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Corruption and Development: The Need of International Investigations with a Multijurisdictional Approach and the Involvement of Multilateral Development Banks with National Authorities

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Abstract:

The authors argue that while both Multilateral Development Banks (MDBs) and national governments have mechanisms to fight corruption, the outcomes of these enforcement mechanisms diverge. MDBs are interested in the causes and effects of corruption from a development perspective and, as such, tend to sanction Small and Medium Enterprises and individuals, while national governments are focused on a more punitive outcome, targeting larger multinational corporations. The article examines the enforcement objectives articulated in national legislation, namely the American Foreign and Corrupt Practices Act and its Canadian counterpart (the CFPOA) as well as several Canadian cases, on the one hand, and the tools and outcomes of the MDBs' Sanctions Systems on the other. The authors conclude that national enforcement efforts and MDBs' sanctions outcomes intersect in their fight against international corruption in that their results are complimentary; the former punishing large-scale offenders, while the latter ensuring the integrity of development projects.

Keywords:

Corruption, FCPA, CFPOA, Multilateral Development Banks, development, international corruption

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Corruption and Development

The need of International Investigations with a multijurisdictional approach and the involvement of Multilateral Development Banks with National Authorities

Juan G. Ronderos¹
Michelle Ratpan
Andrea Osorio Rincon

Introduction

Since the inception of the United States (US) Foreign Corrupt Practices Act (FCPA) in 1977, the world has witnessed the creation of a number of international conventions, agreements, and national laws aimed at tackling international corruption. The Organization of American States, the United Nations, the OECD, the Multilateral Development Banks (MDBs)², and an ever-growing number of nations have adopted tools to address international corruption from diverse angles. International treaties and agreements have aimed at enticing nations to adopt anti-corruption legislation to forbid the bribing of foreign officials by their nationals, while the MDBs and national jurisdictions have created specific tools to target international corruption. Although there seems to be unity of purpose amongst these treaties, agreements, organizations and nations, there are some significant differences. National jurisdictions are interested in punishing corporations and individuals for bribing foreign officials in an effort to protect commercial national interest in the international market, while MDBs are more interested in confronting the pervasive effect of corruption in development projects in the countries they serve. These two objectives may coincide in some instances, such as in the international bribery case of Canadian construction company SNC-Lavalin, where the World Bank was interested in the actions of this company in Bangladesh, while the Royal Canadian Mounted Police had been looking into the company's dealings in Montreal. But in the majority of cases, MDBs are more interested in the causes and effects of corruption in development projects in member countries³ than targeting big multinational corporations,⁴ leading to the sanctioning of smaller national or regional corporations⁵ and individuals.

¹ We would like to acknowledge the kind contribution of Julia Wojtowicz who assisted in writing this article.

² For the purpose of this paper, MDBs refer to the Multilateral Development Banks that are signatories of the 2010 "Agreement on Mutual Enforcement of Debarment Decisions" or Cross Debarment Agreement. These MDBs are the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the World Bank Group and the IDB Group.

³ Member countries are the member states that own each of the MDBs. In the case of the Inter-American Development Bank (IDB), it is owned by 48 member states, of which 26 are borrowing members in Latin America and the Caribbean. The IDB was founded in 1959 as a partnership between 19 Latin American countries and the United States. Over the next several decades, the Bank expanded its membership, initially through the Western Hemisphere. Trinidad and Tobago became a member in 1967, to be soon joined by Barbados (1969), Jamaica (1969), Canada (1972), Guyana (1976), The Bahamas (1977) and Suriname (1980). The 22 non-regional or non-Western Hemisphere member countries, joined between 1976 and 1986. Belize became a member in 1992 and Croatia and Slovenia joined as successor states of Yugoslavia in 1993. The Republic of Korea became a member country in 2005 and the People's Republic of China became a member country in 2009. (Inter-American Development Bank, January 9, 2015), online: Member Countries <<http://www.iadb.org/en/about-us/member-countries,6291.html>>.

⁴ This is not to say that MDBs avoid investigating and pursuing leads related to alleged misconduct by large multinational corporations. However, this is not one of the major parameters to decide what is investigated and/or who is sanctioned.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) and similar international instruments aim at ensuring that all jurisdictions adopt comparable legislation to the FCPA, outlawing foreign bribery across the board. As a consequence of the enacted legislations, national anti-corruption enforcement systems are directed at punishing offenders criminally or imposing fines and civil sanctions on those entities that have violated national laws related to foreign bribery. In the case of the US, one of the main concerns for US authorities in relation to bribery of foreign officials has been to “level the playing field” so that US corporations can fairly compete abroad with other corporations.⁶ The US considers that international corruption takes away fair and competitive business, inhibiting American corporations for doing business abroad. The US has decided to fight corruption to protect the ability of US companies to compete on the global scales.⁷

MDBs have had a different thrust. MDBs are concerned with the pervasive effects of corruption in development in the countries and sectors they serve. More specifically, MDBs are entrusted to ensure that the funds they have received and administer are strictly used for the purpose for which they were intended: development. The creation of anti-corruption mechanisms is a tangible way by which MDBs fulfill this fiduciary duty of ensuring proper use of funds.⁸ But most importantly, it is one of the ways in which MDBs can ensure that communities are being properly served by projects sponsored by MDBs, making sure that funds are not being squandered or diverted. The key difference between MDBs’ anti-corruption systems and that of national authorities is the objective. The purpose of the MDBs’ anti-corruption Sanctioning System is to ensure that the funds are not being misused and to avoid doing business with entities and/or individuals who have been found to have committed prohibited practices, including corruption.⁹ In other words, the objective is to safeguard the developmental objectives of

⁵ These types of companies are referred herein as Small and Medium Enterprises (SMEs).

⁶ Roger P. Alford, *Broken Windows Theory of International Corruption, A Symposium: The FCPA at Thirty-Five and Its Impact on Global Business* (73 Ohio St. L.J.1253, 2012) 1272-1273.

⁷ Caldwell Leslie R., Assistant General Attorney Department of Justice, Remarks, Duke University School of Law, Durham, NC, (October 23, 2014), online:<<http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law>>

⁸ Inter-American Development Bank, *Agreement Establishing the Inter-American Development Bank*, Article III, Section 1. Use of Resources, (April 8, 1959), online: <<http://www.iadb.org/leg/documents/pdf/convenio-eng.pdf>>. *The International Bank for Reconstruction and Development*, Articles of Agreement, Articles of Agreement III General Provisions Relating to Loans and Guarantees, Section 1. Use of Resources, (February 16, 1989), online: <<http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>>

⁹ A prohibited or sanctionable practice as defined under the Uniform Framework for Preventing and Combating Fraud and Corruption (the “IFI Framework”) includes:

- ‘Corrupt practice: the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.’
- ‘Fraudulent practice: any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.’
- ‘Collusive practice: an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party (e.g. leaking of bid information, rigged specifications).’
- ‘Coercive practice is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.’ Online: <[http://lnadbg4.adb.org/oai001p.nsf/0/CE3A1AB934F345F048257ACC002D8448/\\$FILE/Harmonized%20Sanctioning%20Guidelines.pdf](http://lnadbg4.adb.org/oai001p.nsf/0/CE3A1AB934F345F048257ACC002D8448/$FILE/Harmonized%20Sanctioning%20Guidelines.pdf)>.

projects, taking into account the communities that are being served, and excluding those actors who have demonstrated that they do not adhere to the ethical standards expected in a development project.

Building on the historical context of anti-corruption mechanisms, this Article will explore the differences between the enforcement objectives of national legislations and authorities, such as the FCPA and the Canadian Corruption of Foreign Public Officials Act (CFPOA) on the one hand, and the tools used by MDBs on the other, taking into account that both systems are aimed at “fighting corruption.” This Article builds on the notion that foreign bribery is a multifaceted proposition with multiple victims and actors. Consequently, addressing corruption in international development requires action and collaboration from all actors (national and international) while using different legal tools. National criminal, local and international, investigations have to be complemented with MDBs international administrative ones in order to achieve effectiveness. However, there has to be a clear understanding of their differences and limitations in order to appropriately measure success in each of the systems.

To that end, the first section of this Article will explore the origins of the FCPA in the late seventies, and how the statute was later transformed in the late eighties. This section will present a brief description of the history of enforcement of the FCPA. This will provide an understanding of the current sense of purpose and objectives within the US foreign anti-corruption system.

The second section will concentrate on the development of the CFPOA and its history of enforcement. Cases discussed will include Nikko Resources,¹⁰ Griffiths,¹¹ and Karigar¹², each of which illustrates the implementation of the CFPOA as a punishment and deterrent tool. This section will also examine two cases strongly connected to the international development context. The first is that of Acres International, a Canadian civil engineering firm found guilty by the Lesotho courts for corrupt acts, but never prosecuted by Canadian authorities. The second case is SNC-Lavalin, which highlights an evolution towards greater enforcement of the CFPOA and increased collaboration between Canadian authorities and the World Bank.

The third section will explain how MDBs got involved in the fight against corruption after 1996, and their enforcement mechanism created and perfected in the first decade of the 21st century. Specifically, this section will address the rationale behind the MDBs’ involvement in the fight against corruption and why it is international in nature. It will describe the different tools used by the Inter-American Development Bank (IDB) and the World Bank Group (WBG) to address corruption in development projects. In order to illustrate the effects of corruption in development projects and demonstrate the importance of the involvement of MDBs in this field, two cases will be analyzed that will highlight the importance of

¹⁰Her Majesty the Queen vs. Niko Resources Ltd., (Court of Queen's Bench in Alberta, Judicial District of Calgary June 23, 2011).

¹¹Her Majesty the Queen vs. Griffiths Energy International Inc. E-File No.:CCQ13GRIFFITHSENER, Action No. 130057425Q1, (January 25, 2013).

¹²Her Majesty the Queen v. Karigar, 2014 ONSC, 2093, Court file No.: 10-030208.

pursuing Small and Medium Enterprises (SMEs)¹³, and the ultimate objective of fighting corruption for the MDBs.

In closing, this Article will address the question of where do national enforcement efforts and MDBs intersect in their fight against international corruption. It will also present the areas in which the objectives of the actions taken by national jurisdictions and MDBs differ. Canadian and US authorities have concentrated their enforcement efforts in sizable corporations with international reach, while the MDBs have concentrated their efforts on SMEs, which in the majority of cases are local or regional. This article submits that, although the outcomes are significantly different at the national level and at the MDBs, they are complimentary in nature. However, measuring success in both instances relates to their different origins and objectives and hence, drawing comparisons in enforcement efforts could be misleading.

¹³ The World Bank defines SMEs by the number of its employees. However, the World Bank does not present a distinct number. It varies from 5 to 99 employees or even up to 250 employees. The IDB defines small firms as those with 5 to 49 employees and medium-sized enterprises as those with 50 to 499 employees (see Evaluation of the World Bank Group's Targeted Support for Small and Medium Enterprises, Approach Paper, Independent Evaluation Group – World Bank Group (7 January 2013), online: <https://ieg.worldbankgroup.org/Data/reports/ap_evaluationof_smes.pdf> (last access: 23 October 2014); Arturo Galindo Alejandro Micco, Bank, *Credit to Small and Medium-Sized Enterprises: The Role of Creditor Protection*, Inter-American Development Bank, Working Paper # 527 (2005) 5, online: <<http://www.iadb.org/res/publications/pubfiles/pubWP-527.pdf>> (last access: 27 October 2014).

The FCPA

In the US, the enforcement authority of the FCPA is shared between DOJ and SEC.¹⁴ The DOJ is in charge of the criminal FCPA enforcement authority. DOJ jurisdiction covers criminal and civil enforcement for the FCPA's anti-bribery provisions over domestic concerns, which include: (a) U.S. citizens, nationals and resident, and (b) US business and their offices, director, employees, agents, or stockholders acting on the domestic concern's behalf.¹⁵ The SEC is responsible for the civil enforcement of the FCPA over issuers and their officers, director, employees, agents, or stockholders acting on the issuer's behalf.¹⁶ Even though the DOJ and the SEC have the authority to enforce the FCPA, these federal entities work in close collaboration with many other federal agencies¹⁷ including the United States Federal Bureau of Investigation (FBI).¹⁸ Cross-collaboration between these agencies has been a key factor to the successful prosecution of FCPA violations.

Although the FCPA was enacted in 1977 and amended in 1988 and 1998, significant enforcement only began in the late 2000.¹⁹ In the first few years of the FCPA's existence, the SEC only tried few cases.²⁰ Between 1978 and 2000, the SEC and the DOJ conducted an average of three FCPA cases a year.²¹ In contrast, by 2007, the DOJ brought more than sixty investigations per year,²² as 2009, the DOJ convicted 50 individuals for FCPA violations,²³ and in 2010 seventy-four investigations were initiated and at least eight FCPA-related settlements were reached.²⁴ In recent years, the DOJ and the SEC have demonstrated more interest in investigating FCPA violations.²⁵ Since 2013, the DOJ has brought FCPA cases against 21 corporations,²⁶ charged against or plead out 25 individuals, and obtain penalties for

¹⁴ Enforcement Division of the US Securities and Exchange Commission and Criminal Division of the U.S. Department of Justice, FCPA A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2012, 2-4.

¹⁵ Juedes, Dieter, *Taming the FCPA Overreach through an Adequate Procedures Defense*, 4 Wm. & Mary Bus. L. Rev. 40 (2012-2013), 40

¹⁶ Crites, D. Michael, *The Foreign Corrupt Practices Act at Thirty-Five: A Practitioner's Guide* (73 Ohio St. L.J. 1058, 2012), 1058.

¹⁷ As an example, the Department of Commerce and the Department of State are working to address corruption in other countries through anti-corruption and good governance initiatives. In addition, both departments have assisted U.S. corporations doing business abroad.

¹⁸ Enforcement Division of the US Securities and Exchange Commission and Criminal Division of the U.S. Department of Justice, FCPA A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2012, page 4

¹⁹ Koehler, Mike, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. Rev. 108 (2011-2012), 108

²⁰ Willborn, Emily, *Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors*, 22 Minn. J. Int'l L. 428 (2013), 428

²¹ Willborn, Emily, *Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors*, 22 Minn. J. Int'l L. 428 (2013), 428

²² Nelson D. Schwartz and Lowell Bergan, *Payload: Taking Aim at Corporate Bribery*, *The New York Times* (November 25, 2007), online: <<http://www.nytimes.com/2007/11/25/business/25bae.html?pagewanted=all&r=0>>

²³ Yin Wilczek, "SEC to Unveil FCPA Actions Against Individuals by Year's End", Bloomberg BNA (October 10, 2014), online: <<http://www.bna.com/sec-unveil-fcpa-n17179896476/>>

²⁴ Juedes, Dieter, *Taming the FCPA Overreach through an Adequate Procedures Defense*; 4 Wm. & Mary Bus. L. Rev. 41 (2012-2013), 41

²⁵ Huskins, Priya Cherian, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1449 (2007-2008), 1449

²⁶ Miller Chevalier, "FCPA Winter Review 2015" (January 22, 2015), online:

<<http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=139809>>

approximately \$800 million.²⁷ This change is the result of multiple factors such as: (a) the increase of global business transactions (b) the recent global financial crisis, and (c) the multiple U.S. corporate scandals.²⁸

Although many corporations and individuals have been prosecuted as a result of the SEC and DOJ's joint investigations, most of them result in settlement agreements. Sanctions imposed by the SEC and the DOJ made US corporations aware of the monetary and reputational consequences of these investigations.²⁹ Therefore, corporations prefer to settle or plead guilty once they are faced with possible FCPA charges, instead of enduring the prosecution process.³⁰ In the U.S more than 88% of criminal foreign bribery and related cases have been resolved by settlement, whereas only about 12 percent have proceeded to trial.³¹ Recently, Siemens, Ralph Lauren Corporation, Tyco, Hewlett Packard, and ALCOA corporations paid millions of dollars to the U.S. government in settlement agreements.³² Other settlements reached between 1999 and 2012 resulted more than \$5.7 a billion in monetary sanctions of corporations.³³

However, the funds resulting from these settlements seldom return to the nations that were affected by the bribes. The United Nations Convention Against Corruption (UNCAC) establishes as one of its fundamental principles the return of assets to their countries.³⁴ However, it is interesting to note that only 3.3% of the \$6 billion dollars in sanction have been ordered to return or effectively returned to those countries where officials were bribed.³⁵ On the contrary, the monetary sanctions imposed have stayed within the jurisdiction of those countries imposing the sanctions or countries where the corporations are headquartered, such as the US. Nearly \$6 billion dollars in monetary sanctions have

²⁷ Yin Wilczek, "SEC to Unveil FCPA Actions Against Individuals by Year's End", Bloomberg BNA (October 10, 2014), online: <<http://www.bna.com/sec-unveil-fcpa-n17179896476/>>

²⁸ Juedes, Dieter, *Taming the FCPA Overreach through an Adequate Procedures Defense*, 4 Wm. & Mary Bus. L. Rev. 40 (2012-2013), 41

²⁹ Juedes, Diet, *Taming the FCPA Overreach through an Adequate Procedures Defense*; 4 Wm. & Mary Bus. L. Rev. 41 (2012-2013), 48

³⁰ Hansberry, Heidi, *In Spite of Its Good Intentions, the Dodd-Frank Act Has Created a FCPA Monster*, 102 J. Crim. L. & Criminology 197 (2012), 197

³¹ Jacinta Anyango Oduor, Francisca M.U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park and Oliver Stolpe, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (December, 2013), 34, online: <<http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0086-3>>

³² U.S. Securities and Exchange Commission, *SEC Enforcement Actions*, online: <<http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>

³³ Caroline Bradley, *International Finance Spring 2014 Recovering the Proceeds of Crime*, page 9, online in: <<http://blenderlaw.umlaw.net/wp-content/uploads/2013/10/intfinmats2014kleptocracy.pdf>>

³⁴ UNCAC, Article 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."

³⁵ Jacinta Anyango Oduor, Francisca M.U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park and Oliver Stolpe, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (December, 2013), 67, online: <<http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0086-3>>

been imposed by bribe originating countries.³⁶ The fact that these funds have remained in the US could be traced to the history, goals and objectives of the FCPA.

Origins and development of the FCPA

The FCPA was enacted in 1977 to address bribe payments made to foreign government officials by American corporations or individuals.³⁷ In many cases, these payments were made to foreign government officials to obtain or retain business.³⁸ Prior to the adoption of the FCPA, bribing foreign officials was not expressly prohibited by US legislation.³⁹ Although there were some laws to control improper activities by Americans abroad, as the Wire Fraud Statute and the Mail Fraud Act, none addressed the payment of bribes to foreign officials.⁴⁰ Due to the lack of legislation to address this issue, payments made by many American corporations to foreign officials were of public knowledge.⁴¹ Evidence suggests that US government agencies like the Department of State (DOS) and the Department of Defense (DOD) were aware of these bribes and in some cases, even provided information as to whom and how much to pay.⁴²

The FCPA criminalized foreign bribery and created special accounting provisions to address the corresponding accounting irregularities generated by the payment of bribes i.e. the resulting inaccuracy of business books and records of corporations.⁴³ Two main provisions are the driving force of the FCPA: (a) an enforcement mechanism that criminalizes the payment of bribes to foreign government officials, enforced by the US Department of Justice (DOJ);⁴⁴ and (b) an accounting requirement to properly reflect transactions in order to help prevent corruption,⁴⁵ designed as a civil enforcement tool entrusted to the

³⁶ Jacinta Anyango Oduor, Francisca M.U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park and Oliver Stolpe, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (December, 2013), 97-98, online: <<http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0086-3>>

³⁷ The concept of individuals or corporations that could be subject to FCPA enforcement was enhanced in 1988.

³⁸ Department of Justice, *Foreign Corrupt Practices Act*, online: <<http://www.justice.gov/criminal/fraud/fcpa/>>

³⁹ Lochner, Scott J, *Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 645-674

⁴⁰ Lochner, Scott J, *Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 648

⁴¹ Lochner, Scott J, *Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 Rolo, Tanya, *Retaking the Helm against International Bribery: The Facilitating Payments Exception and Sovereign Dominance*, N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 1890

⁴² Dowd, Raymond J, *Civil Rico Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 Fordham Int'l L.J. 948 (1990-1991), 948.

Lochner, Scott J, *Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 648

⁴³ Porrata-Doria, Rafael A. Jr., *Amending the Foreign Corrupt Practices Act of 1977: Repeating the Mistakes of the Past*, 38 Rutgers L. Rev. 30 (1985-1986), page 30

⁴⁴ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), § 78dd-2(i)(1), §§ 78dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3), §§ 78dd-1(c), -1(f)(3); 78dd-2(c), -2(h)(4); 78dd-3(c), -3(f)(4)(A). §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1), et seq.

⁴⁵ 15 U.S. Code § 78m and §78M-1

US Securities and Exchange Commission (SEC).⁴⁶ The first provision establishes the criminal enforcement mechanism, prohibits US corporations to give anything of value to foreign government officials for the purpose of obtaining or retaining business with a broad understanding of jurisdiction.⁴⁷ The second provision, civil in nature and known as the books and records provision, requires US issuers⁴⁸ to establish and maintain internal controls including accounting standards (maintain records, books and accounts in detail and reflecting the real transactions of the corporation) to avoid violations.⁴⁹

The US was the first nation⁵⁰ to pass legislation prohibiting bribery of foreign official and setting clear rules regarding proper keeping of financial books and records in relation to this type of activity.⁵¹ The US Congress had a number of reasons to pass the FCPA, among which was to create an “alliance-building” instrument between the U.S. and developing countries.⁵² During 1976, prior to the enactment of the FCPA, the press exposed multiple corruption scandals such as Watergate and the Bananagate. These *exposés* led to congressional hearings on the activities of US corporations abroad⁵³ and investigations by different agencies. The apparent widespread surge of corporate foreign bribery and its exposure by Congress, the SEC, and DOJ investigations became part of the motivation for Congress to enact the FCPA.⁵⁴ Additionally, foreign policy considerations, such as multiple bribes paid by American corporations operating abroad that could have inadvertently linked bribe payers to the US government⁵⁵

⁴⁶ Pisano, Francesca M., *The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations*, 62 Emory L.J. 613 (2012-2013), 613

⁴⁷ Sullivan, Patrick G, Smith, Gregory Kaler; Thoemmes, Boguslaw B.; Carter, Adam Augustine, *Foreign Corrupt Practices Act*, 28 Am. Crim. L. Rev. 542 (1990-1991) 542.

The FCPA has a broad understanding of jurisdiction and a sense of the extraterritorial application of this law. For more on this issue see Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation Colloquy: Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal under the Global Conditions of the Late Twentieth Century*, 24 YALE J. INT'L L. 257(1999), 290-291. Also see Steven R. Salbu, *Foreign Corrupt Practices Act as a Threat to Global Harmony, The Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium*, 20 MICH. J. INT'L L. 419(1998).

⁴⁸ ‘SEC considers a corporation an issuer if (a) is listed on a national securities exchange in the United States, or (b) the company’s stock trades in the over-the-counter in the U.S. and the company is required to file SEC reports’, 11, online: <<http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>>

⁴⁹ Pisano, Francesca M., *The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations*, 62 Emory L.J. 613 (2012-2013), 613

⁵⁰ Chaffee, Eric, *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade*, Mercer L. Rev. 711 (2012-2014), 714

⁵¹ Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 559

⁵² FCPA Blog, Andy Spalding, *Beyond Balance II: Rediscovering the FCPA’s Original Purpose*(January 26, 2013) online: <<http://www.fcpablog.com/blog/2012/1/26/beyond-balance-ii-rediscovering-the-fcpas-original-purpose.html>>

⁵³ Rolo, Tanya, *Retaking the Helm against International Bribery: The Facilitating Payments Exception and Sovereign Dominance*, N.Y.U. J. Int’l L. & Pol. 645 (1980-1981), 1892

⁵⁴ Eldridge, Preston, *Without Bounds: Navigating Corporate Compliance through Enforcement of the Foreign Corrupt Practices Act*; 66 Ark. L. Rev. 736 (2013), page 736

⁵⁵ See for example, “Mr. Tanaka and Lockheed”, *The Washington Post*(August 21, 1976). In relation to the Japanese bribery investigation of former Prime Minister Kakuei Tanaka and the payments received by Lockheed to persuade a Japanese airline to buy airplanes from the American company. The Editorial of the Washington Post warns of the perceived link between the Lockheed as a bribe-payer and the fact that at the time it was the largest contractor for the DOD. See also Mike Koehler, *Story of the Foreign Corrupt Practices Act, The Symposium: The FCPA at Thirty-Five and Its Impact on Global Business*, 73 OHIO ST. L.J. 929(2012), 935.

and the battle between capitalism vs. communism, were key factors to the discussion that led Congress to embark in this effort.⁵⁶

The Watergate scandal was perhaps one of the main drivers for the enactment of the FCPA.⁵⁷ President Nixon's re-election campaign was subject to an investigation for alleged illegal contributions by corporate executives.⁵⁸ As a result, the SEC and the Attorney General's Office conducted subsequent inquiries into the illegal payments made by US corporations.⁵⁹ The US Attorney General appointed a Special Prosecutor (the Watergate Special Prosecutor) to investigate the legality of the payments made by US corporations to foreign government officials.⁶⁰ The Watergate Special Prosecutor and Congress directed their investigation to determine the legality of these questionable payments.⁶¹

Following the Watergate scandal, the SEC also opened a series of investigations. The SEC evaluated the issue of contributions from a different perspective than that of Congress and the Watergate Special Prosecutor. The SEC investigation concentrated on the fact that the corporations did not disclose to their investors the questionable payments. In doing so, the SEC tried to identify the mechanisms used by these corporations to document the illegal payments in their books and records.⁶² The investigations by the SEC and the Watergate Special Prosecutors uncovered that hundreds of US corporations had spent millions of dollars bribing foreign government officials.⁶³ The inquiries exposed the use of secret slush funds to make the illegal payments.⁶⁴ In addition, these corporations had falsified their corporate financial records, disguising or concealing the source and illegal use of these funds.⁶⁵

The Bananagate scandal contributed as an additional consideration for the creation of the FCPA.⁶⁶ In 1975, the President and CEO of the United Brands Company, a major importer of bananas to the US, jumped from a New York City building window falling to his death.⁶⁷ The suicide investigation revealed that the CEO authorized payments to the President of Honduras to reduce taxes on banana exports.⁶⁸ This scandal exposed on the one hand, a practice used by US companies to further their business agenda

⁵⁶ Michael P. Tremoglie, *FCPA: Protect investors at home or America's image abroad?* Legal Newline (August 17, 2012), online: <<http://legalnewline.com/in-the-spotlight/237030-fcpa-protect-investors-at-home-or-americas-image-abroad>>

⁵⁷ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, Moritz Law, Ohio State Law Journal, 960-963

⁵⁸ Bixby, Michael *The Lion Awakes: The Foreign Corrupt Practices Act - 1977 to 2010*; B.12 San Diego Int'l L.J. 92 (2010-2011), page 93

⁵⁹ Philip Mattera, *The New Business Watergate: Prosecution of International Corporate Bribery is on the Rise*, Corpwatch (December 18, 2007), online in: <http://www.corpwatch.org/article.php?id=14859>

⁶⁰ Mr. Elliot Richardson acted as General Attorney of the U.S during the Watergate scandal. Once he became aware of the scandal, Mr. Richardson appointed Archibald Cox as the special prosecutor for the Watergate Scandal.

⁶¹ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, Moritz Law, Ohio State Law Journal, page 962-964.

⁶² Bixby, Michael *The Lion Awakes: The Foreign Corrupt Practices Act - 1977 to 2010*; B.12 San Diego Int'l L.J. 92 (2010-2011), page 93

⁶³ Public Broadcasting Service, *Spotlight: History of the FCPA, How a tough U.S. anti-bribery law came to pass*, online in: <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html>

⁶⁴ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, Moritz Law, Ohio State Law Journal, 932.

⁶⁵ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, Moritz Law, Ohio State Law Journal, 932.

⁶⁶ Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 602

⁶⁷ Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 602

⁶⁸ Smith, Lena E., *Is Strict Liability the Answer in the Battle against Foreign Corporate Bribery*, 79 Brook. L. Rev. 1801 (2013-2014), 1801

by paying bribes to foreign officials and on the other hand, the lack of legislation to prevent or punish this type of conduct.⁶⁹

The investigations of the Bananagate scandal led to the discovery of additional questionable activities by the Lockheed Corporation.⁷⁰ In 1976, after the post-Watergate and Bananagate scandal investigations led by the SEC, the media reported⁷¹ that US government contractors—including the Lockheed Corporation⁷²-- had bribed several government officials in Japan, Italy, Republic of Korea, and the Netherlands.⁷³ Lockheed officials admitted paying bribes to Japanese executives and government officials to promote Lockheed aircraft sales in that country.⁷⁴ The corporation argued that bribe payments were customary in these countries.⁷⁵ As a consequence of the Lockheed case, the former Japanese Prime Minister, other Japanese politicians and two former Italian defense ministers were arrested.⁷⁶ This led to serious questioning by the public in the US, like a stern editorial of the Washington Post in 1976 requesting concrete action by US authorities.⁷⁷

The US Congress also took foreign policy into consideration for the enactment of the FCPA. Given that at the time the Cold War was in full force, US Officials feared that if examples of foreign bribery by US corporations—such as defense contractors—were made public, it could reaffirm communist assertions that the US was made of greedy socially destructive capitalists.⁷⁸ The US Congress gave special attention to bribery payments such as the ones made in Italy, and the political consequences that they could bring.⁷⁹ The worry at the time was that these bribes could threaten the credibility of the US as an advocate of democracy and jeopardize US alliances around the world.⁸⁰ The US decided that it was

⁶⁹ Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 603

⁷⁰ Smith, Lena E., Is Strict Liability the Answer in the Battle against Foreign Corporate Bribery, 79 Brook. L. Rev. 1801 (2013-2014), 1801

⁷¹ Rolo, Tanya, *Retaking the Helm against International Bribery: The Facilitating Payments Exception and Sovereign Dominance*, N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 1890Int'l

⁷² Lockheed Corporation, the largest US defense contractor, received at the time a \$250 million federal loan to keep the company out of bankruptcy. Therefore, other countries perceived a close relation between the US government and the Corporation. The public perception was that this money could have been used to bribe foreign officials. The US government was very sensitive regarding the foreign perception of the bribes. (Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 603-604)

⁷³ FCPA Blog, Andy Spalding, *Beyond Balance II: Rediscovering the FCPA's Original Purpose*, online:

<<http://www.fcpablog.com/blog/2012/1/26/beyond-balance-ii-rediscovering-the-fcpas-original-purpose.html>>

⁷⁴ Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 603

⁷⁵ Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 603

⁷⁶ American Bar Association, online:

<http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_goodman.authcheckdam.pdf> Also, with these findings the SEC established the Voluntary Disclose Program for those corporations willing to self-report their wrong doing to avoid punishment. As a result of this program, SEC was able to collect information regarding questionable payments of more than 400 corporations for U.S. \$300 million dollars. See: Rolo, Tanya, *Retaking the Helm against International Bribery: The Facilitating Payments Exception and Sovereign Dominance*, N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 1890 and 1892. See also Alvaro Cuervo-Cazurra, *The effectiveness of laws against bribery abroad*, 39 J INT BUS STUD (2008), 636.

⁷⁷ Editorial, "Mr. Tanaka and Lockheed", *The Washington Post* (1976).

⁷⁸ FCPA Blog, Andy Spalding, *Beyond Balance II: Rediscovering the FCPA's Original Purpose*, online:

<<http://www.fcpablog.com/blog/2012/1/26/beyond-balance-ii-rediscovering-the-fcpas-original-purpose.html>>

⁷⁹ Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 604

⁸⁰ Pisano, Francesca M., *The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations*, 62 Emory L.J. 613 (2012-2013), 613. See also FCPA Blog, Andy Spalding, *Beyond Balance II: Rediscovering the FCPA's Original Purpose*, online: <<http://www.fcpablog.com/blog/2012/1/26/beyond-balance-ii-rediscovering-the-fcpas-original-purpose.html>>

necessary to create legislation to address ethical business practices related to bribery of foreign officials to build and maintain economic and political alliances with developing countries, and represent its democratic values around the world.⁸¹ Congress resolved to foster worldwide consumer confidence in US corporations by promoting morally sound business practices in the US, and US corporations in other countries.⁸² Senator Frank Church and Representative Robert Nix⁸³ held multiple hearings to create an appropriate solution for this issue.⁸⁴ Discussions focused on two options: (a) establishing a system of US reporting and disclosure to discourage questionable payments and advocate for proper record keeping and accounting; or (b) criminalizing bribes paid to foreign officials.⁸⁵ The former implied that bribing a foreign government official was legal as long as it was disclosed to US authorities. This option was not considered to be the best approach.⁸⁶ The US Congress opted for the second alternative, creating a deterrence factor by criminalizing bribery with direct enforceable measures.

Up to this point in time, it was clear that the FCPA's owed its existence to press *exposés*, the perception of wrongness of US business actions abroad and its harmful foreign policy implications. However, it was US businesses that helped transform the rhetoric of the *raison d'être* of the FCPA to the widely used term "leveling the playing field" by influencing changes to the law. In fact, the FCPA was modified twice since its inception. First in 1988 the Omnibus Trade and Competitiveness Act of 1988 (OTCA)⁸⁷ and then in 1998 by the International Anti-Bribery Act.⁸⁸ The amendments introduced by the OTCA included as subject to the law issuers of securities, domestic concerns, and the officers, director, employees, agents, or stockholders of either issuers or domestic concerns. The modifications addressed made by OTCA responded to concerns raised by American corporations after the enactment of the FCPA.⁸⁹ One of these concerns was that the existence of the FCPA compromised American corporations' competitiveness *vis-à-vis* foreign businesses.⁹⁰ Corporate America argued that foreign companies were not subjected to the same guidelines and limits while operating abroad.⁹¹ Non-regulated foreign US

⁸¹ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, Moritz Law, Ohio State Law Journal, 951.

⁸² Isaacson, Kristin, *Minimizing the Menace of the Foreign Corrupt Practices Act*, 2014 U. Ill. L. Rev. 599 (2014), 604

⁸³ Chaffee, Eric, *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade*, Mercer L. Rev. 711 (2012-2014), 710-712.

⁸⁴ Lochner, Scott J, *Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 649

⁸⁵ Lochner, Scott J, *Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 649. See also Cuervo-Cazurra, J INT BUS STUD, (2008), 636.

⁸⁶ Lochner, Scott J, *Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. Int'l L. & Pol. 645 (1980-1981), 649

⁸⁷ Salbu, Steven R., *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*; Wash. & Lee L. Rev. 243 (1997), 243

⁸⁸ "The International Anti-Bribery and Fair Competition Act of 1998", online:

<<http://www.justice.gov/criminal/fraud/fcpa/docs/antibribe.pdf>>

⁸⁹ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, Moritz Law, Ohio State Law Journal, 975.

⁹⁰ Chaffee, Eric, *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade*, Mercer L. Rev. 711 (2012-2014), 712

⁹¹ Pisano, Francesca M., *The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations*, 62 Emory L.J. 613 (2012-2013), 613

competitors paying bribes were even allowed to claim these payments as tax deductions.⁹² American companies pleaded that they risked losing important sales, transactions, and investment opportunities⁹³ due to the lax stance of some foreign jurisdictions in relation to foreign bribery. In fact, until 1997 in some European countries such as Germany, businesses were allowed to deduct bribes from their taxes as part of their business costs. Bribe payments were deductible as “useful expenditures” for the company⁹⁴ and commonly accepted as a Gentlemen’s Agreement.⁹⁵

This led the US Congress to entice foreign allies to adopt similar legislations.⁹⁶ Specifically, the OTCA established the following:

“It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.”⁹⁷

In addition, the law required the President to report to Congress on:

“(i) the progress of the negotiations referred [above] [...], (ii) those steps which the executive branch and the Congress should consider taking in the event that these negotiations do not successfully eliminate any competitive disadvantage of United States businesses that results when persons from other countries commit the acts described in paragraph (1); and (iii) possible actions that could be taken to promote cooperation by other countries in international efforts to prevent bribery of foreign officials, candidates, or parties in third countries.”

⁹² Porrata-Doria, Rafael A. Jr., *Amending the Foreign Corrupt Practices Act of 1977: Repeating the Mistakes of the Past*, 38 Rutgers L. Rev. 30 (1985-1986), 33

⁹² Salbu, Steven R., *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*; Wash. & Lee L. Rev. 243 (1997), 243

⁹³ Koehler, Mike, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. Rev. 108 (2011-2012), 108

⁹⁴ “The Siemens scandal - Bavarian baksheesh”, *The Economist* (December 17, 2008) online: <<http://www.economist.com/node/12800474>>

⁹⁵ Dietmar H. Lamparter, “Verpfeifen kommt zuletzt”, *Zeit Online* (November 22, 2006), online: <<http://www.zeit.de/2006/48/Siemens-Interview>>

⁹⁶ Other amendments to the FCPA in that first reform included decriminalizing the failure to comply with FCPA’s accounting requirements unless it was done “knowingly” in order to avoid FCPA accounting requirements for issuers. One of the most interesting modifications introduced by the OTCA was the de-criminalization of facilitation payments.⁹⁶ Under the new legislation it was no longer considered a criminal act to make payments to foreign government officials who perform “ministerial or clerical” duties.⁹⁶ See Bixby, Michael, *The Lion Awakes: The Foreign Corrupt Practices Act - 1977 to 2010*; B.12 San Diego Int’l L.J. 92 (2010-2011), page 98. Judith L. Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact Symposium: The 1988 Omnibus Trade Bill--Issues and Perspectives*, 1989 BYU L. REV. 491(1989), 496. Also see Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 Wash. & Lee L. Rev. 229(1997) , 246. Finally see Roberts, BYU L. Rev., (1989) ,497.

⁹⁷ US Congress, *Omnibus Trade and Competitiveness Act of 1988*, PUBLIC LAW 100-418 (US Congress ed., 1988).

This Act made it clear that the FCPA may have created a potential trade disadvantage and therefore the “playing field” for American corporations had to be leveled. This is one of the precursors that led to the OECD convention, as the US Government was mandated by Congress to pursue it.

The second modification to the FCPA occurred in 1998, as a consequence of the creation of the OECD Convention.⁹⁸ In order to align the FCPA to the Convention, the scope of the FCPA was expanded to include some foreign nationals.⁹⁹ In addition, the reform added alternative basis for jurisdiction based on nationality¹⁰⁰ (FCPA anti-bribery provision have extraterritorial jurisdiction),¹⁰¹ empowered the DOJ allowing it to subpoena witnesses and documents in certain civil investigations,¹⁰² and expanded the reach of US authorities outside of US territory.¹⁰³

The Canadian Corruption of Foreign Public Officials Act

The Canadian Corruption of Foreign Public Officials Act (CFPOA)

As outlined above, the FCPA was brought about through a combination of national corruption scandals and allegations of bribes paid by US companies abroad, which together precipitated a change in social attitudes towards punishment and deterrence of domestic and foreign corrupt acts and a great concern by US Congress of the foreign policy implications of bribery to foreign public officials by American corporations. After the FCPA enactment, US corporations advocated for the expansion of similar legislation around the globe in order to “level the playing field,” a sentiment that was captured by the US Congress in OTCA, which resulted in the adoption of the OECD Convention. Consequently, it was Canada’s signing of the 1997 OECD Convention which led in 1999 to the enactment of the Canadian Corruption of Foreign Public Officials Act (CFPOA), 22 years after the FCPA, and 11 years after the OTCA. However, unlike the FCPA enforcement in the US, there have been only a handful of cases pursued by Canadian authorities under the purview of the CFPOA. As a reference point, the US has had more than 270 civil or criminal enforcement proceedings initiated since 2007 under the FCPA resulting in more than \$5.7 billion in fines.¹⁰⁴ While Canada’s enforcement of the CFPOA may be in its infancy, it has not gone unnoticed. It appears that as a result of Canada’s enforcement actions in the last few years,

⁹⁸ Porrata-Doria, Rafael A. Jr., *Amending the Foreign Corrupt Practices Act of 1977: Repeating the Mistakes of the Past*, 38 Rutgers L. Rev. 30 (1985-1986), 33. See also Underwood, Phil, “The OECD Bribery Convention as Cover for US FCPA Enforcement Abroad”, in GAB The Global Anticorruption Blog, posted March 28, 2014. Last date accessed, November 2, 2014, online: <<http://globalanticorruptionblog.com/2014/03/28/the-oecd-bribery-convention-as-cover-for-us-fcpa-enforcement-abroad/>>

⁹⁹ Bixby, Michael, *The Lion Awakes: The Foreign Corrupt Practices Act - 1977 to 2010*; B.12 San Diego Int'l L.J. 92 (2010-2011), 99-100

¹⁰⁰ The nationality principle states that the FCPA’s anti-bribery provisions will apply even if the conduct at issue has no U.S. nexus. This means that the FCPA provisions can be violated even if an improper payment scheme is devised and executed entirely outside of the U.S., online: <<http://www.fcpaprofessor.com/fcpa-101>>

¹⁰¹ Securities and Exchange Commission, online: <<http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>>

¹⁰² FindLaw, *The International Anti-Bribery and Fair Competition Act of 1998 Amends the Foreign Corrupt Practices Act* (March 26, 2008), online: <<http://corporate.findlaw.com/law-library/the-international-anti-bribery-and-fair-competition-act-of-1998.html>>

¹⁰³ Michael B. Bixby, *Lion Awakes: The Foreign Corrupt Practices Act - 1977 to 2010, The*, 12 SAN DIEGO INT'L L.J. 89(2010) , 100.

¹⁰⁴ Securities and Exchange Commission, *SEC Enforcement Actions: FCPA Cases*, online: <<http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>

Transparency International has moved Canada from the category of “little enforcement” to “moderate enforcement” which includes countries that have at least one major case and active investigation.

Notwithstanding this limited enforcement, Canadian anti-corruption efforts related to Canadian companies have been recently at the center of attention of anti-corruption advocates, particularly after the World Bank’s decision to debar SNC Lavalin for bribes paid in Bangladesh within the context of the Padma Multipurpose Bridge Project, and ongoing investigations by Canadian authorities on other dealings of the same company in Montreal, in Libya and Tunisia.¹⁰⁵ Furthermore, as opposed to its American counterpart, the enforcement of the CFPOA has been subject to much criticism.¹⁰⁶ The critiques have focused primarily on the reticence of Canadian authorities to enforce the existing legislation.

The CFPOA provides for Canadian jurisdiction over the bribery of foreign public officials only when a listed offense has a real and substantial connection to the territory of Canada. In other words, the offense must occur in whole or in larger part in Canada.¹⁰⁷ A close look at the CFPOA, in particular, section 3 (1) which defines the offence of bribing a public official, illustrates that its purpose is specifically the punishment of individuals who bribe or attempt to bribe a foreign public official. Violation of the CFPOA is an extraditable offense and is punishable, in the case of an individual, by imprisonment for up to 14 years with the possibility of fines imposed in addition to imprisonment. This means that there is no availability of a conditional sentence or discharge for the offense of bribing a foreign public official. The standard of proof for the offense is “beyond a reasonable doubt” since the offense is criminal.

Prior to the enactment of the CFPOA, there were several missed opportunities to pursue corruption cases in Canada. One glaring example can be found in the case of Acres International. Acres International, a civil engineering firm, which together with Lahmeyer International GmbH (Germany), Impregilo SpA (Italy), and Spie Batignolles (France), were found guilty by the High Court of Lesotho of acts of corruption, which occurred in the 1990’s in relation to the Lesotho Highlands Project.¹⁰⁸ In 2002, Acres International was found guilty of bribing the chief executive in charge of the \$8 billion Lesotho Highlands Water Project, through an intermediary. Masupha Ephraim Sole, the executive who had accepted bribes from Acres and several other major international infrastructure companies, was sentenced to 15 years in prison, on evidence obtained through a Swiss court order to disclose Sole’s secret bank accounts. The conviction was upheld by the country’s Court of Appeals in 2003. The Lesotho courts efficiently took action and ordered the parties to pay substantial fines.¹⁰⁹

¹⁰⁵ As part of a Negotiated Resolution Agreement between the World Bank Group and SNC-Lavalin, the World Bank Group debarred SNC-Lavalin and over 100 of its affiliates for a period of 10 years. Under this agreement, SNC-Lavalin and its affiliates committed to cooperate with the World Bank’s Integrity Vice Presidency and continue to improve their internal compliance program. SNC-Lavalin was investigated for misconduct involving a conspiracy to pay bribes and misrepresentations when bidding for Bank-financed projects, in violation of the World Bank’s procurement guidelines, online: <<http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>>

¹⁰⁶ Michael Osborne, *Canada’s Foreign Anti-Bribery Law*, 10, online: <<http://www.cba.org/CBA/advocacy/PDF/Osborne.pdf>>

¹⁰⁷ CFPOA, s. 3(1).

¹⁰⁸ Justice T. Monopathi, High Court of Lesotho, *R v. DuPlooy*, (CRI/T/111/1999) (October 17, 2003).

¹⁰⁹ Stolen Asset Recovery Initiative STAR, *Lesotho Highlands Water Project/Jacobus Michiel Du Plooy* (October 17, 2003), online: <<http://star.worldbank.org/corruption-cases/node/20073>>

In 2004, the World Bank followed suit and promptly debarred Acres International for three years.¹¹⁰ The Bank declared Acres ineligible to receive any new Bank-financed contracts for a period of three years. Following the Acres trial, the World Bank also found Lahmeyer International guilty of bribery. The World Bank's Sanctions Board¹¹¹ found that Lahmeyer had used the same intermediary as Acres.¹¹² However, despite actions taken by Lesotho and the World Bank, no prosecution was initiated in Canada. While it appears that Canadian law enforcement authorities opened an investigation into the activities of Acres International, the civil engineering firm was never charged or prosecuted in the judicial system.¹¹³

Since the enactment of the CFPOA, Canadian law enforcement and judicial authorities have pursued several notable cases. What is noteworthy about this trend is that much like Canada's adoption of the CFPOA, its move towards greater national enforcement of this act was again, appears to be the result of external international pressures by both the OECD and Transparency International. In March 2011, the OECD issued a report on Canada's implementation of the OECD convention (OECD Report).¹¹⁴ The report, which came 12 years after the enactment of the CFPOA was quite scathing. Amongst other observations, the OECD Committee found that Canada had only completed one prosecution since the enactment of the CFPOA. The Committee noted that there were 20 open investigations and that credit for these cases should be largely attributed to the RCMP International Anti-Corruption Unit, which had been established in 2008.¹¹⁵ In 2012, Transparency International issued its eighth annual progress report on country implementation of the OECD convention and once again, criticized Canada for lack of enforcement.¹¹⁶ It is interesting to note that after these reports, in particular the OECD Report, the number of foreign bribery investigations in Canada increased from 23 in 2010, to 35 in 2013. What is equally important is the change in judicial attitudes towards punishment of foreign corrupt acts within the Canadian court system.

Prior to the case of SNC-Lavalin, there have been three cases that mark a shift in Canada's implementation of the CFPOA. The three cases which have received serious media attention in Canada after the enactment of the CFPOA and the OECD Report are Her Majesty the Queen vs. Niko Resources Ltd. (Niko Resources);¹¹⁷ Her Majesty the Queen vs. Griffiths Energy International Inc. (Griffiths)¹¹⁸ and Her Majesty the Queen vs. Karigar (Karigar).¹¹⁹ These cases show a distinct trend towards a culture of national investigations, prosecutions and punishment of companies who engage in corrupt practices with foreign public officials.

¹¹⁰ The sanctions against Acres International by the World Bank came after the Bank's Sanctions Committee had deemed that the case originally presented to them had no sufficient evidence. The Sanctions Committee, based on the evidence presented in the court cases decided to reopen the case and sanction the Canadian firm.

¹¹¹ At the time it was called "Sanctions Committee".

¹¹² Vinay Bhargava, "Curing the Cancer of Corruption"(The World Bank, 2006), 345

¹¹³ 2007 TI Progress Report Card on OECD Convention Enforcement - Canada(2007) , 2.

¹¹⁴ Phase Three Report on Implementing the OECD Anti-Bribery Convention in Canada, March 2011, online:

<<http://www.oecd.org/canada/Canadaphase3reportEN.pdf>>

¹¹⁵ *Id.* p. 5.

¹¹⁶ *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012*, online:

<http://issuu.com/transparencyinternational/docs/2012_exportingcorruption_oecdprogress_en?e=2496456/2042485>

¹¹⁷ Her Majesty the Queen vs. Niko Resources Ltd., (Court of Queen's Bench in Alberta, Judicial District of Calgary June 23, 2011).

¹¹⁸ Her Majesty the Queen vs. Griffiths Energy International Inc. E-File No.:CCQ13GRIFFITHSENER, Action No. 130057425Q1, January 25, 2013.

¹¹⁹ *Her Majesty the Queen v. Karigar*, 2014 ONSC, 2093, Court file No.: 10-030208, (*Karigar*).

In brief, in the summer of 2011, Niko Resources, an Alberta based Oil and Gas Company, plead guilty to offences under the CFPOA and was forced to pay a \$9.5 million fine and a three year probation order, pending implementation of a compliance program, for payments made to a foreign senior public official in Bangladesh. Niko had given the Energy Minister of Bangladesh a payment of CAN\$190,000 dollars for a vehicle for personal use as well as for trips to Calgary and New York following an explosion at one of Niko's natural gas fields in Bangladesh. At the time of the payment, the Energy Minister had been in the process of determining how much compensation was owed to Bangladesh villagers for water contamination and other environmental concerns caused by the explosion. The Canadian media hailed the decision a "wake up call" delivered to Canadian companies after Canada had been criticized for lax enforcement of the CFPOA.¹²⁰ Media sources also called the case "the most significant development in Canada's efforts to fight foreign bribery since the 1999 implementation of the CFPOA."¹²¹

On January 22, 2013, another Alberta Oil and Gas company was in the spotlight, when the Alberta Court of Queens bench held that Griffiths would pay CAN\$10.35 million dollars penalty after it had been found guilty of a bribe payment of CAN\$2 million dollars to a diplomat's wife in order to secure lucrative opportunities in Africa.¹²² Both cases involved large companies whose primary business was the export of oil and gas. This is not surprising given that Canada's number one export over the past five years has been oil and gas extraction.¹²³

More surprisingly is the fact that, both the Niko Resources and Griffiths cases were heard and determined by the same judge: Justice Brooker of the Alberta Court of Queens Bench. Some may suggest that the decisions were the work of a vigilant judge rather than a change in Canadian criminal policy. However, it is our view that these two cases mark a move not only towards greater enforcement of the CFPOA by the judiciary, but also demonstrates its judicial interpretation as a tool for punishment of corrupt acts by individuals and companies. This is illustrated in part by the fact that in both cases the financial penalties imposed on the companies were more significant than the alleged bribes themselves. This marks a notable shift towards punishment and deterrence as goals of the judicial system. What is absent from either of the decisions is any reference to the ill effects of corruption on international development or the affected country as a reason for the fines.

The third and most recent Canadian conviction was that of Karigar in August 2013. The Superior Court of Ontario convicted Nazir Karigar for conspiring to bribe Indian government officials with US450,000 dollars, following a failed attempt to secure an airline security contract valued at CAN\$100 million dollars for the supply of a security system by Cryptometrics Canada, an Ottawa based technology company.¹²⁴ Karigar was sentenced to three years in prison for conspiracy to bribe public officials in

¹²⁰ Miller Thomson lawyers avocats, Kiselbach, Daniel L. and Truman, Richard, *Canada's Corruption of Foreign Public Officials Act: Niko Resources Ltd. Receives a \$9.5 Million Fine for Bribery*(October2011), online: <<http://www.millertomson.com/en/publications/newsletters/criminal-law-regulation-enforcement/2011-archives/october-2011/canadas-corruption-of-foreign-public>>

¹²¹ McCarthy Tetrault, John W. Boscariol, *A Deeper Dive Into Canada's First Significant Foreign Bribery Case: Niko Resources Ltd*, online: <http://www.mccarthy.ca/article_detail.aspx?id=5640>

¹²² Court of Queen's Bench of Alberta, Judicial Centre of Calgary, *Her Majesty the Queen v. Griffiths Energy International*, E-File No.:CCQ13GRIFFITHSENER, Action No. 130057425Q1, January 25, 2013.

¹²³ Government of Canada, Canadian Industry, *Mining, Quarrying, and Oil and Gas Extraction (NAICS 21): International trade*, online: <<https://www.ic.gc.ca/app/scr/sbms/sbb/cis/internationalTrade.html?code=21#int1>>

¹²⁴ *Supra* note 111, Karigar.

India.¹²⁵ The Karigar decision marks the first contested trial of a charge under the CFPOA and the first conviction against an individual. Justice Hackland of the Ontario Superior Court, in relying on Article 3(1) of the CFPOA stated that a serious sentence was necessary in that:

“Canada’s Treaty Obligations as well as the domestic case law from our Court of Appeal requires, in my view, that a sentence be pronounced that reflects the principals of deterrence and denunciation of your conduct. Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a Canadian penitentiary.”¹²⁶

Not only did Justice Hackland discuss deterrence and denunciation as underlying principles of the CFPOA, but he also took judicial notice of the importance of international development goals when considering corruption cases and appropriate penalties. To this effect, Justice Hackland stated the following:

“...the corruption of foreign public officials, particularly in developing countries, is enormously harmful and is likely to undermine the rule of law. The idea that bribery is simply a cost of doing business in many countries, and should be treated as such by Canadian firms competing for business in those countries, must be disavowed.”¹²⁷

This connection to the effects of foreign bribery in developing countries became more relevant in the SNC-Lavalin case. In September 2011, the RCMP raided the offices of Montreal based SNC-Lavalin, in connection with bribe payments made during its bid to supervise the contractor responsible for the construction of a multi-billion dollar bridge in Bangladesh.¹²⁸ SNC-Lavalin is one of the 10 largest engineering and construction firms in the world with significant presence in developing countries and a good history of contracts with international development agencies and MDBs.

The Canadian courts took action rapidly and in 2012, former engineer Mohammad Ismail and former Executive Vice-President Ramesh Shah were charged with bribing officials in Bangladesh. They are awaiting trials in Toronto. The former head of construction of the company was also arrested on charges of corruption, fraud and money laundering in connection with dealings in North Africa.¹²⁹

On April 17, 2013 and after a long investigation, the WBG announced the debarment of SNC-Lavalin Inc.-in addition to over 100 affiliates--for a period of 10 years following the company’s misconduct in relation to the Padma Multipurpose Bridge Project in Bangladesh, all part of a Negotiated Resolution

¹²⁵ Rob Currie, *International and Transnational Criminal Law-First Canadian Trial and Conviction Under Anti-Corruption*(October 18, 2013), online: <<http://rjcurrie.typepad.com/international-and-transna/2013/10/first-canadian-trial-and-conviction-under-anti-corruption-law.html>>

¹²⁶ Supra note 11, *Karigar*.

¹²⁷ Supra note 111, *Karigar*, para. 8.

¹²⁸ Samuel Rubinfeld & Joe Palazzolo, “Mounties Raid SNC Lavin in Corruption Probe”, *The Wall Street Journal* (September 2, 2011), online: <<http://blogs.wsj.com/corruption-currents/2011/09/02/mounties-raid-snc-lavalin-in-corruption-probe/>>

¹²⁹ Critiques of Canada’s enforcement measures should not be too severe. As of October 30, 2014, a Dhaka court acquitted all seven defendants accused of taking bribes from SNC-Lavalin in connection with the Padma Bridge Project. (*Richard L. Cassin, Victim’ SNC-Lavalin collects \$13 million in recovered funds.* online: <<http://www.fcpablog.com/blog/tag/snc-lavalin>>)

Agreement between the WBG and the corporation.¹³⁰ Under the Agreement, the SNC-Lavalin Group and its affiliates committed to cooperate with the World Bank's Integrity Vice Presidency (INT) and continuing to improve their internal compliance program. The debarment of SNC-Lavalin Inc. qualified for cross-debarment by other MDBs under the Agreement of Mutual Recognition of Debarments (Cross-Debarment Agreement)¹³¹ that was signed on April 9, 2010, and consequently was accepted by other MDBs like the IDB.

It is evident from the discussions regarding Niko Resources, Griffiths and Karigar, that the case of SNC-Lavalin is not new. It is likely that due to its size and international influence, that SNC-Lavalin has received more attention than its smaller Canadian counterparts. However, when looked at in context, this case marks an evolution in Canadian investigations and judicial decisions that have moved towards enforcement and punishment of individuals and companies under the CFPOA. What is different with SNC-Lavalin is that it is the first time that Canadian authorities have so closely cooperated with an MDB in an investigation. In fact, the RCMP reportedly initiated its investigation at the request of the WBG, which had itself lend US1.2 billion dollars to the government of Bangladesh for the construction of the bridge, and subsequently investigated and debarred the corporation in relation to this matter.

Corruption in development projects: intersection of the investigations and sanctions imposed by MDB's and actions taken by national authorities

The SNC-Lavalin case is perhaps one of the most salient cases in which the collaboration between and MDBs and a national authorities materializes. However, the nature of the two investigations and subsequent procedures against the corporations and/or its executives is fundamentally different. Whereas in the case of the FCPA, US authorities carry out criminal and civil investigations in relation to foreign corrupt practices, Canadian authorities seem to carry only criminal actions against CFCPA offenders. Both systems conform to the mandates emanating from the OECD Convention. In the case of MDBs investigations and sanctions procedures are clearly administrative in nature and rooted within the principals of Global Administrative Law.¹³²

To the effect of understanding the differences between national and MDB systems, it is important to track the origins of the fight against corruption in MDBs back to 1996, when the first international

¹³⁰ "World Bank Debars SNC Lavalin and its Affiliates for 10 years", *The World Bank* (April 17, 2013) online: <<http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>>

¹³¹ The participating institutions to the IFI's Agreement for Mutual Enforcement of Debarment Decisions (Cross-debarment Agreement) are the World Bank Group, the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development and the IDB Group. The IFI's Cross-debarment Agreement provides that, subject to the prerequisite conditions set forth in the IFI's Cross-debarment Agreement, unless a participating IFI (i) believes that any of the prerequisite conditions set forth in the IFI's Cross-debarment Agreement have not been met or (ii) decides to exercise its rights under the "opt out" clause set forth in the IFI's Cross-debarment Agreement, each participating IFI will promptly enforce the debarment decisions of the other participating IFI's.

¹³² Pascale Helene Dubois and Ailen Elizabeth Nowlan. "Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law." *The Yale Journal of International Law Online*. Fall 2010, Vol. 36.

acknowledgement of the extent and pervasiveness of corruption in international development was provided by then-World Bank President James D. Wolfensohn during his speech at the annual meetings of the WBG and International Monetary Fund¹³³

The first investigative unit and administrative adjudicative system was created at the World Bank in 1998, which was subsequently modified in 2002 after two reviews conducted by the former Under-Secretary of the United Nations and a former Attorney General of the United States, Richard Thornburgh (January 2000 and August 2002).¹³⁴ These reviews were later complemented by the work conducted by an independent Panel chaired by former US Federal Reserve Chair, Mr. Paul Volcker, which framed the World Bank's current debarment and suspension system. In 2001, the IDB adopted a similar system to that of the WBG. Mr. Thornburgh reviewed the IDB system in 2008 in his report "Concerning the Anti-Corruption Framework of the Inter-American Development Bank (IDB)."¹³⁵ The recommendations of this report contained great similarities with the World Bank's system, and were adopted by the IDB in 2010.

Both the IDB and the World Bank's systems were heavily influenced by the US Federal Acquisition Regulations (FAR) suspension and debarment system.¹³⁶ The FAR regulates the way in which US federal agencies can exercise their discretion in deciding which contractors are not being presently responsible and therefore can be excluded from participating in public procurement. The concept of present responsibility provides the US Government with the necessary tools to avoid doing business with those contractors or providers that have shown not to be responsible in fulfilling "...their legal or contractual

¹³³ James D. Wolfensohn, Annual Meeting Speech, "Coalitions for Change", World Bank Group and International Monetary Fund, Boards of Governors, 1992 Annual Meetings (September 28), online: <<http://www.imf.org/external/am/1999/speeches/pr02e.pdf>>. Former president of the World Bank said: "It is true that when I came to the World Bank, I was given an admonition by our General Counsel that I should read the Articles of the Bretton Woods agreements. In there it says I am to deal with economic matters and that as an international civil servant, I should not, if I want to keep my job, talk about political matters. I was then told that there was one word I could not use, which was the "C" word, the "C" word being "corruption". Corruption, you see, was identified with politics, and if I got into that, I would have a terrible time with my Board." James D. Wolfensohn, World Bank's President Remarks at the Global Forum on Fighting Corruption (U.S. Government trans., 1999). Wolfensohn's worry was later corroborated by a 2004 World Bank study that estimated the amount of bribes paid worldwide to be "[...] more than \$1 trillion, or the equivalent of 3 percent of gross world product [...]." Bhargava, Curing the Cancer of Corruption. 2006. Bhargava, Curing the Cancer of Corruption. 2006. Bhargava, Curing the Cancer of Corruption. 2006. Wolfensohn, World Bank's President Remarks at the Global Forum on Fighting Corruption. 1999.

¹³⁴ Thornburgh, Dick; Gainer, Ronald L.; Walker, Cuyler H, *Report to Shengman Zhang, Managing Director and Chairman of the Oversight Committee on Fraud and Corruption concerning mechanisms to address problems of fraud and corruption*, The World Bank Annual Report, 1991 (January 21, 2000), online: <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/08/05/000160016_20040805171318/Rendered/PDF/29755.pdf> (First Report). Thornburgh, Dick; Gainer, Ronald L. and Walker, Cuyler H., *Report Concerning the Debarment Processes of the World Bank* (August 14, 2002), online: <<http://siteresources.worldbank.org/INTDOII/Resources/thornburghreport.pdf>> (Second Report)

¹³⁵ Thornburgh, Dick; Santistevan de Noriega, Jorge; Gainer, Ronald L. and Walker, Cuyler H., *Report Concerning the Anti-Corruption Framework of the Inter-American Development Bank* (November 21, 2008), online:

<<http://www.iadb.org/en/news/news-releases/2009-12-08/idb-moves-to-strengthen-anti-corruption-framework,6079.html>>

¹³⁶ General Services Administration, Federal Acquisition Regulation (the FAR) "The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984, and is issued within applicable laws under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget", 5

obligations.”¹³⁷ In doing so, US federal agencies can suspend and debar contractors deemed to be not presently responsible to avoid future potential harm to the US federal acquisition system. Fraud and corruption are only two of the various rationales under which contractors can be excluded from participating in US federal procurement, a system that was designed to reduce the “overall risk of harm to the procurement system.”¹³⁸ In addition, suspensions and debarments under the FAR apply across all federal agencies irrespective of which agency declared the ineligibility of a contractor.

Following the same concept of applicability across US federal agencies of suspension and debarments under FAR, in 2010 the MDBs signed a Cross Debarment Agreement¹³⁹ to allow each participant to recognize the debarment decisions imposed by others. This Cross-Debarment Agreement included the adoption by all MDBs of the same definitions of sanctionable practices (corrupt practice, fraudulent practice, collusive practice, and coercive practice).¹⁴⁰ Similarly, the MDBs also accepted some general principles and guidelines for sanctions, and harmonized principles on treatment of corporate groups. However, there has been no “harmonization” on the Sanctions Procedures utilized by the MDBs to impose debarments and suspensions.

MDBs’ main concern in relation to corruption in development projects and tools to address it

The enforcement of the anti-corruption provisions included in Bank-financed activities by the World Bank and the IDB has been growing since 2003. Today, the number of entities that are cross-debarred exceeds 500, not including many other entities that have been debarred by each institution and do not qualify for cross-debarment. However, most investigations undertaken by MDBs relate to SMEs in the context of the development projects they finance. A reduced number of these investigations relate to large international corporations headquartered in developed nations, such is the case with the SNC-Lavalin matter.

A recent example of a case in Latin American that exemplifies the type of SME that are debarred by MDBs and its impact to the poor can be found in El Salvador. In 2009, the IDB financed a housing project for vulnerable population nearby a river in San Salvador.¹⁴¹ The affected community was lacking roads, housing, water and sanitation.¹⁴² Within the context of this project, the executing agency opened a bidding process for civil works and awarded the contract to a local SME.¹⁴³ During the construction process, the executing agency found that the SME had submitted an invoice for works that had not been performed according to the contract, and it was supported with a certificate of execution issued by a

¹³⁷ Pascale Helene Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*. 2012 U. Chi. Legal F. 195 2012, 198.

¹³⁸ Pascale Helene Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System Combating Corruption*, 2012 U. CHI. LEGAL F. 195(2012) , 198-199.

¹³⁹ This Agreement includes six MDB's: The World Bank, the Asian Development Bank, the African Development Bank, the European Development Bank and the Inter-American Development Bank.

¹⁴⁰ See supra note 7.

¹⁴¹ Karla Argueta, “*Proyectos Nuevos Mejicanos a juicio en Corte de Cuentas*”, El Salvador (Lunes, 7 de Marzo de 2011), online: <http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6358&idArt=5638593>

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

project supervisor that misrepresented the advancement of works.¹⁴⁴ The construction of the project was stopped for more than seven months and never finished. The families that were the beneficiaries of the project had to be moved from their shelters to unfinished houses,¹⁴⁵ and as a consequence, according to news reports, the population living in the area was exposed to unsuitable weather conditions resulting in children getting sick.¹⁴⁶

Based on the information provided by the Government, the case was investigated and sanctioned by the IDB. The SME and its legal representative were debarred for 13 years, and the consultant to the executing agency and project supervisor to 9 years of debarment respectively. These sanctions were subject to Cross-debarment and the company and individuals have been excluded from eligibility to participate in projects financed by the World Bank.

MDBs have also used other tools to address the adverse effects of corruption in development projects. In addition to traditional investigations, the WBG through INT has conducted wide Bank portfolio reviews known better as “proactive diagnostic tools,” or Detailed Implementation Reviews (DIRs). These reviews have had different names over time, and have covered Bank operations in India,¹⁴⁷ Vietnam, Cambodia, Indonesia and Kenya. Although perhaps the most well-known review was the India DIR for the political implications that it had, the Cambodia DIR had direct measurable effects in the way that a Government conducts business. The Cambodia DIR also showed the commitment of an MDB to development as the primary goal in fighting corruption.

An important aspect of the Cambodia DIR is that it produced actionable information to start some investigations by INT. These investigations related to SMEs. As an example, on April 2, 2010, the World Bank debarred a Cambodian Construction SME, Royal Mekong Construction and Development Pte., Ltd and its director Mr. Heng Rathpiseth for having engaged in fraudulent practices related to the projects under investigation in Cambodia. The two Respondents were ineligible to bid on World Bank projects for two years.¹⁴⁸ Despite the relative small size of the companies under investigation, the impact of the DIR generated great ramifications.

In 2004, the World Bank’s regional staff in Cambodia raised some concerns about corruption in Bank financed projects.¹⁴⁹ During the second half of that year, INT started to address these concerns together

¹⁴⁴ Karla Argueta, “Proyectos Nuevos Mejicanos: abandono y familias viviendo en riesgo”, El Salvador (Lunes, 13 de Diciembre de 2011), online: <http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6358&idArt=5400582>

¹⁴⁵ Argueta Karla, “La espera es larga ... y el trabajo es poco”, El Salvador.com, (lunes 7 de marzo de 2012), online: <http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6342&idArt=5638595>

¹⁴⁶ *Ibid.*

¹⁴⁷ Department of Institutional Integrity, World Bank Group, *Detailed Implementation Review India Health Sector, 2006-2007*, (December 19, 2007) Volume 1 and 2, online:

<<https://openknowledge.worldbank.org/bitstream/handle/10986/20590/915780ESW0v20P00see0also04292900BR0.pdf?sequence=1>> and <http://siteresources.worldbank.org/EXTDOI/Resourses/WB250_Web_Vol1_012408.pdf>. See also Institutional Integrity, World Bank Group, *Annual Report 2005-2006, Detailed Implementation Review (DIR)*, 16 online:

<<http://siteresources.worldbank.org/INTDOI/Resourses/complete.pdf>>

¹⁴⁸ Press Release, “World Bank Debars Royal Mekong Construction”, *The World Bank* (April 2, 2010), online: <http://siteresources.worldbank.org/INTDOI/Resourses/Mekong_and_Rathpiseth_debar.pdf>

¹⁴⁹ James W. Adams, “World Bank’s anti-corruption work in Cambodia”, *The World Bank* (15 October, 2007), online: <<http://go.worldbank.org/7JE5PDOPLO>> (last access 1. November 2014).

with the Government of Cambodia by conducting a Fiduciary Review.¹⁵⁰ As a result of this exercise, INT assisted the Government of Cambodia in identifying some weaknesses in a number of governmental offices and helped devise an action plan for the Government to reduce the opportunities for future corruption. Within the scope of this joint exercise, several projects were scrutinized and seven¹⁵¹ were found to have sufficient evidence to substantiate allegations of fraud and corruption.¹⁵² the procurement procedures of the project agreements were not strictly obeyed, many contractors had bribed government officials, project's financial management systems and audit requirements had control issues and could, therefore revealed breakdowns or irregularities.¹⁵³ In light of these results, the World Bank and the Government of Cambodia agreed on several actions, such as the strengthening of procurement mechanisms in project design and implementation, identification of specific anti-corruption measures as part of project preparation, and the introduction of Standard Operating Procedures in order to improve project management practices.¹⁵⁴

In June 2006, while conducting a further in-depth control of Bank-financed projects, INT found that three of the above ongoing projects still had corruption related problems.¹⁵⁵ As a consequence, the World Bank canceled approximately USD 2.5 billion of funds for the three projects. The Government of Cambodia had to agree to repay the amount of the canceled project funds plus interest, and to strengthen governmental efforts in fighting corruption. These efforts included the Incorporation of legally binding anti-corruption plans, the establishment of an Anti-Corruption Working Group and the enhancement of Cambodia's investigative capacity with the assistance of the World Bank.¹⁵⁶ Though the suspension of disbursements may have been perceived as a drastic action, the World Bank had no

¹⁵⁰ The Fiduciary Review is part of the World Bank's Country Assistance Strategy for Cambodia in order to promote transparency and accountability of and, therefore, enhance the governance environment. "The Royal Government Of Cambodia And The World Bank Release Summary Report And Action Plan Aimed At Reducing Fiduciary Risks", The World Bank, Press Release No: 2006/085/EAP (16 September 2005), online: <<http://go.worldbank.org/AI5WFB6J0>> (last access 1. November 2014).

"Cambodia: Summary of Fiduciary Review", The World Bank (2007), 1, online:

<<http://siteresources.worldbank.org/INTCAMBODIA/Resources/FiduciarySummary.pdf>> (last access 1. November 2014).

¹⁵¹ The investigated projects were: Biodiversity and protected Areas management Project (BPAMP), the Flood Emergency and Rehabilitation (FERP), the Agricultural Productivity Improvement Project (APIP), Forestry Concession Management and Control Pilot Project (FCMCP), Land Management and Administration Project (LMAP), Provincial and Rural Infrastructure Project (PRIP) and Peri-Urban Water Supply and Sanitation Project (PPWSP). "Cambodia: World Bank Releases New Statement and Update", The World Bank, (6 June, 2006), online: <<http://go.worldbank.org/SMMHI1V940>> (last access 1. November 2014).

¹⁵² "Cambodia: World Bank Releases New Statement and Update", The World Bank, (6 June, 2006), online:

<<http://go.worldbank.org/SMMHI1V940>> (last access 1. November 2014).

¹⁵³ "Cambodia: Summary of Fiduciary Review", The World Bank (2007), 2, online:

<<http://siteresources.worldbank.org/INTCAMBODIA/Resources/FiduciarySummary.pdf>> (last access 1. November 2014).

¹⁵⁴ "Cambodia: Summary of Fiduciary Review", The World Bank (2007), 3-5, online:

<<http://siteresources.worldbank.org/INTCAMBODIA/Resources/FiduciarySummary.pdf>> (last access 1. November 2014).

¹⁵⁵ "Cambodia: 2007 Article IV Consultation – Staff Report; Staff Supplement; and Public Information Notice on the Executive Board Discussion", International Monetary Fund, IMF Country Report No. 07/290 (2007), 12, online:

<<http://books.google.de/books?id=3XofcHc2rrYC&pg=RA1-PA12&lpg=RA1-PA12&dq=world+bank+cancel+project+funds+cambodia+2007&source=bl&ots=B9H7PVdtjg&sig=2XFOOD51M-eg9YdGCU3vZO80hDg&hl=de&sa=X&ei=cAVVKnHCNCQigKb3IHAAQ&ved=0CFkQ6AEwCA#v=onepage&q=world%20bank%20cancel%20project%20funds%20cambodia%202007&f=false>> (last access 01.11.2014)

¹⁵⁶ "World Bank Lifts Suspension of Projects", The World Bank (February 7, 2007) online:

<<http://go.worldbank.org/CDMB9JW7U0>>(last access 1 November 2014)

other recourse to address the significant developmental impact of corruption in these projects.¹⁵⁷ This action proved to be beneficial. During the ensuing period, the Government undertook the required actions and subsequently, the World Bank lifted the suspension on the three projects.

Areas of divergence between national enforcement efforts and MDBs fight against international corruption: SMEs and large multinationals

The two cases described above demonstrate the type of corruption that concerns MDBs. That is, corruption that affects development projects, for the most part implemented by local government agencies. What is interesting to note in both cases is that the corporations involved in these two cases were SMEs. In fact, between 2008 and 2012, SMEs and individuals added up to approximately 90 percent of all entities debarred at the World Bank.¹⁵⁸ Most of these debarred enterprises were located in developing countries, which the World Bank refers to as Part II Countries.¹⁵⁹ The remaining, almost 10 percent of debarred companies, were large multinationals.¹⁶⁰ During the same period, 100 percent of companies debarred by the IDB were SMEs.¹⁶¹ The above numbers exemplify the reality of fighting corruption by both MDBs while addressing the roots of the problem. In this respect, it is important to note that worldwide SMEs account for "...90 percent of businesses and more than 50 percent of employment..."¹⁶² – and more than 94 percent in Latin America and the Caribbean.¹⁶³ Thus, SMEs in

¹⁵⁷ E.g. by providing land titles to people in order to achieve a certain degree of income security, repairing and construction of more than 400 km of roads, expanding the access to rural areas. Moreover poor people are affected by corruption disproportionately hard because they are more reliant on public services while they are not able to pay for them at the same time and suffer, therefore, more from corrupt officials and practices. "Cambodia: World Bank Releases New Statement and Update", The World Bank, (6 June, 2006), online: <<http://go.worldbank.org/SMMHI1V940>> (last access November 1, 2014).

¹⁵⁸ Anne-Marie Leroy, Frank Fariello, "The World Bank Group Sanctions Progress And Its Recent Reforms", (Washington, D.C.: The World Bank, 2012), online: <<http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/SanctionsProcess.pdf>> (last access: 22 October 2014). In the World Bank's review process there was concern of the fact that the majority of sanctioned firms at the first tier of review were SMEs that would not only fail to contest the charges but would also fail to engage in the process. See The study conducted by the World Bank found that "[...] the majority of cases resolved at the first tier (92%) have resulted not from an exchange of views at the first tier but by a 'default' by Respondents failing to engage the system in any way, either by providing an Explanation to OSD or to appeal the case to the SB. Most of these defaults involve small and medium-sized enterprises (SMEs) and form part of a larger pattern of non-engagement by SMEs in the system."

¹⁵⁹ The World Bank, "A Guide to the World Bank: Third Edition", (Washington, D.C.: The World Bank, 2011), online: <<https://openknowledge.worldbank.org/handle/10986/2342>>.

¹⁶⁰ Anne-Marie Leroy, Frank Fariello, "The World Bank Group Sanctions Progress And Its Recent Reforms", (Washington, D.C.: The World Bank, 2012), online: <<http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/SanctionsProcess.pdf>> (last access: 22 October 2014).

¹⁶¹ The IDB debarred from 2008 until 2012 195 companies in total. (Sanctioned Firms and Individuals, Inter-American Development Bank (2014), online: <<http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/sanctioned-firms-and-individuals,1293.html>> (last access: 27 October 2014)).

¹⁶² "IFC and Small and Medium Enterprises", IFC Issue Brief / Small and Medium Enterprises, International Finance Corporation – World Bank Group (2012), online: <http://www.ifc.org/wps/wcm/connect/277d1680486a831abec2fff995bd23db/AM11IFC+IssueBrief_SME.pdf?MOD=AJPERES> (last access: 23 October 2014).

¹⁶³ "The IDB supports the internationalization of SMEs in the region through a business roundtable and best practices programs", Inter-American Development Bank, online: <<http://www.iadb.org/en/topics/trade/the-idb-supports-the-internationalization-of-smes-in-the-region-through-a-business-roundtable-and-best-practices-programs,7005.html>> (last access: 24 October 2014).

developing countries are one of the main engines of growth. In addition, the MDBs have also sanctioned individuals—25 percent of the MDB sanctioned parties are individuals.¹⁶⁴ Still the fact remains that within the 75 percent of sanctioned corporations, the majority are SMEs.

This data supports the fact that MDBs are interested in individuals and corporations that participate in MDB-financed activities. These individual consultants and local corporations (SMEs) have the *in situ* expertise to perform services or provide goods and works related to developing projects. And the effect of both, the projects and the performance of individuals and corporations in providing goods and services has a direct effect on the ground on the projects and countries that the MDBs serve. All these projects have the objective of improving people's lives by increasing their access to multiple services, self-sufficiency opportunities, and establishing a stable environment, all part of the development objective that guides MDBs' purpose.

In addition, the United Nations Office on Drugs and Crime (UNODC) has established that the smaller an enterprise is, the more likely it will be subject to corruption and to perceive it as a major business obstacle.¹⁶⁵ According to the UNODC, the reasons for SMEs to engage in corrupt activities depend in part on the environment they operate. SMEs participating in markets where corruption is common practice have a slim chance of successfully doing business without engaging in illegal practices.¹⁶⁶ For this reason, it should come as no surprise that the Sanctions Systems of MDBs handle more cases related with SMEs than large multinational corporations. The number of SMEs intricately related to development work in member countries is significantly higher than that of large multinational corporations. Although, as noted earlier, MDBs keep a keen eye on the actions of large multinationals in member countries, as in the case of SNC-Lavalin, these cases make a small portion of the MDBs sanctioned entities.

In relation to imposed sanctions, the MDBs procedures have established a list of administrative sanctions to be imposed on respondents. Based on the sanctioning guidelines, the MDBs can decide from a number of sanctions, including reprimand, debarment, conditional non-debarment, and debarment with conditional release. These sanctions' objective is to deter wrongdoing on the part of corporations and individuals, and protect the projects financed by the MDBs in order to fulfill their development objectives. All this within the understanding that corruption undermines development

¹⁶⁴The data was taken from SEC website and the MDBs list of sanctioned parties accessed on March 15, 2015.

¹⁶⁵ *Corruption prevention to foster small and medium-sized enterprise development – Volume II*, United Nations Industrial Development Organization & United Nations Office on Drugs and Crime (2012), 1, Online: <http://www.unodc.org/documents/corruption/Publications/2012/Corruption_prevention_to_foster_small_and_medium_size_enterprise_development_Vol_2.pdf> (last access: 23 October 2014).

¹⁶⁶ *Corruption prevention to foster small and medium-sized enterprise development – Volume II*, United Nations Industrial Development Organization & United Nations Office on Drugs and Crime (2012), 2, Online: <http://www.unodc.org/documents/corruption/Publications/2012/Corruption_prevention_to_foster_small_and_medium_size_enterprise_development_Vol_2.pdf> (last access: 23 October 2014).

projects¹⁶⁷ and MDBs can protect project beneficiaries and stakeholders through preventive and sanctioning actions.

In contrast, national enforcement systems such as the US DOJ and SEC are more inclined to pursue FCPA cases in relation to multinational corporations like Siemens, Ralph Lauren Corporation, Tyco, Hewlett Packard, and ALCOA. As earlier explained, on the one hand the FCPA was born out of the corrupt actions of some large US corporations abroad. Its expansion to the OECD through the Convention was catalyzed by complaints of some US corporations of the lack of a “level playing field” generated by the same FCPA. These corporations requested action by US authorities to protect their commercial interests abroad by inviting other nations to adopt similar norms to the FCPA. Therefore, the enforcement of the FCPA and similar norms in other countries like Canada follows the path of “leveling the playing field”, although in the Case of Canada, as described in the decision of Justice Hackland, with some concern in the effects of corruption in the affected country. This historical development informs in part the enforcement of national laws against foreign bribery.

In fact, the proceedings conducted by the SEC have resulted in severe punishments in the form of fines for corporations and sometimes imprisonment for their legal representatives, CEOs or staff.¹⁶⁸ While SEC has concentrated on charging corporations, the DOJ prosecutes both, individuals and entities. On the one hand, all of the defendants charged and sanctioned by the SEC on 2013 were corporations. On the other hand, 63 percent of DOJ enforcement actions during 2013 were against individual and 37 percent against corporations.¹⁶⁹

The fines imposed by SEC are the outcome of either formal proceedings or settlements agreements, depending on the firm’s willingness to cooperate with SEC.¹⁷⁰ Companies like Alstom, Avon, Halliburton, and Pfizer have agreed to pay millions of dollars to settle SEC charges.¹⁷¹ Settlements reached between the SEC and corporations are usually comprised by two components; a monetary penalty and a compliance program. Compliance programs typically include the imposition of extensive policies and procedures, training, vendor reviews, due diligence, expense control, and escalation of red flags, to name a few.¹⁷² As a result of all SEC enforcement actions, corporations have not only paid several

¹⁶⁷ Simmons & Simmons, Alexandra Webster, “Multilateral development bank sanctions: the real worst case scenario?”, (December 18, 2014), online: <<http://www.elexica.com/en/legal-topics/crime-fraud-and-investigations/16-multilateral-development-bank-sanctions-the-real-worst-case-scenario>>

¹⁶⁸ Shearman & Sterling LLP, Client Publication, “Litigation: Recent Trends and Patterns in FCPA Enforcement” (March, 2006). online: <http://www.shearman.com/~media/Files/NewsInsights/Publications/2006/03/Recent-Trends-and-Patterns-in-FCPA-Enforcement/Files/View-Full-Text/FileAttachment/LIT_032706.pdf>

¹⁶⁹ Gibson Dunn, “2013 Year-End FCPA Update” (January 6, 2014), online: <<http://www.gibsondunn.com/publications/pages/2013-Year-End-FCPA-Update.aspx>>

¹⁷⁰ Yockey, Joseph W., “FCPA Settlement, Internal Strife, and the Culture of Compliance”, 2012 Wis. L. Rev. 689 (2012), 699

¹⁷¹ FCPA Professor, Foley & Lardner, attorneys Kenneth Winer & Manda Sertich, “Assessing the Power of SEC to Impose Monetary Penalties In Administrative Proceedings, Charging Violations of the FCPA”, (June 13, 2011), online: <<http://www.fcpaprofessor.com/assessing-the-power-of-the-sec-to-impose-monetary-penalties-in-administrative-proceedings-charging-violations-of-the-fcpa>>

¹⁷² Blank and Rome Counselors at Law, SEC FCPA Settlements sends Wake –up call to small and medium-sized Businesses, (August 2014), online: <<http://www.blankrome.com/index.cfm?contentID=37&itemID=3379>> and Securities and Exchange Commission, Andrew Ceresney, Director, SEC Division of Enforcement, *Remarks at 31st International Conference on the Foreign*

penalties but also have significantly increased the amount of money spent in compliance programs.¹⁷³ As it was mentioned earlier, these settlements have resulted in large sums that have been paid to the US Government and have not made their way to countries that were the beneficiaries of the contracts or agreements upon which bribes were paid.

Conclusion

Perhaps the last point presented in this paper highlights the great difference between national enforcement by the US and Canada of foreign bribery laws and that of the Sanctions Systems by MDBs. While national jurisdictions are keen in sanctioning individuals and corporations for their wrongdoing, there seems to be little evidence of restitution to the real victims of the corrupt practices in developing countries. So far the evidence suggests that if bribes were paid by a corporation or individual subject to the US or Canadian jurisdictions, in relation to a contract or dealing in a developing country, the penalties imposed as the result of the proceedings or settlement agreement are not directed at restituting the affected developing country, nor the specific communities. And this may be explained because the foreign bribery laws were created primarily to protect the markets of the countries that enacted such laws—primarily the US. Under such proposition, in the case of the US, the affected party in any foreign bribery scheme would be the US market, the US government and its people.

On the opposite side, MDBs main concern is development in the countries they serve. As such, the Sanctions Systems were created as part of this objective and strive to root-out corruption of developing projects while assisting member countries in strengthening governance. The sanctions imposed by MDBs are aimed at avoiding contracting with corporations or individuals that engage in prohibited practices. While at the same time collaborating with national entities in addressing areas in which there could be governance challenges, as it was the case in Cambodia. On the other hand, MDBs interest in investigating and sanctioning corruption lies in the effects that it has on development projects and the poor. Corruption affects the most vulnerable communities which are the ones that MDBs are trying to assist through development projects. These development projects tend to engage for the most part SMEs which comprise the majority of corporations worldwide and are a significant source of development. It is for this reason that the MDBs' Sanctions Systems deal with a significant number of SMEs.

Although this is an apparent point of divergence between national authorities such as the US and Canada on the one hand, and the MDBs on the other, it could also prove to be an area of convergence. Both systems are looking at different aspects of the same problem. Foreign bribery involves actions in multiple jurisdictions and affects multiple parties. It affects and distorts the markets in which large

Corrupt Practices Act, (November 19, 2014), online:

<http://www.sec.gov/News/Speech/Detail/Speech/1370543493598#.VQs4EmjF_uQ>

¹⁷³ Securities and Exchange Commission, Andrew Ceresney, Director, SEC Division of Enforcement, *Remarks at 31st International Conference on the Foreign Corrupt Practices Act*, (November 19, 2014), online:

<http://www.sec.gov/News/Speech/Detail/Speech/1370543493598#.VQs4EmjF_uQ>

multinationals operate and generates pervasive advantages to those companies that indulge in bribery. It has devastating effects on the communities that need the assistance the most, while challenging local governance structures. However, national systems and the MDBs get to see different angles of the actions of wrongdoers and could benefit in continuing the pursuit of complementary enforcement actions as in the case of SNC-Lavalin. In addition, the affected developing nations could benefit from the proceeds of the heavy sums resulting from fines imposed by national enforcement agencies in foreign bribery cases, money that could serve to strengthen local governance and hence, level the international playing field.