is a global success story in how industries may effectively employ collective action to safeguard against corruption. The MACN's origins root partially in response to the UK's 2011 enactment of the *Bribery Act*,[48] a piece of legislation which codified the illegality of facilitation payments. The shipping

[46] *Ibid*.
[47] "MACN" (last visited 20 July 2021), online: *Maritime Anti-Corruption Network* [MACN] <www.macn.dk>.
[48] *Bribery Act 2010* (UK), c 23.

industry had battled such forms of corruption for many decades, with facilitation payments becoming so embedded in the industry that most considered it near impossible to effectively conduct maritime business without them. A small group of committed maritime companies, primarily operating out of Northern Europe, banded together to discuss how the industry could protect itself against such perverse sector-wide corruption concerns. While such facilitation payments were typically small in monetary value, such as requiring cartons of cigarettes (the Suez Canal was termed the 'Marlboro Canal' by many ship captains), these payments had become so pervasive that ships would regularly carry hundreds of cartons of cigarettes to ensure they would not be unfairly treated by port authorities; ships who refused to comply with facilitation payment demands could find themselves stuck in ports for an extended period of time or be forced to negotiate their way through a canal without a pilot—a significant safety issue.[49]

The success of this group relied largely on their system of detecting and reporting bribery. The MACN employed Chatham House Rules,[50] allowing members to speak more openly about corruption issues and risks. MACN also launched an anonymous reporting mechanism to collect corrupt demands globally. By ensuring anonymity, the MACN was able to ask their members and non-members to report any demands for bribery which they encountered throughout the course of their business. The anonymous reporting mechanisms decreased companies' concerns and ultimately increased their level of reporting. The MACN was able to collect significant data on problematic ports, allowing the collective to tailor projects to those areas which faced the highest corruption risks. The MACN's practical and non-judgemental approach led to phenomenal growth; starting with 12 shipping companies in 2012, the MACN now has over 150 members reporting over 45,000 anonymous incidents of facilitation demands since 2012.[51] The reporting system enabled the MACN to target those areas suffering the most abuse, putting pressure on these ports to cease corrupt maritime practices.

As Cecilia Müller Torbrand, CEO of MACN, puts it:

> It doesn't matter how rigorous a company's ABC compliance program is – if they are the only company that says no – bad practices will continue, and the company will face a competitive disadvantage in many markets. The change comes when companies are adhering to the same standards and when governments, business and civil society address corruption risks together. Collective action is all about working together and identifying incentives for everyone in order to create ownership, implement solutions and finally achieve a sustainable change.[52]

Nigeria was one port identified as a significant corruption risk to maritime trade. MACN members put intense pressure on the Nigerian port authority to help rid the sector of corrupt

[49] "From Malboro [sic] Canal to Zero-Tolerance Transits" (9 December 2017), online: *MACN* <https://macn.dk/from-malboro-canal-to-zero-tolerance-transits/>.
[50] MACN, *MACN Anti-Trust Compliance Policy*, (Paris: MACN, 2012) at 3, online (pdf): <https://macn.dk/wp-content/uploads/2021/02/MACNAnti-TrustCompliancePolicy-2021.pdf>.
[51] "MACN", *supra* note 47 at "MACN in Numbers".
[52] Cecilia Müller Torbrand shared this comment specifically for this publication.

practices, lest they continue to face increased pressure from shipping companies. Today, the situation is much improved; the Nigerian government actively participates in helping shipping companies effectively respond to requests for facilitation payments and levies fines against corrupt officials (this case study is further explored at Section 5.1).[53]

Another project was initiated in Argentina, where data from MACN member companies highlighted a systemic issue regarding demands for payments for unclean grain holds. Inspectors tended to have broad discretion, thereby vesting in them the power to accept or reject shipments based on their categorization. Once the issue was brought to the attention of senior government officials, they worked with the MACN to remove bad actors from positions of authority, establishing an adequate system of procedural controls. Through this collaborative effort, government officials and the MACN reduced corruption at the Argentinean port by approximately 90%. The true catalyst behind this effort was the senior government officials' willingness to rid the port of corruption. Until this matter was brought to light, shipping companies had largely assumed that senior government officials were either themselves profiting from these corrupt practices, or were simply uninterested in becoming involved in these matters. Yet, as MACN members have repeatedly seen over the years, local governments in these high-risk nations have an interest in cleaning up their ports and establishing a reputation of clean and ethical conduct to encourage increased trade.[54]

The MACN screens its members to ensure that they have a sincere desire to improve internal control mechanisms and increase compliance with the UK *Bribery Act* and the US *FCPA*. Members are not immediately removed from the MACN or shamed if they are implicated in issues of non-compliance; rather, the MACN views such incidents as opportunities for members to reaffirm their intentions and refocus their efforts. The MACN engages in a concerted effort to ensure all members are provided with industry-leading compliance tools. Recently, an online anti-corruption and bribery training program was made available to all MACN members free of charge.[55] Member meetings are also held free of charge to MACN members, encouraging strong attendance; MACN member meetings typically attract in excess of 100-200 participants, and include breakout sessions where members are provided with actionable tools to combat corruption.[56]

The three main pillars of the MACN are the three C's: capacity building, collective action, and collaboration.[57] Each member is asked to make progress on its anti-bribery and corruption program. In order to achieve these goals, members are provided with free tools

[53] MACN Secretariat, Nigeria Collective Action: MACN Impact Report, (Copenhagen: MACN, 2018), online (pdf): <https://static1.squarespace.com/static/53a158d0e4b06c9050b65db1/t/5d088f2423ffb700019ff12b/1560842037151/macn-annual-report-2018.pdf>.

[54] "The Maritime Anti-Corruption Network: Argentina Collective Action" (27 February 2018), online: Business for Social Responsibility <https://www.bsr.org/en/our-insights/case-study-view/maritime-anticorruption-network-argentina-collective-action>.

[55] "MACN Launches Anti-Corruption E-Learning Initiative" (7 June 2020), online: *The Digital Ship* <https://thedigitalship.com/news/item/6641-macn-launches-anti-corruption-e-learning-initiative>.

[56] For more information on the MACN member meetings, see: "Events Archives - MACN" (last visited 20 October 2021), online: *MACN* <https://macn.dk/category/events/>.

[57] "MACN's Pillars: The Three C's" (last visited 30 July 2021), online: *MACN* <https://macn.dk/our-work/>.

on the MACN website, and also given detailed expert and peer advice at member meetings (held bi-annually around the globe).

A major contributing factor for the MACN's success is that the group is made up of businesses involved in the maritime industry; as such, the MACN understands the nuances of the sector and can appreciate the real-world challenges member companies face in their dealings. Additionally, the extra days a vessel is forced to remain in a port can cost tens of thousands of dollars. A company with over 100 vessels is therefore looking at corruption costs well into the millions of dollars. The ports themselves also have an interest in rooting out corruption; poorer economies may well go bankrupt if they can no longer import or export goods out of their ports, increasing domestic efforts in rooting out corrupt practices. With MACN member companies approaching 50% of world tonnage,[58] the MACN wields a massive amount of economic power to influence systemic issues in ports around the globe.

The MACN launched the Port Integrity Campaign in India with the full support of the Ministry of Shipping and the Indian National Shipowners' Association.[59] The pilot program was successfully launched in the Mumbai ports, and is now being rolled out to other ports in surrounding regions. In the Suez Canal, the MACN launched a collective "Say No" campaign which has resulted in significant improvement in the port's compliance efforts.[60] Through further collaborative efforts, the MACN has created onboard communication toolkits for captains and port agents.[61] With several shipping companies working in tandem with one another, it has become nearly impossible for pilots to refuse service or provide subpar service to ships who refuse to engage in corrupt practices. This frontline material has also been further developed to support captains in ports globally.

The growth of the MACN and the network's impact is impossible to ignore. As the program continues to grow, so too does the influence of displaying the MACN logo on ships. Ports who see the MACN logo are now significantly less likely to attempt to acquire facilitation payments from these ships, as the MACN's growing network of companies have continually refused to engage in these corrupt practices. The MACN's influence has grown to include other industries that rely on shipping, such as the oil and gas sector, where companies rely on clean supply chains to ensure their reputations remain intact. Collective action has even turned into a business opportunity for MACN members, as some companies have opted to only use ships adorned with the MACN logo when transporting their goods. Today, major corporations such as BP, Shell, and BHP have begun seeking out ships displaying the MACN logo to carry their cargo.

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[58] "The Lloyd's List Podcast: Shipping's Quiet Corruption Revolution" (21 May 2021), online (podcast): *Lloyds List* <https://lloydslist.maritimeintelligence.informa.com/LL1136860/The-Lloyds-List-Podcast-Shippings-quiet-corruption-revolution>.

[59] MACN, *2019 Impact Report*, (MACN, June 2020) at 24 [2019 MACN *Impact Report*], online (pdf): <https://macn.dk/wp-content/uploads/2020/11/MACN-2019-impact-report-1.pdf>.

[60] *Ibid* at 16.

[61] *Ibid*.

## 5.1 Case Study: The Nigerian Port Industry and the MACN

The Nigerian Port case study illustrates the powerful potential of collective action undertaken at the industry level. A 2017 study on sector-specific coordinated governance initiatives in curbing corruption surveyed MACN members who commented:

> As a large group, we also started a pilot project in Nigeria and we got a lot of credits for tackling Nigerian ports. Nigeria is such a difficult country to work in and many of MACN members are not even doing ports calls in Nigeria but we consider this a learning journey and we worked with UNDP on identifying key challenges, risks in six Nigerian ports … our reporting program shows in 2013 members reported 50 incidents of bribes being requested at a certain port. We have a collective action, three years later, members show only two incidents.[62]

However, the long-term sustenance of collective action changes require effort from the local government and authorities. In this light, the following excerpt illustrates a promising development:

> Plans are in the pipeline by the Federal Government to deploy its anti-corruption mechanisms to significantly reduce the menace of fraudulent and criminal activities at the Nigerian ports.
>
> This comes as the Nigerian Ports Authority (NPA), is currently studying the various tariffs across ports in West Africa, with a view to determining how competitive Nigerian ports are compared to its neighbours.
>
> An October 2016 report identified corruption, which is closely linked to the inefficiencies at the ports, as costing Nigeria the loss of about N$1trillion annually.
>
> These corruptive tendencies also contribute in making the Nigerian ports among the most expensive in the world due to the legion of charges ports users are being subjected [to] daily.
>
> If these multi-challenges are resolved, experts believe Nigeria will be on the path to becoming the maritime hub in West Africa, as being clamoured for.
>
> Already, the Managing Director, Nigerian Ports Authority (NPA), Hadiza Bala Usman, has confirmed that the Presidential Advisory Committee on Anti-Corruption will soon open an office in the NPA in line with a report submitted by the Independent Corrupt Practices Commission (ICPC) on the corruption index in ports administration.

[62] Berta Van Schoor, *Fighting Corruption Collectively: How Successful Are Sector-Specific Coordinated Governance Initiatives in Curbing Corruption?* (Berlin: Springer Vieweg, 2017) at 151, online (pdf): <https://link.springer.com/content/pdf/10.1007%2F978-3-658-17838-3_4.pdf>.

> Usman, who is also a member of the Presidential Advisory Committee on Anti-Corruption, affirmed that the Authority will embark on strong anti-corruption measures in 2017.
>
> The move will further sanitise the sector and enhance smooth operations and clearance of cargo at the ports. Many illegal payments that contribute to making Nigerian ports charges non-competitive in [the] West African region would be eradicated and enhance the ease of doing business at the ports.
>
> The NPA boss, who visited major customs agents and freight forwarders last weekend, also assured that the Authority will interact more with stakeholders in 2017, in order to keep abreast with happenings at the various ports.
>
> To this end, she said the NPA would introduce quarterly stakeholders meetings to know what is on ground at the ports, and be better informed on the plight of operators.
>
> …
>
> To this end, she said there was the need for government to look into corruption at the ports and how to plug the leakages.[63]

The MACN's 2019 *Impact Report* provides further information regarding the Nigerian Port case study, as well as other MACN initiatives.[64]

## 6. SAFEGUARDING INTEGRITY IN MAJOR SPORT EVENTS

The International Olympic Committee (IOC), like other International Sport Organizations (ISOs), has traditionally operated in a relatively independent manner free of domestic and/or international governmental control pursuant to ISOs' "principle of autonomy" in sports governance.[65] Over the past decade however, the world of Major Sport Events (MSEs) has evolved towards a much more collaborative relationship between ISOs. This sea change in the model of governance of MSEs largely arose following allegations of bribery influencing the selection process for the hosts of the FIFA World Cup in 2006 (Germany), 2010 (South Africa), and 2022 (Qatar), as well as the Rio 2016 Olympic Games. In addition, the value proposition for hosting these MSEs was called into question due to concerns of perceived

[63] Sulaimon Salau, "Government Moves to Tackle Corruption At Nigerian Ports" (18 January 2017), *The Guardian*, online: <https://guardian.ng/business-services/government-moves-to-tackle-corruption-at-nigerian-ports/>.

[64] 2019 MACN *Impact Report*, *supra* note 59.

[65] See, for example, the emphasis on autonomy in the Olympic Charter: International Olympic Committee (IOC), *Olympic Charter*, (Lausanne, Switzerland: IOC, 2020) at 11, 16, 55, 60 (entered into force 17 July 2020), online (pdf): <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

gigantism and the failures of Sochi 2014 and Rio 2016 to deliver the promised legacies of the Olympic Games.[66]

These developments lead to independent ISO actors, such as the IOC, to increasingly enter into more collaborative working relationships with host governments and other key stakeholders in the sports industry. While remaining separate in their areas of specific expertise, these public and private entities moved to a more intimate, inclusive and collaborative institutional model for the planning, delivery, and oversight of MSEs. By working together, these entities became more equipped to ensure better sustainability and integrity outcomes for host communities.

This process of moving towards closer working relationships between the IOC and host communities was facilitated by the IOC undergoing strategic reforms in two fundamental areas: (i) the IOC reimagined the appropriate scale of the Games project and the efficiencies, cost control measures, and delivery systems that should be applied to the awarding criteria, allowing for the "New Norm" of Host City Selection and Games Delivery that focused on producing optimal Games sustainability outcomes; and (ii) the measures taken by the IOC to improve its internal systems to ensure greater transparency, accountability, and integrity in its own operations.[67]

## 6.1 Olympic Agenda 2020: "New Norm" of Host City Selection and Games Delivery

In September 2013, the IOC introduced the "Olympic Agenda 2020."[68] This was an open, inclusive, and wide-ranging consultation involving multiple Olympic Movement stakeholders as well as interested civil society organizations. The consultation aimed to produce a new strategic roadmap for the future of the Olympic Movement that would increase the IOC's capacity to leverage the Games to bring about positive change globally. Through strengthening its own internal governance systems, the IOC increased the level of transparency and ethical practices in its operations and outreach. The Olympic Agenda 2020 process ultimately developed 40 recommendations that were approved by the IOC Session in December 2014.[69]

Importantly, the IOC intensified its efforts in the following years to continue renewing its process of awarding future Games. A collaborative working process involving the IOC's partners, industry experts, and the Olympic Games Delivery Executive Steering Committee

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[66] See for example, the discussions in Simona Azzali, "Challenges and Key Factors in Planning Legacies of Mega Sporting Events Learned from London, Sochi, and Rio de Janeiro" (2020) 14:2 Intl J Architectural Research 203.

[67] "What is the New Norm" (last visited 30 July 2021), online: *International Olympic Committee* <https://olympics.com/ioc/faq/roles-and-responsibilities-of-the-ioc-and-its-partners/what-is-the-new-norm>; "Olympic Agenda 2020" (last visited 30 July 2021) [Olympic Agenda 2020], online: *International Olympic Committee* <https://www.olympic.org/olympic-agenda-2020>. See also James McBride, "The Economics of Hosting the Olympic Games" (last updated 19 January 2018), online: *Council on Foreign Relations* <https://www.cfr.org/backgrounder/economics-hosting-olympic-games>.

[68] Olympic Agenda 2020, *supra* note 67.

[69] *Ibid.*

analysed every function of the Games operations, including venues, energy, broadcasting accommodation, transport and technology, to determine how the Games could be made more affordable, beneficial, and sustainable for future host cities.

This renewal process produced the "New Norm"—a set of 118 reforms pursuant to six recommendations of Olympic Agenda 2020, adopted by the IOC at its 132nd Session in 2018.[70] These reforms are designed to produce maximum cost savings (upwards of hundreds of millions of dollars) in the delivery of the Games without compromising the Olympic Games experience. The plan invites opportunities to reduce venue sizes, rethink transport options in favour of public transit, optimise the use of pre-existing infrastructure, and reuse the field of play of competition venues for various sports.[71]

The expanded Invitation Phase process communicated in Olympic Agenda 2020 and the New Norm would apply immediately to the 2026 Olympic Winter Games Bid Process.[72] But the new collaborative approach to Games delivery and the rescaled model of the Games contemplated in the new Candidature Phase would apply immediately to the process of selecting the Paris 2024 and Los Angeles 2028 Summer Olympic Games.[73] Both cities previously hosted the Games; as such, their existing civic assets would obviate the need for new large capital investments, such as those undertaken in relation to the Sochi 2014 Winter Games and the Rio 2016 Summer Games.

## 6.2 Transparency and Accountability in IOC Operations and the Chief Ethics and Compliance Officer

The IOC enhanced the transparency of its operations by requiring the IOC financial statements be prepared and audited pursuant to the global benchmark International Financial Reporting Standards (IFRS).[74] A dedicated IOC Audit Committee oversees risk

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[70] "The New Norm: It's a Games Changer" (6 February 2018), online: *IOC* <https://olympics.com/ioc/news/the-new-norm-it-s-a-games-changer>; and IOC, Executive Steering Committee for Olympic Games Delivery, *Olympic Agenda 2020 — Olympic Games: The New Norm,* (Lausanne, Switzerland: IOC, 2018) [118 Reforms], online (pdf): <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/2018/02/2018-02-06-Olympic-Games-the-New-Norm-Report.pdf#_ga=2.253318729.1937900192.1527605308-1040588004.1527505901>.

[71] 118 Reforms, *supra* note 70.

[72] IOC Working Group, *Olympic Winter Games 2026 IOC Working Group Report,* (September 2018), online (pdf): <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Winter-Games/Games-2026-Winter-Olympic-Games/18-029-IOC-ANG-LO-RES.pdf>.

[73] See, for example, "New Era of Games Embraced as Updated Paris 2024 Venue Concept Approved" (17 December 2020), online: *IOC* <https://olympics.com/ioc/news/new-era-of-games-embraced-as-updated-paris-2024-venue-concept-approved>; and Newsroom, "IOC Coordination Commission and Paris 2024 Agree to Examine New Games Delivery Opportunities", *Around the Rings* (19 September 2021), online: <https://www.infobae.com/aroundtherings/ioc/2021/07/12/ioc-coordination-commission-and-paris-2024-agree-to-examine-new-games-delivery-opportunities/>.

[74] "International Olympic Committee Publishes 2020 Annual Report and Financial Statements" (20 July 2021), online: *IOC* <https://olympics.com/ioc/news/international-olympic-committee-publishes-2020-annual-report-and-financial-statements>.

management, financial reporting, compliance, internal controls, and governance within the IOC.[75] The IOC ultimately began requiring the publishing of an annual activity and financial report, including the allowance policy for the expenses of IOC members which reaffirms the volunteer status of IOC members. In doing so, the IOC demonstrated increased accountability of its operations and greater transparency for the raising and spending of revenue.

As a result of Olympic Agenda 2020, the Rules of Conduct for the Bid Process[76] underwent two significant changes designed to help promote transparency and integrity in the Bid Process: (i) the new IOC Rules required consultants advising bidding cities to register with a publicly listed IOC services (thus avoiding undisclosed conflicts of interest in the consultancy sector); and (ii) the Host City Contract would henceforth be made public.[77]

Olympic Agenda 2020 also recommended the creation of the Chief Ethics and Compliance Officer (CECO) position, which the IOC introduced in 2015.[78] The function of the Ethics and Compliance Office is primarily preventative, providing information and education on the ethical principles guiding the IOC. The Office further provides an educational and advisory role for the entire Olympic Movement, helping participants understand and apply ethical rules and principles. For example, the work of the CECO includes protecting IOC Members from the risk of being unwitting targets of 'extreme promotion' by bid cities through an iterative process, whereby the CECO answers questions regarding acceptable conduct in promotional efforts by bid cities.

## 6.3 Collective Action in the MSEs Industry

The integrity of sports competitions is essential to attract the attention of fans and participants; no one sport organization, regulator of the sports betting industry or law enforcement entity can successfully address the issue of match fixing alone. Each organization plays an important role in recognizing possible synergies in their joint efforts and applying their resources to collectively address such issues; these interested parties must work together in a coherent and synchronized way. Collective action among all these organizations is required to provide the education and awareness, clear prohibitions against

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[75] See the subheading "Mission" in "Audit Committee" (last visited 18 September 2021), online: IOC <https://olympics.com/ioc/audit-committee#tab-da04fbe3-e2f4-4a60-8b1a-dd782d7b3794-0>.

[76] See the documents under "Future Olympic Hosts" (last visited 18 September 2021), online: IOC <https://olympics.com/ioc/documents/olympic-games/future-olympic-hosts>.

[77] IOC, Olympic Agenda 2020 — 20+20 Recommendations, (Lausanne: IOC, 2014) [Olympic Agenda 2020 Recommendations] at 9, 11, online (pdf): <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Documents/Olympic-Agenda-2020/Olympic-Agenda-2020-20-20-Recommendations.pdf#_ga=2.193689577.573903206.1634784951-2058394911.1634784951>.

[78] *Ibid* at 4, 22. See also Thomas Bach, "Speech by IOC President Thomas Bach on the Occasion of the Opening Ceremony" (Speech delivered at the 127th IOC Session, Monaco, 7 December 2014), *Olympic Agenda 2020 — Context and Background* (Lausanne: IOC, 2014) at 6, online (pdf): <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Documents/Olympic-Agenda-2020/Olympic-Agenda-2020-Context-and-Background.pdf?_ga=2.243904525.961419715.1632024516-183013384.1632024516>.

betting on Olympic events, monitoring of betting patterns, safe reporting systems, and the well-resourced investigation and sanctioning systems that are needed to tackle this existential reputational problem for sport.

In Olympic Agenda 2020, IOC President Thomas Bach stated "we have first and foremost to protect the clean athletes … from doping, match-fixing, manipulation and corruption. We have to change our way of thinking. We have to consider every single cent in the fight against these evils not as an expense but as an investment in the future of Olympic Sport."[79]

#### 6.3.1 Integrity Betting Intelligence System

To mitigate the risk of competition manipulation, the IOC entered into a collaborative working partnership with the stakeholders of the Olympic Movement and other interested international organizations involved in safeguarding the integrity of sports competitions. An early step to address this threat was the launch of the IOC's Integrity Betting Intelligence System (IBIS)[80] in 2014. IBIS is a centralized mechanism for the exchange of information and intelligence that enables the sport movement to allocate and analyse information and intelligence about potential match fixing. Once potential match fixing is identified by an IBIS stakeholder, relevant entities (both from the licensed betting industry as well as government regulatory agencies) are contacted. IBIS is a useful tool that enables closer cooperation among sports organizations, sports betting operators and law enforcement who are aligned in their goals to remove match fixing in sports competitions.

#### 6.3.2 International Forum on Sports Integrity

In 2015 the IOC hosted the first International Forum on Sports Integrity (the Forum).[81] The meeting included representatives from world governments, the Council of Europe, the European Union, INTERPOL, Europol, United Nations agencies, sports betting operators, Olympic Movement stakeholders, among other interested parties. The Forum is fully supported by the Association of National Olympic Committees (ANOC), Association of Summer Olympic International Federations (ASOIF), and Association of International Olympic Winter Sports Federations (AIOWF).

The Forum was chaired by IOC President Thomas Bach who in his Opening Remarks stated:

> In Olympic Agenda 2020 we stressed the need to protect clean athletes from match-fixing, manipulation of competitions and related corruption…. Today's forum has brought all key players around the table to address this need and coordinate our action. We are pleased with the support we have received so far in this regard, in particular from the Council of Europe. We

[79] Olympic Agenda 2020 Recommendations, *supra* note 77 at 4.
[80] IOC, *Factsheet: The Integrity Betting Intelligence System (IBIS)*, (Lausanne: IOC, 2021), online (pdf): <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Factsheets-Reference-Documents/IBIS/Factsheet-IOC-Integrity-Betting-Intelligence-System-IBIS.pdf?_ga=2.41393450.961419715.1632024516-183013384.1632024516>.
[81] IOC, Press Release, "First International Forum for Sports Integrity Adopts Roadmap for Future Action to Protect Clean Athletes" (13 April 2015), online: <https://www.olympic.org/news/first-international-forum-for-sports-integrity-adopts-roadmap-for-future-action-to-protect-clean-athletes>.

> are intensifying our efforts to protect the integrity of sport and we ask that European and non-European governments sign the Council of Europe's Convention on the Manipulation of Sports Competitions and continue to work hand-in-hand with us.[82]

The Forum created a roadmap for future action aimed at strengthening and coordinating all activities to protect clean athletes from match fixing, manipulation of competitions, and related corruption. The Forum called on European and non-European governments alike to sign the Council of Europe Convention on the Manipulation of Sports Competitions, which ensures that domestic laws enable criminal investigations and sanctioning of the manipulation of sports competitions when it involves coercive, corrupt and/or fraudulent practices.

The ongoing work of the Forum focuses on themes such as education and information, intelligence and investigation, and legislation and regulation. The Forum's collaborative research lead to reports of strategies to combat match fixing, including the *Resource Guide on Good Practices in the Investigation of Match-Fixing* (the UNODC and the ICSS),[83] and a *Handbook on Protecting Sport from Competition Manipulation* (the IOC and Interpol).[84] Europol also produced a Situation Report entitled *The Involvement of Organized Crime Groups in Sports Corruption*.[85] The Forum allows these entities to work together to implement the strategies identified in these top-level reports.

The IOC launched its new Integrity and Compliance Hotline[86] at the Forum. The hotline is a new reporting mechanism intended to bring to light potential cases of competition manipulation as well as other violations of the integrity of sport. The web-based hotline is open to athletes, coaches, referees, and the public, while guaranteeing 100% anonymity. Anyone can report suspicious approaches or activities related to competition manipulation and/or infringements of the IOC *Code of Ethics*[87] or other matters—including financial misconduct or other legal, regulatory, and ethical breaches—over which the IOC has jurisdiction.

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[82] *Ibid*.

[83] United Nations Office on Drugs and Crime [UNODC] & the International Centre for Sport Security, *Resource Guide on Good Practices in the Investigation of Match-Fixing*, (Vienna: UNODC, 2016), online (pdf): <http://www.unodc.org/documents/corruption/Publications/2016/V1602591-RESOURCE_GUIDE_ON_GOOD_PRACTICES_IN_THE_INVESTIGATION_OF_MATCH-FIXING.pdf>.

[84] Interpol & IOC, *Handbook on Protecting Sport from Competition Manipulation,* (Lausanne: IOC, 2016), online (pdf): <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Betting/Education-Awareness-raising/Interpol-IOC-Handbook-on-Protecting-Sport-from-Competition-Manipulation.pdf>.

[85] Europol, *The Involvement of Organised Crime Groups in Sports Corruption: Situation Report,* (Europol, 2020), online: <https://www.europol.europa.eu/publications-documents/involvement-of-organised-crime-groups-in-sports-corruption>.

[86] "Welcome to the International Olympic Committee's Integrity and Compliance Hotline" (last visited 30 July 2021), online: *IOC* <https://ioc.integrityline.org/>.

[87] "Code of Ethics" (last visited 30 July 2021), online: *IOC* <https://olympics.com/ioc/code-of-ethics>.

### 6.3.3 International Partnership Against Corruption in Sport

The International Forum on Sport Integrity was also the occasion for the launch of the International Partnership Against Corruption in Sport (IPACS).[88] IPACS is a multi-stakeholder platform, including government and inter-governmental organizations, such as the United Nations, the European Union, the Council of Europe, Interpol, the United Nations Office of Drugs and Crime (UNODC), and UNESCO, who joined forces in order to "bring together international sports organisations, governments, inter-governmental organisations, and other relevant stakeholders to strengthen and support efforts to eliminate corruption and promote a culture of good governance in and around sport."[89]

The IOC, the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the UNODC, and the government of the United Kingdom coordinate the work of IPACS. An important operating assumption informing these new working partnerships is the recognition that no single organization can effectively address the multiple corruption challenges facing sports on its own. Collective action among the major public and private stakeholders in the sports world is needed. IPACS accomplishes its work through expert task forces overseen by an IPACS Steering Committee and regular high-level meetings among the IPACS organizations.

IPACS ultimately established four distinct working groups, focused upon:

- **Task Force 1:** reducing the risk of corruption in procurement relating to sporting events and infrastructure;[90]
- **Task Force 2:** ensuring integrity in the selection of major sporting events, with an initial focus on managing conflicts of interests;[91]
- **Task Force 3:** optimising the processes of compliance with good governance principles to mitigate the risk of corruption;[92] and
- **Task Force 4:** enhancing effective cooperation between law enforcement, criminal justice authorities and sport organisations.[93]

[88] See "About" on "IPACS" (last visited 30 July 2021), online: *International Partnership Against Corruption in Sport* [IPACS] <https://www.ipacs.sport/>.
[89] *Ibid*.
[90] "Reducing the Risk of Corruption in Procurement Relating to Sporting Events Infrastructure" (last visited 30 July 2021), online: *IPACS* <https://www.ipacs.sport/procurement-task>.
[91] "Ensuring Integrity in the Selection of Sporting Events" (last visited 30 July 2021), online: *IPACS* <https://www.ipacs.sport/major-sport-events-task>.
[92] "Optimising the Processes of Compliance with Good Governance Principle to Mitigate the Risk of Corruption" (last visited 30 July 2021), online: *IPACS* <https://www.ipacs.sport/good-governance-task>.
[93] "Enhancing Effective Cooperation between Law Enforcement, Criminal Justice Authorities and Sport Organisations" (last visited 30 July 2021), online: *IPACS* <https://www.ipacs.sport/cross-sector-cooperation>.

### 6.3.4 Summary of IOC Initiatives for Collective Action

Ultimately, Olympic Agenda 2020 has resulted in a more robust and collaborative relationship between the IOC and the Olympic Movement to support host communities, both at the bid and delivery stages of the Games cycle. The internal governance reforms of the IOC have built a significant new capacity to raise awareness and educate members of the Olympic Movement regarding the IOC's *Code of Ethics*, as well as how to identify, investigate, and sanction alleged violations. Such measures apply to every element of the work of the IOC, from the awarding of the Games to the design, build and hosting of the Games.

Throughout this period, the IOC successfully strengthened its internal integrity management systems to become more transparent and accountable. Further, the IOC enhanced its collaborative relationships with other members of the Olympic Movement to maximize the benefits local communities receive from hosting the Games. The IOC's willingness to work closely with external partners has reasserted the Olympic Movement's potential to utilize collective action in order to harness the power of sport for positive results. These kinds of working relationships have not required the IOC to diminish its basic principle of autonomy. Instead, the new collaborative approach has strengthened the IOC's capability to deliver the Games.

How can the IOC's experience working with host nations and Olympic Movement stakeholders be used in the closer working arrangements contemplated in Olympic Agenda 2020? How may these partnerships allow the IOC (while working closely with event delivery partners) to reduce corruption in the build and hosting stages of the Games? How can the IOC (and other ISOs) ensure that their officials comply with ethical conduct and avoid considering inappropriate self-interests in the decision-making process? What bright lines of ethical decision-making should apply both to the IOC and the other organizations involved in MSEs?

No one organization may unilaterally dictate such guidelines to another organization involved in these multi-stakeholder events. To bridge these fault lines of inter-organizational behaviour, commonly accepted ethical norms to guide decision-making must be embraced, communicated, and enforced. The future management of MSEs requires greater consensus about the ways of doing business in this complex multi-stakeholder environment. IBIS, the Forum, and IPACS are examples of important collective action initiatives among global sport stakeholders who have embraced this kind of shared thinking regarding appropriate conduct by both public and private actors in the MSE ecosystem. The IOC and leading government organizations joined together to develop common standards of behaviour and enforcement systems, applicable both internally and externally among stakeholder organizations. Ultimately, IBIS, the Forum and IPACS (and other similar collaborative initiatives) showcase how taking collective action on shared objectives can make significant collective progress in the fight against corruption in the global sport context.

## 7. INTEGRITY PACTS AND MONITORS

An integrity pact is a tool Transparency International (TI) developed in the 1990s to enhance the power of collective action.[94] It is "both a signed document and approach to public contracting which commits a contracting authority and bidders to comply with best practice and maximum transparency."[95] In this project- or transaction-specific agreement between a customer (usually a public entity, such as a government or government agency) and all bidders for the contract (usually companies),[96] the parties agree to a fair and transparent process,[97] thus enforcing accountability in public contracting.[98] Importantly, Integrity Pacts provide a proactive instrument to supplement the largely reactive process of law enforcement.[99] TI states that "when Integrity Pacts are first tried, there are often fears that taking time for transparency and accountability will delay work. Experience has shown, however, that they help ensure projects are delivered on time and within or below budget."[100]

For this reason, TI further states that it is "highly desirable to make the signing of the [Integrity Pact] mandatory,"[101] because the Integrity Pact can function only if all bidders submit to it. Although this mandatory, complete form of the Integrity Pact reflects the ideal use of this mechanism, it is also valued for its flexibility: "in some jurisdictions they are used in their complete form; in other jurisdictions only essential elements are used."[102] Sometimes they are voluntary and the party seeking the project tries to convince all bidders of the advantages of having an Integrity Pact in place, other times they are imposed.[103]

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[94] "Integrity Pacts" (last visited 30 July 2021) [TI Integrity Pacts], online: *Transparency International* <https://www.transparency.org/en/tool-integrity-pacts>.

[95] *Ibid*.

[96] *Ibid*.

[97] Juanita Olaya, *Integrity Pacts in the Water Sector: An Implementation Guide for Government Officials*, (Berlin: Water Integrity Network & Transparency International, 2010) at 32, 34, online (pdf): <https://knowledgehub.transparency.org/assets/uploads/kproducts/2010_IntegrityPactsWaterSector_EN.pdf>.

[98] TI Integrity Pacts, *supra* note 94.

[99] Wesley Cragg, Uwafiokun Idemudia & Bronwyn Best, "Confronting Corruption Using Integrity Pacts: The Case of Nigeria" in Ronald J Burke, Edward C Tomlinson & Cary L Cooper, eds, *Crime and Corruption in Organizations: Why it Occurs and What to Do About It* (London: Gower Publishing, 2010), 297 at 300.

[100] Transparency International, Media Release, "Integrity Pacts: Reaching Out to the Water Sector" (19 January 2011) [TI Water Sector], previously online at: <www.transparency.org/news/feature/integrity_pacts_reaching_out_to_the_water_sector>.

[101] Transparency International, *The Integrity Pact: A Powerful Tool for Clean Bidding*, (Berlin: Transparency International, 2009) [TI Clean Bidding] at 5, online (pdf): <www.transparency.org/files/content/tool/IntegrityPacts_Brochure_EN.pdf>.

[102] Cragg, Idemudia & Best, *supra* note 99 at 303.

[103] TI Clean Bidding, *supra* note 101 at 5. Beyond what we have considered in this section, additional tools and readings on Integrity Pacts are available under the "Publications and Resources" tab under "Integrity Pacts—Civil Control Mechanism for Safeguarding EU Funds" (last visited 30 July 2021), online: *Transparency International* <www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/>.

### 7.1 Importance of Fairness Monitors

TI notes that "the Integrity Pact is based on a simple principle: full transparency at every step of a well-designed contracting process."[104] As such, Integrity Pacts are generally overseen by Fairness Monitors—either independent experts or NGOs—that ensure "increased levels of transparency and accountability, compliance with the Pact's commitments."[105]

This independent monitoring is critical to preserve not only the terms of the Pact, but also to determine when non-compliance measures outlined in the Integrity Pact need to be enforced. Juanita Olaya, writing for the Water Integrity Network and Transparency International, states this mechanism's importance:

> Without the monitoring system, the advantages created by an IP may be unrealized. The monitor scrutinises the process closely and guards the implementation and enforcement of the IP. He is the source of credibility, reassuring both the authority and the bidders that the process will go as agreed, and is a source of information for the general public, building trust in the contracting process.[106]

Olaya also notes that there are certain necessary qualities of a good monitor, including independence, knowledge (of the project's contractual process and technical aspects), capacity (time, effort, resources), accountability, and commitment.[107] But beyond these characteristics, there is no standard monitoring mechanism: the chosen monitor can be an organisation or an individual, a governmental or non-governmental body, a national or international body, etc.[108]

## 8. ACTIVE PARTICIPATION BY CIVIL SOCIETY IN GOVERNMENT PROCUREMENT

A report published by the G20 in 2020 noted that worldwide spending on infrastructure reached approximately $2.7 trillion a year.[109] According to estimates, between 10 and 30% of investment in infrastructure is lost due to corruption, mismanagement, and inefficiency.[110] The IMF found that losses due to inefficiency affect all countries, with an average 15%

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[104] TI Water Sector, *supra* note 100.
[105] *Ibid*.
[106] Olaya, *supra* note 97 at 82.
[107] *Ibid* at 84-85.
[108] *Ibid* at 86-87.
[109] Infrastructure Transparency Initiative (CoST), *Business Plan 2021-2025: Strengthening Economies and Improving Lives*, (16 December 2020) [CoSt Business Plan] at 10, online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2020/12/Business-Plan-Final.pdf>.
[110] Infrastructure Transparency Initiative (CoST), *The Need for CoST: Strengthening Economies and Improving Lives,* (High Holborn, UK: CoST, 2020) [Need for CoST] at 1, online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2020/11/The-Need-for-CoST.pdf>.

efficiency gap in advanced economies, 34% in emerging markets and up to an astonishing 53% in low-income developing countries.[111] Weaknesses in public investment management institutions cause inefficiency, which increases the risk of rent-seeking and corruption, resulting in major value losses from global spending on public infrastructure.[112] Infrastructure development involves large, long-lasting, and complex projects characterized by high degrees of information asymmetry. This structure makes it harder to detect inflated prices, inferior quality, and/or slow-moving delivery.[113]

One recent example of this issue was found following a federal investigation in Brazil which unveiled massive kickbacks paid by companies in return for construction contracts with Petrobras, a majority-state-owned oil company.[114] A group of companies colluded to secure contracts with Petrobras, overcharging and diverting some of the funds and facilitating kickback payments directed to Petrobras's management and top-level Brazilian political elites. According to estimates from the Institute for Strategic Studies on Petroleum, Natural Gas and Biofuels, this embezzlement scheme led to a reduction of 2% of GDP in Petrobras investments and a 5% reduction in gross fixed capital formation, in addition to the embezzlement of about $2.5 billion in public funds (0.13% of GDP) during 2004–2012.[115] The corrupt scheme remained undisclosed for such a long period partially due to serious vulnerabilities in the internal control framework of Brazil's national oil company, a low level of transparency, lax disclosure rules, and a fragmented external oversight system, involving multiple government agencies that proved to be incapable of detecting the irregularities.[116]

The Infrastructure Transparency Initiative (referred to as CoST) was previously known as the Construction Sector Transparency Initiative. It is a global multi-stakeholder program that strives to achieve greater transparency, participation, and accountability in public sector infrastructure constructions. CoST was launched in 2015 and is funded by the UK and the Netherlands. It is an important example of collective action that brings together governments, businesses and civil society to promote the disclosure, validation, and interpretation of data from infrastructure projects. CoST is operating in 19 participating countries, most of which are developing nations. By helping make data on infrastructure public and accessible, CoST informs and empowers civil society organizations and citizens to hold decision-makers accountable for funds held in public trust. In doing so, CoST seeks to improve the quality of public infrastructure projects and reduce risks of inefficiency, mismanagement, and corruption.[117]

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[111] Gerd Schwartz et al, eds, *Well Spent: How Strong Infrastructure Governance Can End Waste in Public Investment*, (Washington, DC: International Monetary Fund, 2020) at 35, online: <https://www.elibrary.imf.org/view/books/071/28328-9781513511818-en/28328-9781513511818-en-book.xml>.

[112] CoST Business Plan, *supra* note 109 at 10.

[113] Schwartz et al, *supra* note 111 at 175.

[114] For further discussion of the Petrobras affair, see Chapter 1, Section 2.3.

[115] Schwartz et al, *supra* note 111 at 175, citing Eduardo Costa & Esther Dweck, *Reduction of Petrobras Investments: A Balance of Losses* (The Institute for Strategic Studies on Petroleum, Natural Gas and Biofuels Zé Eduardo Dutra (Ineep), 2019).

[116] *Ibid.*

[117] "About Us" (last visited 30 July 2021) [CoST - About Us], online: *CoST - Infrastructure Transparency Initiative* <https://infrastructuretransparency.org/about-us/>.

## 8.1 CoST Pilot Project

The creation of CoST was inspired by the success of the Extractive Industries Transparency Initiative (EITI) in bringing good governance practices in the non-renewable natural resources sector, and it employs a similar framework. Since its creation in 2003, the EITI has established a global standard to promote the open and accountable management of oil, gas, and mineral resources. It does so through bringing together multi-stakeholder groups of government, companies and civil society to implement, adapt and supervise the observance of the EITI Standard.[118] The Standard requires the disclosure of information along the extractive industry value chain, from the point of extraction as revenues make their way through the government, and reports on whether public benefit resulted. The EITI seeks to strengthen public and corporate governance, promote understanding of natural resource management, and provide the data to inform reforms for greater transparency and accountability in the extractives sector. Since the launch of its pilot project in four countries in 2003, the EITI has grown to include 56 member countries worldwide.[119]

CoST shares a similar story. It began as a 2008-2010 pilot initiative by the World Bank and the United Kingdom's Department for International Development.[120] The CoST pilot project spanned eight countries: Ethiopia, Malawi, Philippines, Tanzania, the UK, Vietnam, Zambia, and Guatemala (which joined in 2009). In each country, CoST organized a national Multi-Stakeholder Group (MSG), comprising representatives from government, industry, and civil society.[121] The pilot program consisted of a comprehensive baseline study of several core indicators across countries: a) existing levels of transparency and rules on disclosure regarding public infrastructure projects b) levels of competition in procurement (bidding statistics), and c) performance of construction projects in terms of time, cost and quality (i.e., time and cost overruns, and orders to remedy defective work).[122] A standard methodology was developed to evaluate each of the aforementioned indicators in participating countries, enabling future assessment of the results of various reforms.[123]

MSGs were tasked to profile the local construction sector, the laws and regulations relating to public administration and transparency, and relevant institutions and initiatives relating to governance in the country. The groups tested disclosure processes across several procuring entities to assemble a list of key project data and performed assurance reviews of disclosed data, identifying causes for concern and helping stakeholders to understand the

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[118] "Multi-Stakeholder Governance - The Power of Three" (last visited 25 October 2021), online: *EITI* <https://eiti.org/oversight>.

[119] For a discussion of the EITI's pilot program, see EITI, *Extractive Industries Transparency Initiative Source Book* (London: Department for International Development, 2005) at 7, online (pdf): <https://eiti.org/files/documents/sourcebookmarch05_0.pdf>. A list of the current EITI member countries can be found at: "Countries" (last visited 25 October 2021), online: *EITI* <https://eiti.org/countries>.

[120] Infrastructure Transparency Initiative (CoST), *Report on Baseline Studies: International Comparison,* (January 2011) [CoST Baseline] at 1, online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2018/06/Report-on-baseline-studies-International-comparison.pdf>.

[121] *Ibid*.

[122] *Ibid.*

[123] *Ibid*.

main issues.[124] The pilot project drew data from the assessment of 100 infrastructure projects in essential services: housing, road-building, supply of water, healthcare, education and emergency prevention infrastructure.[125] CoST looked specifically at how a multi-stakeholder approach could increase transparency and accountability in the delivery of infrastructure projects.[126]

The pilot presented noteworthy findings necessary for replicating CoST on a broad scale. The study found that existing transparency requirements regarding tenders were aimed at participants, but did little to inform the public about projects.[127] Moreover, none of the pilot countries required disclosure of changes to contract time and cost during project implementation, and only one country required disclosure of final cost and time after project completion.[128] Time overruns for construction were found to be extensive and exceeded cost overruns.[129] The study also identified the most important barriers to broader disclosure:

(i) Poor information management and limited technical capacity of procuring entities. In many countries, systems for storing and retrieving project information were found to be weak or non-existent. Moreover, the large number of agencies involved in planning, procurement, and delivery of construction projects lead to scattered storage of project information in hard copies rather than a compilation of all the project data in unified electronic databases.

(ii) Skepticism over the potential benefits of wider disclosure. In the UK, officials from procurement entities expressed the view that public interest in information about construction project execution was generally lacking and questioned the value of transparency as a tool against corruption.

(iii) The additional cost of compiling information in the absence of electronic data storage. Officials in Malawi, Zambia, Guatemala, and the UK suggested that in the absence of electronic storage and an improved records management system, the compilation of project-level data in an appropriate format for publication would carry significant costs that might outweigh potential benefits.[130]

The pilot project resulted in substantive recommendations for legislative improvements, enhancing broader transparency and strengthening its enforcement, and building technical capacity for data management to facilitate public disclosure.[131] The pilot project

[124] "Our Story" (last visited 30 July 2021) [CoST - Our Story], online: *CoST - Infrastructure Transparency Initiative* <https://infrastructuretransparency.org/about-us/our-story/>.
[125] *Ibid.*
[126] CoST Baseline, *supra* note 120 at 1.
[127] *Ibid* at 21.
[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid* at 12-13.
[131] *Ibid* at 21.

"demonstrated that the CoST approach could be applied across different contexts and various government systems and infrastructure sub-sectors."[132]

## 8.2 After Initial Success: CoST Approach, Development, and Toolkit

Subsequent to the successful pilot project, CoST was established as a London-based charity and by 2020 expanded its activity to an impressive 19 national and sub-national members and affiliates spanning four continents.[133] Over time CoST has become a well-recognized international initiative in promoting transparency through collective action. The success of the CoST approach resulted in many governments institutionalizing it through legal and policy frameworks. CoST facilitates the collaborative efforts of governments, the private sector and communities to achieve better economic efficiency in infrastructure projects by providing them with a set of principles and guidance on increasing transparency, accountability, and participation in public infrastructure.[134] In addition to working with CoST members at the national level, CoST engages with a variety of key international organizations (World Bank, TI, FIDIC, Article 19, Open Contracting Partnership, Hivos, Civic-20), facilitating the global exchange of experience and knowledge on transparency and accountability in public infrastructure[135] and pursuing common goals to better the delivery of infrastructure.[136]

CoST's collaborative approach has four core features:

- **Multi-stakeholder working:** In each country, CoST is directed by groups comprising representatives of key stakeholders of infrastructure projects: government, private sector and civil society. CoST serves as a neutral forum for the stakeholders to negotiate and pursue shared objectives to ensure value for money from infrastructure investment.
- **Disclosure:** CoST increases transparency by promoting the public disclosure of data on public infrastructure projects such as the purpose, scope, costs, and implementation of infrastructure projects. To facilitate disclosure, CoST has designed a CoST Infrastructure Data Standard (CoST IDS).[137] This tool requires procuring entities to disclose 40 data points ("items") across key stages of the infrastructure project cycle. In turn, it puts data from the inception to the completion of infrastructure projects into an accessible, understandable, and applicable format for both policy-makers and the public. In 2018-2019 in collaboration with Open Contracting Partnership, CoST has designed a new

[132] CoST - Our Story, *supra* note 124.
[133] CoST Business Plan, *supra* note 109 at 10. at 10
[134] Need for CoST, *supra* note 110 at 1-2.
[135] CoST - About Us, *supra* note 117.
[136] Need for CoST, *supra* note 110 at 1.
[137] Infrastructure Transparency Initiative (CoST), *CoST Infrastructure Data Standard*, (CoST, 2017), online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2017/12/CoST-Infrastructure-Data-Standard.pdf>.

Open Contracting for Infrastructure Data Standard (OC4IDS) that members are encouraged to adopt.[138]

- **Assurance:** CoST conducts an independent review of the disclosed data. CoST validates technical data, interprets it into plain language, and identifies concerns through this assurance process. Stakeholders can then understand the main issues, and it acts as a basis for holding decision-makers to account.
- **Social accountability:** Social accountability stakeholders such as the media, civil society, and citizens work with CoST to publicly promote the findings from the CoST assurance process and to use the disclosed data to monitor infrastructure projects. The social accountability factor creates a platform for communities to address officials on the issues that are important to them. Civil society representatives hold positions on multi-stakeholder groups which guide the delivery of programmes. To ensure the expertise of participants from civil society, CoST carries out regular training programmes on identifying and processing relevant project data through the government's online data disclosure platforms. The same training is available for journalists. In 2017, Josue Quintana, a CoST-trained reporter in Honduras, published an article exposing a miscalculation of about $170 million on a road and bridge expansion and reconstruction project. The government reviewed the contract after growing media pressure and receiving guidance from the CoST Honduras assurance process.[139]

In 2018 CoST developed the manual Infrastructure Monitoring Tool, and in 2020 it launched the Electronic Infrastructure Monitoring Tool (e-IMT), an online platform for tracking the progress and quality of infrastructure delivery. The main function of the e-IMT is to compile and provide access to up-to-date pivotal project information regarding its status and any issues. The e-IMT's oversight role prevents financial mismanagement, health and safety failings, and poor project outcomes.[140]

CoST has developed several informative tools and standards to facilitate disclosure and increase the technical capabilities of member countries to manage data on infrastructure projects and make it publicly accessible:

- **Open Contracting for Infrastructure Data Standard (OC4IDS):**[141] This toolkit, developed with Open Contracting Partnership, provides a comprehensive

[138] "OC4IDS – A New Standard for Infrastructure Transparency" (16 April 2019), online: *CoST - Infrastructure Transparency Initiative* <https://infrastructuretransparency.org/resource/oc4ids-a-new-standard-for-infrastructure-transparency/>. More on the Open Contracting for Infrastructure Data Standard is discussed below.

[139] "Civil Society" (last visited 30 July 2021), online: *CoST - Infrastructure Transparency Initiative* <https://infrastructuretransparency.org/our-approach/cost-feature-multi-stakeholder/civil-society/>.

[140] "CoST Tools and Standards" (last visited 30 July 2021), online: *CoST - Infrastructure Transparency Initiative* <https://infrastructuretransparency.org/cost-tools-and-standards/#Infrastructure-Monitoring-Tool>.

[141] In 2018, Open Contracting Partnership and CoST came together in a collaborative effort to develop a standard for transparency in infrastructure project delivery. The CoST IDS identifies key items and creates a framework for disclosing project data by procuring entities. Much of this data can be

approach to disclosure, combining current best standards for publishing contract and project-level data. It is applied to e-platforms, encouraging vital data centralization and accessibility in 'real time.' The OC4IDS provides tools for publishing and monitoring standardized data on infrastructure projects.[142]

- **CoST Infrastructure Disclosure Platform:** Developed by CoST Honduras, the Information and Monitoring System for Works and Supervision Contracts (SISOCS) provides easy access to data on thousands of public and public-private partnership projects. The platform code for this tool became open source in 2021, enabling worldwide attention on the transparency of a range of high-value projects.
- **Infrastructure Transparency Index (ITI):** A tool that measures and compares levels of transparency in the infrastructure sector. Procuring entities are scored on key transparency indicators including disclosure practices and citizen participation and assessed for improvement of their performance in a country's infrastructure sector over time.
- **CoST data analytics guidance:** CoST Ukraine's data analytical tool generates visual representations of state investments in infrastructure. The tool brings attention to data related to the successful bidders, changes to budgets and timeframes, and geographical differences in investment. CoST provides disclosure guidance for CoST members on how to adopt and use the tool on e-platforms in the private sector.[143]

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captured and verified through the Open Contracting Data Standard (OCDS), another tool developed by Open Contracting Partnership, to describe millions of procurement processes around the world relating to goods, services and public works. Infrastructure projects are typically long-term processes that include numerous contracts for planning, design and preparation work, construction, and implementation monitoring.
Another problem arose from scattered published data on infrastructure projects and contracts, which populated disparate systems and needed to be manually matched, creating additional obstacles and extra time expenditures for monitors. The collaborative efforts of the two organizations linked the OCDS and CoST IDS, thereby creating a comprehensive dataset (known as OC4IDS) to facilitate monitoring. OC4IDS leverages both standards, combining CoST's work on which project data to disclose with OCP's work on what to disclose about contracting processes. The project was implemented during June 2018-March 2019, providing CoST MSGs with access to scalable tools and methods to secure access to open data on infrastructure projects, monitor project design and performance, and drive better quality and more affordable infrastructure. "About" (last visited 25 October 2021), online: *Open Contracting for Infrastructure Data Standards Toolkit* <https://standard.open-contracting.org/infrastructure/latest/en/about/>; Bernadine Fernz, "The #OC4IDS: A New Standard for Infrastructure Transparency" (17 April 2019), online (blog): *Open Contracting Partnership* <https://www.open-contracting.org/2019/04/17/the-oc4ids-a-new-standard-for-infrastructure-transparency/>; "Creating a Data Standard for Infrastructure Transparency: Laying the Foundations" (29 September 2020), online (blog): *CoST Infrastructure Transparency Initiative* <https://infrastructuretransparency.org/2020/09/29/creating-a-data-standard-for-infrastructure-transparency-laying-the-foundations/>.

[142] For more information on the OC4IDS toolkit, visit "Open Contracting for Infrastructure Data Standards Toolkit" (last visited 30 July 2021), online: *Open Contracting Partnership* <https://standard.open-contracting.org/infrastructure/latest/en/>.

[143] Need for CoST, *supra* note 110 at 6.

The CoST program, scalable to different political, economic and social systems, involves modifying the universal approach for each country's context. Before developing and implementing country-specific recommendations, CoST conducts a baseline study, which aims to identify the main vulnerabilities and need for reforms and technical assistance. For example, in the scoping study on Ukraine, CoST noted that despite disclosure and availability of information in the public domain, there was one significant missing link—the lack of any significant impact on how Ukrainian state road operators managed business and spent money. Therefore, the main focus of CoST Ukraine shifted towards launching a platform for systemic public oversight and assurance regarding large-scale investment projects in the road building sector.[144]

## 8.3 CoST Success Stories and Results

Thanks to CoST support and technical assistance, by the end of 2020, CoST members disclosed data on more than 38,000 investments.[145] Tools and standards developed by CoST through almost ten years of work are now recognized as international best practices, receiving endorsements from the G20, UNDP, the European Investment Bank, Transparency International, World Bank, Global Infrastructure Basel, and FIDIC. In 2019, over 5,200 people from government, civil society, investigative journalism, and the private sector were trained to use infrastructure data.[146] The number of private sector representatives who received training in 2019 doubled in comparison to the previous year, indicating a shift in the industry towards more transparency and signaling early success in collective action.[147]

Besides the general increase in transparency and public awareness on spending in delivering infrastructure projects, CoST assurance reports prevent efficiency gaps and improve delivery quality. Evidence produced by CoST has been used to catalyze the closure of corrupt public institutions in Honduras;[148] to pressure a Ukrainian contractor into correcting serious defects in a bridge;[149] to trigger institutional reforms that reduced waste and inefficiency in Afghanistan;[150] and to deter wasteful procurement in Thailand, leading to savings of $460 million.[151] Findings from CoST studies and reports also helped to advocate for legislative amendments in Guatemala, stopping the frequently used scheme of

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[144] Olga Mrinska, Stephen Vincent, & Charlotte Ellis, *Adam Smith International for Construction Sector Transparency Initiative - Ukravtodor Scoping Study: Final Report* (Adam Smith International, 2015) at 36-37, online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2015/01/147_Adam-Smith-International-Ukravtodor-Scoping-Study-Final-Report-Draft-Final-2.pdf>.

[145] Need for CoST, *supra* note 110 at 5.

[146] *Ibid*.

[147] *Ibid*.

[148] CoST Business Plan, *supra* note 109 at 10.

[149] *Ibid* at 6.

[150] *Ibid* at 10.

[151] *Ibid* at 10. See also: Infrastructure Transparency Initiative (CoST), *CoST Thailand: Saving Millions, Enabling Participation and Shifting Mindsets*, (2020), online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2020/07/Thailand-final.pdf>; Shirley Tay, "How Thailand is Cutting Infrastructure Costs with Transparency", *GovInsider* (16 November 2020), online: <https://govinsider.asia/smart-gov/comptroller-generals-department-pattaraporn-vorasaph-how-thailand-is-cutting-infrastructure-costs-with-transparency/>.

establishing NGOs as a means of bypassing procurement regulations and siphoning off funding intended for public infrastructure projects.[152]

CoST helped avoid waste of over $7.4 million in the over-run on road rehabilitation in Malawi.[153] CoST also generated savings of $3.5 million on building a road in Ethiopia,[154] money that enabled the government to undertake other important development projects. The CoST process in building a road in Ethiopia is further described as follows.

**An Example of the CoST Process at Work**

Road projects represent around a quarter of the annual infrastructure budget of the Ethiopian federal government. The Road Sector Development Program therefore constitutes one of the major lines of federal spending.

From 2010 to 2016, CoST Ethiopia's assurance process reviewed 52 building, road and water infrastructure projects representing investments worth $3.27 billion.[155] Thirty-two of them are road sub-sector projects. The building of the Gindebir to Gobenza Road in Eastern Ethiopia exemplifies CoST's impact. The exorbitant price of the road caught public attention and triggered an inquiry from the federal anti-corruption agency, and the agency requested technical support from CoST Ethiopia to evaluate the cost of the road.

As a 2018 CoST report notes, "CoST Ethiopia's Assurance Team highlighted that original plans for the road in Eastern Ethiopia exaggerated the volume of retaining wall and excavation required for the road-building project. CoST Ethiopia's MSG then held a workshop involving the media and civil society organizations, sparking considerable interest in reviewing costs. As a result, the Government of Ethiopia adopted an alternative design for the road project. Furthermore, the original designers were debarred from Government contracts for two years."[156]

The design adopted by the government resulted in $3.5 million in savings, which Eyasu Yimer, Vice-Chair of Transparency Ethiopia, noted could be applied towards "[building] a two-block school that may allow 500 students to attend."

Lastly, the 2018 CoST report also notes that "CoST Ethiopia's disclosure of information on a rural road project led to a reduction in construction time by six months, bringing the

[152] Infrastructure Transparency Initiative (CoST), *Delivering Better Value Public Infrastructure,* (CoST, 2018) [Delivering Better Value Public Infrastructure] at 2, online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2018/06/2186_CoST-Success-Stories.pdf>.
[153] *Ibid* at 1.
[154] *Ibid* at 2.
[155] "CoST Ethiopia - From Technical Data to Actionable Information, New Aggregation Study Launched" (last visited 11 November 2021), online: *CoST - Infrastructure Transparency Initiative* <https://infrastructuretransparency.org/news/cost-ethiopia-from-technical-data-to-actionable-information-new-aggregation-study-launched/>.
[156] Delivering Better Value Public Infrastructure, *supra* note 152, at 2.

benefits to the rural community earlier than expected. Since the first sections of the road opened in 2011, it is reported that the income of local farmers has more than doubled."[157]

CoST supported member governments to improve their response to the COVID-19 crisis. As a result, CoST compiled robust guidance on application of the CoST approach in situations of crisis. In Honduras, the CoST approach was implemented as a governance component during the construction of 93 new health facilities as part of the rapid response to the COVID-19 pandemic.[158]

## 8.4 Future Projects

The 2020 independent review recognized the significant impact of CoST worldwide, but also pointed out the areas of further improvement. Among them, the report noted: "a more robust monitoring, evaluation, accountability and learning framework; a more diverse funding base; a significant increase in income; recognition for CoST members and individual reformers who drive success; and prioritising the development and roll-out of the Infrastructure Transparency Index."[159]

Recognizing the need to accelerate the delivery of good quality infrastructure services in order to reach the United Nations' Sustainable Development Goals and meet global challenges, CoST has recently adopted a Business Plan for 2021-2025. Its focus for the years to come is scaling up and responding to latent demand to deliver a step-change in impact. The plan outlines the following strategic priorities:

- increasing global impact through a growing number of CoST members and affiliates (the projected increase in 12 new members);
- increasing international support for improving transparency, participation and accountability in infrastructure investment;
- improving learning and knowledge sharing; and
- ensuring efficient use of resources to maximize impact.[160]

## 8.5 Best Practice in Collective Action

CoST's success lies with its approach. It is directed towards committed, resilient, and influential multi-stakeholder groups from government, civil society, and private sectors. By bringing them all together around the table, CoST ensures key components: political will, innovation by large industry players, and effective monitoring of the use of public funds. A committed group of stakeholders starts changing "the rules of the game," shifting the

[157] This description is largely taken from Delivering Better Value Public Infrastructure, *supra* note 152 at 2.
[158] Need for CoST, *supra* note 110 at 6.
[159] CoST Business Plan, *supra* note 109 at 11.
[160] *Ibid* at 6-9.

construction industry towards more transparency and accountability in project delivery. Empowering media and civil society representatives through ongoing training and education events guarantees monitoring of compliance with disclosure requirements and delivery of infrastructure projects. Assurance reports highlight issues and lead to government action. Finally, the institutionalization of the implemented rules on disclosure ensures the long-lasting effect of the change, entrenching them against potential political turbulence.

CoST presents an excellent example of the success of collective action in curbing corruption. As an independent arbiter, CoST works to persuade all stakeholders that they benefit from reducing mismanagement and corruption. Governments benefit from better management of public infrastructure projects, including more competitive prices and a larger bidder pool. For politicians, better performance means greater chances of re-election, while bureaucrats enjoy increased job security and opportunities for promotion. The private sector profits from an improved investment climate and level playing field. Citizens enjoy advantages that come from better quality infrastructure, better value received for taxes paid, and greater trust in both government and the private sector.[161] Once the key players reach this understanding and decide to implement new disclosure rules, the next most important question for everyone involved in the collaborative effort against corruption is how to ensure that no one cheats the rules and unduly benefits from deflecting.

As an independent non-profit organization, CoST enjoys a heightened level of trust from key stakeholders: government, business, and civil society. Greater credibility makes CoST well placed to launch collective action and bring together pivotal players who might suffer from a lack of mutual trust. Therefore, CoST bridges the gap between various parties and builds trust between them, guaranteeing that all the players abide by the same rules and align their activities in a collaborative effort to bring more transparency and integrity in infrastructure. After setting up a multi-stakeholder group in a member country, CoST also balances the power inequality between parties. The most important role played by CoST in the initial stage of implementing disclosure procedures is that of the external monitor, issuing assurance reports and ensuring that both government and businesses fully abide by the new rules and make the information on infrastructure procurement publicly available. Simultaneously, CoST provides training to media and civil society representatives, building up their capacity to take over monitoring once the project has been implemented.

Such an approach guarantees that the multi-stakeholder group can continue to exist independently even after CoST "exits." Moreover, government, business, and civil society are all well-equipped to perform their function within the partnership. They also have relatively equal bargaining power and an effective system of "checks and balances" to prevent collusion and deviation. This ultimately promotes trust and institutionalizes a new culture and new rules of doing business, makes deflections intolerable, and drives smaller market actors to embrace new rules—thereby creating a self-fulfilling virtuous spiral.

[161] "CoST Uganda: A Collective Action Approach to Integrity in Infrastructure Procurement" (25 January 2021), online: *Basel Institute on Governance* <https://baselgovernance.org/blog/cost-uganda-collective-action-approach-integrity-infrastructure-procurement>.

CoST collaboration with Open Contracting Partnership on developing OC4IDS represents collective action on an even larger scale. The cooperation between the two organizations in turn facilitates collective action by other parties. The OC4IDS is not merely a tool to link two otherwise separate datasets for better monitoring. Rather, it serves the much more important function of bringing together multi-stakeholder groups of different projects—project data and contract data transparency—to align their interests and powers in advocating for more transparency, integrity, and better funds management.

CHAPTER 16

# THE ROLE OF NGOS

DUFF CONACHER

## CONTENTS



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

# 1. INTRODUCTION

The role of non-governmental organizations (NGOs) in combatting corruption is recognized in the United Nations Convention Against Corruption (UNCAC)[1] as a key part of any anti-corruption effort in any country. The Preamble states:

> Bearing in mind that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective.

Article 13 of the UNCAC, entitled "Participation of society" states:

> 1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:
>
>  (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
>
>  (b) Ensuring that the public has effective access to information;
>
>  (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;
>
>  (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
>
>  (i) For respect of the rights or reputations of others;
>
>  (ii) For the protection of national security or *ordre public* or of public health or morals.
>
> 2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate,

[1] United Nations Convention Against Corruption, 9 to 11 December 2003, 2349 UNTS 41, A/58/422, (entered into force 14 December 2005) [UNCAC], online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

> for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

The UNCAC's Chapter VII: Mechanisms for Implementation, Article 63 states:

> Conference of the States Parties to the Convention
>
> 1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.
>
> …
>
> 4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:
>
> …
>
> (c) Cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations …

The communiqués of bi-annual United Nations anti-corruption conferences have highlighted the need for every jurisdiction to implement broad, multi-pronged enforcement measures. The importance of raising public awareness of corruption through education and public promotion initiatives and support of civil society anti-corruption organizations is a particular measure that continues to receive emphasis.[2]

The 34 member countries of the OECD have adopted several guidelines concerning political ethics enforcement, including *The 10 Principles for Transparency and Integrity in Lobbying*.[3] Principle 10 states that civil society (non-profit, citizen organizations, media, etc.) should be involved in the regular review of the implementation and impact of restrictions on lobbyists, along with public office holders, lobbyists, and watchdog agencies.

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[2] "Conference of the States Parties to the United Nations Convention Against Corruption" (last visited 19 November 2021), online: *United Nations Office on Drugs and Crime* [UNODC] <http://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html>. See, for example, UNODC, *Resolutions and Decisions Adopted by the Conference of the States Parties to the United Nations Convention against Corruption*, UN Doc V.14-01171 (E), 25–29 November 2013, online: <https://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1401171e.pdf>.

[3] OECD, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, OECD Legal Instruments, OECD/LEGAAL/0379 (Paris: OECD, 2021) [OECD, *Principles for Transparency and Integrity*], online (pdf): <https://legalinstruments.oecd.org/public/doc/256/256.en.pdf>. As a 'legal instrument' of the OECD, it is not binding, but the OECD audits implementation by member countries. See "OECD Legal Instruments" (last visited 19 November 2021), online: *OECD* <http://www.oecd.org/legal/legal-instruments.htm>. See also: OECD, OECD Anti-Corruption Division, *Fighting Corruption: What Role for Civil Society? The Experience of the OECD*, (Paris: OECD, 2003), online (pdf): <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/19567549.pdf>.

Regional anti-corruption conventions also require the participation of NGOs. For example, Article 12 of the African Union Convention on Preventing and Combating Corruption (AUCPCC) states that parties should involve NGOs in raising public awareness and assisting with the implementation of the Convention. Article 12 also states NGOs should play a role in monitoring compliance.[4]

Courts have also recognized the key role of NGOs. A ruling by the European Court of Human Rights stated that NGOs are "one of the most important actors in the democratic process."[5]

However, despite these lofty words and commitments, in reality, anti-corruption efforts are a multi-year struggle for NGOs. In many cases, it is an out-and-out decades-long battle to pressure and push governments and big businesses to make even the most basic changes to rules and enforcement measures to combat corruption. Often, an ongoing campaign is necessary to prevent rollback of any changes that have been won.

The strategies and tactics deployed by NGOs to manifest these changes vary country by country, jurisdiction by jurisdiction, and span across the full spectrum of nonviolent (and in some situations, violent) actions. Of course, there are debates about which strategies and tactics are effective. The debates are based upon competing and conflicting theories regarding how social change occurs and arguments concerning what has actually happened in any country or jurisdiction efforts to stop corruption.

Given space limitations, this chapter provides a sketch of the role of NGOs in combatting corruption. Thousands of NGOs are involved in anti-corruption work worldwide, and it is impossible to summarize their efforts in one chapter. Determining which anti-corruption strategies have been, or will be, effective in a given jurisdiction is immensely challenging. Such debates require the consideration of a wide range of topics, a multitude of events, and all conceivable anti-corruption efforts. Given that there is debate on how exactly changes have occurred, any discussion on anti-corruption efforts also necessarily involves the discourse surrounding the theories, methods and approaches of documenting any historical event.[6]

As a result, this chapter provides only an overview of these strategies and tactics and the debates concerning their effectiveness, along with a case study based on the author's experience since 1993 as the Coordinator of Democracy Watch in Canada. To be clear, this chapter focuses on the role of citizen-run NGOs, as opposed to NGOs that are affiliated directly or indirectly with governments or politicians, such as the Global Organization of Parliamentarians Against Corruption (GOPAC) and the Inter-Parliamentary Union, because their structure and operations differ in significant ways. Associations of politicians often undertake some of the same activities as citizen-run NGOs and face the same types of

[4] Indira Carr & Opi Outhwaite, "The Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice" (2011) 44:3 Suffolk UL Rev 615 at 617.
[5] *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203, Ziemele J et al, dissenting at para 2.
[6] Chris Lorenz, "History: Theories and Methods" in James D Wright, ed, *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed (Amsterdam: Elsevier, 2015) 131.

resistance to their anti-corruption efforts as citizen-run NGOs, especially their members who are politicians in opposition parties. However, very different and distinct laws, structures and societal roles usually apply to political parties, politicians, and government-affiliated NGOs, which makes it difficult to summarize their role while simultaneously summarizing the role of citizen-run NGOs. Further, this chapter focuses on NGOs that are involved in the distinct role of advocating for anti-corruption measures, as opposed to other NGOs like media outlets that play a role in monitoring governments and corruption. All of these actors—political associations, parties, citizen-run NGOs, media, and the public overall—are part of what is commonly called "civil society." The role of citizen-run advocacy NGOs as one sector of civil society involved in anti-corruption efforts is the focus of this chapter.

## 2. RELATIONSHIPS WITH GOVERNMENTS AND BUSINESSES

A major factor in the role, strategies, and tactics of any NGO working on anti-corruption initiatives is its relationship with the governments and businesses in which jurisdiction(s) it operates. The range of relationships begins at the low end with violent repression in jurisdictions where none or few of the rights set out in the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*[7] have been recognized or enacted into law. In jurisdictions where rights have been enacted and are respected and enforced at a basic level, the relationship often moves to nonviolent repression and resistance. In jurisdictions where a fuller set of rights have been enacted and are respected and enforced through a more comprehensive system, the range of possible relationships cover every step of Sherry Arnstein's classic "Ladder of Citizen Participation," for governments and businesses:

1. manipulating NGOs and citizens through dishonest, secretive and unethical dealings and public relations efforts; to
2. informing NGOs of policy changes; to
3. consulting them while developing changes; to
4. placating and co-opting them; to
5. partnering with them (in rare cases); to
6. delegating powers to them (even more rare); and, at the top end to
7. circumstances where NGOs and citizens have control over policy (extremely rare).[8]

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[7] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), online: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), online: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>. United Nations, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), online: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

[8] Sherry R Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 J Am Plann Assoc 216. See an illustration of the ladder at: "Arnstein's Ladder of Citizen Participation" (last visited 19 November 2021), online: *The Citizen's Handbook* <https://www.citizenshandbook.org/arnsteinsladder.html>.

Based on the provisions of the UNCAC, OECD, and other international conventions, governments are required to have the following relationship with NGOs:

1. To protect, through laws and other supports, all of the fundamental rights of freedom of association, freedom of expression, and the right to petition the government and the courts for changes, set out in the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*, subject only to restrictions to protect the rights and reputations of others (for example, through laws prohibiting defamation, and those protecting national security and public order (i.e., laws prohibiting violent protests));
2. To promote the active participation of NGOs in anti-corruption efforts;
3. To promote the transparent contribution of NGOs to government decision-making processes concerning anti-corruption measures, including involving them in developing, implementing, and regularly reviewing these measures;
4. To ensure access to government information;
5. To raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption; and
6. To allow, arguably, funding from outside the jurisdiction to support NGOs' work, including anti-corruption activities.

In 2020, the UN Office of the High Commissioner for Human Rights (OHCHR) included Article 33 in its General Comment #37 on Article 21 of the *International Covenant on Civil and Political Rights* (*ICCPR*). Article 21 protects the right to peaceful assembly. With regard to the sixth requirement mentioned above, the World Movement of Democracy argues that the inclusion of Article 33 is "the strongest international mechanism yet for protecting civil society's right to receive funding."[9] The General Comment is enforceable in international law, and Article 33 sets out the requirements for governments to protect the actions of individuals and organizations leading up to a gathering, including the protection of actions related to the "mobilization of resources."[10] However, as discussed below, the practice of international funding has been controversial, and the right of NGOs to receive outside support has been attacked more and more aggressively by governments around the world since 2005.

## 2.1 Evolution of International Aid

Democracy aid efforts, with anti-corruption aid as a subset of those efforts, evolved and expanded from the late 1980s with three main approaches. These approaches are aimed at

[9] "The Right to Receive Funding" (last visited 19 November 2021), online: *World Movement for Democracy* <https://www.movedemocracy.org/defending-democratic-space/right-to-receive-funding>.

[10] UNHRC, *General Comment No 37 (2020) on the Right of Peaceful Assembly (Article 21),* UN Doc CCPR/C/GC/37 17 September 2020, online (pdf): <https://www.movedemocracy.org/wp-content/uploads/2020/11/General-Comment-37.pdf>.

changing the relationship between governments and NGOs, and the citizens involved in both, to fulfill the requirements discussed in Section 2. Of course, this undertaking was just the beginning of a sustained long-term effort, given that so few governments had fulfilled even a few of the requirements. The three main approaches are:

1. support for key democratic institutions and processes (especially free and fair elections and political parties);
2. strengthening key institutions that check the power of the national government, especially parliaments, judiciaries, and local governments; and
3. support for civil society (NGOs, media, labour unions, and civic-education initiatives).[11]

Initial aid efforts supported NGOs, but primarily NGOs that existed only due to the support of international aid or those that provided state services. NGOs that advocated for reform to stop corruption and ensure the proper use of public money for the provision of public goods and services received much less support.[12] The lessons learned from the past four decades have led substantially more aid organizations to recognize that capacity-building within local NGOs, which are rooted in, connected to, and supported by the mass of the public, can be key to advancing democratic (and relatedly, anti-corruption) reforms.[13]

Advocacy NGOs generally need support from outside their jurisdiction, especially in countries where income inequality is extreme, as the public simply does not have the money to sustain these organizations at a level that allows for effective action. As well, even in countries with a lower rate of income inequality, advocacy NGOs often criticize and challenge political parties, politicians and officials across the political spectrum—thus making it difficult to raise funding from anyone who supports any party or politician. Finally, anti-corruption advocacy is often aimed at the political and business elite of any country, who usually control significant funding sources such as government and private or family foundation grants. These 'elites' are often reluctant to support initiatives aimed at challenging how they are exercising their power, especially those which challenge corrupt activities.

## 2.2 Funding Systems in the US, UK, and Canada

The US, however, is an exception to the general trends regarding NGO fundraising. For example, Candid, an NGO, is supported by several foundations that provide grants for democratic reform work in the US. Candid has a data tool that illustrates this point. A search of the foundation grants in Candid's database in August 2021, reveals that since 2011 a total

[11] Thomas Carothers, "Democracy Aid at 25: Time to Choose" (2015) 26:1 J Democracy 59, online: <https://www.journalofdemocracy.org/articles/democracy-aid-at-25-time-to-choose/>. Jennifer M Brinkerhoff, "Donor-Funded Government—NGO Partnership for Public Service Improvement: Cases from India and Pakistan" (2003) 14:1 Voluntas 105.
[12] Sangeeta Kamat, "NGOs and the New Democracy: The False Saviors of International Development" (2003) 25:1 Harv Intl R 65. Lina Suleiman, "The NGOs and the Grand Illusions of Development and Democracy" (2013) 24:1 Voluntas 241.
[13] *Ibid*; Carothers, *supra* note 11.

of 828 funders had granted $287.4 million to 1,084 organizations under the category "campaign finance." This $287.4 million is part of the $12.3 billion granted by 13,971 funders to 27,508 organizations for democratic reform work in the US since 2011.[14]

The UK is also somewhat an exception to this trend, though not to the same extent as the US. The government funding body, the "Westminster Foundation for Democracy," supports NGOs and civil society groups in 38 non-UK countries.[15] The UK Democracy Fund[16] supports several democratic reform and education organizations, including some that work on anti-corruption initiatives. Transparency International UK (TI UK) had a $9 million annual budget in 2020, but about half the amount came from international funders, with much of the funding allocated towards addressing corruption outside the UK.[17] TI UK is a member of the UK Anti-Corruption Coalition (the Coalition), which focuses on a wide scope of anti-corruption issues both inside and outside the UK. The Coalition largely consists of organizations concerned with international development issues and the UK government's role abroad, including its implicit and explicit support of corrupt practices by other governments. The composition of the Coalition lends to its focus on issues of corrupt practices by other governments.[18] Bond[19] is a network of more than 400 international development organizations and other international initiatives based in the UK. Bond, however, primarily works on stopping corruption in other countries rather than in the UK. Overall, the UK has far fewer organizations working on democratic reforms and anti-corruption when compared proportionally to the US.[20]

In stark contrast, there is almost no government funding nor grants from private or family foundations available for anti-corruption (or any kind of democratic reform) work focused on the laws that apply to politicians and government officials and their actions in Canada. The Canadian government grants tens of millions annually to support NGOs and civil society organizations trying to win democratic reforms abroad.[21] The government, however, provides no support for these efforts in Canada (nor do any sub-national governments in Canada). Based on US statistics, discussed above, and the fact that the Canadian economy is approximately one-tenth the size of the US economy, Canada should have had, since 2011,

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[14] "Foundation Funding for US Democracy: Data Tool" (last visited 19 November 2021), online: *Candid* <https://democracy.candid.org/>.

[15] "About" (last visited 19 November 2021), online: *Westminster Foundation for Democracy* <https://www.wfd.org/about/>.

[16] "UK Democracy Fund" (last visited 19 November 2021), online: *Joseph Rowntree Reform Trust* <https://www.jrrt.org.uk/what-we-do/the-uk-democracy-fund/>.

[17] "Annual Impact Report and Accounts 2019–2020" (September 2021), online (pdf): *Transparency International UK* <https://www.transparency.org.uk/sites/default/files/pdf/publications/Transparency%20International%20UK%202020%20Annual%20Impact%20Report%20and%20Accounts.pdf>.

[18] "Fighting Corruption in 2021" (last visited 19 November 2021), online: *UK Anti-Corruption Coalition* <https://www.ukanticorruptioncoalition.org/focusareas>; "Our Members" (last visited 19 November 2021), online: *UK Anti-Corruption Coalition* <https://www.ukanticorruptioncoalition.org/members>.

[19] "About Us" (last visited 19 November 2021), online: *Bond* <https://www.bond.org.uk/about-us#>.

[20] See e.g. Unlock Democracy, Democracy Audit, Demos, and Electoral Reform Society.

[21] See e.g. Global Affairs Canada, News Release, "Canada Announces Support to Fight Corruption" (9 December 2016), online: <https://www.canada.ca/en/global-affairs/news/2016/12/canada-announces-support-fight-corruption.html>.

83 funders grant $29 million to 100 organizations working on campaign finance reforms alone. In other words, an average of $2.9 million should have been granted annually over the past decade just for work on that issue. And 1,400 funders should have granted $1.2 billion to 2,750 democratic reform organizations over the past decade for democratic reform work.

Even Transparency International Canada only had a budget of approximately CDN$358,700 in 2020.[22] This budget is barely adequate to operate at a basic level, let alone undertake multi-pronged activities. Almost half that budget came from one anonymous donor; one-quarter from sources outside Canada, and only four percent from the government. Since it was established in 1996 and throughout its history, TI Canada received even less annual funding. Further, the funding was almost exclusively for initiatives focused on anti-corruption activities outside of Canada—mainly bribery of foreign governments by Canadian companies. Only in the past few years did TI Canada begin to undertake any initiatives focused on stopping corruption from occurring within Canada. These initiatives call for laws to be enacted establishing registries that disclose the actual owners of all corporations and properties in the country (known as a "beneficial ownership" law).[23]

Democracy Watch is the only national NGO in Canada that focuses on anti-corruption advocacy broadly. Democracy Watch's work involves campaigns for reforms and enforcement of laws, and filing complaints and court cases against both public sector and business officials across the political spectrum, in the areas of bribery, money laundering, government procurement, political finance, lobbying, conflict of interest, access to information, and whistleblower protection.[24] Since the establishment of Democracy Watch in 1993, no government program has ever had grants available to support activities in any of these areas. Only two private foundations have ever provided grants to Democracy Watch, and those grants were discretionary and not part of an ongoing or even temporary anti-corruption granting program. The organization relies almost entirely on donations from individual Canadians, 95% of whom donate less than CDN$150 annually, and has never had enough funding to pay for more than two employees.[25]

## 2.3 International Aid and NGO Challenges

In many countries funding from outside the country supports NGOs' anti-corruption efforts worldwide. However, foreign governments and international agencies and NGOs' involvement in supporting domestic NGOs can have negative effects, no matter how grassroots-based the domestic NGOs. Foreign and international involvement raises questions of who is directing the activities of the domestic NGOs, whose interests are being

[22] "Supporters" (last visited 20 November 2021), online: *Transparency International Canada* <https://transparencycanada.ca/supporters>.

[23] "Beneficial Ownership Transparency" (last visited 20 November 2021), online: *Transparency International Canada* <https://transparencycanada.ca/beneficial-ownership-transparency/overview>. See also Chapter 5, Section 6.1.2.3.

[24] "List of Key Changes Democracy Watch Has Won For You" (last visited 9 December 2021), online: Democracy Watch <https://democracywatch.ca/about/>.

[25] "Please Donate to Democracy Now" (last visited 9 December 2021), online: *Democracy Watch* <https://democracywatch.ca/donate/>.

furthered, and whether the dependency on international funding changes the domestic NGOs' priorities to suit the funders. When suspicions arise due to support from foreign governments and their agencies (such as the US National Endowment for Democracy), as well as international agencies, it becomes relatively easy for a government to incite the public to believe that the foreign entity is attempting to undermine or even overthrow the government. This narrative is particularly compelling given the history of the US, Russia, England, China, and other colonial and imperial powers intervening in the affairs of other countries.[26] Particular concerns emerge with internationally operating NGOs connected to political parties. The International Republican Institute's direct connection with the US Republican Party and the National Democratic Institute's loose connection with the US Democratic Party, serve as two examples of this phenomenon.[27] NGOs in a developing country working in concert with or in support of opposition parties raise similar questions.

The difficulties of providing support have become acute in the past 15 years. Through the 1980s and up to the mid-2000s, funding from international sources was generally not actively challenged or questioned. However, according to the World Movement for Democracy, since 2012, governments in 70 countries have enacted more than 160 laws to restrict the rights of NGOs to receive international funding to support their activities.[28] Several factors have led to these restrictions: first, the effectiveness of NGOs to mobilize the public can threaten governments and governing parties and politicians; second, many governments resist international pressure generally, and, more specifically, international pressure applied through the support of NGOs; and third, many governments look to undermine opposition parties and movements by tying them to foreign governments and agencies.[29]

Funders have adopted a variety of methods to try to neutralize these efforts by governments. One method has been funding campaigns to stop the enactment of such laws. Alternatively, funders have increased funding transparency to reduce the public's level of suspicion (which raises the issue of revealing details about the people who run the NGOs—making them more vulnerable to attacks by the government). Lastly, funders have assisted NGOs with public education initiatives concerning their role and legitimacy.[30] However,

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[26] Martin Williams, "FactCheck: America's Long History of Meddling in Other Countries' Elections", *Channel 4 News* (23 November 2017), online: <https://www.channel4.com/news/factcheck/americas-long-history-of-meddling-in-other-countries-elections>.

[27] See e.g. Grant W Walton, "Gramsci's Activists: How Local Civil Society is Shaped by the Anti-Corruption Industry, Political Society and Translocal Encounters" (2016) 53 Political Geo 10.

[28] "The Right to Receive Funding" (last visited 20 November 2021), online: *World Movement for Democracy* <https://www.movedemocracy.org/defending-democratic-space/right-to-receive-funding>. Lloyd Hitoshi Mayer, "Globalization Without a Safety Net: The Challenge of Protecting Cross-Border Funding of NGOs" (2018) 102:3 Minn L Rev 1205.

[29] Thomas Carothers & Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire*, (Washington, DC: Carnegie Endowment for International Peace, 2014), online (pdf): <https://carnegieendowment.org/files/closing_space.pdf>.

[30] Thomas Carothers, "The Civil Society Flashpoint" (6 March 2014), online: *Carnegie Endowment for International Peace* <https://carnegieendowment.org/2014/03/06/civil-society-flashpoint-why-global-crackdown-what-can-be-done-about-it/h2kw>; Thomas Carothers, *The Closing Space Challenge: How Are Funders Responding?* (Washington, DC: Carnegie Endowment for International Peace, 2015), online (pdf): <https://carnegieendowment.org/files/CP_258_Carothers_Closing_Space_Final.pdf>;

governments keep trying to cut off outside support for anti-corruption, democratic reform, and development groups. The measures and changes in practices required to solve this problem are likely much more nuanced and multi-faceted, especially given the growing restrictions on civil society and resistance to the pressure of NGOs by governments in several established democracies.[31] A recent example of this pressure is when the President of Mexico filed a diplomatic note with the US Embassy calling on the US Agency for International Development to stop funding the NGO Mexicans Against Corruption and Impunity.[32] In reality, as long as NGOs need this external funding to have any chance of success in sustaining their efforts long enough to win changes, many governments will continue to try to block this funding.

## 2.4 Method for Sustaining NGOs Worldwide

Leading US activist Ralph Nader pioneered and developed a promising solution, albeit politically unpopular, that can be implemented in almost all countries and lowers the costs of both reaching the public and rallying their financial support for domestic NGOs. The method involves having the government establish citizen-run and citizen-funded independent NGOs by law for each government and business sector.[33] Each NGO is given the right to include a notice in the emails and mailings sent to the public by the government institutions or businesses in each sector. The notice invites the public to join the NGO for a nominal annual fee. Nader calls the method the "silicon chip" of citizen organizing, as it exponentially increases the resources and power of citizens in each sector. It can be applied in almost every government and business sector.[34]

For example, a government would enact a law creating an anti-corruption NGO to watch over government ethics (political finance, lobbying, and conflict of interest), spending, and

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Thomas Carothers, "Is it Time for the Aid Community to Explain Itself to Developing Countries?" (7 September 2016), online: *Carnegie Endowment for International Peace* <https://carnegieendowment.org/2016/09/07/is-it-time-for-aid-community-to-explain-itself-to-developing-countries-pub-64504>.

[31] Saskia Brechenmacher & Thomas Carothers, *Defending Civic Space: Is the International Community Stuck?* (Washington, DC: Carnegie Endowment for International Peace, 2019), online (pdf): <https://carnegieendowment.org/files/WP_Brechenmacker_Carothers_Civil_Space_FINAL.pdf>; Saskia Brechenmacher & Thomas Carothers, "Civic Freedoms Are Under Attack. What Can Be Done?" (29 October 2019), online: *Carnegie Endowment for International Peace* <https://carnegieendowment.org/2019/10/29/civic-freedoms-are-under-attack.-what-can-be-done-pub-80168>.

[32] Associated Press, "Mexico's López Obrador presses US to End Contributions to Anti-Corruption NGO", *Market Watch* (24 May 2021), online: <https://www.marketwatch.com/story/mexicos-lopez-obrador-presses-u-s-to-end-contributions-to-anti-corruption-ngo-01621881233>.

[33] "Questions and Answers About Using the 'Pamphlet Method' and Email Method To Form and Fund Citizen Associations To Watch Over Business Sectors and Government Institutions" (last visited 20 November 2021) [Democracy Watch Questions and Answers], online: *Democracy Watch* <https://democracywatch.ca/questions-and-answers-about-using-the-pamphlet-method-to-form-and-fund-citizen-associations-to-watch-over-business-sectors-and-government-institutions/>.

[34] See further information for how this method can be implemented in various business and government sectors: "Citizen Association Campaign" (last visited 20 November 2021), online: *Democracy Watch* <https://democracywatch.ca/campaigns/citizen-association-campaign/>.

procurement. The NGO would have the right to include a notice in the electronic communications and mailings that the government sends to the public about taxes, social spending supports, etc. In countries where government offices, banks, and other financial institutions are the hub locations where the public pay their taxes and receive public services, the NGO's notice would be distributed to each member of the public who comes to the location. The email notice would be a line like "to join the government ethics and spending watchdog group, click here." Mailings or handouts would contain a brief pamphlet describing the NGO and inviting people to join for a nominal annual fee. A board of directors elected from amongst its members would run the NGO. Strict conflict of interest rules would render government officials or their family members, friends and associates ineligible from board membership.[35]

Another example, in the business sector, would be the government creating an NGO to watch over financial institutions and services, given their frequent connections to corrupt practices such as money laundering. Each financial institution would be required to include the NGO's notice at the top of each email or electronic communication or in one or two mailings sent to customers annually. The notice would invite customers to join the financial services watchdog group, and the NGO would have a democratic structure with a board elected from among its members.[36]

The US demonstrates the potential for this method to create broad-based, well-resourced, self-sustaining NGOs. Groups established in three states in the early 1980s to watch over public energy and water utilities are still going strong with tens of thousands of supporters.[37] Moreover, the groups have saved taxpayers tens of billions of dollars while also pushing for and winning leading sustainable energy and water conservation measures. Three to five percent of the public usually join the groups.[38] At that rate, in Canada, where there are approximately 30 million taxpayers and 25 million banking customers,[39] a CDN$20 annual

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[35] "Questions and Answers About Using the 'Pamphlet Method' to Create Citizen Watchdog Groups For Government Institution" (last visited 20 November 2021), online: *Democracy Watch* <https://democracywatch.ca/questions-and-answers-about-using-the-pamphlet-method-to-create-citizen-watchdog-groups-for-government-institutions/>.

[36] "Questions and Answers About the Proposed Financial Consumer Organization (FCO)" (last visited 20 November 2021), online: *Democracy Watch* <https://democracywatch.ca/question-and-answers-about-the-proposed-financial-consumer-organization/>.

[37] Beth Givens, *Citizens Utility Boards: Because Utilities Bear Watching* (Sandiego: Center for Public Interest Law, 1991), online: < https://democracywatch.ca/wp-content/uploads/CUB_Report.pdf >; Bill Jeffrey, *Citizen Utility Boards: Can They Work in Canada?* (Ottawa: Public Interest Advocacy Centre, 1996).

[38] Givens, *supra* note 37 at 70.

[39] Canada Revenue Agency, "Individual Income Tax Return Statistics for the 2021 Tax-Filing Season" (last updated 9 December 2021), online: *Government of Canada* <https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/individual-income-tax-return-statistics.html>. The estimate of 25 millions banking customers is a rough estimate that I have calculated from various sources: "Focus: Banks and Consumers" (last updated November 2021) at 1, online (pdf): Canadian Bankers Association <https://cba.ca/Assets/CBA/Documents/Files/ArticleCategory/PDF/bkg_consumers_en.pdf>; Julia Kagan, "Big Six Banks" (31 May 2020), online: Investopedia <https://www.investopedia.com/terms/b/bigsixbanks.asp>.

membership fee would give a government ethics and spending NGO between 900,000 and 1.5 million members and an annual budget of CDN$18 million to CDN$30 million. A financial services industry watchdog NGO would have between 750,000 and 1.25 million members and an annual budget of CDN$15 million to CDN$25 million. Both organizations would transform the policies, activities, effectiveness, and accountability in respect to government ethics and spending.

Again, it will not be easy to convince a single government or business to create well resourced, self-sustaining NGOs let alone all of them. However, given opposition parties often seek policy proposals from NGOs to build support and increase their chances of winning power, a first step towards its enactment is NGOs proposing its implementation. If it is enacted, it will significantly change the balance of power between governments, big businesses, and the public in a positive way that will very likely make winning other key changes and protections more possible.

A multi-year effort is needed to win anti-corruption rules and implement strong enforcement and high penalties. Even if an NGO develops a broad base with deep roots in the community and becomes well-resourced and funded from domestic sources, including from the method discussed above, true reform necessitates a multi-year effort. The following section summarizes the main strategies and tactics that NGOs deploy in these long-term efforts to win key changes.

## 3. STRATEGIES AND TACTICS

The four general citizen action strategies that NGOs undertake are:

1. Community organization to build power through the involvement and empowerment of members of a community and confrontation and negotiation with people in power in government and business;
2. Advocacy through research, setting out a policy agenda, public education initiatives, lobbying, and lawsuits;
3. Service delivery for short-term disaster or humanitarian crisis relief and/or long-term initiatives based on assessments of community needs and planned objectives, sometimes with the aim of developing an alternative economy to develop the community; and
4. Community development for planned objectives, such as building a community centre, park, road, or housing development.[40]

In the area of anti-corruption work, the first two strategies are usually deployed as changes to laws, regulations, actions of government and big business officials, and public awareness and attitudes are the usual goals. As categorized by A Rani Parker, NGOs that deploy these

[40] "The 4 Main Citizen Action Strategies" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2013/08/4MainStrategies.pdf>.

first two strategies are usually advocacy NGOs (ANGOs) as compared to NGOs that deploy the third and fourth strategies which are usually operating NGOs (ONGOs), while some NGOs are hybrids whose activities span all four strategy areas (HNGOs).[41]

The tactics used in pursuing these strategies are wide-ranging. Gene Sharp alone documented 198 methods of nonviolent action for social change.[42] Which strategy and tactic any NGO deploys at any one time varies based on a wide-ranging set of factors:

1. The NGO's mission statement: Some NGOs only do one or a few related things. For example, a "think-tank" usually only produces research and policy position papers and holds conferences to discuss issues. Other NGOs deploy a broad array of strategies and tactics.
2. The NGO's relationship with institutions of power: As discussed in Section 2, the human rights laws, and enforcement infrastructure for those laws, greatly affect NGOs' relationships with governments and big businesses and the strategies and tactics various NGOs will use to attempt to win changes.
3. The issue and situation: Different issues, situations, and cultural forces affect the specific strategy and tactic that an NGO will choose at any one time.
4. Theory of change: An NGO's theory of how social change occurs will also affect its choices of strategies and tactics.

While some critics and historians speculate or make definitive statements concerning why a politician, government official, or the head of a big business changed something, whether a law, policy, or practice, others recognize that it is extremely difficult to determine why any change occurs.[43] The difficulty is that the decision-maker may claim to make the change for a reason that is not the real reason. Usually only a few people, the closest confidantes of the decision-maker, will know the real reason, and the decision-maker may mislead even them. After the fact, depending on how the change is viewed, it is not unusual to see the decision-maker and those involved in the decision-making process take credit for the change happening or blame the others involved. This is augmented by the fact that minutes of decision-making meetings in governments and big businesses are usually very brief, only listing topics discussed but not what was said, and that meetings and other communications of the real decision-makers are often kept secret for years.[44] Anyone trying to determine why

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[41] A Rani Parker, "Prospects for NGO Collaboration with Multinational Enterprises," in Jonathan P Doh & Hildy Teegen, eds, *Globalization and NGOs: Transforming Business, Government, and Society* (Westport: Praeger, 2003) 81, as cited in Carr & Outhwaite, *supra* note 4 at 620–621.

[42] "198 Methods of Nonviolent Action" (last visited 20 November 2021), online (pdf): *Albert Einstein Institution* <https://www.aeinstein.org/wp-content/uploads/2014/12/198-Methods.pdf> summarizing Gene Sharp, *The Politics of Nonviolent Action,* vol 3 (Boston: Porter Sargent, 1973), online (pdf): <https://www.bmartin.cc/pubs/peace/73Sharp/Sharp73-ch3.pdf>.

[43] Daniel Little, "Disaggregating Historical Explanation: The Move to Social Mechanisms in the Philosophy of History" (2013) 2:8 Social Epistemology Rev Reply Collective 1, online: <http://wp.me/p1Bfg0-QM>.

[44] For example, in Canada the minutes of Cabinet meetings and other Cabinet documents are not disclosed for 30 years and access to information law does not apply to Cabinet ministers' offices: *Access to Information Act,* RSC 1985, c A-1, s 69.

a change has happened is forced to rely on the unreliable rumour mill in the short term and equally unreliable memoirs of the participants in the medium term.

Given the difficulty of determining why changes have been won in the past, it is difficult to determine which strategies and tactics, in any jurisdiction, have been successful in the past or may be successful in the future.[45] Although some strategies are generally considered more effective than others, comparison is difficult in the face of complex, multi-faceted, and changing situations with multiple actors. As a result, this chapter cannot pronounce exactly what the roles, strategies or tactics of NGOs should be most effective in any situation or anti-corruption effort. Instead, this section summarizes some of the main strategies and tactics used by NGOs and the results of studies which provide some insight as to their effectiveness.

Legal realism scholars, and subsequently legal pluralism and law and society scholars, have documented the gap between the "law on the books and the law in action"[46] and the effects of various institutions, social networks (especially power and inequality relationships), and local cultures on how law actually governs the actions of people and organizations. Their studies have revealed that the hegemony of a legal system is not based on legal principles and written rules alone (or, in some cases, even at all), but instead on the actions and decisions of people who hold power of various sorts (legal, political, social, and cultural). There people range from community leaders whose actions can establish community norms, through to courts, regulators, and bureaucrats exercising their discretion in multiple transactions with each other and members of the public, transactions that apply legal rules consistently or inconsistently (or even ignore them altogether).[47]

The legal consciousness school of legal theory (an extension of this scholarship) proposes that the lines law draws in society are animated, even defined, by the actions of individuals and communities in response to the law.[48] Patricia Ewick and Susan Silbey propose that people position themselves as "conforming" (often unconsciously), "contesting" (through advocacy) or "resisting" the law (through non-compliance or protest).[49]

Taking into account these general frameworks, I propose the following general criteria for assessing the effectiveness of NGO strategies and tactics in leading or contributing to anti-corruption changes:

1. Did the effort begin with research on the political landscape of the jurisdiction concerning the key processes and actors that make legal, social, and cultural changes, and the network of actors who participate in and protect corrupt practices?;

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[45] Steven Sampson, "Anti-corruption: Who Cares?" in S Arvidsson, ed, *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (Cham, Switzerland: Palgrave Macmillan, 2019) 277. Steven Sampson, "The Anti-Corruption Industry: From Movement to Institution" (2010) 11:2 Global Crime 261.
[46] Susan S Silbey, "After Legal Consciousness" (2005) 1 Annual Rev L Soc Sci 323 at 324.
[47] *Ibid* at 330–332.
[48] *Ibid* at 333–334.
[49] Patricia Ewick & Susan S Silbey, "Conformity, Contestation, and Resistance: An Account of Legal Consciousness" (1992) 26:3 New Eng L Rev 731.

2. Did the NGO (or group of NGOs working in a formal or informal coalition) build a social movement that used multi-pronged strategies and tactics?;
3. Was each strategy and tactic strategically chosen for systemic impact?;
4. Are the NGO's staff professional and effective, or do they cause problems and hold the NGO back from success?
5. Did the NGO build partnerships or fragment the movement?;
6. Was the NGO adequately funded in order to allow it to sustain its efforts?;
7. Was the effectiveness of each strategy and tactic evaluated systematically?;
8. Did the NGO, and the social movement it fostered, coordinated, or was involved in, change the legal rules (including the enforcement system and penalties for violations) in important ways and/or hold wrongdoers accountable?;
9. Were the NGO and the social movement effective enough to stop those in power from exercising their discretion to maintain the status quo by ignoring the new legal rules (or thwarting the enforcement system and penalties in any way)?; and
10. Finally, overall, did the NGO and the social movement change not only the legal rules but also the legal and social culture enough to ensure the actions of the people and organizations governed by the rules actually changed?[50]

As the summaries of common strategies and tactics and case studies below make clear, the final two criteria listed above are, not surprisingly, often the most difficult to achieve. Many NGOs worldwide have built and sustained partnerships and movements that have used multi-pronged strategies and tactics to win changes to legal rules, enforcement systems, and penalties for the purpose of holding wrongdoers accountable. However, it is more difficult to stop those in power from exercising their legal discretion to thwart changes to rules, enforcement mechanisms, and penalties. In part, the case studies are cautionary tales about how important it is to ensure that new rules are strong, clear, and restrict that discretion. This includes restricting the discretion of enforcement entities to ensure the rules are complied with through strong and strict enforcement. Further, winning a permanent change to the culture of government and business institutions so that the culture actively prevents, rather than encourages and fosters, corruption is an ultimate, very difficult change to win. This is true not only for NGOs but also for anyone and any organization involved in anti-corruption efforts.

Set out below are summaries of common strategies and tactics used by NGOs worldwide to win changes in many areas, including anti-corruption. As noted in Section 2, the government's relationship with NGOs and citizens has a significant impact on the strategies and tactics NGOs in a jurisdiction will undertake. The summaries below begin with tactics commonly used in jurisdictions where fundamental human rights are not recognized or enforced and move to strategies and tactics used in jurisdictions with well-developed laws and enforcement systems.

[50] 'Legal culture' refers to the definition discussed in David Nelken, "Comparative Legal Research and Legal Culture: Facts Approaches and Values" (2016) 12:1 Annual Rev L Soc Sci 45 at 45.

It is important to note that in undertaking anti-corruption initiatives, NGOs will not only be subject to resistance from governments and businesses, but they can also significantly undermine their efforts if NGOs do not establish and maintain internal procedures, monitoring, and enforcement systems to prevent corruption within their own organization.[51]

## 3.1 Research and Disclosure

An initial role of NGOs is to research the political landscape of the jurisdiction concerning the key processes and actors that make legal, social, and cultural changes. This information is essential to participating effectively in those processes, building allies, and neutralizing those who will resist change.[52]

Another role of NGOs is to track the level of corruption in each jurisdiction. Sarah Chayes argues that it is key for governments to answer a series of questions concerning the structure and function of the "kleptocratic network" in any country before engaging with the government of the country to ensure that members of that network are not inadvertently supported.[53] NGOs must not only gather information on key actors participating in and sustaining corrupt practices, the structure and operations of their network, and the network's strengths and vulnerabilities, but also the cultural environment of corruption in the jurisdiction. This research is not an easy task. Corrupt actions are either illegal or stigmatized in most jurisdictions. As a result, those involved usually attempt to keep their actions secret. However, documenting the absence of anti-corruption measures in a jurisdiction's laws (or flaws in the measures) and the absence of effective enforcement agencies (or flaws in the enforcement policies and practices of existing agencies) is a step towards reform. Even an evaluation that relies on incomplete information can, through issuing a regular report, assist in raising awareness of corruption problems and the negative effect of corruption in the country, which is one step in the long road of effectively ending corruption.

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[51] See, for example: Albert Anton Traxler, Dorothea Greiling & Hannah Hebesberger, "GRI Sustainability Reporting by INGOs: A Way Forward for Improving Accountability?" (2018) 31:6 Voluntas 1; Soha BouChabke & Gloria Haddad, "Ineffectiveness, Poor Coordination, and Corruption in Humanitarian Aid: The Syrian Refugee Crisis in Lebanon" (2021) 32:4 Voluntas 894; Ronald D Francis & Anona Armstrong, "Corruption and Whistleblowing in International Humanitarian Aid Agencies" (2011) 18:4 J Financial Crime 319.

[52] See e.g. "Democracy Skills Civics and Citizenship Course" (last visited 20 November 2021), online: *Democracy Education Network* <http://democracyeducation.net/democracy-skills-course/#government>; "Key Questions to Ask to Hold Governments Accountable" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2013/08/KeysForGovt.pdf>; "How to Know Your Political Landscape" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2013/08/PoliticalLandscaping.pdf>.

[53] Sarah Chayes, "Corruption: The Prior Intelligence Requirement" (9 September 2014), online: *Carnegie Endowment for International Peace* <https://carnegieendowment.org/2014/09/09/corruption-priority-intelligence-requirements/ho96>.

International NGOs have played a major role in completing such evaluations of the anti-corruption culture, rules, and enforcement systems in various jurisdictions. As described in Chapter 1, Transparency International (TI), the world's largest anti-corruption NGO, produces the annual Corruption Perceptions Index (CPI) which, through a survey of experts and businesses in jurisdictions around the world, attempts to measure the perceived level of corruption in the public sector of each jurisdiction.[54] The main criticism of the CPI is that its sample of experts often does not include people on the front line of anti-corruption efforts and that surveying business executives skew the results toward lowering the level of perceived corruption. Executives are incentivized to rank a country as "clean" if their business benefits from corrupt actions or weak enforcement. To its credit, in recent years TI's CPI has highlighted cases demonstrating big businesses in "clean" countries bribing governments of other countries[55] and how governments in "clean" countries facilitate both domestic and international corruption by failing to enact key anti-corruption measures.

TI also produces the Global Corruption Barometer (GCB) which is based on a survey of the public's experience with, and perception of, corruption in their country.[56] For example, the 2017 report, based on surveys of 162,316 people in 119 countries between 2014 and 2017, found that one in four people had paid a bribe in order to obtain public services during the previous year.[57] However, comparing countries using the GCB is difficult because the full survey was mainly conducted in developing countries and the questions asked were not consistent between countries. For example, the bribery questions were not asked in Belgium, France, Greenland, the Netherlands, Sweden, Switzerland, the UK, and the USA due to funding constraints.[58]

Some NGOs have developed other evaluation techniques to challenge the survey method of measuring corruption. For example, Global Integrity developed an evaluation methodology with 15 categories and more than 300 criteria for measuring the effectiveness of rules and enforcement systems for ensuring government integrity in any jurisdiction. Global Integrity evaluated more than 30 countries in 2010 and more than 100 countries from 2006 to 2010. An expert researcher in each jurisdiction completed a peer-reviewed Integrity Scorecard and a media representative produced a summary report of news and developments during that year.[59] The initiative ended in 2013, in part due to lack of funding and the difficulties of maintaining consistency in evaluation standards and assessments across countries whose

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[54] "Corruptions Perceptions Index 2020" (last visited 20 November 2021), online: *Transparency International* [*TI*] <https://www.transparency.org/en/cpi/2020/index/nzl>.

[55] "CPI 2020: Five Cases of Trouble at the Top" (28 January 2021), online: *TI* <https://www.transparency.org/en/news/cpi-2020-trouble-at-the-top-cases>; "CPI 2020: Trouble in the Top 25 Countries" (28 January 2021), online: *TI* <https://www.transparency.org/en/news/cpi-2020-trouble-in-the-top-25-countries#12-canada-77-snow-washing>.

[56] "Global Corruption Barometer" (last visited 20 November 2021), online: *TI* <https://www.transparency.org/en/gcb>; "GCB Survey" (last visited 20 November 2021), online (pdf): *TI* <https://images.transparencycdn.org/images/Global_Corruption_Barometer_Core_Questionnaire2017.pdf>.

[57] "People and Corruption: Citizens' Voices from Around the World" (14 November 2017) at 7, online (pdf): *TI* <https://images.transparencycdn.org/images/GCB_Citizens_voices_FINAL.pdf>.

[58] *Ibid* at 12 n IX: Canadians were not surveyed for the GCB 2017.

[59] "Global Integrity Report 2010: Data" (last visited 20 November 2021), online: *Global Integrity* <https://www.globalintegrity.org/resource/global-integrity-report-2010-data/>.

political and legal systems vary greatly. However, the criteria still provide a fairly comprehensive basis for evaluating the state of anti-corruption measures in any jurisdiction. Since 2012, Global Integrity has continued using the same methodology in Africa through the Africa Integrity Indicators project.[60] Global Integrity also maintains the Anti-Corruption Evidence Research Programme that gathers evidence for developing and implementing effective anti-corruption initiatives.[61]

A different corruption related measure involves assessing the strength of the rule of law in each country. For NGOs in many countries, anti-corruption efforts focus mainly on establishing a rule of law system that will investigate, prosecute, and penalize corrupt acts and give citizens and organizations the right to file complaints calling for investigations. This reality is reflected in the World Justice Project's Rule of Law Index[62] which is based on several criteria, including constraints on government powers and the absence of corruption.[63]

However, these international indices are only a starting point for a domestic NGO's anti-corruption methods. As Chayes proposes, the research challenge continues with compiling evidence of corruption, including tracking the assets and liabilities of politicians, political staff, and government officials, to determine who may be living beyond the means of their salaries due to acceptance of bribes, kickbacks, etc.

## 3.2 Public Education

In addition to their country-level and, in some cases, sub-national jurisdiction, monitoring, measuring, and surveying activities, some international NGOs also provide support to domestic NGOs' anti-corruption efforts through providing guidance and direct training in these research efforts. For example, TI has several free online anti-corruption toolkits that NGOs in any jurisdiction can use to research, reveal, and combat corruption. The National Democratic Institute and the UN also have toolkits.[64]

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[60] "About the Africa Integrity Indicators" (last visited 20 November 2021), online: *Africa Integrity Indicators* <https://www.africaintegrityindicators.org/about>.

[61] "Anti-Corruption Evidence Research Program" (last visited 20 November 2021), online: *ACE Global Integrity* <https://ace.globalintegrity.org/>.

[62] "WJP Rule of Law Index" (last visited 20 November 2021), online: *World Justice Project* <https://worldjusticeproject.org/rule-of-law-index/global>.

[63] See e.g. "World Justice Project: Canada" (last visited 20 November 2021), online: *World Justice Project* <https://worldjusticeproject.org/rule-of-law-index/country/2020/Canada>.

[64] "Anti-Corruption Toolkits for Civil Society" (last visited 20 November 2021), online: *TI* <https://www.transparency.org/en/toolkits/civil-society>; Richard Holloway, "NGO Corruption Fighters' Resource Book: How NGOs Can Use Monitoring and Advocacy to Fight Corruption" (2006), online (pdf): *National Democratic Institute* <https://www.ndi.org/sites/default/files/NGO-Corruption-Fighters-Resource-Book-ENG.pdf>. The UN also published its own toolkit (although it has not been updated since 2004): United Nations Office on Drugs & Crime [UNODC], *The Global Programme Against Corruption: UN Anti-Corruption Toolkit,* 3rd ed (Vienna: UN, 2004), online (pdf): <https://www.un.org/ruleoflaw/files/UN_Anti%20Corruption_Toolkit.pdf>. See also the UNDP Global Portal on Anti-Corruption for Development, (last visited 22 November 2021) online: *UNDP Anti-Corruption for Development* <https://anti-corruption.org/>.

Beyond this international "train the trainer" educational efforts aimed at other NGOs, some NGOs like the UN, move beyond research and disclosure to undertaking formal education campaigns. When UNCAC was adopted in 2003, the UN General Assembly designated December 9th as the annual International Anti-Corruption Day.[65] It also makes public education materials available in several languages for use by NGOs, including posters and social media graphics, and videos that local TV stations can broadcast.[66]

As set out in Article 13(1)(c)of UNCAC, governments are required to undertake "public information activities that contribute to nontolerance of corruption, as well as public education programmes, including school and university curricula."[67] While the US government has a public education program called the International Anticorruption Champions Award to recognize anti-corruption leaders and innovators around the world, it does not have a program to recognize and award anti-corruption champions in the US.[68] The US government's self-assessment for its 2018 review by the UNODC of its compliance with UNCAC requirements lists no activities under Article 13(1)(c).[69]

Though the UK developed an anti-corruption strategy after consultation with anti-corruption NGOs, it also does not have a public education program to raise awareness of corruption and to educate the public about how to file complaints.[70] Canada has not yet been reviewed by UNODC concerning its compliance with Article 13(1)(c) and other articles in Chapter II of the UNCAC. Canada does not currently have such a public education program. Chapter II is scheduled to be reviewed in 2021.[71]

Many governments educate their public about corruption in other countries but not in their own. NGOs in many countries fill this gap by raising awareness of incidences of corruption and how to file complaints by issuing reports and news releases, conducting surveys, holding events, maintaining websites, and posting on social media sites.[72] Media outlets not

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[65] "International Anti-Corruption Day: Background" (last visited 20 November 2021), online: *United Nations* <https://www.un.org/en/observances/anti-corruption-day/background>.
[66] "Campaign Materials" (last visited 20 November 2021), online: *UNODC* <http://www.anticorruptionday.org/actagainstcorruption/en/print/index.html>; "Corruption Scenarios" (last visited 20 November 2021), online: *UNODC* <http://www.anticorruptionday.org/actagainstcorruption/en/scenarios/index.html>.
[67] UNCAC, *supra* note 1, art 13(1)(c).
[68] "Recognizing Anticorruption Champions Around the World" (23 February 2021), online: *US Department of State,* online: <https://www.state.gov/dipnote-u-s-department-of-state-official-blog/recognizing-anticorruption-champions-around-the-world/>.
[69] UNODC, *United Nations Convention Against Corruption: United States Self-Assessment*, UN Doc CAC/COSP/IRG/2016/4, 28 November 2018 at 91–95, online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/SA-Report/2019_07_05_USA_SACL.pdf>.
[70] UNODC, *Country Review Report of the United Kingdom of Great Britain and Northern Ireland*, at 157–162, online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_11_16_UK_Final_Country_Report.pdf>.
[71] "Country Profile: Canada" (Last visited 20 November 2021), online: *UNODC* <https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fcan.html>.
[72] "How To Do a Credible Survey/Poll" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2019/01/8-HowToSurveyPoll.pdf>.

only amplify the voices of NGOs but also conduct investigations, publish articles, and air broadcasts revealing what they find, as well as provide whistleblowers with an outlet for reporting wrongdoing, including corrupt activities.

As attacks on NGOs and other civil society organizations have escalated in the past decade, they have also been essentially forced to respond with public education concerning the legitimacy of their role in society. This has been a difficult challenge for high-level NGOs that are mainly funded through aid grants from other countries. This highlights the importance of having broad-based NGOs that represent the public and advocate their concerns as a key component of any effort aimed at winning anti-corruption and other democracy reforms.[73]

## 3.3 Advocacy for Stronger Rules, Enforcement, and Penalties

The research and disclosure and public education efforts of NGOs are often the initial steps in an overall strategy of advocating for key changes to enact and implement stronger rules, enforcements, and penalties to stop corruption. Research in several countries has shown that the policy proposals developed by NGO think-tanks and advocacy groups often seed the policy and election platforms of political parties that are looking to seize opportunity when an opening presents itself, due to a crisis, scandal, or other reason, to either adapt as a governing party in order to maintain power or to move from being an opposition party to being the governing party.[74] If NGOs are connected to a broad base or sector of the public, they often seed not only the policies and platforms of opposition parties, but also the parties' support base itself.[75]

The following are brief summaries of the main advocacy tactics used by NGOs.

### 3.3.1 Protests and Demonstrations

Protests and demonstrations can be an initial reaction to the disclosure of corruption in a political system. Protests and demonstrations are often aimed at winning a short-term concession or promise of reform from a government or business. They are sometimes, but often not, successful. However, they can also be much more. A 2005 study found that over the previous 33 years, nonviolent people-powered civic resistance (boycotts, mass protests, blockades, strikes, and civil disobedience) was one of the most effective tactics for winning a transition from a dictatorial, corrupt government to a more democratic good government, as long as the civic resistance includes strong and cohesive nonviolent coalitions of NGOs

[73] Saskia Brechenmacher & Thomas Carothers, "Five Ways to Build Civil Society's Legitimacy Around the World" (9 May 2018), online: *Carnegie Endowment for International Peace* <https://carnegieendowment.org/2018/05/09/five-ways-to-build-civil-society-s-legitimacy-around-world-pub-76294>.

[74] Jorge Valladares Molleda, Kristen Sample & Sam van der Staak, "Implications for Action: Enablers, Triggers, Lockers and Agents of Programmatic Parties" in *Politics Meets Policies: The Emergence of Programmatic Political Parties* (Stockholm: International IDEA, 2014) [*Politics Meets Policies*] at 107–108, online (pdf): <https://www.idea.int/sites/default/files/publications/politics-meets-policies.pdf>.

[75] Nic Cheeseman & Dan Paget, "Programmatic Politics in Comparative Perspective" in *ibid*, 73 at 76, 83–85.

and other civil society actors (including political parties).[76] Another study of the period 2013 to 2018 found that 10% of the world's countries had experienced government leadership change due to corruption, but that broad-based NGOs connected to grassroots NGOs were a key driver of the transition, again, through nonviolent civic resistance.[77]

As other studies have shown, national NGOs that are more technocratic and legal-based are needed to translate popular demands into policy proposals for changes, but grassroots NGOs are still vital. National NGOs may not pursue changes that will resonate with most people nor have the political power needed to push a new government or ruling party to adopt and implement the proposals, even in the face of resistance by the country's power elite.[78] Since national NGOs lack access to the public, they need the assistance of grassroots NGOs that are involved in developing policy proposals and mobilizing people to push for changes. These ingredients of successful systemic change have been seen in various areas of reform, including for advancing essential rule of law measures.[79]

### 3.3.2 International Appeals

This tactic is included despite the fact that international appeals and court cases can take a significant amount of financial resources. However, while NGOs in developing countries may lack the resources themselves to undertake this tactic, NGOs in jurisdictions with well-developed human rights laws and enforcement systems and significant resources can help attract international attention and put international pressure on their government to implement anti-corruption measures. Such international appeals, and resulting media coverage, can often be an early and effective first step towards reforms.

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[76] Adrian Karatnycky & Peter Ackerman, *How Freedom is Won: From Civic Resistance to Durable Democracy* (Washington, DC: Freedom House, 2005), online (pdf): <https://freedomhouse.org/sites/default/files/How%20Freedom%20is%20Won.pdf>.

[77] Thomas Carothers & Christopher Carothers, "The One Thing Voters Hate the Most", *Foreign Policy* (24 July 2018), online: <https://foreignpolicy.com/2018/07/24/the-one-thing-modern-voters-hate-most-corruption/>; Thomas Carothers & Benjamin Press, "Understanding Protests in Authoritarian States" (2020) 40:2 SAIS Rev Intl Affairs 15.

[78] Abigail Bellows, "Bridging the Elite-Grassroots Divide Among Anticorruption Activist" (2020) Carnegie Endowment for International Peace Working Paper, online (pdf): <https://carnegieendowment.org/files/WP_Bellows_EliteGrassroots.pdf>; Moisés Naím, "What Has a Bigger Impact, Elections or Street Protests?", *El País* (19 June 2019), online: <https://english.elpais.com/elpais/2019/06/19/inenglish/1560937997_603402.html>; Jonathan Pinckney, *When Civil Resistance Succeeds: Building Democracy After Popular Nonviolent Uprisings* (Washington, DC: ICNC Press, 2018), online (pdf): <https://www.nonviolent-conflict.org/wp-content/uploads/2018/10/When-Civil-Resistance-Succeeds-Pinckney-monograph.pdf>; Moisés Naím, "Why Street Protests Don't Work", *The Atlantic* (7 April 2014), online: <https://www.theatlantic.com/international/archive/2014/04/why-street-protests-dont-work/360264/>; Maria J Stephan & Erica Chenoweth, "Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict" (2008) 33:1 Intl Security 7, online (pdf): <https://www.belfercenter.org/sites/default/files/legacy/files/IS3301_pp007-044_Stephan_Chenoweth.pdf>.

[79] Rachel Kleinfeld, "How to Advance the Rule of Law Abroad" (4 September 2013), online: *Carnegie Endowment for International Peace* <https://carnegieendowment.org/2013/09/04/how-to-advance-rule-of-law-abroad/glfa>.

NGOs in jurisdictions with well-developed laws and enforcement can, and should, always play a role in supporting NGOs in jurisdictions where fundamental human rights are not recognized or enforced. Actions such as signing on to a letter calling for action from the UN, OECD, World Bank or a regional inter-state body or informing media outlets of abuses are relatively easy, low-cost actions that can assist by putting a spotlight on corruption in developing countries.

As well, an extension of the research and disclosure tactic outlined above that involves partnering of domestic and international NGOs is a joint effort to track bank accounts and other assets in other countries that have been established or bought by government officials from the proceeds of corruption. These efforts can help with the push for governments to impose *Magnitsky Act* sanctions to freeze and seize those assets in the US, UK, Canada, and other countries.[80]

However, as summarized in Section 2, the involvement of international NGOs in any jurisdiction, actively or by supporting domestic NGOs, can easily be controversial because it raises the question of whether the citizens of the jurisdiction actually support the activities and aims of the NGOs involved. As well, while shining a spotlight on corrupt actions in any country can lead to international pressure on the country's government, the pressure that may lead to a change in government, usually domestic pressure of NGOs, opposition parties, and citizens, must also continue over the long-term to result in the implementation and enforcement of effective anti-corruption measures.

### 3.3.3 Coalition Building

NGOs working in coalition, coherently and strongly advocating together, has proven to be an effective tactic for winning key democratic reforms, including anti-corruption reforms. A network involves several groups that all work on the same issue or problem. Groups in a network usually meet with each other, or communicate with each other, regularly. However, groups in a network do not usually work together on strategies, approaches, tactics, or activities. In other words, the groups share a concern about an issue or problem but work independently to try to solve the issue or problem.

While working as a network allows each group to work independently without agreement from the other groups, uncoordinated activities can conflict with each other and make it appear to a government or corporation that there is not broad support for proposed solutions. Unlike a network, a coalition of groups works together on strategies, approaches,

[80] Brent Bambury, "Canada is Getting its Own Magnitsky Act and Vladimir Putin is Not Impressed", *CBC News* (6 October 2017), online: <https://www.cbc.ca/radio/day6/episode-358-outsmarting-the-nra-canada-s-magnitsky-act-ham-radios-for-puerto-rico-music-in-dna-and-more-1.4329733/canada-is-getting-its-own-magnitsky-act-and-vladimir-putin-is-not-impressed-1.4329831> (Canada); UK, HC Library, *Magnitzky Legislation* (Briefing Paper No 8374) by Ben Smith & Joanna Dawson (London: HC Library, 2020), online (pdf): <https://commonslibrary.parliament.uk/research-briefings/cbp-8374/> (UK); "Global Magnitzky Act" (last visited 20 November 2021), online: *US Department of State* <https://www.state.gov/global-magnitsky-act/> (US); "Global Magnitzky Sanctions" (last visited 20 November 2021), online: *US Department of the Treasury* <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/global-magnitsky-sanctions> (US). See Chapter 5, Section 5.3 for further discussion on the *Magnitsky Act.*

tactics, or activities. The difficulty of coalitions is reaching agreement. This means that networks are more common than coalitions. However, by working together, coalitions are often more effective than networks because they clearly show broad support for proposed solutions.[81]

### 3.3.4 Lobbying and Campaigns

NGOs that can mobilize the public, through research and disclosure, public education, and possibly international appeals, as well as build strong, unified coalitions, still have the challenge of transferring all of that power into a long-term campaign and lobbying effort for the key systemic changes that will stop corruption or other societal problems the NGOs are tackling. Many of these efforts are ongoing strategies and tactics to overcome seven barriers to social change, the "D" barriers:[82]

- The first is the density of government. Political landscape research effort can help overcome density to government by determining key actors and decision-makers and what processes governments use for making decisions.
- The second is that governments will often deny that there is a problem to be solved. Extensive research documenting and disclosing the problem is needed to overcome this barrier.
- The third is that governments will often delay changes, which is why it is a good idea for any campaign plan to take into account that key systemic changes often take five to ten years to be won, if not longer.
- The fourth is discredit, which occurs when governments begin to actively resist pressure for change as a movement gains strength. This can take the form of alleging that movement leaders are engaging in questionable activities and attempting to label NGOs as front groups for opposition political parties or foreign governments.
- The fifth is divide, which usually tests whether the coalitions that the NGOs have built are cohesive and strong. Often governments will seek to make a deal with one or more of the partner NGOs in a coalition, usually the groups that make the weakest demands, giving them some or most of what they want in exchange for applauding the government's actions, thereby undermining the coalition's more significant demands for systemic changes.
- The sixth is deceive, which is usually implemented by governments that are trying to spin small changes to be perceived as more significant changes that NGOs are seeking. In a country such as Canada, where only a small fraction of eligible voters read newspaper articles daily and the majority of readers only skim articles or scan headlines, if governments can win favourable headlines

[81] "How to Organize a Network or Coalition" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2019/01/6-CoalitionsNetworks.pdf>.

[82] "How To Overcome The 7 D's Of Government and Corporate Decision-Making Processes" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2019/01/4-Overcome7DsGovtCorp.pdf>.

that set out such a spin, then they may deceive the public into believing that they have fully implemented the demanded changes.[83]

- The final "D" for NGOs to overcome in any campaign and lobbying effort for systemic changes is destroy. While this response by governments has not been frequently used in recent years in developed democracies such as the United States, the UK, and Canada, it has certainly been used, and continues to be used, to stop campaigns by NGOs representing visible minorities, Indigenous peoples, and other vulnerable sectors of society. It is also used by many autocratic, authoritarian governments worldwide through jailings, poisonings, and assassinations of leaders of NGOs, media outlets, and other civil society sectors who dare to challenge politicians' illegal and corrupt actions.

Overall, whether an NGO's lobbying and campaign efforts involve setting out policy proposals,[84] organizing a demonstration[85] or boycott,[86] holding events, undertaking public education initiatives, writing letters,[87] and holding lobby meetings with politicians and government officials,[88] they will almost always be met with resistance from at least some institutions in any government. By campaigning over the long-term in multi-faceted ways, building allies and coalitions, and addressing and neutralizing opposing arguments or arguments to maintain the status quo along the way, sometimes all the barriers can be

[83] It is difficult to give a precise estimate of the number of eligible voters who read full newspaper articles every day and what portion of them simply scan headlines. Based upon various sources, I estimate that of the approximately 27 million eligible voters, roughly one million read full newspaper articles every day and four million only skim articles and scan headlines: "Voter Registration Safeguards" (last visited 12 December 2021), online: *Elections Canada* <https://www.elections.ca/content2.aspx?section=proc&dir=reg&document=index&lang=e>; "Daily Newspaper Circulation Data" (last visited 11 December 2021), online: *News Media Canada* <https://nmc-mic.ca/about-newspapers/circulation/daily-newspapers/>; Kate Moran, "How People Read Online: New and Old Findings", *Nielsen Norman Group* (5 April 2020), online: <https://www.nngroup.com/articles/how-people-read-online/>; Farhad Manjoo, "You Won't Finish This Article: Why People Online Don't Read to the End", *Slate* (6 June 2013), online: <https://slate.com/technology/2013/06/how-people-read-online-why-you-wont-finish-this-article.html>.

[84] "How to do an Effective Policy Proposal Report" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2019/01/5-EffectiveProposalRpt.pdf>.

[85] "How To Organize An Effective Peaceful Legal Action Or Peaceful Illegal Action" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2019/01/2-HowToProtest.pdf>.

[86] "How To Organize An Effective Boycott" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2019/01/1-HowToBoycott.pdf>.

[87] "How To Write a Letter to a Politician" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2013/08/LetterToPolitician.pdf>.

[88] "How To Lobby a Decision-Maker" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <http://democracyeducation.net/wp-content/uploads/2019/01/3-LobbyDecisionmaker.pdf>.

overcome and the systemic changes won to stop corruption or other undemocratic, unaccountable government actions.

### 3.3.5 Public Interest Litigation

Another NGO strategy is public interest litigation (PIL). The debate concerning the effectiveness of PIL for winning social change is as long as the history of the use of the courts for this purpose. In recent decades, some commentators, such as Gerald Rosenberg, have concluded that the courts offer a "hollow hope" (at least for movements seeking change in the US, where it took governments 20 years to desegregate schools after the US Supreme Court ruled segregation in education unconstitutional).[89] Other commentators argue that PIL can help mobilize a movement and legitimize its claims or the personal claims of its members and that strategic "impact" cases can destabilize institutions, increase accountability, raise awareness, change public opinion, and threaten institutions with legal costs.[90]

Scott Cummings and Deborah Rhode argue history shows that to be effective PIL must be:

- one part of a multi-pronged social change effort;
- adequately funded to ensure comprehensive litigation efforts are possible (especially in ensuring enforcement of court orders); and
- evaluated systematically and continuously to ensure strategic litigation decisions and efforts over the long-term.[91]

Orly Lobel posits that, when pursuing either legal reform or extralegal activism aimed at transformative changes, one should be concerned about and monitor the possibility of "cooptation" that can essentially neutralize efforts aimed at winning changes.[92] Lobel's review of the literature leads to conclude that the following six key causes of co-optation can undermine PIL:

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[89] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), as cited in Nancy Nicol & Miriam Smith, "Legal Struggle and Political Resistance: Same Sex Marriage in Canada and the USA" (2008) 11:6 Sexualities 667 at 668.

[90] Stuart Scheingold, "Constitutional Rights and Social Change: Civil Rights in Perspective" in Michael W McCann & Gerald L Houseman, eds, *Judging the Constitution: Critical Essays on Judicial Lawmaking* (Glenview, IL: Scott Forseman, 1989) at 73–91; Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17:3 JL Society 309 as cited in Nicol & Smith, *supra* note 89; Charles F Sabel & William H Simon, "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117:4 Harv L Rev 1015, 1021 as cited in Scott L Cummings & Deborah L Rhode, "Public Interest Litigation: Insights from Theory and Practice" (2009) 36:4 Fordham Urban LJ 603 at 608; Michael W McCann, "How Does Law Matter for Social Movements?" in Bryant G Garth & Austin Sarat, eds, *How Does Law Matter?: Fundamental Issues in Law and Society Research* (Evanston, IL: Northwestern University Press, 1998) at 83–84, as cited in "Public Interest Litigation: Insights from Theory and Practice" (2009) 36:4 Fordham Urban LJ 603 at 608.

[91] Cummings & Rhode, *supra* note 90 at 603.

[92] Orly Lobel, "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics" (2007) 120:4 Harv L Rev 937.

1. Lack of the resources and energy needed to win the changes fully (echoing the concern of Cummings and Rhode);
2. That filing one specific case in specific legal forums like courts can undermine comprehensive calls for change, and as a result fragment a social movement;
3. That lawyers handling the PIL can control the agenda of the movement, not always in the movement's best interests;
4. That the effects of court rulings are inherently limited because they do not enforce themselves, nor necessarily change public opinion or actions;
5. That becoming involved in PIL, and the legal system generally, can undermine other social change tactics (in part because of the resources required for PIL); and
6. That existing social arrangements can use legal rules set out in statutes, regulations, or court rulings (if a PIL case is lost), and also social and cultural norms, to resist, restrict, or reject change efforts.

No matter what, Lobel argues, political and market powers are always forces that can undermine efforts to win changes.[93]

Another form of litigation involves NGOs in any jurisdiction, alone or in partnership with international NGOs, filing or intervening in court cases aimed at freezing or seizing the accounts and assets of government officials that are the proceeds of corruption. For further discussion of freezing and seizing illegal assets see Chapter 5.

## 4. A CANADIAN STUDY: LONG-TERM RESISTANCE TO NGO ANTI-CORRUPTION PROPOSALS IN A SUPPOSED MATURE DEMOCRACY

Case studies of NGOs involved in anti-corruption efforts are readily available in many online publications.[94] This section focuses on one Canadian case study, specifically the experiences of the Canadian NGO, Democracy Watch's advocacy for long-delayed federal lobbying reform. As has been highlighted in the previous sections, this case study shows that the struggle for anti-corruption reforms is almost always a multi-year effort, involving many strategies and tactics, with many hurdles to overcome for the NGOs involved. This case study demonstrates the multi-faceted resistance to NGO anti-corruption proposals that is deeply rooted in a tradition of lobbyists and politicians trading favours even in a jurisdiction like Canada that is often ranked as a mature, developed, and leading democracy. This case study also shows how the struggle by NGOs for reforms can be resisted by the

[93] *Ibid* at 949–958.

[94] See e.g. case studies in: Holloway, *supra* note 64 at 231–275; UNODC, supra note 64; "Anti-Corruption Toolkits for Civil Society", supra note 64; Sarah Chayes, *Fighting the Hydra: Lessons From Worldwide Protests Against Corruption,* (Washington, DC: Carnegie Endowment for International Peace, 2018), online (pdf): <https://carnegieendowment.org/files/CP_330_Chayes_Kleptocracy_Final.pdf>.

power elite in several ways, including implementing measures that create a gloss of reform while unethical practices continue largely unabated.

From 1994 to 2011, Democracy Watch, in partnership with other organizations, advocated for federal restrictions on lobbyists supporting the politicians they are lobbying, through political donations, fundraising, and other means. The case study documents the multi-year, multi-pronged, active resistance by several actors in Canada's federal political system following the enactment of those restrictions in 1997. This resistance effectively delayed the enforcement of the restrictions until 2011, and after 2011 limited enforcement to only a small percentage of cases.

The only legal restrictions on lobbyists at the federal government level in Canada before 1988 were provisions prohibiting the fundamentally illicit influence actions of bribery, influence peddling, and extortion. These provisions were first enacted by the federal Parliament in 1883 and incorporated into the *Criminal Code of Canada* when it was first enacted in 1892.[95] Very few people were charged with crimes, let alone convicted, in part because donations were not considered bribes unless they could be directly connected to a government decision (a difficult evidentiary hurdle).[96]

More than 20 private member bills (bills introduced by individual Members of Canada's Parliament who are not a government Minister) aimed at regulating lobbyists were introduced in Parliament between 1965 and 1985, mainly in response to scandals, but none became law.[97] Still, even though it took until 1988, Canada became one of the first countries in the world to regulate lobbying in non-criminal ways when Parliament enacted the *Lobbyists Registration Act* (*LRA*) that year (although the law came long after the laws in the US (1946) and Germany (1951), and just behind Australia (1983)).[98] The coming into force of the *LRA* in 1989 began the slow process of lobbying disclosure. The first version of lobbying disclosure was called the "business-card law" because it only required lobbyists to register their name, work address, the subject matter(s) of their lobbying, and the government institutions they lobbied. Four years later, the registry was still only available in print form

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[95] *Sommers and Gray v The Queen*, [1959] SCR 678 at 683.

[96] Kenneth M Gibbons & Donald Cameron Rowat, *Political Corruption in Canada Cases, Causes and Cures* (Toronto: McClelland & Stewart, 1976). See discussion on Robert Sommers, forestry minister for the Government of British Columbia and the first Cabinet minister in the Commonwealth to be jailed for corruption in office in 1958 for taking bribes, at 226. "Socred Cabinet Minister Jailed for Corruption, Dies at 89", *CBC News* (30 October 2021), online: <http://www.cbc.ca/news/canada/socred-cabinet-minister-jailed-for-corruption-dies-at-89-1.225006>. J C Van Horne, former leader of the Progressive Conservative Party in New Brunswick, pled guilty in 1975 to accepting a bribe over the purchase of park lands: "Colourful NB Tory leader was Convicted of Bribery", *Globe and Mail* (2 September 2003), online: <http://www.theglobeandmail.com/incoming/colourful-nb-tory-leader-was-convicted-of-bribery/article1045260>.

[97] Nancy Holmes & Dara Lithwick, "The Federal Lobbying System: The Lobbying Act and the Lobbyists' Code of Conduct" (last modified 28 April 2020) at 14 n 5, online (pdf): *Library of Parliament* <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2011-73-e.pdf>.

[98] *Lobbyists Registration Act*, RS 1985, c 44 (4th Supp). In 2008, the title of the law was changed to the *Lobbying Act*. For the timeline of countries' implementing lobbying regulation see: "Lobbying" (last visited 20 November 2021), online: *OECD* <http://www.oecd.org/gov/ethics/lobbying.htm>.

for review during office hours at the Office of the Registrar General in Hull, Quebec. As a result, few reporters, and almost no members of the public, made the effort to look at the registry.

Democracy Watch was not involved in the first round of legal restrictions on federal lobbyists in Canada because the non-profit advocacy organization was not established until September 1993. There is no evidence of a social movement (other than general concern by the public and proposals by opposition political parties and their MPs) advocating for restrictions on lobbyists before 1993 or involved in the enactment of the *LRA*.[99] Leading up to the 1993 federal election, the Liberal Party of Canada began to highlight the issue of political ethics. The former Liberal leader Jean Chrétien gave a speech listing promises of change that resulted in a chapter entitled "Governing with Integrity" in the Liberal's campaign platform. Democracy Watch's first action was the release of a report card on the main federal parties' election platforms, including their proposals to reform the political finance system, to "restrict and require full disclosure of the activities of lobbyists," and to "increase ethical standards in government."[100]

After the Liberals won a majority of seats in the House of Commons in November 1993, they began the process of implementing their government integrity election promises. Through 1994, Democracy Watch issued news releases and reports on the issues and received extensive media coverage.[101] This set the basis for its campaign aimed at winning changes in three areas: restrictions on third-party advertising spending, restrictions and disclosure of donations, and restrictions on influence actions by lobbyists.

In their election platform, the Liberals had promised to "put an end to backroom deals" and bring lobbyists "from the shadows out into the open."[102] On June 14, 1994, the government introduced Bill C-43, which proposed to amend the *LRA* essentially by requiring more detailed disclosure of lobbying activities, including the specific bill, regulation, contract, etc.,

[99] For example, the following article does not mention any such a movement: John Sawatzky, "Power Plays: How the Lobby System Works", *Montreal Gazette* (28 May 1983) B5.

[100] Democracy Watch, "Report Card on the Federal Parties 1993 Democratic Reform Election Platforms" (8 October 1993), Ottawa, Democracy Watch Archive File.

[101] "Government Ethics Campaign: 1994" (last visited 20 November 2021), online: *Democracy Watch* <http://www.dwatch.ca/camp/ethicdir94.html>; Democracy Watch, Media Release, "Democracy Watch Calls on Federal Government to Enact Model Lobbying and Ethics Reforms" (11 May 1994), online: <http://www.dwatch.ca/camp/RelsMay1194.html>. The report was entitled *Spring Cleaning: A Model Lobbying Disclosure and Ethics Package for Those Hard to Reach Places in the Federal Government*. Wilson was responsible for administering the Registry of Lobbyists established under the *LRA*: "Media and Public Appearances: 1994" (last visited 20 November 2021), online: *Democracy Watch* <http://www.dwatch.ca/camp/media94.html>.

[102] "Government Ethics Campaign" (last visited 22 November 2021), online: *Democracy Watch* <https://democracywatch.ca/campaigns/government-ethics-campaign/>; see also the Red Book: *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: The Liberal Party of Canada, 1993), online (pdf): <https://www.poltext.org/sites/poltext.org/files/plateformesV2/Canada/CAN_PL_1993_LIB_en.pdf>.

that was the focus of a lobbying effort.[103] The bill did not address several loopholes that allowed unregistered, secret lobbying. A sub-committee of the House of Commons Standing Committee on Industry began a review of Bill C-43 on September 27, 1994. Of the few citizen organizations that testified before the Committee, only Democracy Watch called for requirements to ensure disclosure of all lobbying and the amounts spent on each lobbying effort (including creating an electronic registry so people across Canada could easily see lobbying details) and to restrict political donations and other activities by lobbyists. At the time, the general position of citizen organizations was that they were "public interest" groups with publicly known mandates and, therefore, should not be required to disclose their lobbying. As a result, while Democracy Watch's proposals were reviewed and responded to in the sub-committee's report, none were implemented. Only paid lobbyists, and business lobbyists who lobbied more than 20% of their work time, were required to register. Lobbying concerning the enforcement of a law did not have to be registered. As well, the Liberal government added a new loophole to the *LRA*: a lobbyist no longer had to register if they were invited by the public office holder to lobby them.[104]

The Liberals had also promised a new Ethics Counsellor position as a watchdog who "has the teeth to investigate and take strong action."[105] Instead, the Ethics Counsellor, Howard Wilson, chosen by the Prime Minister, had no security of tenure, no independent decision-making power, no investigative powers, and no power to penalize violators of ethics rules.[106]

As often happens, the media's interest in the issue decreased after the Liberals implemented these changes, as many assumed that the key problems had been solved. From 1995 to 1998, Democracy Watch continued to point out problems and issue regular report cards on the government's record, but received scant media coverage.[107] Funding received from foundations also caused Democracy Watch to focus its resources and efforts on the issue of bank accountability through these years.

The one positive development during this time was the establishment of the *Lobbyists' Code of Conduct* (*Lobbyists' Code*) in March 1997, which included honesty, ethical, and professionalism requirements on federal registered lobbyists. For more detail on lobbying see Chapter 11.

In 1999, as the media reported that the Liberals were preparing some changes to political finance rules, Democracy Watch began to focus on the issue again. It released a report setting

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[103] "The Lobbying Act: Key Events in the History of the Canadian Lobbyists Registration Regime" (last visited 20 November 2021), online: *Office of the Commissioner of Lobbying of Canada* <https://www.lobbycanada.gc.ca/en/rules/the-lobbying-act/>.

[104] Paul A Pross, "The Lobbyists Registration Act: Its Application And Effectiveness" in Donald Savoie et al, *Restoring Accountability —Research Studies: Volume 2 — The Public Service and Transparency,* (research paper prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities) (Ottawa: Privy Council Council, 2006), online: <http://dsp-psd.pwgsc.gc.ca/Collection/GomeryII/ResearchStudies2/CISPAA_Vol2_5.pdf>.

[105] "Government Ethics Campaign: 1994", *supra* note 101.

[106] Democracy Watch, News Release, "Democracy Watch Releases Letter to Chrétien Calling for Changes to Ethics Enforcement Regime" (31 October 1994), online: <http://www.dwatch.ca/camp/RelsOct3194.html>.

[107] "Government Ethics Campaign", *supra* note 102.

out comprehensive recommendations for changes in June 1999, organized a broad Money in Politics Coalition of citizen groups supporting those recommendations, and organized a separate Government Ethics Coalition to push for restrictions on lobbyists.[108] The Liberal government introduced Bill C-2 in June, which, among other mostly minor changes requiring more disclosure of donations, limited third-party advertising spending during the statutory election campaign period to CDN$150,000 nationally and CDN$3,000 in each riding.[109] Despite the efforts of the coalitions to win changes to Bill C-2 by labelling it "more loophole than law," it came into force without changes in June 2000.

Democracy Watch continued to build its campaign and coalitions. Public attention to Liberal fundraising scandals and the loopholes left by Bill C-2 caused the Liberals to introduce Bill C-9 in 2001, which required riding associations to disclose the identity of their donors (before only parties were required to disclose donors).[110] Democracy Watch continued to issue news releases and reports for the next few years.[111]

Democracy Watch explicitly questioned the ethics of large donations and fundraising by lobbyists through filing several ethics complaints from 2000 to 2004. This marked the beginning of Democracy Watch's decade-long attempt to require the Ethics Counsellor to enforce the *Lobbyists' Code*. First, Democracy Watch filed 12 complaints from April 2000 to October 2002 with Ethics Counsellor Wilson about lobbyists violating the *Lobbyists' Code*. Then, in December 2002, Democracy Watch applied to the Federal Court of Canada for a review of the Ethics Counsellor's structural bias (because the Counsellor was controlled by the Prime Minister) and the delay in ruling on eight of the 12 complaints.[112]

In response to Democracy Watch's December 2002 court application, Ethics Counsellor Wilson, in January 2003, issued an interpretation bulletin of a key rule in the *Lobbyists' Code* that essentially said that lobbying was only unethical if a lobbyist forced a politician to make

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[108] Democracy Watch, Media Release, "Report Calls on Government to Clean Up Political Finance in Canada" (1 June 1999), online: <http://www.dwatch.ca/camp/RelsJun199.html>; Democracy Watch, Media Release, "New Coalition Launches Campaign to Clean Up Canadian Political Finance" ( 10 November 1999), online: <http://www.dwatch.ca/camp/RelsNov1099.html>; Democracy Watch, Media Release, "New Coalition Launches Campaign for Stronger Lobbying And Ethics Laws, Files Complaint With Ethics Counsellor" (25 September 2000), online: <http://dwatch.ca/camp/RelsSep2500.html>.

[109] Bill C-2, *An Act respecting the election of members to the House of Commons, repealing other Acts relating to elections and making consequential amendments to other Acts*, 2nd Sess, 36th Parl, 2000, online: <https://www.parl.ca/DocumentViewer/en/36-2/bill/C-2/royal-assent>.

[110] Democracy Watch, Media Release, "Liberals Hide Sources of $2.1 Million in Election Donations, Group Calls for Changes to Bill C-9 to Close Loopholes" (23 April 2001), online: <http://www.dwatch.ca/camp/RelsApr2301.html>.

[111] "Show Us the Names Behind the Money" (26 May 2000), online: *Democracy Watch* <http://www.dwatch.ca/camp/OpEdMay2600.html>; Democracy Watch, Media Release, "Democracy Watch Raises Serious Ethical Concerns About Canadian Alliance and All Other Leadership Races" (9 March 2002), online: <http://www.dwatch.ca/camp/RelsMar0802.html>; Democracy Watch, Media Release, "Donations and Lobbying by Top Federal Government Contractors Reveal Problem of Money in Politics" (31 October 2002), online: <http://www.dwatch.ca/camp/RelsOct3102.html>.

[112] Democracy Watch, Media Release, "Democracy Watch Launches Court Challenge of Ethics Counsellor's Bias, Delay and Failure to Fulfill Legal Duties in Eight Complaints" (18 December 2002), online: <http://dwatch.ca/camp/RelsDec1802.html>.

a decision by extorting them. The Ethics Counsellor then used this interpretation to rule on several of Democracy Watch's complaints.[113] In April and May 2003, Democracy Watch responded by filing for judicial review of the Ethics Counsellor's structural bias and rulings. In January 2004, the federal Liberal government introduced Bill C-4, which proposed to replace the Ethics Counsellor with a more independent Registrar of Lobbyists and Ethics Commissioner.[114] The government tried to stop Democracy Watch's court case on the basis that the Ethics Counsellor position no longer existed, but the court not only rejected that motion, but ruled in July 2004 that the Ethics Counsellor was "structurally biased," "specifically biased" against Democracy Watch, and that its complaints had to be re-ruled on by the new Registrar.[115]

In early 2003, public attention to various fundraising and unethical lobbying scandals prompted the Liberal government to introduce Bill C-24. Democracy Watch and its coalition responded with a concerted push to finally win changes that would limit donations to a level that would inhibit lobbyists from influencing politicians.[116] Its intervention in the review of the bill led the House Committee to make an amendment lowering the individual donation limit from CDN$10,000 annually to CDN$5,000 as of January 1, 2004.[117] The bill also implemented Democracy Watch and the coalition's recommendations to restrict donations by corporate, union, and other organizations to CDN$1,000 annually; to require quarterly disclosure of donations to parties; and to require disclosure of donations to party leadership race candidates (the Liberals had already imposed this on candidates in their 2003 leadership race).[118]

Through this 2000 to 2004 period, Democracy Watch continued to advocate for closing the loopholes in the *LRA* that allowed for secret lobbying or obscured key details about lobbying activities. Scandals and public concern led to the government introducing Bill C-15 in fall 2002. The Bill closed the loophole in the *LRA* that Bill C-43 had created in 1995 allowing lobbyists not to register if a public office holder invited the lobbyist to lobby them. It also expanded the definition of lobbying so that more people communicating with public office holders about their decisions would be required to register.[119] Another win in 2005 was the

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[113] *Ibid*.

[114] Democracy Watch, Media Release, "Democracy Watch Hails Passage Of Bill C-4, Ethics Enforcement For Federal Politicians Closer Than Ever In Canadian History" (31 March 2004), online: <http://dwatch.ca/camp/RelsEthicsMar3104.html>.

[115] *Democracy Watch v Canada (Attorney General)*, [2004] 4 FCR 83, 2004 FC 969, at paras 25–31, 41–56, 95–97.

[116] "Analysis of Bill C-24 re: Federal Political Donations" (March 2003), online: *Democracy Watch* <http://www.dwatch.ca/camp/BillC24AnalysisMar0503.html>. Aarn Freeman, "Submission on Bill C-24 to the Standing Committee on Procedure and House Affairs" (10 April 2003), online: *Democracy Watch* <http://www.dwatch.ca/camp/BillC24TestimonyApr1003.html>; Democracy Watch, Media Release, "Democracy Watch Issues 'Search Warrant' For Secret Political Funds, Changes To Bill C-24" (24 April 2003), online: <http://www.dwatch.ca/camp/RelsApr2403.html>.

[117] Aaron Freeman, "Political Financing Bill Closes Some, But Not All, Donations Loopholes" (1 February 2003), online: *Democracy Watch* <http://www.dwatch.ca/camp/OpEdFeb0103.html>.

[118] "New Political Fundraising Rules Passed into Law!: Money in Politics Campaign Update" (August 2003), online: *Democracy Watch* <http://www.dwatch.ca/camp/BillC24AnalysisAug03.html>.

[119] Democracy Watch, Media Release, "Coalition Calls for Stronger Lobbying Law" (21 November 2002), online: <http://dwatch.ca/camp/RelsNov2102.html>.

creation of a new House of Commons Committee, called the Standing Committee on Access, Privacy and Ethics, which focused on the key accountability issues.[120]

Responding to ongoing scandals in November 2005, the Conservative Party of Canada, now led by Stephen Harper, promised a *Federal Accountability Act* (*FAA*) that included further restrictions on donations. When the Conservatives won the January 2006 election, they introduced some of their promised *FAA* measures in Bill C-2. The bill banned corporate and union donations; lowered the annual individual donation limit to CDN$1,000; changed the *LRA* into the *Lobbying Act*; established a new five-year prohibition on individuals registering as lobbyist after leaving public office (although a weak prohibition given that loopholes allow for lobbying without having to be a registered lobbyist); increased penalties; and increased the limitation period for prosecutions for violations.[121]

Democracy Watch won these changes due to the efforts of its coalitions and the unexpected developments related to scandals and competition between parties. Further, all these efforts ran parallel to Democracy Watch's coordinated campaign and the PIL strategy that mobilized to restrict the other schemes designed by lobbyists to have undue influence over politicians.

After being taken to court by Democracy Watch, the new Registrar Michael Nelson (a position that the *FAA* was changing into a Commissioner of Lobbying) finally issued a ruling in October 2006 on one of Democracy Watch's original eight complaints about unethical lobbying. The complaint was filed in April 2000 against lobbyist Barry Campbell (a former Liberal MP) lobbying the federal Liberal government's Minister of State (Financial Institutions) Jim Peterson (brother of former Ontario Premier David Peterson) while organizing an event that raised CDN$70,000 for Jim Peterson.[122] Democracy Watch filed yet another judicial review application challenging the Registrar's ruling because it used the same interpretation used by Ethics Counsellor Wilson and found that Campbell had not violated any *Lobbyists' Code* rule.[123]

In January 2007, Peterson and Campbell filed a libel lawsuit against Democracy Watch concerning a new release it had issued about the application for judicial review.[124] This was a typical use of "Strategic Litigation Against Public Participation" lawsuit, a SLAPP suit as they are known.[125] The lawyer for Peterson and Campbell offered to withdraw the lawsuit

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[120] "Standing Committee on Access to Information, Privacy and Ethics" (last visited 22 November 2021), online: *House of Commons Canada* <https://www.ourcommons.ca/Committees/en/ETHI>.
[121] Democracy Watch, Media Release, "Accountability Act's Half-Measures a Half-Step Forward In Federal Government Accountability" (12 December 2006), online: <http://www.dwatch.ca/camp/RelsDec1206.html>.
[122] Democracy Watch, Media Release, "Democracy Watch Calls for Changes to Political Finance Law and Investigation to Address Conduct By Member Of Cabinet And Lobbyist" (13 April 2000), online: <http://www.dwatch.ca/camp/RelsApr1300.html>.
[123] Democracy Watch, Media Release, "Group Files Court Challenge of Federal Registrar of Lobbyists' Ruling That Lobbyists Can Fundraise For Ministers They Lobby" (25 January 2007), online: <http://www.dwatch.ca/camp/RelsJan2507.html>.
[124] *Ibid*.
[125] "Anti-SLAPP Advisory Panel" (last updated June 2013), online: *Ontario Ministry of the Attorney General* <https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/>.

if Democracy Watch would withdraw its case challenging the Registrar's ruling. Democracy Watch refused. Peterson and Campbell did not withdraw the libel lawsuit for the following two years until the judicial review case was over.

Finally, on January 28, 2008, the case was heard in Federal Court in Toronto,[126] and on February 19 the court issued a ruling finding that the Registrar's ruling was reasonable. Democracy Watch appealed that ruling to the Federal Court of Appeal.[127] In the summer of 2008, Campbell filed a motion for security for costs, a motion usually filed when a defendant in a case believes they will win the case, but does not believe that the plaintiff will be able to pay a cost award. Democracy Watch tried to settle the motion, but Campbell's lawyer only offered instead to drop the motion if Democracy Watch would drop its appeal. Democracy Watch again refused, and soon after Federal Court of Appeal Justice Allen Linden, who historically was deeply involved in the Liberal Party of Canada,[128] issued an order giving Democracy Watch 30 days to pay CDN$10,000 into court or forfeit the case.[129] Democracy Watch's board decided to pay the amount rather than delay the case further by appealing the ruling.

There were no further attempts to stop the case. The Federal Court of Appeal heard the case in January 2009.[130] It ruled on March 12, 2009, that the Ethics Counsellor's and Registrar of Lobbyists' interpretation was "deeply flawed"[131] because it "mistakes conflict of interest for corruption"[132] and that the *Lobbyists' Code* rule clearly "prohibits lobbyists from placing public office holders in a conflict of interest" because "[a]ny conflict of interest impairs public confidence in government decision-making."[133]

While Democracy Watch finally won this case, it took until 2011 for the Commissioner of Lobbying to rule on all eight of the complaints Democracy Watch had filed from 2000 to 2002.[134] The Commissioner ruled that all of the lobbyists involved were "innocent" because

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[126] Democracy Watch, News Release, "Challenge of Federal Registrar of Lobbyists' Ruling that Lobbyists Can Fundraise for Ministers They Lobby, and of Federal Lobbying Ethics Enforcement System, in Federal Court in Toronto on Monday" (25 January 2008), online: <http://dwatch.ca/camp/RelsJan2508.html>.

[127] Democracy Watch, Media Release, "Democracy Watch Appeals Federal Court Ruling That Legalizes Lobbyists Raising Money and Doing Favours for Cabinet Ministers They Lobby" (11 April 2008), online: <http://dwatch.ca/camp/RelsApr1108.html>.

[128] For details see, Ellen Anderson & Bertha Wilson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2002) at 124–125.

[129] Democracy Watch, News Release, "Federal Court Justice Orders Democracy Watch To Pay In Advance $10,000 in Costs or Face Dismissal…" (15 August 2008), online: <http://www.dwatch.ca/camp/RelsAug1508.html>.

[130] Democracy Watch, News Release, "Federal Court of Appeal Hearing on Monday of Landmark Case Challenging Ruling that Approved of a Lobbyist Organizing a Fundraising Event for a Cabinet Minister He Was Registered To Lobby" (9 January 2009), online: <http://dwatch.ca/camp/RelsJan0909.html>.

[131] *Democracy Watch v Campbell*, [2010] 2 FCR 139, 2009 FCA 79 at para 48.

[132] *Ibid* at para 51.

[133] *Ibid* at para 48.

[134] Democracy Watch, News Release, "Federal Commissioner of Lobbying Fails in Past Year to Rule on Five Longstanding Ethics Complaints" (8 April 2010), online: <http://dwatch.ca/camp/RelsApr0810.html>.

they had been operating under the old Ethics Counsellor's interpretation of Rule 8 and could not retroactively be found guilty, and also because too much time had passed.

In September 2009, Democracy Watch filed a new complaint about a lobbyist assisting a cabinet minister with a fundraising event while lobbying the minister. In February 2011, the Commissioner of Lobbying (now Karen Shepherd) ruled on the complaint, finding the lobbyist, and another lobbyist who had also assisted with the event, guilty of violating the *Lobbyists' Code*.[135] These were the first lobbyists found guilty of violating the *Code* since it was enacted fourteen years earlier, in March 1997.

However, the ongoing loopholes in the *Lobbying Act* that excluded numerous lobbying activities and weak enforcement by the Commissioner and Canada's national police force (the RCMP), essentially made the *Code* meaningless. The chances of getting caught, let alone penalized, for failing to register were still slim.

From 1990 to 2005, the Ethics Counsellor only published two reports concerning a lobbyist failing to register lobbying as required by the *LRA*.[136] Between the 2004–2005 and 2008–2009 fiscal years Registrar of Lobbyists Michael Nelson (and then Commissioner of Lobbying Shepherd) along with RCMP and Crown prosecutors, decided not to prosecute 135 of the 136 lobbyists who were caught violating the *LRA*.[137] No one was prosecuted for violating the federal lobbying law from 1988 to the end of the 2009 fiscal year.

Along with ongoing weak enforcement, as of 2009, federal Canadian laws and codes still allowed:

1. donations that an average voter could not afford;
2. spending on election ads at a level that an average voter could not afford;
3. secret lobbying;

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[135] Office of the Commissioner of Lobbying of Canada, *Report on Investigation: The Lobbying Activities of Michael McSweeney*, (Ottawa: Office of the Commissioner of Lobbying, 2011), online (pdf): <https://lobbycanada.gc.ca/media/1797/ri_mcsweeney-eng.pdf>; Office of the Commissioner of Lobbying of Canada, *Report on Investigation: The Lobbying Activities of Will Stewart*, (Ottawa: Office of the Commissioner of Lobbying, 2011), online (pdf): <https://lobbycanada.gc.ca/media/1792/ri_stewart-eng.pdf>. See the complaint at: Democracy Watch, News Release, "Group Files Complaints with Lobbying Commissioner, Ethics Commissioner and Elections Canada About Lobbyist's Assistance" (22 October 2009), online: <http://www.dwatch.ca/camp/RelsOct2209.html>.

[136] Paul A Pross, "Law and Innovation: The Incremental Development of Canadian Lobby Regulation" in O P Dwivedi, Byron M Sheldrick & Timothy A Mau, eds, *The Evolving Physiology of Government: Canadian Public Administration in Transition* (Ottawa: University of Ottawa Press, 2009) 151 at 173.

[137] Office of the Commissioner of Lobbying of Canada, "Annual Report: Office of the Commissioner of Lobbying of Canada" (last visited 22 November 2021), online: *Government of Canada* <https://publications.gc.ca/site/eng/9.505813/publication.html>. Office of the Commissioner of Lobbying, *Annual Report on the Application: 2008–2009*, (Ottawa: Office of the Commissioner of Lobbying, 2009) at 10–12, online: <https://publications.gc.ca/collections/collection_2009/cal-olc/Iu77-1-2009E.pdf>. Note that few details were provided in the Registrar's reports. The main source of the statistics is the Monitoring subsection of the Commissioner's 2008–2009 Annual Report.

4. lobbying the day after a public office holder leaves office; and
5. politicians to accept the gift/favour of fundraising assistance from a lobbyist (as long as the lobbyist exploits one of the loopholes in Canada's lobbying law that allows lobbying without registering under the law).

As the OECD and other international organizations have articulated, the key to restricting undemocratic and unethical influence by lobbyists is to prevent illicit actions through establishing a "culture" of transparency, integrity, and compliance.[138] The ongoing loopholes in federal Canadian laws and codes and weak enforcement and penalties, point to a conclusion that the changes to rules won by Democracy Watch and its coalitions, combined with ongoing public expectations, were not enough to change the legal culture, let alone the social culture, of unethical favour-trading in Canada's capital.

Though legal rules were changed in important ways, the federal government bureaucracy (most specifically the Registrar of Lobbyists and Commissioner of Lobbyists) resisted enforcing legal changes and delayed rulings for 14 years. This allowed wrongdoers to escape accountability and a status quo of non-enforcement to persist through to 2009.

The overall lesson from the experience of Democracy Watch and the social movement it led from 1994 to 2011 is that even if an NGO does nearly everything right in the short-term to win anti-corruption changes to legal rules, it may not be enough. It will almost always still face a long-term struggle to change the legal and social culture in ways that will entrench the legal rules, make them effective, and, finally, close the gap between what is legal and what is ethical in government and business.

## 5. CONCLUSION

NGOs play multiple critical roles in combatting corruption: researching and disclosing loopholes and flaws in rules and enforcement, raising public awareness, organizing protests, building coalitions for change, lobbying and campaigning, and filing petitions with enforcement agencies, tribunals, and courts. NGOs face many challenges in their anti-corruption work: from building a strong and broad base of public support; to partnering with other organizations without compromising too much; to obtaining the resources for the multi-faceted activities needed to win reforms; to ensuring they are proposing effective reforms; to trying to maintain their independence, internal integrity, and legitimacy.

The record in many countries shows that, in part because of these many challenges, few NGOs are strong enough on their own or in coalition to win effective anti-corruption changes, even if they have the capacity to undertake long-term campaigns. As corruption is a collective action problem,[139] collective action by many sectors is needed to overcome the

[138] OECD, Principles for Transparency and Integrity, *supra* note 3.

[139] Anna Persson, Bo Rothstein & Jan Teorell, "Why Anticorruption Reforms Fail: Systemic Corruption as a Collective Action Problem" (2012) 26:3 Governance 449. Alina Mungiu-Pippidi, "Quantitative Report on Causes of Performance and Stagnation in the Fight Against Corruption" (21

barriers and create a culture of ethical government and business in any jurisdiction. NGOs lead the way in many parts of this collective action, organizing and activating the grassroots, brokering and negotiating the building of coalitions and partnerships to pressure the power elite, and connecting the public's concerns with strategic advocacy in government policy-making processes.

As they are not seeking power or the perks of power like opposition political parties are, NGOs create continued pressure for effective anti-corruption measures through changes in government over the long-term. While opposition parties may undertake research and play "gotcha" politics, exposing corrupt activities of government officials and then promise changes to try to win elections, the record in many countries shows this approach to be ineffective on its own. When those parties win power, or a share of power, the ongoing pressure from NGOs and other sectors of civil society is essential to ensuring those election promises are kept.

In these ways, NGOs provide the force behind historical changes across jurisdictions. They provide the fuel, the oxygen, the spark, and the engine to activate the public and push government to combat corruption and address other problems in society.

May 2014), online: *AntiCorruption Policies Revisited* <http://anticorrp.eu/publications/quantitative-report-on-causes/>.

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