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Trends in the International Fight Against Bribery and Corruption

Margot Cleveland
Christopher M. Favo
Thomas J. Frecka
Charles L. Owens

ABSTRACT. Over the past decade, we have witnessed some early signs of progress in the battle against international bribery and corruption, a problem that throughout the history of commerce had previously been ignored. We present a model that we then use to assess progress in reducing bribery. The model components include both hard law and soft law legislation components and enforcement and compliance components. We begin by summarizing the literature that convincingly argues that bribery is an immoral and unethical practice and that the economic harm it causes falls most heavily on those least able to absorb it. The next section summarizes the main provisions of anti-bribery legislation including the *Foreign Corrupt Practices Act* (FCPA), the Organization for Economic Development's *Convention on Combating Bribery of Foreign Officials in International Business Transactions,* the *United Nations Convention Against Corruption* and the laws of selected countries. We conclude this section with a discussion of the ''moral imperialism'' argument for not imposing Western laws and values on other cultures. The next section focuses on the roles played by NGOs including Transparency International (TI), the World Economic Forum (WEF), and the International Chamber of Commerce. We review trends in enforcement and prosecution, including a review of the United States' enforcement processes, mechanisms for cross-border legal assistance, a discussion of the distinctive nature of FCPA cases, and an assessment of what the future holds for enforcement. The final section focuses on compliance processes for corporations aimed at reducing the risk of FCPA and related violations. This section also addresses the ethics of gift giving and ''grease'' payments. The article concludes with a summary and suggestions for further research. Throughout the article, we reference important bribery cases and include comments from several authorities who are on the front lines of the battle against international bribery.

KEY WORDS: anti-bribery model, bribery and corruption, compliance & enforcement, FCPA, OECD

Introduction

> *Never before have the objectives of the international community and the business world been so aligned.*
>
> (United Nations Global Compact)[1]

Increasingly, we are realizing that everything in our world is connected.[2] Whether it is a flu virus or a U.S. sub-prime mortgage crisis, events occurring in one part of the world have widespread impacts. In addressing such impacts, coordinated global responses are required. A particularly insidious and unethical global problem is bribery and corruption. The problem is age-old, it is massive, it stifles economic development, and it has devastating effects on the most vulnerable members of society. For example, based on survey data from over 60 developing nations, Gray and Kaufmann (1988) conclude that corruption is the single most important impediment to worldwide economic development and growth.

In this article, we focus on the most common and costly (to society) form of corruption – bribery. Specifically, we focus on payments made by transnational corporations to foreign governmental officials in return for a favor, often the granting of a large contract. While bribery is illegal in most nations of the world, the revenues stemming from bribes are large and, historically, the cost to bribe payers, in terms of penalties, has been low. Thus, the economic incentives to bribe have been large. But now this is starting to change. With an international focus on transnational corporate bribe payers and a domestic focus on bribe recipients, the global community is starting to respond. Our primary purpose in the balance of this article is to assess the effectiveness of the world's strategic response to the

bribery problem, with a particular focus on the unethical behavior of bribe payers. The article is intended as a primer for readers who are unfamiliar with the recent marshaling of resources to combat international bribery and as a summary of ethical issues and challenges related to bribery.

Previous research has resulted in an almost universal consensus that bribery is immoral, unethical, and harmful. There remain some difficult ethical issues, many of which we address throughout the article, but to understand and address more complex ethical issues, it is important to first review, and assess the major components of a comprehensive model to combat bribery. As such, our emphasis is on assessing progress in the anti-bribery campaign while also considering long-debated issues such as imposition of Western-style values on other cultures, the ethicality of certain gift-giving practices, and the payment of small bribes. It is important to begin assessing progress, because, within the past decade and for the first time in the history of commerce, the world has taken notice that international bribery is a significant problem, and tools are now in place to combat it. Further, we believe the model we provide is useful for considering other ethical issues which are global in scope such as environmental stewardship and human rights. In addition, we contribute to the literature in the manner of a ''crude'' Delphi study, by including comments from major players who are leading the fight against bribery.

Bribery is one of the most significant problems facing society. There is a universal disdain for bribery that transcends borders, cultures, religious beliefs, and forms of government. Dalton (2006) states that ''bribery and corruption are universally condemned both on economic and moral grounds…'' and bribery ''not only violates the tenets of nearly every major religion of the world, it also imposes severe economic costs in any nation where it is practiced, with acute effects being felt in developing economies.''[3]

The most widely quoted bribery statistic is the World Bank's worldwide estimate of $1 trillion per year[4] with the total cost of corruption estimated at more than 5% of global GDP (US $2.6 trillion). The estimate is based on surveys tallying bribes paid by business enterprises for operations of the firm, bribes paid for favorable decisions on procurement, and includes bribes paid by household users of public services.[5] In order to put the $1 trillion into perspective, Alan L. Boeckmann, President and CEO of Fluor Corporation, on a YouTube commentary sponsored by Transparency International (TI), states that the $1 trillion is enough to feed 400 million starving people for the next 27 years![6] The problem is especially acute for emergent economies that may be unable to absorb many of the costs and consequences of corruption. For example, in 1997, the International Monetary Fund and the World Bank suspended over $250 million in loans to Kenya as a result of the country's failure to deal with bribery issues.[7] Also, Cuervo-Cazurra (2008) provides evidence that investors from countries who implemented the OECD Convention (discussed later) reduced their investments in corrupt countries.

The economic effects and ethicality of bribery have been discussed by literally hundreds of sources including Dalton (2006), Gray and Kaufmann (1988), Nichols (1999), and Shaw (2000). We shall briefly summarize major discussion points below.

Consider the key economic objectives of efficiency and equity. Bribery discourages efficiency by basing transactions on the size of the bribe rather than on the price and quality of the goods and services supplied. In a capitalistic economy, competition weeds out inefficiency. But when bribery is the basis of a transaction, inefficient entities producing sub-par products can survive. Bribery rewards corruption instead of efficiency. From an equity standpoint, bribery is unfair. One method of promoting equity is through tax policy. Gray and Kaufmann (1988) note that bribery restricts government's ability to raise taxes and results in taxes being levied on fewer and fewer taxpayers and imposing a regressive tax that falls heavily on trade and service activities of small businesses.[8] Fairness is also promoted by the rule of law. However, bribery blurs the distinction between legal and illegal behavior, sanctions conduct based on a willingness to pay and transforms the rule of law into the rule of individuals pursuing their selfish interests. Transparency contributes to both efficiency and equity. However, bribes are hidden; they are *sub rosa* transactions. Bribery pushes firms underground and tends to undermine the legitimate economy; the undermining of the legitimate economy also resorts in ethical problems.

Shaw (2000) summarizes the effects of bribery on governance. First, like markets where poor quality drives out good quality, a government overrun by corruption tends to drive out honest officials. Bribery destroys trust in the system. It tends to undermine democracies by suggesting to the public that government is for sale. Seligson (2006) focuses specifically on the argument that corruption weakens democracy by undermining citizen trust. Based on surveys of individuals' experiences with actual (rather than perceived) corruption in Latin America, he concludes that corruption does, indeed, erode the legitimacy of democracies, thus creating another ethical challenge. It does so by substituting personal gain for fiduciary responsibility – essentially, the definition of corruption.

But even without regard to the consequences of bribery, i.e., harm to democracy and the legitimate functioning of the economy, there is overwhelming agreement that bribery is immoral and unethical. Dalton (2006) notes the almost universal condemnation by most schools of religious thought, the connotation of bribery as ''evil,'' ''bad,'' ''unethical'' and ''dishonest,'' its offensive nature to moral values, and the fact that people find corruption shameful and repugnant.[9] Shaw (2000) notes that ''most legal codes prohibit bribery because it assaults the worth and integrity of the bribe-giver and bribe-taker. If a characterization of 'shameful' is not self-evident, one must wonder why bribery, without exception, is secretive and private and conducted in clandestine ways.''[10] He argues that anti-bribery laws are consistent with the German philosopher Habermus' notion of the ''general will'' and with Kant's categorical imperative.

In summary, there are important economic, governance, and ethical reasons for attacking the bribery problem. Bribery takes a huge toll on society. It discourages growth in emerging economies and contributes to poverty. It violates moral principles and economic principles, and it destroys freedom. There is universal agreement among people of goodwill that bribery is wrong.

Anti-bribery model

Table I summarizes the elements of our anti-bribery model.

The table shows the elements of what needs to be a coordinated and multifaceted attack against bribery. The parties involved include states and their legislative processes, enforcement agencies, non-governmental agencies, financial, and legal service firms, and transnational corporations themselves. Delaney (2005) calls this process ''regulation across borders.'' It includes ''hard law'' mechanisms of enforcement dubbed trans-governmental networks by Slaughter (2004) and ''soft law'' mechanisms of non-governmental organizations. But it also includes enforcement mechanism of law enforcement agencies and compliance mechanisms of firms and their agents.

We organize the rest of the article around the above mechanisms as follows. We begin with a discussion of international anti-bribery legislation. This includes an analysis of the U.S. *Foreign Corrupt Practices Act* (FCPA) and two soft law organizations – the Organization for Economic Development *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Convention), the *United Nations Convention Against Corruption* (soft law) and selected country-specific legislation. We conclude this section by addressing the ''moral imperialism'' criticism leveled against parties who adopt anti-bribery legislation. This is followed by a discussion of the roles of additional soft law regulators (NGOs), including TI and the World Economic

TABLE I

Anti-bribery model

Legislative mechanisms	Enforcement and compliance mechanisms
Hard law mechanisms: Country-specific laws; e.g., the Foreign Corrupt Practices Act *Soft law mechanisms*: e.g., UN Global Compact, OECD Convention, NGOs	*Enforcement*: Law enforcement agencies; e.g., the DOJ, SEC and FBI *Compliance*: Firms, auditors, legal assistance

Forum (WEF). The next section focuses on the activities of the U.S. enforcement agencies, specifically, the Securities and Exchange Commission (SEC), the Department of Justice (DOJ), and the Federal Bureau of Investigation (FBI). This section includes a discussion of ethical issues related to self-reporting. The final major section discusses the roles of professional service firms and the responses of firms from a compliance standpoint. Included in this section is a discussion of the ethics of gift-giving and the payment of small bribes known as facilitation or "grease" payments. Our conclusion includes an assessment of progress and a summary of ethical and other issues requiring further research.

Foreign Corrupt Practices Act (FCPA), OECD convention, and other country-specific anti-bribery legislation OECD convention

Ethical norms: the evolution from Lockheed

Imagine it is the fall of 1972, and you, an executive of an American based multinational corporation, supervise sales for your corporation which is in dire straits. The bankruptcy of a key supplier has caused severe production problems, determined, if not deceitful, competitors have instituted a slanderous whispering campaign to poison the market, and although the contracts in this industry are infrequent, a single one is sufficient to sustain the company for years. If problems were mountains, then you are on Everest. Therefore, if solicited, why would you not pay the bribe? It is easily rationalized. The bribe would not violate American law, it could be concealed from regulators and stockholders when characterized as a payment to a third-party agent, the competition is doing the same thing, it is essential to win the contract, and most importantly, it will save the company, and in turn hundreds of jobs. As one executive explained, paying bribes is a reality in your market:

> Some call it gratuities. Some call them questionable payments. Some call it extortion. Some call it grease. Some call it bribery. I looked at these payments as necessary to sell a product. I never felt I was doing anything wrong. I considered them a commission – it was the standard thing – if you were operating in the Far East, you knew you'd have to pay 2–5% on the sales… I didn't resent it. I did what I thought was necessary.[11]

To A. Carl Kotchian, the eventual President and Vice Chairman of Lockheed, it made good business sense to use an intermediary to pay $12.6 million in bribes to Japanese businessmen and government officials, including the then Japanese premier Kakuei Tanaka. In October, 1972, the Lockheed strategy secured a $133 million contract to sell Lockheed TriStar jetliners to All Nippon Airways and a separate promise for Japan to purchase $650 million in P-3C Orions.

In order to conceal the bribes, Lockheed employed a technique still in practice today. The payments were made to a third-party intermediary, Yoshio Kodama, Lockheed's "secret agent" in Japan, and not so coincidentally, a "Godfather" in the Yakuza.[12] In order to avoid a paper trail the Paris office of Lockheed's New York law firm used a trust account to access several 100 thousands of dollars Lockheed kept in a Parisian bank's safe deposit box. They packed the cash in shipping crates and sent it to Kodama. Later, Kodama was paid by "bearer checks" that could be cashed by whoever submitted them to a bank.[13] These precautions beg the question: if Kotchian thought he was doing nothing wrong, then why go to all this trouble?

Despite the sophistication of a corporation's precautions, improprieties are difficult to conceal and are often revealed in unimaginable ways. Like many dark secrets from the 1970s, the path to daylight began at 1:47 A.M. on June 17, 1972, when Watergate Complex Security Guard Frank Wills observed an adhesive tape on the basement doors and called the police.[14] The ensuing investigation uncovered, among other things, the White House master list of campaign contributors[15] identifying specific corporations and their illegal campaign contributions, many in cash. Eventually, 17 American corporations and 15 high-ranking business executives pleaded guilty to violating election laws.[16] Since "it was largely corporate funds, laundered in foreign countries and returned to the U.S. in black satchels, that financed the Watergate break-in and the subsequent illegal payoffs to cover it up,"[17] some corporate practices deserved examination. The Senate Subcommittee on Multi-National

Corporations, headed by Idaho Senator Frank Church, began subpoenaing records and analyzing American corporations' overseas activity.

Senator Church's committee quickly uncovered extensive overseas bribery. Military equipment suppliers were most prone to bribery during the cold war days. These corporations sought multimillion dollar contracts, typically negotiated with government representatives, often in dictatorships, kingdoms, or third world countries, and faced substantial competition from Western European and Soviet/ Soviet Block manufacturers. Patriotism could be used to justify paying a bribe since countries purchasing American manufactured weapons were more likely to adopt pro-American foreign policies.

Lockheed and its attorneys fought Senator Church's subpoenas but had only fleeting success. Although ordered to disclose only those records pertaining to Lockheed's military sales, Lockheed's accounting firm and law firm inadvertently disclosed its commercial sales records.[18] The Subcommittee's interest was piqued by payments to Kodama whom Senator Church described as "a prominent leader of the ultra right-wing militarist faction in Japan." Since the payments were made while the U.S. publicly opposed the faction, Church observed two policies at play. The U.S. "had a foreign policy…which had vigorously opposed this political line in Japan and a Lockheed foreign policy which has helped to keep it alive through large financial subsidies in support of the company's sales efforts."[19] On February 6, 1976, Kotchian, then Lockheed's President and Vice Chairman, found himself before the Senate Sub-Committee describing Lockheed's practices and acknowledging the improper payments.[20] Lockheed eventually admitted to paying over $38 million in bribes from the 1960s through the mid-1970s to officials in Japan, the Netherlands, Italy, Germany, Saudi Arabia, Iran, and other countries.

The FCPA statute

The post-Watergate fallout for the U.S. business was immediate. By April 1976, more than 50 companies had disclosed their improper political payments to the SEC and another 35 sought guidance for disclosures or were the subject of SEC investigations. President Ford appointed Elliott Richardson to chair a 10-member "Task Force on Questionable Corporate Payments Abroad" whose recommendations ultimately became the *Foreign Corrupt Practices Act*.[21] Given all that Congress had heard and witnessed over the prior few years, what could they do but enact the strictest and most comprehensive anticorruption statute that the world had seen – legislation which, as we shall see, was, quite literally, 20 years ahead of its time.

The FCPA legislation passed by Congress in 1977 adopted a two-prong approach to combating foreign corruption. First, the FCPA mandated specific recordkeeping and internal control requirements;[22] these requirements sought to provide a mechanism for the government to discover corrupt payments.[23] Second, the FCPA criminalized bribery of a foreign official.[24] Congress amended the FCPA in 1988, adding two affirmative defenses to liability,[25] and again in 1998,[26] expanding the scope of the FCPA to include foreign nationals.[27]

Accounting provisions

The first way the FCPA sought to prevent unethical bribery was through provisions governing record keeping and control. However, the FCPA's record-keeping and internal control requirements apply only to select entities, namely, "issuers" required to register with the SEC.[28] "In addition, an issuer that controls more than 50% of the stock of a foreign subsidiary must ensure that the subsidiary adheres to the books and records provisions."[29] Covered issuers must also use good faith efforts to influence firms for which it holds 50% or less of stock to comply with the accounting provisions.[30] Moreover, "[t]he accounting provisions are broad and apply to all dealings undertaken by the issuer, regardless of whether the business actually engages in foreign operations or whether the transaction is considered a bribe."[31]

The FCPA requires covered entities to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and disposition of the assets of the issuers."[32] In addition, covered entities must:

> (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that

(i) transactions are executed in accordance with management's general or specific authorization;
(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with Generally Accepted Accounting Principles (GAAPs) or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
(iii) access to assets is permitted only in accordance with management's general or specific authorization; and
(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[33]

''Reasonable assurances'' and ''reasonable detail'' are further defined by the FCPA to ''mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.''[34]

The FCPA accounting requirements create criminal liability, but only for ''knowing violations.'' Specifically, an individual who ''knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account described in'' the FCPA is subject to criminal liability.[35]

Anti-bribery provisions

Second, the FCPA sought to confront unethical bribery head-on: the anti-bribery provisions of the FCPA, as amended in 1998, prohibit ''any person''[36] from using the mails or other means of interstate commerce to corruptly influence a foreign official or foreign political party or candidate, in order to obtain or retain business.[37] In order to establish a violation of the anti-bribery provisions of the FCPA, the government must prove five elements:

(1) a payment of – or an offer, authorization, or promise to pay – money or anything of value, directly, or through a third party;
(2) to (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any official of a public international organization, or (e) any other person while ''knowing'' that the payment or promise to pay will be passed onto one of the above;
(3) the use of an instrumentality of interstate commerce (such as telephone, telex, email, or the mail) by any person (whether the U.S. or foreign) or an act outside the United States by a domestic concern or a U.S. person, or an act in the U.S. by a foreign person in furtherance of the offer, payment or promise to pay;
(4) for the corrupt purpose of influencing an official act or decision of that person, inducing that person to do or omit to do any act in violation of his or her lawful duty, securing any improper advantage, or inducing that person to use his influence with a foreign government to affect or influence any government act or decision;
(5) in order to assist the company in obtaining or retaining business or in directing business to any person or to secure an improper advantage.[38]

However, not all payments to foreign officials are prohibited by the FCPA. Rather, the FCPA expressly excludes ''facilitating'' or ''expediting'' (i.e., ''grease payments'') which seek ''to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.''[39] (Later, we shall discuss the ethics of such payments.)

In addition, as noted above, in 1988, Congress amended the FCPA, providing two affirmative defenses. First, the FCPA allows for ''the payment, gift, offer, or promise of any value'' which is ''lawful under the written laws and regulations of the recipients' country.''[40] Second, ''the payment, gift, offer, or promise of anything of value'' is legal if it is ''a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate ''so long as the payment is ''directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government of agency thereof.''[41] As noted above, we will address the facilitating payment and gift issues in the section that deals with compliance.

FCPA prosecutions, the first 20 years

The landmark nature of the FCPA left the SEC and the DOJ struggling to enforce the new legal mandates. In fact, between 1977 and 1995, the DOJ only initiated 16 prosecutions. However, this still placed the U.S. well-ahead of other countries. During this period, the U.S. was the only country with an international prohibition against bribery. As a result, there were particular concerns about competing with European countries, where, in many cases, bribe payments were even tax deductible. By one estimate, American companies lost $45 billion in 1995 alone due to the FCPA. There were some initial prosecutions under the Carter administration, but with the inauguration of President Reagan, enforcement patterns changed.[42] Funding for the SEC and DOJ was cut, and the new provisions related to affirmative defenses were added in 1988.

However, along with the two affirmative defenses, the 1988 Amendments to the FCPA required that the President pursue the negotiation of an agreement among members of the Organization of Economic Cooperation and Development (OECD) to adopt cross-border anti-bribery legislation. Founded in 1960, the OECD is a Paris-based group of 30 member countries who are committed to democracy and the market economy. As of 1997, its member countries produced two-thirds of the world's goods and services and are the home countries for most large multinational companies.[43]

Owing to a series of events, the time was ripe for a broad coalition to organize itself to fight the unethical practices of bribery and corruption. Arguably, corruption and bribery resulted in the fall of governments in Brazil, Italy, Pakistan, and Zaire and laid low economies from Indonesia to Russia during this time period.[44] Finally, people had had it with corruption. The OECD became a proponent of anti-bribery measures because massive bribery scandals and economic crises provided mounting evidence, as noted above, that corruption distorts competition, undermines development and destabilizes democracy.

OECD convention

On November 21, 1997, OECD Member countries and five non-member countries[45] adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[46] The Convention was signed in Paris on December 17, 1997,[47] and entered into force on February 15, 1999,[48] after the requisite number of signatory countries ratified the convention.[49] As of November 2008, 37 countries have ratified the OECD Convention:[50] A detailed analysis of the OECD Convention is provided in Appendix 1.

Similar to the FCPA, the OECD Convention contains both anti-bribery and accounting provisions. Unlike the FCPA, it does not include foreign political parties within its anti-bribery provisions. It is important to note that the OECD Convention is not self-executing (the OECD has no direct enforcement power); rather, it requires signatory nations to adopt their own legislation to make bribery illegal. In order to ensure that this happened, the Convention implemented a rigorous surveillance process beginning in 1991. Phase 1 involved a review of country-specific legislation to determine whether the standards of the Convention had been met. Phase 2 began in 2001 with the objective of assessing enforcement processes and, the degree to which they are effective. It also expanded its focus to consider non-criminal accounting and auditing requirements and the issue of non-tax-deductibility of bribery payments. Results were summarized in a Mid-Term study in 2005. Appendix 1 also includes an interesting analysis of the implemented legislations in France, Germany, the U.K., the U.S., and Brazil.

Other BRIC countries and the United Nations Convention Against Corruption

Owing to their importance in terms of international trade, we next focus on ethical mandates governing the three remaining BRIC countries, Russia, India, and China who are not signatories of the OECD Convention.[51] This allows us to consider another important piece of anti-bribery legislation, the *United Nations Convention Against Corruption* and the United Nations Global Compact.[52] The UN Convention was adopted by the General Assembly in 2003 and at present, it has 140 country/state signatories, including Russia, India, and China.[53] Broader than legislation dealing with bribery, the Convention requires states

to introduce effective policies and institutional arrangements for the prevention of corruption, including the establishment of a specific anti-corruption body, codes of conduct, and policies promoting good governance, the rule of law, transparency, and accountability. It requires states to criminalize a wide range of acts of corruption. It emphasizes that prevention, investigation, prosecution, and seizure and return of assets require international cooperation. Unlike other anti-corruption legislation, the UN Convention also provides for asset recovery.[54] The specific provision addressing bribery of foreign officials reads as follows:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally the promise, offering or giving to a foreign public official or an official of an international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties.[55]

China

It is reported that China does not presently have a law against bribing foreign officials.[56] However, as thousands of transnational firms flock to China in pursuit of trade, training sessions and seminars on "doing business in China" are in vogue. A major topic is bribery and corruption. Rose et al. (2007) note a "panoply of new laws regulating foreign trade and investment, remaining cumbersome bureaucratic administrative structures, regulations that are at odds with other laws, and a divide between national policy goals and implementation at the local level as some of the problems." Also, "connections to officialdom continue to be important to business success."[57] This is an environment where corruption and bribery thrive. Importantly, the Chinese Communist Party (CCP) has disciplinary rules against party officials accepting bribes and a central enforcement mechanism. It is reported that in 2006 alone, the CCP brought disciplinary action against over 97,000 party members.[58]

India

Bribery is covered by the Prevention of Corruption Act (POCA) of 1988. While similar to the FCPA, POCA differs in three important respects. First, facilitation payments are not permitted under the Act, second, it is limited to acts performed in India, and finally, the law targets improper payments and not improper receipts. A related concern is that India does not have targeted legislation to combat fraud and illicit payments in the private sector.[59] As is the case for China, the focus is on the challenges of doing business in India. The burdensome and bureaucratic regulatory environment, competition among central, state and municipal agencies, and complex tariff and tax systems are some of the problems.

Russia

Russia is widely recognized as one of the most corrupt industrialized countries. Based on several indicators[60] of the scope of the problem, Russia announced a major anti-corruption drive in 2006 and passed new legislation to combat the problem. However, again as is the case for China and India, the legislation focuses on the recipient of bribes.[61] The focus seems appropriate as prosecutors indicated that they had uncovered 28,000 cases of corruption involving state officials in the first 8 months of 2006 alone.[62]

The moral imperialism concern

Dalton (2006) provides strong evidence that the FCPA was justified on moral grounds rather than economics grounds, and she views this as problematic. She advocates that a *de minimis* exception be added to the law to accommodate gift-giving practices that are culturally accepted and expected in several countries. Salbu (1999) goes a step further and argues "that any form of *extraterritorial* anti-bribery legislation, even the most perfectly conceived, must be considered imprudent under the global conditions of the late twentieth century."[63] To what extent are these concerns justified?

Delaney (2005) makes the valid observation that intervention into the affairs of other nations as in the case of bribery "demands a higher threshold of justification than ordinary international policies."[64] But he goes on to provide compelling arguments that moral imperialism is not considered a major issue. Noting that the subjects of the regulations are

transnational corporations and not citizens of foreign countries, that a large number of countries (now 140) have signed the UN Convention, that bribery is condemned in every country of the world, and that it is largely Western nations that engage in transnational bribery, he effectively completes his arguments by quoting Dr. Frene Ginwalla, Speaker of the South African Parliament, as follows: ''attributing corruption to [African] cultures is both arrogant and racist, as well as convenient and self-serving. It says more about the culture of [the West], than our own.''[65]

Soft law mechanisms: NGOs

Countries, through their legal mechanisms, represent just one part of a comprehensive approach to fighting bribery. Another set of actors is non-governmental agencies. In this section, we summarize the roles of several international organizations whose primary tool in fighting unethical bribery and corruption is persuasion.

Transparency International (TI)

Headquartered in Germany, TI was founded in 1993 by a group of individuals who have ''shared in common the experience of having witnessed first-hand the devastating effects of cross-border corruption…TI is a politically non-partisan organization whose primary function is raising awareness about corruption on a global level.''[66] TI is organized around a national chapter system that now includes 95 countries. Three of its most important reports, the Corruption Perception Index (CPI), the Bribe Payers Index (BPI), and the Global Corruption Barometer (GCB), provide important measures of the perceived levels of bribery and corruption throughout the world.

The CPI measures relative corruption in countries based on perceptions of international business people, both residents and non-residents, and is a compilation of data from up to 15 different survey sources. Selected CPI scores from the 2008 survey are shown in Table II.

Table II shows several interesting results. Surprisingly, the U.S. is ranked only 18th, tied with Japan, a ranking just below the U.K. Among the Latin American countries, the only reasonably high scores are Chile and Uruguay with scores of 6.9. The scores for the BRIC countries (Brazil, Russia, India, and China) are particularly low. A score below 5.0 is considered an indicator of serious corruption. Of the 180 countries included in the survey, all but 52 have scores below 5.0. This is a sobering indicator of the extent of the global corruption problem.[67]

Transparency International's 2006 BPI focused on 30 leading export countries ''whose combined global exports represented 82% of the world total in 2005.''[68] Respondents were asked to identify the country of origin of foreign companies doing the most business in their country and then answer the following question: ''In your experience, to what extent do firms from the countries you selected make undocumented extra payments or bribes?''[69] TI followed up with a similar survey in 2008 and reported the results for 22 leading export countries. A score of 10 indicates a perception of no corruption while a zero indicates rampant corruption. We summarize results of the 2006 and 2008 surveys in Table III.[70]

Table III shows that many of the countries of origin with the lowest perceived bribe payments are OECD countries, with Italy and possibly Spain as exceptions. The U.S. and Japan are also included in the low bribery group. Near or at the bottom of both surveys (perception of extensive bribe paying) are the BRIC countries with Russia at the bottom of the survey in 2008.[71] TI concludes that ''for too many, bribery remains routine business practice.''[72]

Transparency International also publishes a GCB which focuses on the general public's attitudes about corruption. The 2007 GBC is based on interviews with 63,199 people in 60 countries. Among the key findings of that survey are

- The poor are most penalized by corruption and are most pessimistic about prospects for less corruption in the future.
- About one in 10 people around the world had to pay a bribe in 2007.
- The most prominent sources of bribes stem from interactions with the police, the judiciary, and registry and permit services.[73]

We asked Cobus de Swardt, Managing Director of TI, to provide his assessment of progress being made

TABLE II

Selected CPI scores from TI 2008 CPI

Country rank	Country	CPI score	SD	Surveys used
1	Denmark	9.3	0.2	6
2	Sweden	9.3	0.1	6
3	New Zealand	9.3	0.2	6
4	Singapore	9.2	0.3	6
5	Finland	9.0	0.8	6
5	Switzerland	9.0	0.4	6
7	Iceland	8.9	0.9	5
7	Netherlands	8.9	0.5	6
9	Australia	8.7	0.7	8
10	Canada	8.7	0.5	6
11	Luxemburg	8.3	0.8	6
12	Austria	8.1	0.8	6
12	Hong Kong	8.1	1.0	8
14	Germany	7.9	0.6	6
14	Norway	7.9	0.6	6
16	Ireland	7.7	0.3	6
16	U.K.	7.7	0.7	6
18	U.S.	7.3	0.9	8
18	Japan	7.3	0.5	8
23	Chile	6.9	0.5	7
23	Uruguay	6.9	0.5	5
40	South Korea	5.6	1.1	9
52	Slovakia	5.0	0.7	8
55	Italy	4.8	1.2	6
72	Mexico	3.6	0.4	7
72	China	3.6	1.1	9
80	Brazil	3.5	0.6	7
85	India	3.4	0.3	10
109	Argentina	2.9	0.7	7
121	Nigeria	2.7	0.5	7
141	Iran	2.3	0.5	4
147	Russia	2.1	0.6	8
178	Iraq	1.3	0.3	4
180	Somalia	1.0	0.6	4

in the fight against international corruption. The Managing Director first noted an increased societal awareness compared to 10–15 years ago. Today, corruption is widely recognized as an important global challenge. Legal mechanisms such as the OECD are in place to criminalize bribery, and there has been a general mood change with bribery now widely recognized as immoral. There are many companies who have adopted anti-bribery principles and installed systems and procedures to discourage bribery. There is also greater cooperation among various anti-corruption agencies. Have we succeeded in eliminating bribery as a routine business practice? In de Swardt's view, the answer is ''no,'' and he cites as evidence the BPI indicating that bribery is still fairly routine. Noting that bribery and corruption are complex transactions, there is a particular need to focus on third parties who facilitate the transactions. He suggests that independent attestation of the effectiveness of company anti-bribery programs and even closer cooperation among companies and business organizations are two important means of attacking the problem.

TABLE III

Transparency International's BPI comparison of 2006 and 2008 survey results

2008 Rankings of 22 countries	2006 Rankings of 30 countries
Average scores above 8.0 (range 8.8–8.1) Belgium, Canada, Netherlands, Switzerland, Germany, U.K., Australia, Singapore, U.S.	*Average scores above 7.0 (range 7.81–7.10)* Switzerland, Sweden, Australia, Austria, Canada, The U.K., Germany, Netherlands, France, Belgium, The U.S., Japan
Average scores of 7s (range 7.9–7.4) Spain, Hong Kong, South Africa, South Korea, Brazil, Italy	*Average scores of 6s (range 6.78–6.01)* Singapore, Spain, UAE, France, Portugal, Mexico, Hong Kong, Israel
Average scores of 6s (range 6.8–6.5) India, Mexico, China	*Average scores of 5s (range 5.94–5.16)* Italy, South Korea, Saudi Arabia, Brazil, South Africa, Malaysia, Taiwan, Turkey, Russia
Russia 5.9	China 4.94, India 4.62

Possible range: 0 = "bribes are common" to 10 = "bribes never occur".

World Economic Forum

Founded in 1971, the WEF is a Geneva-based NGO funded by one thousand member companies who pay an annual fee of roughly $50,000. It is a prestigious organization that has been the target of anti-globalization activists. Its five-day Annual Meeting is by invitation only; the approximate 2,000 participants include CEOs from the member companies as well as leading politicians, academics, NGOs, religious leaders, and the media. The Forum is "committed to improving the state of the world"[74] by undertaking various global initiatives related to health, education, the environment, water, and corruption. Its anti-corruption initiative is called the Partnering Against Corruption Initiative (PACI).[75] PACI was launched in 2004 by CEOs of firms in engineering, construction, energy, metals, and mining industries.

Partnering Against Corruption Initiative calls for signatory companies to (1) commit to a zero-tolerance policy toward bribery and (2) develop and implement an effective program for countering bribery. At this time 141 companies have signed a statement in support of the program, including over 25 U.S.-based companies. PACI is a three-stage process of implementation, self-evaluation, and external verification. Based on a 2008 survey, 100% of the signatory companies had an anti-corruption program in place, 90% continuously evaluate their anti-corruption programs, and 40% have received external assurance/third-party certification of their anti-corruption programs.[76]

International Chamber of Commerce

Founded in 1919, the International Chamber of Commerce (ICC), France-based NGO, bills itself as "the voice of world business championing the global economy as a force for economic growth, job creation and prosperity."[77] Like TI, it supports its agenda through various initiatives including its anti-bribery initiative in partnership with TI, the WEF, and the UN Global Compact. The ICC and its cohorts have issued several publications including "The Business Case Against Corruption," whistle-blowing guidelines and have made recommendations concerning the UN Convention.

FCPA Blog

Founded by Richard L. Cassin of Cassin Law LLC, the FCPA Blog provides a good "current events" summary of international bribery activity, including updates of litigation. While not a typical NGO organization, we recognize the FCPA Blog as a different kind of "soft law" mechanism for monitoring bribery activity. In responding to a series of questions, we asked about progress in the fight

against corruption, Cassin noted that ''one of the best weapons against public corruption is also the simplest – transparency. When governments at all levels introduce transparent licensing procedures, for example, corruption is immediately reduced.''[78] Traditional news sources as well as electronic sources such as the FCPA Blog contribute to the transparency objective.

Enforcement and prosecution

Table IV summarizes recent trends and patterns in FPCA enforcement. The DOJ and SEC do not publish comprehensive statistics on enforcement actions, so data must be gleaned from other sources. Shearman & Sterling LLP publishes an FCPA Digest of Cases and, along with Gibson, Dunn & Crutcher LLP, tracks trends in enforcement.[79] We rely heavily on these sources.

Table IV shows the extraordinary increase in both DOJ and SEC actions since 1998. It is not an overstatement to suggest we have entered a new era of enforcement – the first serious international anti-bribery offensive in the history of mankind. Prior to 1998, Shearman & Sterling document only 30 cases in the 20-year period leading up to the OECD Convention, compared to a total of 72 cases in the last 10 years. Of the 72 recent cases, 38 were initiated in 2007 alone. In addition, it is estimated that there are about 100 open investigations at this time. The table summarizes other trends in enforcement including investigations arising from the Iraqi Oil for Food Program, the increasing number of prosecutions against individuals, parallel multi-country investigations, and the trend toward increased discovery and voluntary disclosure. Finally, the table shows the magnitude of recent fines, where the all previous fines are dwarfed by the recent settlement involving Siemens AG. We provide short summaries of specific cases in Appendix 2. Of particular interest are the trends in the dollar amount of fines and disgorgement, with Siemens paying a combined $1.2 billion to the U.S. and German authorities and Halliburton's settlement involving its Kellogg Brown & Root subsidiary totaling $579 million. The trend of prosecuting individuals as well as corporations is also apparent.

The enforcement and prosecution process

As is the case when combating the increased intricacy and sophistication of organized crime activities necessitated the passing of the expansive RICO statute in 1970, eradicating improprieties concealed by the corporate veil requires radical philosophical changes. The FCPA, and its enforcement, reflect these changes.

Mark Mendelsohn, Former Deputy Chief of the Criminal Division's Fraud Section explained that:

> Department of Justice policy, as set out in the U.S. Attorney's Manual, requires that all FCPA investigations and prosecutions be handled by the Criminal Division's Fraud Section. As a practical matter, however, the Fraud Section often collaborates with U.S. Attorney's Offices in these cases. The principal reason for this centralized responsibility is the need for close coordination with the State Department, the U.S. Securities and Exchange Commission, and other interested agencies. Experience has shown that this centralized responsibility has also resulted in the development of significant expertise in the Fraud Section as well as a greater degree of predictability among companies and individuals facing investigation for foreign bribery.[80]

FCPA cases are developed through a variety of methods including, corporate self-disclosure, complaints from individuals, foreign countries and organizations, and information developed by the FBI and other government agencies. The Fraud Section's oversight was instituted to address the ''complex enforcement problems abroad and the difficult issues of jurisdiction and statutory construction.''[81] In other words, since the investigation will have a foreign aspect, issues not present in the typical investigation will be significant. For example, if the investigation requires the assistance of a foreign local law enforcement officer, will the investigation then put that officer in a difficult position or danger? Will the investigation then instigate an international crisis? Will it be possible then to obtain the necessary documents and cooperation from overseas?

A country's treatment of evidence of bribery of its own officials can vary. Returning once again to the Lockheed case, Japan's reaction is typical of the current trend. Prime Minister Takeo Miki vowed to ''get to the bottom of the affair'' and within months, over

TABLE IV

Trends in FCPA enforcement

Shearman & Sterling *Case Digest* cases through 2007[a]	Total number	Number prior to 1998
Total number of DOJ criminal prosecutions under the FCPA	56	18
Total number of DOJ civil actions under the FCPA 5 (4 prior to 1994)	5	4
Total number of SEC actions relating to foreign bribery	41	8
	102	30

Increase in combined number of SEC & DOJ enforcement actions[b]	Year	Number
	2003	2
	2004	5
	2005	12
	2006	15
	2007	38
Estimated number of open DOJ/SEC investigations in 2008[c]		100

Other indicators
Investigations arising from the Iraqi Oil for Food Program
24 companies have disclosed investigations[d]
Increase in number of prosecutions against individuals
Since 1990, twice the number of prosecutions against individuals than against corporations[e]
International enforcement and parallel international investigations (excluding oil for food)
Involving 17 countries (12 involving Siemens) and 12 companies in total
Increased discovery and voluntary disclosure
44 of 68 newly disclosed FCPA investigations in 2005–2007 were voluntarily disclosed to the SEC or DOJ based on company internal investigations[f]

Largest fines[g]
Siemens AG, $1.6 billion ($450 million FCPA), 2008[h]
Kellogg, Brown & Root, LLC $579 million, 2009
Baker Hughes, $44 million, 2007
Chevron, $30 million, 2007
Vetco International, $26 million, 2007
York International, $22 million, 2007
Statoil, $21 million, 2006
Schnitzer Steel, $15 million, 2006
ABB, $16 million, 2004

[a]Newcomb (2007).
[b]Gibson Dunn and Crutcher LLP (2008).
[c]*Ibid*.
[d]Gibson and Crutcher, *op cit*.
[e]Shearman and Sterling (2008).
[f]*Ibid*.
[g]See case summaries on SEC Website except for Siemens case, at http://www.sec.gov/litigation.
[h]Transcript of Press Conference (2008). Announcing Siemens AG and three subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations.

15 individuals were indicted. Ultimately, the former Prime Minister, Tanaka, and several of his closest associates, were convicted of accepting bribes. Even Kodama, who while under house arrest, survived a disillusioned Ultra right-wing party member's kamikaze-style plane crash into his house, was charged, but died in his sleep before his trial commenced.

In the Netherlands, the results were different. Kotchian and another Lockheed employee disclosed that in 1961 Lockheed provided a $1.1 million "gift" to Prince Bernhard, the Royal Consort. Although an investigative commission issued a 240-page report, the commission found no proof that Bernhard had received the payment. The Dutch parliament voted overwhelmingly against prosecution. In words echoing the popular sentiment, Protestant Anti-Revolutionary Party Leader Willem Aantjes, voiced that "History shows the faithfulness of the House of Orange toward The Netherlands. Let us now show the loyalty of Holland toward Orange."[82]

In addition to diplomatic concerns, another issue is whether the allegations should be examined by the FBI and IRS, or the SEC. A decision may be jurisdictionally based, as Mark Mendelsohn explains:

> Under the FCPA, the Department of Justice has criminal enforcement authority over issuers, domestic concerns, including U.S. citizens, residents, and non-public companies, and other persons whose conduct implicates U.S. territorial jurisdiction, as well as civil enforcement authority over domestic concerns and foreign nationals and companies. The SEC has civil enforcement authority over all issuers. DOJ and the SEC typically work in parallel and in close coordination in investigating issuers.[83]

A more recent example of the political complications inherent in anti-bribery cases concerns the United Kingdom's (UK's) Serious Fraud Office's (SFO's) investigation of BAE Systems. It is alleged that a £60 million "slush fund" was used to support bribes to Saudi Arabian officials in connection with 1980s contracts to sell Tornado and Hawk jets and other weapons to Saudi Arabia. In December, 2006, UK's Attorney General announced the inquiry was being suspended because it could cause "serious damage" to UK–Saudi relations. On July 29, 2008, the UK's Law Lords upheld the decision in part because the SFO advised that the Saudi Arabian government threatened to withdraw co-operation on anti-terrorism issues.[84] Despite the UK's concerns, the DOJ is apparently pursuing an investigation because on May 19, 2008, BAE announced that they had been served several subpoenas.[85]

If the facts of the case suggest a civil investigation should be pursued, then it will be led by the SEC. Kevin M. Loftus, a former Branch Chief at the SEC who oversaw SEC efforts in the Baker Hughes case, and now Counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP, explains: "the Department of Justice and SEC share jurisdiction in FCPA matters and coordinate their efforts to a degree not found in other criminal areas. In part, this is due to the centralized responsibility for FCPA cases at the Department of Justice. The two agencies find that cooperation on FCPA matters works well…and there has been a large uptick in investigations in recent years."[86]

But, if the decision is to conduct a purely criminal investigation, then it will be conducted by the FBI and IRS. The Special Agents assemble their cases through interviews, analysis of records and documents, and information obtained from foreign nations.

Cross-border legal assistance

Article 9 of the OECD Convention calls for cross-border legal assistance in dealing with bribery cases.[87] Cutler (1999) summarizes available legal mechanisms including police-to-police assistance, mutual legal assistance treaties (MLATs), multilateral treaties, letters rogatory, and executive agreements. MLAT requests to and from other countries are processed by the DOJ, Criminal Division, Office of International Affairs (OIA). The U.S. Department of State's Website lists the bilateral mutual assistance treaties in force with other countries.[88] Interestingly, the first such treaty was entered into with Switzerland in 1977. The Website lists 51 agreements in force with 23 entered into force (or updated) since 1998. Treaties are in force with most of the OECD Convention countries. The site indicates that an agreement with Germany, signed in 2003, is not yet in force, although clearly, there has been a great deal of information sharing related to the Siemens case. Among the BRIC countries, MLATs exist with Brazil (2001) and surprisingly, with the Russian Federation, as of 2002.

An example of another form of cooperation is a recent memorandum of understanding between Indonesia's Corruption Eradication Commission (KPK) and the U.S. Federal Bureau of Investigation. The agreement calls for the mutual exchange of data, investigative reports, progress reports, and follow-ups regarding corruption eradication initiatives.[89] Commenting on the agreement, John S. Pistole, Deputy Director, FBI, noted that many countries see the benefit of operating under a strong rule of law. ''This agreement was a recognition by the authorities in Indonesia that they could benefit from the FBI's experience and expertise in the investigation of public corruption. The agreement provides for the FBI to provide training to the Indonesian investigative services on the FBI's methodology for conducting corruption investigations.''[90]

The MLAT process is overseen by DOJ and can be slow and cumbersome. Investigators and Assistant United States Attorneys (AUSAs) submit requests for documents or to conduct interviews in specific countries. The requests are sent to DOJ headquarters, known as Main Justice, where they are reviewed, and translated into the language of the recipient country. This process can mean months before the investigator receives documents which are often written in a foreign language and need translating. Until recently, FCPA investigations were so rare that they were conducted by general white-collar crime squads. In 2006, the FBI initiated a dedicated FCPA squad in its Washington Metropolitan Field Office. Special Agents who investigate the FCPA exclusively partner with FBI legal attachés assigned to its 75 extra-territorial offices covering over 200 countries, territories, and islands. In that process, those Special Agents establish relationships with overseas law enforcement which increasingly expedites the investigations. Inquiries and requests that took months to complete just 2 years ago, are now accomplished by a phone call or email because now each country's anti-bribery investigators are getting to know one another and where to call.[91]

Distinctive nature of FCPA cases

There are several significant aspects of FCPA enforcement that make the cases significantly different from other white-collar crimes. One principal issue is the jurisdictional arm of the statute. The FCPA can be enforced for conduct in any country as long as there is a connection with the U.S. As the U.S. v. Sapsizian case (noted above) illustrates, jurisdiction is broadly interpreted to include maintaining an office or employees, a bank account, conveying funds through the U.S., or trading on a stock exchange within the U.S.

As noted above, the statute also provides that employees and third parties can be prosecuted, even if the corporation is not. Therefore, in contrast with prior practice where the company might go to great lengths to protect its employees who had authorized bribes, it is now in the interest of the company to settle the issues as a corporation and leave its employees to fight their own battles.

Among the most effective weapons within the FCPA are the disgorgement provisions. Scott Moritz of Daylight Forensic & Advisory LLC explained that the disgorgement provisions ''are effective because in some areas the business penalties are far less than the payoffs. Historically, FCPA prosecutions centered on the amount the bribes paid, not the economic benefit the company derived from the bribery. Centering on the bribe amounts alone did not offer sufficient disincentive to change behaviors. With the increased use of disgorgement, regulators have the ability to claw back all of the profits derived from the bribery.''[92]

Ethics issues and voluntary disclosure

In an October 16, 2006 speech before the American Bar Association National Institute on the FCPA, Assistant Attorney General Alice S. Fisher explained that combating corruption was a high priority for the DOJ and outlined the major policy issues for the FCPA. These policies include the importance of using the voluntary disclosure program, the imposition of compliance consultants or monitors as part of the settlement of FCPA cases, the importance of the DOJ opinion procedure, and the advantages of transactional due diligence in mergers and acquisitions.

In a March 27, 2008 speech before the Minority Corporate Counsel 2008 CLE Expo in Chicago, Illinois, Linda Chatman Thomsen, Director, Division of Enforcement, SEC explained the Voluntary Disclosure Program:

> Under the program, any corporation which came forward and self reported an illicit payment problem and fully cooperated with the Commission, was informally assured that Commission enforcement action was unlikely to be taken against it. Full cooperation included conducting an independent internal investigation to determine the full extent of the company's worldwide bribery; sharing the results with the Commission, with the understanding they would be made public; and taking appropriate remedial steps to ensure that the problems were addressed and would not reoccur.[93] More than 500 companies, including more than 100 members of the Fortune 500, took part in the program and voluntarily disclosed in excess of $300 million in bribes and other questionable payments.[94]

The voluntary disclosure program operates on the same principle as all federal securities law, as Thomsen explains, ''that simply requiring companies to clearly and candidly describe what they are doing will cause them to decide to avoid certain problematic behavior.''

But in her October 16, 2006 speech, Assistant Attorney General, Fisher addressed business' principal misgivings with the voluntary disclosure program, that it carries too much risk for companies because the DOJ will not guarantee non-prosecution of a disclosing company. Or in the vernacular, the DOJ would not promise a ''pass'' and the corporations do not want to buy a ''pig in a poke.'' However, the DOJ's reticence is in the best interest of the public, and Fisher explains the rationale:

> Sometimes a single bribe is just the tip of the iceberg in terms of internal control problems, books-and-records violation, and other bribes. So it would not make sense for law enforcement to make one-size-fits-all promises about the benefits of voluntary disclosure before getting all of the facts.
>
> It also would not be in the best interests of law enforcement to make promises about lenient treatment in cases where the magnitude, duration, or high-level management involvement in the disclosed conduct may warrant a guilty plea and a significant penalty.[95]

Another concern is that the DOJ will require offending companies to hire outside consultants to install and then monitor compliance programs. For example, in its settlement, Siemens AG agreed to retain an independent compliance monitor for 4 years, to implement and maintain a robust compliance program, and to make reports to the company and the DOJ.[96] But automatically instituting such a program is not DOJ policy. An analysis is undertaken on a case-by-case basis when considering deferred prosecution agreements. DOJ will consider several factors including the strength of the company's existing management and compliance team, its existing FCPA policies and procedures, and the pervasiveness of the problem.[97]

The DOJ offers the Opinion Procedure to provide a useful guide to businesses. Concerned companies can file an opinion request with the DOJ, such as the 2008 Halliburton request,[98] and receive direction from the DOJ on how to address FCPA concerns. Fisher believes that the Opinion Procedure is underutilized by businesses but could be a useful tool for them.[99]

And finally, Fisher emphasized the importance of companies conducting strong transactional due diligence in the merger and acquisition of companies. Fisher noted that during GE's recent acquisition of Invision, GE learned that Invision had paid bribes for contracts for airport security machines in the Far East. The discovery prompted Invision to make a disclosure but it received a deferred prosecution and only paid a fine. GE's transactional due diligence efforts prevented Invision's FCPA problem from becoming GE's.[100]

What does the future hold for enforcement?

Given the broad reach of the FCPA, its accounting provisions, its penalties, increased domestic enforcement, and burgeoning interest in international cooperation, it is springtime for FCPA enforcement. Kevin Loftus points out that ''there is an increase in international cooperation, bribery is increasingly a focus of interest in other countries, and we are seeing an increased number of bribery prosecutions in jurisdictions other than the U.S. International efforts have increased substantially in this area.''[101] The Siemens settlement is an excellent example of this progress as the U.S. and Germany worked together to achieve settlements with Siemens AG in both countries while the investigation of individuals continues.[102] The Kellogg, Brown & Root LLC plea is another example, as the DOJ press release elaborated ''significant assistance was provided by …the authorities in France, Italy, Switzerland and the

U.K."[103] The high level of cooperation, including sharing information and evidence, was made possible by the use of mutual legal assistance provisions of the OECD Convention Public Officials in International Business Transactions.[104] Moritz observed that "this type of cross border cooperation is now really taking hold but was unheard of just a few years ago."[105]

Cooperation addresses one of the principal concerns described by Deputy Director Pistole, in that all corporations, not just American corporations, must fear their own country's prosecutors. "The goal of the FCPA law and law enforcement is to level the playing field. Efforts must be made to make foreign companies, even those not obligated to follow the FCPA, understand that FCPA type anti-corruption policies are the best for conducting business in every country." And that playing field can be leveled for law enforcement as well as business. If a country with few investigative resources wants to take advantage of investigation done by the FBI, then they need only file the MLAT. In addition, the FBI sponsors worldwide training in white-collar crime to teach investigators how to prove their cases.[106]

Pistole and Moritz emphasize that education and training must play an important role in reducing bribery. In American corporations, much of this can be accomplished internally as more corporations adopt and institute robust ethics and compliance programs. Foreign law enforcement agencies benefit from the FBI's policy of supplying FBI special agents to educate their officers on how to conduct corruption investigations. Foreign corporations are also anxious to learn. Moritz explained that "FCPA consultants now do as much FCPA consulting and training for non-U.S. corporations as American Corporations."[107] This change in practice is a strong indicator that anti-corruption is now a global issue. Loftus adds that "effective international education efforts would appear to include a focus on the insidious nature of bribery and on the collateral consequences on economic development and human rights that result in places where bribery flourishes."[108]

The future focus of law enforcement efforts is in part geographic and directed on developing countries such as the BRIC countries, Mexico, Korea. Moritz explained that "the BRIC countries are where the greatest amount of commercial investment is taking place. Those companies are making the largest investments in their infrastructure for roads, power plants, water, sewage, electrical grids, etc. Most of those contracts require companies to negotiate with the government and the growth is outpacing any governmental controls on the process. Most don't have the investigative structure or the will to prevent corruption and bribery so the corporations must self-regulate."[109]

Particular industries are also worthy of attention, including extraction industries such as oil exploration, drilling, and transport. These industries involve large amounts of money and resources, extensive international competition, and require negotiations with local and national governments. In the FCPA context, the extraction industries to present day are what international military sales were to the 1970s and 1980s. It is no coincidence that the Baker Hughes and Kellogg, Brown and Root were among the most recent settlements and that Halliburton was among the recent DOJ Opinion Procedures.[110]

Third-party agents remain a clear focus of future investigative activity.[111] The attention is in part because using the third party to conceal the bribe is so enticing. In the 1970s, when Lockheed established its intricate system for paying the bribes, it likely believed that it eliminated its vulnerability to disclosure.[112] There was no paper trail, but each participant could be undermined by the improper activities of its partners. And, although corporations may feel vulnerable to unrelated improper activities of the third-party agent, ironically, in Lockheed, the third party, a Yakuza "godfather," was undone by an American President.[113]

Pistole acknowledged that he had heard complaints from executives that it was unfair to hold a company liable if a third party agent gives the public official a gift without the company's knowledge.[114] But the third party has been the traditional conduit of bribes, and the FCPA would be powerless without provisions making the corporation responsible. How can the American corporation prevent the third party from giving a portion of his commission to a government official without seeking corporate authorization? The lesson is that the corporation must choose its third party agents carefully.[115]

Lockheed postscript

In March, 1976, A. Carl Kotchian was removed from his positions as Vice Chairman and Chief

Operating Officer at Lockheed. When interviewed by Robert Lindsey for a 1977 *New York Times* article about his time at Lockheed, Kotchian explained:

> My experience has some of the elements of Watergate. I can compare it because a lot of the things that came out in Watergate were things that were going on previously – and all of a sudden, there's a different set of standards…Lockheed has become the scapegoat for 300 companies that the SEC said were doing the same thing and Haughton (Daniel Haughton, who was forced to resign as Lockheed Chairman) and I are the scapegoats for the scapegoat.[116]

In 1977, Kotchian, and a Japanese writer, told his story in a book published in Japanese but not English. Much of the Lindsey interview, and apparently the book, detailed the intense competition of the aeronautics industry, the difficulty of competing against American, European, and Soviet Bloc companies who were willing to offer bribes, and Kotchian's belief that ''the United States is foolish to prevent such bribes now since it would mean a loss of foreign sales and indirectly hurt the 'free world' by driving some sales to Communist countries.''[117] Kotchian did what he thought was best for his company, its employees, and shareholders.

> Recalling Lockheed's 'superhuman effort' to survive as a corporation and the need for another major Tristar order for the company to continue the survival, he says: 'I must admit that my moral and ethical considerations gave way to the commercial gains that we had been seeking for so many hard days and weeks and years.'

Although Kotchian's motives were more financial than patriotic, he behaved consistently with his era. He was in an extremely competitive business that benefited America during the cold war. Many of his concerns were both sincere and realistic. Furthermore, when he testified before the Senate Subcommittee he apparently did so honestly. Some of this generation's corporate leaders, such as the Enron executives, and even Martha Stewart, found telling the whole truth difficult.

Kotchian's ethical dilemma, and that of sales agents of his time, may be illustrated by the penultimate scene in the James L. Brooks movie *Broadcast News*. The Holly Hunter character chastises the William Hurt character over a clearly unethical technique he used in a news report. Hunter remonstrates, ''You *totally* crossed the line with that piece!'' and Hurt responds that ''It's hard *not* to cross the line when they keep moving the little sucker, don't they?''[118] Both Kotchian and Hurt's character were on the wrong side of the ethical line, but neither even noticed the line until it was pointed out to them. Both argued the line moved, but it had not. What changed was the forcefulness with which it was pointed out. Now that the enforcement side is vociferously pointing at that line, no corporation can miss it.

Where has that anti-bribery line moved in the 30 years since the FCPA's enactment? Arguably, the movement is in a positive direction. The anti-corruption message is clear, and the penalties and enforcement methods are much stronger as a result of the ethical principles defined during the foundational Lockheed period.

In contrast to Kotchian's time, a sales manager now considering paying a bribe has many more concerns. Increasing review of internal accounting records makes recording the bribe more difficult. If the company is sold, the mergers and acquisition review accountants will be specifically looking for FCPA violations and likely know where to look. Ever since the company instituted a compliance program, every employee is trained on spotting FCPA issues. The third party agent may be involved in other illegal activity and if he gets caught, even for something unrelated to this deal, then he could give up the sales agent to save himself. International law enforcement agencies readily communicate with each other and what happens in ''Vegas'' may not stay in ''Vegas.'' And, if at a company like Siemens AG, where the managers authorizing bribes signed a yellow sticky note, rather than the signature line, of the phony invoices, the sales agent should bear in mind that the adhesive on those yellow sticky notes does not hold up well when documents are subpoenaed. In the end, the corporation may just self disclose, settle, and give up a sales agent who paid a bribe. Rather than be the hero for sealing the deal, the sales agent would be shunned as the employee who incurred millions in fines and disgorgements and tainted the company as unethical.

All of these changes have made the line brighter, stronger, and placed it firmly in a place that will benefit all commerce. Whereas Kotchian, who lived

well into his nineties, passing away on December 14, 2008, could argue his bribes saved his corporation, the modern sales agent paying a bribe risks endangering his fellow employee's livelihood. What is most important, the changes empower those in the right—those who choose not to pay the bribe.

Compliance and prevention

> *Compliance brings a premium in the market place—that's why companies throughout the world are now working to put into place real compliance programs—the most important development in today's fight against bribery.*
>
> (Richard L. Cassin)[119]

Compliance with the law and prevention of bribery has become a priority of leading transnational corporations, but again, mostly within the last decade. There are good reasons for this emphasis. The primary reason, as evidenced by Table IV and Appendix 2, is that bribery is becoming costly for corporations. It has been noted that the "expected cost of bribery is the probability of being caught times the probability of being convicted times the punishment levied."[120] Ten years ago, the expected cost was close to zero. Now, all three components of the expected cost equation have increased dramatically.

As a result of worldwide anti-bribery legislation, a quantum leap in enforcement, the effectiveness of NGOs in bringing the problem to the attention of the public, increased transparency, and widespread availability of information throughout the world, whistleblower protections and a host of other factors, the probability of being caught has increased. While we should not overstate the case, the large number of investigations in recent years is evidence that this probability is increasing. Furthermore, the cases that are prosecuted are egregious, and the probability of being convicted is extremely high.

We shall focus later in more detail on punishment considerations and the elements of effective compliance programs.

The United States Sentencing Commission was established as an independent agency in the Judicial Branch of government by the Comprehensive Crime Control Act of 1984 to provide guidelines for the sentencing of both individual and organizational offenders. Chapter 8 of the guidelines specifically addresses organizational compliance and corporate ethics programs and became effective in 1991.[121] The guidelines for organizations were amended and strengthened subsequent to passage of the Sarbanes–Oxley Act of 2002 to further deter and punish organizational criminal misconduct. Under the guidelines, "the prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense."[122] Thus, organizations can receive credit and, therefore, favorable sentencing treatment for having an effective compliance program in place. In a settlement agreement in the Metcalf & Eddy case in 1999,[123] the government clarified its position as to what constitutes an effective FCPA compliance program. While many of the elements are similar to those set forth in the sentencing guidelines, some go further and relate specifically to the FCPA. These elements include having a corporate policy against violations of the FCPA and standards and procedures designed to reduce the prospect of fraud, assignment of senior people to oversee compliance, performance of due diligence wherever appropriate including in the retention of third parties representing the organization with foreign government officials, and in mergers and acquisitions, agreements with third parties that compel them to comply with the law, FCPA training, effective communication of policies, and procedures throughout the organization, a system for reporting potential violations without retribution against those who report, and timely follow-up investigation and remedial action taken when violations are uncovered or policies or controls need improvement.[124]

In a deferred prosecution agreement in the Monsanto case in January 2005, in addition to including language similar to that set forth in the Metcalf & Eddy case describing an effective FCPA compliance program, an element was included that organizations should be "using objective measures" to identify high-risk countries or regions in which it does business and periodically "conduct rigorous FCPA audits of its operations in such regions or countries."[125] Such audits are often called diagnostic reviews by professional service firms.

Once an organization has instituted a compliance program, a risk assessment should be performed of its

operations that are international in scope, ranking its operations so that the locations with the highest risk of FCPA issues will be identified. Following the risk assessment, procedures should be performed (referred to as ''FCPA audits'' above in the Monsanto settlement agreement) with the objective of testing the effective implementation of the program and uncovering potential FCPA issues that may need investigation. Any issues arising either through an audit or other means indicating a potential FCPA violation should be investigated by the organization.

Developing, monitoring, and maintaining an effective FCPA compliance program

An effective compliance program includes program development, risk assessments, compliance audits, and investigations of potential issues.

Program development

The program should be developed keeping in mind the elements of an effective program as set out in the settlement agreements noted above. Some policies developed have legal consequences and if not drafted by a legal representative, organizations may benefit from having in-house or outside counsel review those policies for legal adequacy. The program policies, whether included in one or more policies, should include a code of conduct, gifts policy, training policy, political and charitable contributions policy, delegation of authority policy, and accounting policies regarding the proper recording of transactions.

Risk assessments

Organizations are well-served to understand the level of risk at unit operations that do business internationally. The information gathered during the risk assessment is evaluated to determine the level of risk and then thoughtful decisions can then be made about the procedures that should be undertaken to monitor those operations. Table V provides a summary of major risk assessment components.

FCPA compliance audits

After the compliance program is developed and risk assessments are performed, compliance auditing should be performed for the purpose described above, i.e., with the objective of testing the effective implementation of the program and uncovering potential FCPA issues that may need to be investigated. People performing such audits should be

TABLE V

FCPA risk assessment components

Determination of the Transparency International Corruption Perception rating for the country in which the unit operates;
Whether there are past incidents or allegations of bribery or corruption;
Whether the unit has a culture of commitment to compliance;
The extent to which the unit does business (sells products or provides services) with government agencies and officials;
Whether the unit uses third party intermediaries (agents, representatives, brokers, distributors, consultants, etc.) who have interaction with foreign government officials on behalf of the organization;
Whether the unit is a joint venture where joint venture partners may be or have contact with foreign government officials;
If a newly acquired unit, whether due diligence indicating FCPA issues may exist or the newly acquired unit continues to do business in the prior manner thus raising thus raising FCPA issues;
Other than as a customer, the extent to which the unit has contact with foreign government entities for such things as licensing, taxes, customs or other fees, and whether the unit is subject to any regulatory oversight;
Whether there is a strong financial team in place with appropriate internal controls;
Whether internal audits have been performed at the unit periodically and whether there were findings that could indicate potential FCPA issues;
Whether there are any known disputes with foreign government entities or officials that have been or are in the process of being resolved.

TABLE VI

Important FCPA compliance audit components

Review of risk assessments performed (see Table V) and any prior audits performed noting issues identified and determining if there are any known or suspected FCPA issues;
Evaluation of compliance with the program requirements including training and whether personnel are knowledge of the components of the program and their responsibilities under the program;
Interviews with management, compliance personnel, sales personnel, finance and accounting personnel, human resources personnel, and any others who have contact with foreign government officials or third parties who represent the unit to foreign government officials to gain insights on the effectiveness of the compliance program and any knowledge they have of potential FCPA issues;
Understanding the extent to which the unit does business with governmental entities and has contact with government officials and performing tests in this area;
Testing the recording of transactions for propriety to assess compliance with the books and records and internal controls requirements of the FCPA;
Disbursements testing focused on such areas as payments to third parties, to or on behalf of government officials, for licenses and other government fees, for gifts and entertainment or other things of value, for facilitating payments as defined in the FCPA, for payroll, for charitable or political contributions, and any payments to cash.

highly knowledgeable of the FCPA and of recent cases that have been adjudicated or settled, have extensive experience in conducting interviews, experience in the conduct of FCPA and/or fraud investigations, knowledge of internal control systems, understand GAAPs, and have strong analytical skills. Procedures to be performed in the FCPA compliance audits, either at the corporate office or at the unit site, are summarized in Table VI.

Responding to FCPA investigations

A focus on compliance and prevention is no doubt the most cost-effective method of limiting corporate losses resulting from FCPA violations. However, Michael G. Considine, a partner at Day Pitney, LLP and a former supervisor in the United States Attorney's Office for the Eastern District of New York, emphasizes that FCPA violations are sometimes difficult to detect and he notes, for example, that even "when the most diligent, ethical, conscientious and legally compliant U.S.-based corporation acquires another company, it may acquire an FCPA problem and they may not realize it immediately."[126]

Whenever potential FCPA issues are identified either through the FCPA compliance audits or by other means, it is important that organizations respond timely and appropriately. Ideally, an organization has a fraud response and investigation plan that will guide its response. Information available indicating an FCPA issue should be discussed with inside legal counsel as soon as possible and a decision made about next steps.

Table VII summarizes important considerations in conducting an FCPA investigation.

Professional service firms experienced in forensic accounting, investigations, and compliance monitoring can play an important role in assisting organizations in each of the areas described above. While some organizations have the internal capability to develop and monitor FCPA compliance programs, most do not. Corporations must realize that the FCPA is a criminal statute, and it carries substantial consequences for organizations not in compliance.[127]

If contacted by a corporation, "the defense attorney's first move will be to hire a professional service firm to review the company's records, interview the employees and assemble a report."[128] Moritz explains that the accounting review will often mirror the types of money-laundering investigations he conducted when with the FBI. Moritz looks for transactions through the known safe haven countries, such as the Isle of Man and Madeira Island that appeared in the Baker Hughes and Jack Stanley cases. He also looks for odd combinations like an Argentinean company sending money to Brazil through a Uruguay bank.[129]

At this point, the company faces huge ethical and practical decisions. As Considine explains, "If DOJ is not

TABLE VII

Issues regarding the conduct of FCPA investigations

Preservation of evidence – Steps should be taken at the outset of the investigation to preserve evidence that is likely to exist that will help in satisfactorily completing the investigation. This will likely include both hard-copy documents and electronic information;
Who will lead the investigation – When a decision is made to conduct an investigation having an attorney lead the investigation will enable the organization to take advantage of legal ''privileges'' available. Oftentimes forensic accountants perform a critical role in such investigation but usually report to an attorney, either in-house or outside legal counsel, in performing the work;
Utilizing professionals who have the appropriate experience – Forensic accounting skills are critical to the conduct of an effective FCPA investigation. The skills include investigative experience, knowledge of the FCPA and recent cases adjudicated or settled, interviewing skills, and knowledge of internal controls and GAAP. Many organizations recognize these skills are not available with internal staff and seek the assistance of outside professional service firms. In addition, many organizations see a benefit in having the investigation conducted with outside professionals that are thought to be more independent and for various reasons may be looked upon favorably by law enforcement and regulators. There may also be a need for highly specialized professionals such as computer forensics experts and similar considerations should be given as to whether to use internal or external professionals;
Notifications – Consideration should be given to who should receive notification of the investigation and when. There are many parties of interest to be considered including the senior management, board of directors and audit committee, external accountants, organization personnel, shareholders and potentially law enforcement and the regulators; Notification decisions should be made with careful consideration.

already aware of the problem, prompt notification must be addressed early on.''[130] Does the company make disclosure before the internal investigation is completed or after? The argument for making prompt disclosure is to earn credit with the DOJ, especially when a violation must be disclosed to the SEC anyway. It is worse if the DOJ learns on its own first. And, how would the DOJ find out? An employee involved in a problematic transaction may, through counsel, race into the DOJ in an attempt to cooperate against the company in exchange for lenient treatment. The argument against notifying the DOJ is that if the internal investigation is not complete, how certain then is the corporation about the nature and extent (if any) of the reported problem? If notification is too early, then the corporation may quickly lose control of the internal investigation, and as it drags on, the company may be hurt by rumors of an FCPA problem.

Considine explains that ''all of these decisions are difficult, heavily fact driven and complicated when made before the full scale of the problem is known.''[131] But if the company has a robust compliance program in place, then the bribery was conducted in an undetectable manner, and it is clear the bad actors were acting without company approval or support, with the company having much to work with when negotiating with the DOJ.

In her October 16, 2006 address to the American Bar Association, the United States DOJ Assistant Attorney General Alice Fisher emphasized:

> There is always a benefit to corporate cooperation, including voluntary disclosure…The fact is, if you are doing the things you should be doing – whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts – you will get a benefit. It may not mean that your client will get a complete pass, but you will get a real, tangible benefit.[132]

This explanation of law enforcement procedures is included to illustrate that while ethical choices are admirable and appropriate; they are often easier for decision makers if they can point to what the company will face by choosing the wrong path and the benefits of choosing the correct one.

Dealing with gift-giving issues

> Approving expensive gifts and lavish hospitality can be symptomatic of weak internal controls.[133]

TABLE VIII

TRACE gifts and hospitality guidelines

Be reasonable and customary under the circumstances;
Not be motivated by a desire to influence the foreign official inappropriately;
Be tasteful and commensurate with generally accepted standards for professional courtesy in the country where the company has its headquarters;
Be provided openly and transparently;
Be given in good faith and with expectation of reciprocity;
Be provided in connection with a bona fide and legitimate business purpose in the case of hospitality and travel;
Not be provided to any foreign official or group of foreign officials with such regularity or frequency as to create an appearance of impropriety or undermine the purpose of this policy;
Comply with local laws and regulations that apply to the foreign official.

Among the many resources available to corporations seeking guidance for assessing questionable payments is the UN Global Compact Website. The site addresses many bribery-related issues, including a discussion of issues related to gifts, meals, and entertainment by Wrage (2007) of TRACE. Examples of issues addressed are China's New Year tradition of *hong bao* – giving little red envelopes containing small amounts of cash, the unexpected arrival for dinner of spouses of governmental officials, the tradition of exchanging pens at a signing ceremony (where a government official specified a certain pen costing $300), involuntary entertainment, and a business trip prolonged for foreign governmental officials for legitimate business reasons. TRACE provides a list of guidelines for foreign officials which are summarized in Table VIII. TRACE also suggests that companies address in their policy statements issues such as employee discretion, fixed monetary thresholds, and management approval.

TRACE also notes that local laws of foreign countries often prohibit officials from receiving certain benefits and that most codes of conduct for companies operating internationally state that the companies will comply with all local laws. However, keeping up-to-date with the local laws and customs of the various countries in which transnational firms operate can be a difficult, time-consuming, and expensive process. In order to address this issue, TRACE has developed an on-line listing of local regulations, including both the black letter law and comments on local custom.

This discussion illustrates that it is possible for corporations to behave ethically, to avoid FCPA violations and to adhere to local customs related to gift giving. TRACE notes that dismissing the issue of local law as low risk is not advisable. ''Media and enforcement agencies are paying attention…to this area and both liability and reputational damage can result.''[134]

The ethics of facilitation payments

> The mixed message of permissible small bribes versus impermissible large bribes creates a risky arena for business activities.[135]

As noted above, even the best-intentioned transnational corporations are challenged to fully comply with anti-bribery legal and ethical ideals due to the complex environment in which they operate. Another important ethical issue concerns policies for addressing facilitation payments (''grease payments'') that are excluded from the FCPA and other anti-bribery legislation. We now consider this issue and a suggested ''best practice'' for addressing it.

Facilitation payments are small bribes which are paid to government officials to encourage them to perform routine, non-discretionary governmental tasks.[136] Frequent examples are a customs official charging a small fee to release household goods or a guard at a checkpoint charging a Coca Cola delivery driver a case of Coke for letting him pass. But the standards for facilitation payments tend to stretch, and the limits are hard to define. In its publication, *The High Cost of Small Bribes*, TRACE[137] uses statistical data from its survey of 42 countries engaged in international business to examine the facilitating payments issue and ultimately recommend that corporations should stop the practice.

TRACE emphasizes that despite the small amounts, grease payments are still bribes. In that sense, they cause problems for corporations. These include the consequences of having a double standard. For example, why should the American or Canadian agree to pay a bribe for police or telephone service in the foreign country when they would be outraged if a bribe was demanded in their own country, even if small? The facilitating payments also create a confusing message when training foreign employees. The mixed message of permissible small bribes and impermissible large ones becomes a slippery slope as the small bribes are initially hard to define and quickly grow. The payments also diminish the corporation's reputation in the community. The legal risks to the corporation include the inherent illegality and violation of local laws, the difficulty in maintaining complete accounting records, resolving divergent practices in differing countries and encouraging an atmosphere where if it is acceptable that if a corporation can bribe its way through customs, then why not a terrorist? And, the final argument is efficiency. Once a corporation gets the reputation as a payer, the demands will continue whether or not the services improve. What is more, as every small bureaucrat realizes that the corporation is a soft touch, they all want a piece of the action, and the corporate representatives will spend more, not less time dealing with them.

TRACE recommends that except when dealing with a grease payment to resolve a medical or safety issue for an employee, which DOJ acknowledges does not violate FCPA,[138] the corporation should establish a policy of not paying the bribes and emphasize training. Most of the corporations in their survey advised that after stopping the payments, the number of demands decreased, and it had little effect on the efficiency of the corporation.

Assessment of progress and suggestions for future research

Our purpose has been to summarize trends in the international fight against corruption, with a specific focus on the unethical practice of bribery. We commented on society's universal disdain for bribery based on economic and moral considerations, summarized estimates of the dollar amount and the extent of bribery, summarized legislation, discussed the roles of non-governmental organizations and the activities of enforcement agencies, and discussed compliance programs. We conclude with an evaluation of progress based on our model components of hard law legislation, soft law mechanisms used by NGOs, enforcement and compliance, suggestions for strengthening each model component, and suggestions for future research.

Legislation

By all measures, tremendous progress has been made with anti-bribery legislation in recent years. Thirty years ago, the FCPA stood alone as the only international anti-bribery legislation. During approximately the past decade, new legislation includes the OECD Convention, adopted by 37 countries, enabling country-specific legislation by its signatory countries, the UN Convention Against Corruption, with 140 signatory countries and many other agreements.[139] Primary problem countries are China, India, and Russia where laws criminalizing international bribe paying do not exist. In these countries, the present emphasis seems to be on bribe recipients and most other countries have criminalized the receipt of bribes for decades. However, organizations such as the UN and TI need to continue to exert their influence to have cross-border anti-bribery legislation enacted in countries where it is lacking, with a particular focus on China, India, and Russia. In addition, organizations such as the OECD through its Working Groups need to continue to monitor anti-bribery legislation, identify weaknesses, and recommend ways to strengthen it. Also, a greater focus on MLATs and other forms of international cooperation would be helpful.

NGOs

Fifteen years ago, TI did not exist, and neither the WEF nor the International Chamber of Commerce had yet launched their anti-corruption campaigns. Today, TI is a highly visible advocacy and accountability group in the fight against corruption, and it publishes the most comprehensive and respected measures of bribery and corruption. The

WEF PACI initiative is another example of the important role that NGOs can play. Perhaps the most important tool used by these groups is the Internet. Technology has allowed these organizations to quickly share information globally and to shine a bright light on the bribery problem. Transparency is bribery's biggest enemy.

One important focus of NGOs should be on education. While we have emphasized the universal disdain for bribery among mainstream society, changing the attitudes of those outside the mainstream is complicated. Gwirtzman (1975) describes a sentiment that still rings true today. "In most developing countries, civil-service salaries are deliberately low…on the assumption that people will supplement their salaries by taking money where they can find it. Where political instability is the rule, the tenure of high officials is always uncertain and often short. Bribes provide a form of retirement fund. It is considered far more patriotic to take the money from rich foreign corporations than out of one's own country."[140] With these countries in the midst of development, that philosophy is misplaced and must be eradicated.

NGOs and other groups can play an extremely important role by strengthening their reporting and tracking of specific bribery cases. For example, TI compiles a report on foreign bribery cases and investigations within OECD countries, but names and references to specific cases within individual countries are not provided. Similarly, for U.S. FCPA cases, researchers need to rely on compilations by law firms and the FCPA blog. For BRIC countries, the reporting is particularly weak. The compilation and maintenance of a comprehensive and current transnational bribery data base would be an extremely useful tool for researchers, and one that is not readily available today.

Another useful measure would be an estimate of the dollar magnitude of trans-national bribery within individual countries. Perhaps by combining TI's BPI with country measures of international trade, some crude measures could be developed.

Enforcement

Enforcement lags legislation, and is one of the two areas where the most progress needs to be made. TI concludes in its 2008 CPI report that there has been no diminution in the perception of worldwide corruption. About one in four respondents to the Ernst and Young (2008) 10th global fraud survey indicated that their company had experienced an incidence of bribery and corruption in the past 2 years. The actual percentage of companies involved in bribery is likely to be much higher due to the clandestine nature of the activity. As additional indicators, TI states that the performance of Canada, Japan, and the U.K. is inadequate, and the focus on in China, India, and Russia is primarily on the demand side of bribery. The trends in enforcement that we summarize in Table IV are positive, but clearly, the global community has only scratched the surface from an enforcement standpoint. Enforcement groups continually seek more resources for attacking the problem.

Compliance

The United Nations estimates that today there are about 77,000 transnational corporations with more than 770,000 foreign affiliates.[141] In addition, large multinational corporations may have several 100, 000 worldwide third party vendors and agents. Scott Moritz comments further on the difficulty of assuring compliance by large, transnational companies, due to the decentralized manner in which third parties are paid:

> The company may say it's on SAP or Oracle and its data are in one system, but many companies have frequently grown through acquisitions so, risks and record keeping are diffused throughout their systems. Just about every group within the company can open a vendor at X dollar level so there may not be sufficient checks and balances in place. Since third-party risk is very real, this diffusion enables people with the intent to conceal to be successful.[142]

New legislation, including Sarbanes–Oxley with its emphasis on internal control and trends in enforcement and penalties, has awakened many corporations to the need to implement strong compliance programs. Also, many professional service firms are working with corporations to assure compliance. We have discussed the key elements of effective compliance in this article. However, the

UN statistics concerning the number of transnational corporations, affiliates, and agents highlight the magnitude of the task and the need for an even greater focus on compliance. Programs such as the WEF's PACI initiative, where, at last count, only 141 companies are participating, is indicative of the work left to be done.

A particularly difficult compliance challenge occurs when dealing with third-party agents and vendors. Daylight Forensic maintains a comprehensive database of individuals with a history of inappropriate behavior[143] and corporations should make use of this and similar resources.

Suggestions for future research

Research is needed to track progress in the battle against transnational bribery and corruption. The development of more comprehensive and current databases on bribery cases would assist in enabling such research. A particular emphasis should be on BRIC countries and other TI high Bribe Payer Index countries.

In revealing the high cost of bribery to individual corporations, it would be useful to track all of the components of the damages including fines and penalties, the cost of management time and resources devoted to managing the case, damages related to shareholder and other party lawsuits, prohibitions from contracting, and various reputational effects. We believe that greater awareness of the high cost of bribery to bribe payers would go a long way toward convincing corporations that investments in prevention can be very cost effective. In a similar vein, there is a need for greater understanding of the effects of bribery actions on corporate reputation. In summarizing the results of empirical studies of measures affecting corporate reputation, Schwaiger (2004) lists ethical behavior along with a number of other important attributes. It would be interesting to see whether bribery-related variables such as PACI membership, FCPA violations, and no-bribe policies have significant explanatory power.

Research is needed to develop model compliance programs. In addition, case studies that focus on best practices for using technology to uncover bribery would be useful. Case studies focusing on the experiences of companies who have adopted no-grease payment policies and additional research related to ''ethical'' grease payments (e.g., situations involving medical care for employees) would also be useful.

Finally, it would be interesting to use our anti-bribery model to assess progress in dealing with other ethical issues of a global dimension such as environmental stewardship and human rights. For example, research on the effectiveness of hard and soft law mechanisms to deal with issues of environmental stewardship may reveal that, while there is agreement as to the moral imperative of environmental stewardship, application of that principle into specific legal mandates involves prudential concerns for which there is likely extreme disagreement concerning ''moral'' and ''immoral'' conduct. Conversely, the consensus that bribery is immoral translates, in general, to an agreement on prohibited conduct. Thus, our model which aptly applies to the fight against bribery may not fit perfectly when analyzing other ethical issues; however, the model provides a basis for exploring the advancement of ethical thinking in other areas as well, opening the opportunity for further research on expanded or alternative models.

In conclusion, 10 years ago there was little evidence of any real progress in combating international bribery and corruption. Today, as a result of new legislation, advocacy and monitoring by NGOs, positive trends in enforcement, and compliance, we can clearly point to the beginning of a new era of progress. Bribery and corruption result in huge costs to society, there is widespread awareness of these costs, and the world is starting to respond. Our goal should be to work toward and be able to point to a significant reduction in bribery and corruption over the next decade.

Notes

[1] Overview of the UN Global Compact, http://www.unglobalcompact.org/AbouttheGC/index.html.

[2] For example, in a philosophical sense, see Wilber (2007).

[3] Dalton (2006, pp. 584–585).

[4] World Bank, *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*. http://web.worldbank.org/WBSITE/

EXTERNAL/NEWS/0,,content MDK:20190295~menu.

[5] *Ibid*. The estimate is considered conservative and does not include several other categories of bribes.

[6] See http://www.youtube.com/watch?v:KesmuuOERVw. The presentation forms a part of a global CEO anti-corruption/anti-bribery campaign sponsored by the Geneva-based WEF.

[7] Wesberry Jr. (1998).

[8] Gray and Kaufmann (1998, p. 8).

[9] Dalton (2006, pp. 589–590).

[10] Shaw (2000, pp. 706–707).

[11] Kotchian, from *The New York Times* article 'Kotchian Calls Himself the Scapegoat,' by Lindsay (1977).

[12] Bruno (2009), found at www.trutv.com/library/crime/gangsters_outlaws/gang/yakuza names Kodama as the Yakuza's leader. Kodama was also imprisoned after World War II as a Class A war criminal.

[13] Smith (1976).

[14] Watergate Complex Security log at http://www.watergate.info/burglary/wills-security-log.shtml.

[15] Jensen (1973).

[16] 'Why They Did What They Did,' *The New York Times*, editorial, March 9, 1975.

[17] Gwirtzman (1975).

[18] Smith (1976).

[19] *Ibid*.

[20] Madden (1976).

[21] Although efforts to eliminate international bribery and corruption were arguably launched by the FCPA, it is never mentioned outside of the U.S. The UN and other groups refer to the efforts as "anti-bribery" or "anti-corruption," not FCPA. Presumably, this is to emphasize that the efforts are international, rather than dictated by one or a few countries. Interview of Scott Moritz, former Special Agent, FBI and currently Executive Director, Daylight Forensics and Advisory, by Chris Favo on December 16, 2008.

[22] 15 U.S.C. §§ 78m(b)(2) and b(5).

[23] See Sebelius (2008) (citing Deming 2002) ("Congress enacted the FCPA's accounting provisions as an additional deterrent to bribery based on its determination that U.S. companies concealed most bribery of foreign officials in their corporate books.").

[24] 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3.

[25] Pub. L. No. 100-418, § 5003, 102 Stat. 1415, 1424 (1988). The affirmative defenses are codified at 15 U.S.C. § 78dd-1(c) and 15 U.S.C. § 78dd-2(c). In the 1988 Amendment, Congress also directed the President to "develop an anti-bribery agreement 'with members of the Organization of Economic Cooperation and Development.'" Sebelius (2008) (quoting Pub. L. No. 100-418, § 5003, 102 Stat. 1415, 1424 (1988).

[26] Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 0001-0006, 112 Stat. 3302 (1998).

[27] See 15 U.S.C. § 78dd-1(a) (3) and 78dd-2(a)(3) providing for criminal liability for "any person" and 15 U.S.C. § 78dd-3(a)(3) creating criminal liability for "persons other than issuers or domestic concerns" and specifically for "any person," with "person" defined as "any natural person other than a national of the U.S.... [or a business entity] organized under the law of a foreign nation or a political subdivision thereof." 15 U.S.C.§ 78dd-3(f)(1).

[28] Specifically, the record keeping requirements apply to "[e]very issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title...." 15 U.S.C. § 78m(b)(2).

[29] Sebelius (2008, pp. 579, 584).

[30] 15 U.S.C. § 78m(b)(6).

[31] Sebelius (2008, pp. 579, 584).

[32] 15 U.S.C. § 78m(b)(2)(A).

[33] 15 U.S.C. § 78m(b)(2)B).

[34] 15 U.S.C. § 78m(b)(7).

[35] 15 U.S.C. § 78m(b)(5).

[36] See *supra* at n.10.

[37] 15 U.S.C. § 78dd-1(a) (for issuers), 78dd-2(a) (for domestic concerns), and 78dd-3(a) (for "persons other than issuers or domestic concerns").

[38] Puckett (2008, pp. 149, 152) (quoting Tarun 2006, at p. 3, http://www.lw.com/upload/pubContent/_pdf/pub1287_1.pdf).

[39] 15 U.S.C. § 78dd-1(b) (for issuers); 15 U.S.C. § 78dd-2(b) (for domestic concerns); 15 U.S.C. § 78dd-3(b) (for "persons other than issuers or domestic concerns").

[40] 15 U.S.C. § 78dd-1(c) (for issuers); 15 U.S.C. § 78dd-2(c) (for domestic concerns); 15 U.S.C. § 78dd-3(c) (for "persons other than issuers or domestic concerns").

[41] 15 U.S.C. § 78dd-1(c) (for issuers); 15 U.S.C. § 78dd-2(c) (for domestic concerns); 15 U.S.C. § 78dd-3(d) (for "persons other than issuers or domestic concerns").

[42] Cragg and Woof (2002, p. 116).

[43] George et al. (2000). The authors note the intervening role of the Marshall Plan in the creation of the OECD.

[44] Skubik (2005).

[45] The five non-member countries are Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic.

[46] Organization for Economic Cooperation and Development (2008).
[47] *Ibid*.
[48] OECD Directorate, Anti-Bribery Convention (2008).
[49] Article 15(1) of the OECD Convention provides that "[t]his Convention shall enter into force on the 16th day following the date upon which five of the 10 countries which have the 10 largest export shares (see annex), and which represent by themselves at least 60% of the combined total exports of those 10 countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the 16th day after deposit of its instrument." (OECD Convention 2008).
[50] The 37 countries are Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, South America, Spain, Sweden, Switzerland, Turkey, The U.K., and The U.S. (OECD Directorate, Anti-Bribery Convention, Information by Country (2008)).
[51] Note the analysis of OECD member Brazil in Appendix 1.
[52] Not to be confused with the UN Convention Against Corruption but part of a broader initiative to deal with a host of societal issues, The UNGC "presents a unique strategic platform for participants to advance their commitments to sustainability and corporate citizenship." (UNGC). It encourages corporations to embrace a set of core values captured by 10 principles related to human rights, labor, environment, and anti-corruption. Significantly, the anti-corruption principle – "Businesses should work against corruption and bribery in all its forms, including extortion and bribery," – was added to the Global Compact in 2004. Almost 6,000 business and other stakeholders from more than 130 countries are supporting the initiative. For businesses, there is a "Communication of Progress" requirement to describe in their annual reports or similar documents, ways in which they implement the principles and support sustainability objectives. In June, 2008, the UNGC announced that 630 companies have been removed from its list of participants due to failure to communicate progress.
[53] http://www.unodc.org//unodc/en/treaties/CAC/signatories.html.
[54] United Nations Office on Drugs and Crime (2006).
[55] United Nations General Assembly (2003).
[56] 'Call for Law on Bribing Foreign Officials,' *China.Org.Cn* at http://www.china.org.cn/english/government/228935.htm.
[57] Rose et al. (2007, p. 72).
[58] *Ibid*, p. 72.
[59] *Ibid*, p. 72.
[60] Transparency International estimates that corruption has increased by 700% since 2001, and it is estimated that corruption costs the country $240 billion annually, an amount only slightly less than the government's yearly revenues. See Daly (2007).
[61] However, in its 2008 *G8 Progress Report,* TI notes that the while promised anti-corruption commitments (under UNCAC) have not materialized.
[62] Daly, *op cit*.
[63] Salbu (1999, p. 224).
[64] Delaney (2005, p. 23).
[65] *Ibid*., p. 23.
[66] See TI's homepage at http://www.transparency.org/layout/set/print/news_room/faq/faq_ti.
[67] Seligson (2006) notes some of the limitations of the CPI. It is a measure of the *perception* of corruption only, it varies across countries in terms on the number of survey sources used (fewer sources for low international trade countries), it may suffer from an endogeneity problem (the index is likely correlated with measures of economic progress), and it measures relative corruption, not absolute amounts. In spite of these limitations, the CPI remains the most highly respected and widely used measure of international corruption.
[68] Transparency International, *Bribe Payers Index* (BPI) (2006) *Analysis Report*, p. 3.
[69] *Ibid*.
[70] The surveys are not strictly comparable. The 2006 survey is based on responses of 11,232 business executives from 125 countries while the 2008 survey is based on interviews with 2,742 business executives in 26 countries. The following countries included in the 2006 survey are not in the 2008 survey: Sweden, UAE, Portugal, Israel, Saudi Arabia, Malaysia, and Turkey.
[71] Average scores are higher in 2008 than in 2006. To what extent, the change in average is due to changes in the sampling procedures, is unknown.
[72] See 12/15/08 Press Release at http://www.transparency.org/layout/set/print/news_room/latest_news/press_releases/2008/bpi_2008_en.
[73] Transparency International (2007).
[74] WEF – FAQs at http://www.weforum.org.en/about/FAQs/index.htm.
[75] The WEF indicates that PACI is a multi-stakeholder initiative that includes the Basel Institute on Governance, the International Chamber of Commerce,

the OECD, TI, the United Nations Global Compact, multilateral development banks, and selected international financial institutions.

[76] See WEF *PACI 2008 Highlighting Achievers Survey* at http://www.weforum/org/en/initiatives/paci/HighlightingAchieversSurvey/index.htm.

[77] International Chamber of Commerce (2009).

[78] Cassin (2008).

[79] Newcomb and Urofsky (2007).

[80] Mendelsohn (2009).

[81] *Ibid*.

[82] The Lockheed Mystery (Con't.) (1976).

[83] Mendelsohn (as above).

[84] *Daily Mail Reporter* article 'Serious Fraud Office DID act lawfully by halting BAE corruption probe, Law Lords rule,' published July 30, 2008.

[85] *Forbes.com*. Market Scan article by Ram (2008).

[86] Interview with Kevin M. Loftus, a former Branch Chief at the SEC who oversaw SEC efforts in the Baker Hughes case, and now Counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP by Chris Favo November 21, 2008.

[87] Article 9 states that "Each party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person."

[88] See http://travel.state.gov/law/info/judicial/judicial_690.html.

[89] Anti-corruption watchdog signs cooperation deal with FBI (2008).

[90] Interview of Pistole (2008) FBI Deputy Director, by Chris Favo on December 15, 2008.

[91] Interview of John S. Pistole by Chris Favo on December 01, 2009.

[92] Interview of Moritz (2008) by Chris Favo on December 16, 2008.

[93] Sporkin (1998).

[94] 'Business without Bribes,' *NEWSWEEK*, February 19, 1979, p. 63.

[95] Prepared remarks of Alice S. Fisher, Assistant Attorney General of the United States Department of Justice at the American Bar Association National Institute on the Foreign Corrupt Practices Act. Omni Shoreham Hotel, Washington D.C., October 16, 2006.

[96] DOJ immediate press release, December, 15, 2008, 'Siemens AG and three subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines,' at p. 3.

[97] Fisher (as above).

[98] DOJ Opinion Procedure Release 08-02, June 13, 2008. Halliburton had made an offer to purchase a British business "involved in well flow management and providing specialized products and services in the upstream oil and gas industry." Halliburton submitted a request for direction on whether acquiring the company would violate FCPA, whether Halliburton would "inherit" the company's FCPA problems, and whether Halliburton would be liable for any FCPA violations occurring post acquisition but pre due diligence and compliance. DOJ provided direction on how Halliburton could acquire the company and comply with the FCPA.

[99] Fisher (as above).

[100] Fisher (as above).

[101] Loftus (2008).

[102] Dougherty (2008).

[103] Department of Justice Press Release dated February 11, 2009 "Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine."

[104] DOJ immediate press release, December, 15, 2008, 'Siemens AG and three subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines.'

[105] Moritz, Scott. Executive Director, Daylight Forensic & Advisory, LLC telephone interview by Chris Favo December 16, 2008.

[106] Pistole (2008).

[107] Moritz (as above).

[108] Loftus (as above).

[109] Moritz (as above).

[110] United States Department of Justice Opinion Procedure Release 08-02.

[111] Pistole (as above) and Moritz (as above).

[112] Madden (1976). Reports Senator Church's questioning of Kotchian before the Senate Committee. Kotchian describes a system of paying bribes to Japanese officials through a Hong Kong company controlled by Kodama: *Church: "They provided the cover?" Kotchian: "Yes, sir."*

[113] 'The Lockheed Mystery (Cont'd.),'*Time Magazine*, September 13, 1976.

[114] Pistole (as above).

[115] Daylight Forensics LLC maintains a comprehensive historical database of individuals who have developed a history of inappropriate behavior. A query will reveal if the individual has been involved with other FCPA cases, or has contacts with corporations or individuals that should raise red flags.

[116] 'Kotchian Calls Himself Scapegoat,' by Lindsay (1977) *The New York Times*, published 07/03/1977.
[117] *Ibid*.
[118] *Broadcast News*, Released 1987, Twentieth Century Fox.
[119] Cassin (2008).
[120] Delaney (2005, p. 32).
[121] The United States Sentencing Commission Organizational Guidelines.
[122] United States Sentencing Commission (2005).
[123] U.S. Department of Justice. Consent and Undertaking of Metcalf & Eddy, Inc.
[124] *Ibid*.
[125] U.S. Department of Justice Press Release. 'Monsanto Company Charged With Bribing Indonesian Government Official: Prosecution Deferred for Three Years.'
[126] Considine, Michael G. Partner, Day, Pitney, LLP. Interview by Chris Favo November 14, 2008.
[127] Stulb (2008).
[128] Considine (as above).
[129] Moritz (as above).
[130] Considine (as above).
[131] Considine (as above).
[132] Fisher (as above).
[133] Wrage (2007, p. 80).
[134] Wrage (2007, p. 82).
[135] Wrage (2007, p. 69).
[136] 'The High Cost of Small Bribes,' published by TRACE, Transparent Agents and Contracting Entities.
[137] TRACE International, Inc. is a non-profit organization that supplies anti-bribery compliance products to transnational corporations. "TRACE provides several core services and products including due diligence reports on commercial intermediaries; model compliance policies; an online Resource Center with foreign local law summaries, including guidelines on gifts and hospitality; in-person and online anti-bribery training; and research on corporate best practices."
[138] As Mendelsohn explained, "True extortion through threat to life or physical safety falls outside the scope of the FCPA's prohibitions."
[139] Other agreements include, but are not limited, to the OAS Inter-American Convention Against Corruption, the African Union's Convention on Preventing and Combating Corruption, and the European Union's Criminal Law Convention Against Corruption.
[140] Gwirtzman (1975).
[141] United Nations (2007).
[142] Moritz (as above).
[143] Written response to questions submitted to Scott Moritz, December 16, 2008.
[144] OECD Convention (2008, Article 1(1), (2)).
[145] OECD Convention (2008, Article 7).
[146] OECD Convention (2008, Article 1(4)(a)).
[147] Foreign Corrupt Practices Act, 15 U.S.C.
[148] OECD Convention.
[149] OECD Convention (2008, Article 8).
[150] OECD Convention (2008, Article 3).
[151] Articles 4(1), in full, provides: "Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory." (OECD Convention 2008, Articles 4(1)).
[152] Article 4(2), in full, provides: "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles." (OECD Convention 2008, Articles 4(2)).
[153] OECD Convention (2008, Articles 4(4)).
[154] OECD Convention (2008, Articles 4(3)).
[155] OECD Convention (2008, Articles 9(1)).
[156] *Ibid*.
[157] OECD Convention (2008, Articles 9(3)).
[158] Specifically, Article 10 provides:

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offense of bribery of a foreign public official.
3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offense of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offense for which extradition is sought is within

the scope of Article 1 of this Convention (OECD Convention 2008).

[159] OECD Convention (2008, Articles 5).

[160] OECD Convention (2008, Articles 6). A statute of limitations establishes the time period in which any prosecution must be brought. If the signatory nation specified a very short statute of limitations, the government could avoid the defeat the substantive provisions of OECD by preventing effective enforcement on those provisions.

[161] OECD Convention (2008, Articles 12). A statute of limitations establishes the time period in which any prosecution must be brought. If the signatory nation specified a very short statute of limitations, the government could avoid the defeat the substantive provisions of OECD by preventing effective enforcement on those provisions.

[162] *Ibid*.

[163] OECD Directorate. OECD Working Group on Bribery in International Business Transactions (2008).

[164] *Ibid*.

[165] *Ibid*.

[166] Specifically, the 1997 Revised Recommendations urge member nations to assure their accounting, audit and control mandates are consistent with the following principles:

A. Adequate accounting requirements

(i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

(ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

(iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B. Independent External Audit

(i) Member countries should consider whether requirements to submit to external audit are adequate.

(ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

(iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

(iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C. Internal company controls

(i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

(ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

(iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

(iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

[167] Specifically, the OECD Convention requires that "[a]ll countries party to the Convention commit themselves to ensuring that their national parliaments approve the Convention and pass legislation necessary for its ratification and implementation into national law" (OECD Directorate Anti-Bribery Convention: Entry into Face of Convention (2008)).

[168] OECD Directorate. Commentaries on the OECD Convention on Combatting Bribery (2008). For a criticism of the "functional equivalent" approach, see Tronnes (2000, pp. 117–118).

[169] *Ibid*.

[170] OECD Directorate. 1977 Revised of the Council on Combatting Bribery in International Business Transactions (2008).

[171] *Ibid*.

[172] OECD Directorate (2008).

[173] OECD Directorate. OECD Anti-Bribery Convention: National Implementing Legislation (2008).

[174] *Ibid*.

[175] *Ibid*.

[176] *Ibid*.

[177] The procedures and elements of the Phase 1 review are explained at the OECD (2008) Website.

[178] The procedures and elements of the Phase 2 review are explained at the OECD (2008) Website.
[179] The Mid-Term study is a 164-page document available at the OECD (2008) Website.
[180] OECD Directorate. Steps taken by France (2008).
[181] *Ibid*.
[182] *Ibid*.
[183] OECD Directorate. Steps taken by France (2008).
[184] *Ibid*.
[185] *Ibid*.
[186] *Ibid*. at p. 53.
[187] *Ibid*.
[188] *Ibid*.
[189] Both the Phase 1 and Phase 2 reports noted concern that France's three-year statute of limitation was inadequate. See Phase 1 Report at p. 31, 2008.
[190] *Ibid*.
[191] *Ibid*.
[192] OECD Directorate. Steps taken by Germany (2008).
[193] *Ibid*.
[194] OECD Directorate. Steps taken by Germany (2008).
[195] *Ibid*.
[196] *Ibid*.
[197] *Ibid*. at pp. 55–56.
[198] *Ibid*. at p. 56.
[199] *Ibid*.
[200] OECD Directorate. Steps taken by Great Britain (2008).
[201] *Ibid*.
[202] Phase 1 Review at 1, 2008.
[203] *Ibid*.
[204] *Ibid*.
[205] OECD Directorate. Steps taken by Great Britain (2008).
[206] *Ibid*. at p. 142.
[207] *Ibid*.
[208] *Ibid*. at p. 143.
[209] *Ibid*.
[210] *Ibid*.
[211] OECD Convention (2008, Articles 5).
[212] OECD Directorate. Steps taken by Great Britain (2008).
[213] *Ibid*. at p. 144.
[214] *Ibid*.
[215] *Ibid*. at p. 144.
[216] *Ibid*.
[217] *Ibid*.
[218] *Ibid*.
[219] OECD Directorate. Steps taken by United States (2008).
[220] *Ibid*.
[221] *Ibid*. at p. 146.
[222] *Ibid*. at p. 146.
[223] *Ibid*.
[224] *Ibid*.
[225] *Ibid*.
[226] *Ibid*. at p. 147.
[227] *Ibid*.
[228] *Ibid*.
[229] *Ibid*.
[230] OECD Directorate. Steps taken by Brazil (2008).
[231] Article 15 provides that [f]or each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the 16th day after deposit of its instrument.'' (OECD Convention 2008).
[232] OECD Directorate. Steps taken by Brazil (2008).
[233] *Ibid*.
[234] *Ibid*.
[235] *Ibid*.
[236] *Ibid*.
[237] *Ibid*.
[238] *Ibid*. at p. 22.
[239] *Ibid*.
[240] *Ibid*.
[241] *Ibid*.
[242] *Ibid*.
[243] *Ibid*.
[244] *Ibid*. at p. 23.
[245] *Ibid*.
[246] *Ibid*.
[247] *Ibid*.
[248] Federal Bureau of Investigation, Houston Field Division (2008).
[249] U.S. Securities and Exchange Commission. Litigation Release Number 20363.
[250] U.S. Department of Justice Press Releases (2009).
[251] U.S. Securities and Exchange Commission. Accounting and Auditing Release Number 2493.
[252] U.S. Securities and Exchange Commission. Litigation Release Number 20829.
[253] Department of Justice press release dated February 11, 2009.
[254] U.S. Securities and Exchange Commission Litigation Release No. 20897, February 11, 2009.
[255] The United States of America v. Kellogg Brown & Root, LLC, The United States District Court, Southern District of Texas, Houston Division, filed

February 6, 2009, docket number H-09-071.

[256] U.S. Securities and Exchange Commission Litigation Release No. 20897, February 11, 2009.

[257] U.S. Department of Justice (2008).

[258] Federal Bureau of Investigation (2008).

[259] Federal Bureau of Investigation Houston Filed Division (2008).

Appendix 1: The OECD convention

Convention provisions

The OECD Convention contains 17 articles, including substantive and procedural provisions, as well as provisions setting forth jurisdiction, sanctions, and mutual cooperation agreements. Substantively, like the FCPA, the OECD Convention contains both anti-bribery provisions and accounting provisions. Specifically, the anti-bribery provisions of the OECD Convention state:

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offense. Attempt and conspiracy to bribe a foreign public official shall be criminal offenses to the same extent as attempt and conspiracy to bribe a public official of that Party.[144]

The OECD convention also provides that

> Each Party which has made bribery of its own public official a predicate offense for the purpose of the application of its money-laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.[145]

''Foreign public official'' is defined by the OECD Convention to

> mean[ ] any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization[.][146]

Unlike the FCPA,[147] the OECD Convention does not include foreign political parties within its anti-bribery provisions.[148]

The accounting provisions of the OECD Convention are contained in Article 8 and provide

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books, or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
2. Each Party shall provide effective, proportionate, and dissuasive civil, administrative, or criminal penalties for such omissions and falsifications in respect of the books, records, accounts, and financial statements of such companies.[149]

The OECD Convention also mandates appropriate sanctions, providing

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public

officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.[150]

In addition to the substantive provisions of the OECD Convention and the provisions requiring appropriate sanctions, the OECD Convention contains several articles which seek to assure compliance and cooperation by signatory nations. For instance, the OECD Convention directs signatory nations to establish a method to exercise jurisdiction over bribery of foreign officials occurring within the signatory nation's territory.[151] Similarly, the OECD Convention requires signatory nations to take the steps necessary to exercise jurisdiction over its own nationals for bribery of foreign officials committed abroad.[152] The jurisdiction article, Article 4, further requires signatory nations to determine whether "its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps."[153] Finally, Article 4 provides that if more than one country has jurisdiction, then, at the request of any one signatory nation, the other parties to the Convention will consult to determine the most appropriate jurisdiction.[154]

The OECD further mandates cooperation between signatory nations in Article 9, "Mutual Legal Assistance." Specifically, Article 9(1) requires signatory nations to "to the fullest extent possible… provide prompt and effective legal assistance to another Party" for proceedings within the scope of the OECD Convention.[155] In turn, "the requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance."[156] The OECD Convention further provides that "[a] Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy."[157] The OECD Convention further promotes cooperation by providing that violations of the OECD Convention are extraditable offenses.[158]

In order to prevent signatory nations from defeating the goals of the OECD Convention, the OECD Convention specifies in Article 5 that

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[159]

Article 6 likewise seeks to prevent signatory nations from avoiding the substantive provisions of the OECD Convention by providing that "any statute of limitations applicable to the offense of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offense."[160]

Further cooperative action is established by Article 12, which provides for monitoring and follow-up. Specifically, Article 12 provides that "[t]he Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention."[161] Article 12 further provides that, absent a consensus to the contrary by the parties to the OECD Convention, the monitoring "shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference…."[162]

In addition to the OECD Convention, on May 23, 1997, the OECD Council at Ministerial level approved Revised Recommendation on Combating Bribery in International Business Transactions.[163] As

OECD explained: "The 1997 Revised Recommendation adds strength to the effects of the OECD Anti-Bribery Convention by focusing on areas the Convention does not detail: accounting, auditing and public procurement; international co-operation; the non tax deductibility of bribes; and measures to deter, prevent and combat bribery."[164] For instance, the OECD Convention does not address the tax deductibility of bribes, while the 1997 Revised Recommendations urges member nations "which do not disallow the deductibility of bribes to foreign public officials to re-examine such treatment with the intention of denying this deductibility."[165] The 1997 Revised Recommendations also further elaborate on accounting and external audit requirements, as well as internal company controls.[166]

Overview of implementation

As noted above, the OECD Convention entered into force in February of 1999. However, the OECD Convention is not self-executing; in other words, the OECD Convention does not in itself prohibit or criminalize bribery. Rather, the OECD Convention requires signatory nations to make bribery illegal (and regulate accounting disclosure).[167] However, the OECD Convention does not mandate the specific mechanism or statutory anti-bribery language. In fact, the Commentary to the OECD Convention notes that the "Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system."[168] The Commentary further elaborates on this point, noting "[a] Party may use various approaches to fulfill its obligations, provided that conviction of a person for the offense does not require proof of elements beyond those which would be required to be proved if the offense were defined as in this paragraph."[169] The 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions further stresses "'[f]unctional equivalence' is the underlying concept: differences between countries do not matter, provided these differences lead to effective prosecution and sanction of foreign bribery offenses."[170]

In order to illustrate, the concept of "functional equivalence," the Commentary provides two examples:

> First, "a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article." Second, "a statute which defined the offence in terms of payments 'to induce a breach of the official's duty' could meet the standard provided that it was understood that every public official had a duty to exercise judgment or discretion impartially and this was an 'autonomous' definition not requiring proof of the law of the particular official's country."[171]

Because the OECD Convention is not self-executing, to serve as an effective constraint on multinational bribery, signatory nations must adopt implementing legislation consistent with the OECD Convention mandates. And then, signatory nations must actually enforce their country's legislation. Accordingly, "[u]nder OECD auspices, a rigorous process of multilateral surveillance began in April 1999 to monitor compliance with the Convention and assess the steps taken by countries to implement it in national law."[172] Monitoring took place in two phases: "The first phase of this process sought to review the Parties' laws to combat bribery – their implementing legislation – to determine whether they met the standards in the Convention."[173] Phase 2 of the monitoring began in 2001 and "assess[ed] the structures in place to enforce these laws and to the degree to which they are effective."[174] In addition, Phase 2 expanded its focus to the non-criminal aspects of the OECD Convention, such as the accounting and auditing requirements and the non-deductibility of bribery payments.[175] In 2005, as the Working Group neared the half-way point of Phase 2, it decided to prepare a Mid-Term study to review the findings of Phase 2.[176]

The Phase 1[177] and Phase 2[178] monitoring, along with the Mid-Term study[179] provide substantial insight into the implementation, enforcement, and impact of the OECD Convention. The following is a summary of the implementation of the OECD Convention by France, Germany, the U.K., the United States, and Brazil.

France

On May 25, 1999, France authorized the ratification of the OECD Convention and it deposited its instrument of ratification on July 31, 2000.[180]

France's initial implementing legislation, the Corruption Act of June 30, 2000, was amended by the Anti-Corruption Act of November 13, 2007, which now controls, criminalizing bribery of foreign officials by both natural and legal persons.[181] The Anti-Corruption Act also amended France's Code of Criminal Procedure to allow for the use of surveillance and undercover techniques previously not available in the investigation of bribery.[182]

The OECD Working Group on Bribery in International Transactions (hereinafter "Working Group"), reviewed France's implementing legislation as part of the Phase 1 and Phase 2 monitoring and in January of 2004, made the following recommendations:

First, the Working Group made several recommendations to ensure that effective measures for prevention and detections of foreign bribery are in place. Specifically, the Working Group recommended France encourage enterprises, including small- and medium-sized businesses with foreign operations, to adopt internal control mechanisms, codes of conduct, and ethics committees to address issues of international bribery.[183] The Working Group also encouraged France to issue regular reminders to public officials and diplomatic missions of their duty under French law to notify the public prosecutor of any violations of the anti-bribery law.[184] In addition, the report recommended that France establish procedures to allow employees of the French development agency to report credible evidence of bribery to the public prosecutor and to adopt protections against retaliation for all employees who report suspicious facts indicative of bribery.[185] Further, the Working Group recommended France provide auditors with additional training to inform them of their obligation to report illicit payments to the prosecutor's office and to also educate other financial and professional organizations, which are required to report suspicious transactions to France's financial intelligence unit, of their legal obligations.[186]

Second, the Working Group highlighted recommendations concerning the effective prosecution of bribery offenses. As background, the Working Group noted that France maintains an "exceptional regime" in which the public prosecutor's office, which is subject to a hierarchical structure subject to the executive, holds the sole authority to prosecute bribery offenses.[187] Given this structure, the Working Group encouraged France to facilitate prosecution based on complaints by victims. The Working Group also recommended France maintain statistics of the number of prosecutions of international bribery, as well as data on prosecutions that were "shelved."[188] In Addition, the Working Group recommended that France extend its statute of limitations[189] and facilitate responses to requests for extradition.[190] Finally, the report noted that France was reorganizing its judiciary to provide for specialized judges in the areas of economics and finance; the Working Group encouraged France to assure that it provided this branch of the judiciary sufficient human and financial resources and that it also draw the attention of the magistrates to the importance of applying criminal sanctions to legal persons (i.e., business entities), especially the sanction of confiscation.[191]

Germany

Germany ratified the OECD Convention on November 10, 1998 and deposited its instrument of ratification simultaneously.[192] On February 15, 1999, the OECD Convention entered into force and that same day, Germany's implementing legislation, in the form of the Act on Combating Bribery of Foreign Public Officials in International Business Transactions, took effect.[193]

The OECD Working Group reviewed Germany's implementing legislation as part of the Phase 1 and Phase 2 monitoring and in June 2003, made the following recommendations:

First, the Working Group focused on recommendations for ensuring effectives measures for preventing and detecting foreign bribery exist. Initially, the Working Group recommended that Germany increase its efforts to raise awareness of the anti-bribery law and encourage enterprises, especially small and medium entities with foreign operations, to develop and adopt corporate compliance programs.[194] The Working Group also recommended that Germany ensure that both the police and prosecutorial authorities receive proper training related to foreign bribery and that Germany assess whether adequate resources are devoted to the investigation and prosecution of such offenses.[195] In addition, the report noted a need for Germany to reduce the time-lag for tax audits of the largest

companies.[196] Further, the Working Group recommended that Germany clarify, for instance by issuing guidelines, the obligation of auditors and tax consultants to report suspicious transactions, and that it also provide a mechanism, for example by means of a hotline, for members of public administration to report suspected bribery.[197]

Second, the Working Group focused on recommendations for ensuring adequate mechanisms for the effective prosecution of bribery offenses, suggesting that Germany compile data on investigations of foreign bribery offenses committed by both natural and legal persons, as well as sanctions instituted.[198] The Working Group further recommended that Germany take measures to ensure the effectiveness of legal liability against legal persons, possibly in the form of establishing guidelines governing prosecutorial discretion and further increasing monetary sanctions.[199]

The United Kingdom

The U.K. signed the OECD Convention on December 17, 1997 and deposited its instrument of ratification on December 14, 1998[200] The U.K.'s ratification was extended to the Isle of Man in 2001.[201] After signing the OECD Convention, Parliament reviewed its existing legislative and common law provisions on corruption and concluded in November of 1998, that existing law already sufficiently implemented the Convention.[202] However, the U.K. also accepted, "in principle, that its laws in this area should be restated in a modern statute."[203] The Anti-Terrorism, Crime and Security Act of 2001, which received the Royal Assent on December 14, 2001, amended the law related to bribery, but, as noted in the following, failed to comprehensively address bribery and corruption.[204]

The OECD Working Group reviewed the U.K.'s implementing legislation as part of the Phase 1 and Phase 2 monitoring and most recently updated its recommendations in October 2008, as follows:

First, the Working Group noted that U.K. authorities had committed to adopting wider reform of corruption law, repealing the Anti-Terrorism, Crime and Security Act of 2001 and replacing it with a comprehensive anti-corruption statute.[205] However, the Working Group stated that the U.K. has yet to adopt any new laws addressing bribery and expressed "disappointment" and "serious concern" with the U.K.'s "unsatisfactory implementation of the Convention."[206] Accordingly, the Working Group again stressed the need for the U.K. "to enact new foreign bribery legislation at the earliest possible date."[207] The Working Group further stated that such legislation should assure that "principal consent" does not serve as a defense to bribery.[208] In addition, the Working Group stressed the need for the U.K. to adopt, "on a high priority basis," effective legislation to create corporate liability for foreign bribery.[209] Further, the legislation must establish a broad basis for jurisdiction.[210]

Second, the Working Group stressed the need for the U.K. to assure that investigators and prosecutors at all the stages of the investigative and prosecutorial process comply with Article 5 of the Convention, which requires that "[t]hey shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[211] And further that the U.K. ensure that all governmental actors are aware of their obligations under Article 5 of the Convention.[212]

Third, the Working Group made several recommendations regarding the investigation and prosecution of foreign bribery cases. In this regard, the Working Group first recommended that the Attorney General's supervisory role not include the power to direct individual bribery prosecutions and that the U.K. repeal the statutory provision mandating the Attorney General consent to foreign bribery prosecutions.[213] The Working Group also recommended that the U.K. ensure that the Serious Fraud Office has access to relevant records possessed by the tax authorities and other governmental agencies,[214] and that both the Serious Fraud Office and other investigative agencies have sufficient human and financial resources.[215] In addition, the Working Group suggested modifications to the plea bargaining system to provide a more effective method for resolving foreign corruption cases.[216] Further, the Working Group recommended that the U.K. encourage crown dependencies to adopt anti-corruption legislation.[217]

Finally, the Working Group made two recommendations related to the Export Credit Guarantee Department. Specifically, the Working Group suggested the Department use its audit powers to

investigate suspected foreign bribery and use its contracting power to address cases which cannot be investigated by criminal authorities.[218]

The United States

The United States deposited its instrument of ratification and acceptance on December 8, 1998, and the Convention entered into force on February 15, 1999.[219] The United States' implementing legislation, namely, the International Anti-Bribery and Fair Competition Act of 1998, which amended the FCPA, entered into force on November 10, 1998.[220]

The OECD Working Group on Bribery in International Transactions (hereinafter "Working Group"), reviewed the United State's implementing legislation as part of the Phase 1 and Phase 2 monitoring and most recently updated its recommendations in October 2002.

First, the Working Group recommended that the United States enhance awareness by small- and medium-size businesses with foreign operations of the requirements of the FCPA (which, as amended, adopted the OECD Convention), and provide tools and information tailored to the needs and resources of those businesses in fighting corruption.[221] The Working Group also suggested further efforts to increase awareness in the accounting profession of the mandates of the FCPA.[222]

Second, after noting that the United States has established an expertise over the years of applying the FCPA, the Working Group recommended that the United States, issue public guidelines, including specific guidance on the "facilitation" payment exception to the FCPA.[223] The Working Group also suggested that the United States encourage small and medium business entities to develop and adopt anti-corruption compliance programs.[224] Further, the Working Group recommended that the United States make the accounting provisions applicable to "non-issuers" which conduct foreign operations.[225]

Third, the Working Group made two recommendations related to detection of bribery. Specifically, the Working Group recommended that auditing standards be clarified, especially regarding materiality and that the United States maintain statistics on the number, sources, and processing of FCPA violations.[226]

Finally, the Working Group made several recommendations for ensuring effective prosecution of foreign bribery. Initially, the Working Group recommended that the United States make a clear public statement identifying the criteria and priorities of the Department of Justice and Securities and Exchange Commission in prosecuting FCPA cases.[227] Next, the Working Group recommended the establishment of a mechanism, including the compilation of statistics, to allow for periodic evaluation of FCPA enforcement. The Working Group also suggested that the United States consider whether more focus should be placed on money laundering violations and whether the statute of limitations (5 years) should be extended.[228] The Working Group concluded by suggesting that the United States amend the FCPA to clarify the law, by adopting the specific language of the OECD Convention, namely, that it is an offense to offer, promise, or give a bribe "in order to obtain or retain business or other improper advantage in the conduct of international business."[229]

Brazil

Brazil signed the OECD Convention on December 17, 1997.[230] Brazil ratified the OECD Convention on June 15, 2000 and deposited its instrument of ratification on August 24, 2000. Sixty days later,[231] on October 23, 2000, the OECD Convention entered into force,[232] but it was not until June 11, 2002 that Brazil passed implementing legislation in the form of Law No. 10467, which amended the Brazilian Penal Code and added a provision to Law No. 9613, which criminalized money laundering.[233]

The OECD Working Group reviewed Brazil's implementing legislation as part of the Phase 1 and Phase 2 monitoring and in December 2007, made the following recommendations:

First, the Working Group recommended that Brazil undertake efforts to raise awareness of the bribery offense both within the public (i.e., public administration, diplomatic representatives, and Brazilian Development Bank) and private (i.e., companies active in foreign markets and those seeking export credits) sectors, and to likewise increase training for both sectors.[234] The Working Group also recommended that Brazil institute due diligence procedures to verify that those entities seeking export credits are not engaging in acts of bribery.[235]

Second, the Working Group made several recommendations for Brazil related to the detection and reporting of bribery offenses. Specifically, the Working Group suggested that Brazil adopt ‘‘comprehensive measures’’ to protect public and private ‘‘whistleblowers’’ who report bribery.[236] The Working Group further recommended that Brazil regularly remind public officials, especially those related to exports and foreign operations, of their obligation to report bribery, as well as to facilitate methods of reporting.[237] In addition, the Working Group encouraged businesses with foreign operations to adopt internal control procedures and create audit committees which operate independent of management to assure compliance with anti-bribery laws, and to provide statements in their annual reports as to their compliance programs related to anti-bribery.[238] The Working Group also encouraged the accounting profession to raise awareness of anti-bribery laws and to require external auditors to report violations to corporate management, and possibly also to law enforcement.[239] Also, the report suggested that Brazil consider requiring external audits for all large companies.[240] Finally, in regard to the detection and reporting of bribery offenses, the report recommended that Brazil provide appropriate directives and training to institutions required to report money laundering, and consider extending the money laundering provisions to apply to the accounting and legal professions.[241]

Third, the report looked into the investigation and prosecution of foreign bribery offenses and recommended that Brazil provide sufficient resources and training to law enforcement personal and consider creating a specialized prosecutor’s office to focus on bribery and related offenses.[242] The Working Group further recommended Brazil ensure that all credible allegations of foreign bribery are proactively investigated and that it encourage law enforcement agencies to use a broad range of investigative techniques and access to financial information to investigate such allegations.[243]

Fourth, the Working Group made recommendations concerning legal liability and sanctions, stressing first the need for Brazil to immediately create ‘‘direct liability for legal persons for the bribery of foreign officials,’’ and in doing so establish a broad jurisdictional reach and effective and proportionate sanctions.[244] Further, the Working Group recommended that Brazil’s law make clear that proceeds of foreign bribery may confiscated, including when in the hands of a third party who has acted without good faith.[245] The report also suggested that in granting government contracts, Brazil consider past convictions for bribery, as well as that it adopt due diligence procedures so as to allow the government to withdraw contracts from those involved in foreign bribery.[246] Finally, the Working Group focused on the deductibility of bribes for tax purposes and recommended that Brazil expressly adopt a provision, either in its tax laws or otherwise, clearly stating that bribes are not deductible for tax purposes. Then to ensure compliance, the report recommended that Brazil expressly communicate to tax inspectors that bribes are not deductible and to train inspectors to be attentive to deductions listed as ‘‘commissions, bonuses, and gratuities,’’ which could represent actual bribes.[247]

The above brief look at the efforts of five countries shows the variety of issues related to implementation of the OECD Convention. At one extreme, is the U.K., which from the point of view of the Working Group, has failed to enact sufficient statutory prohibitions on bribery and corruption. At the other extreme is the United States, which, given its role as the patriarch of extra-territorial anti-bribery legislation, provides the most complete implementation and proactive enforcement of the OECD Convention, with recommendations focusing on further educating the public about the mandates of the law. Other issues at play concern the adequacy of signatory countries’ statute of limitations and human and financial resources allocated to investigative and prosecutorial agencies, as well as the appropriateness of the sanctions adopted.

Appendix 2: Summary of recent FCPA cases

Corporations

Baker Hughes

On April 26, 2007, a subsidiary of American corporation, Baker Hughes, paid $44 million in fines, civil penalties and disgorgement as a result of its agreement to pay a bribe to Kazakhoil officials through a third party in the Isle of Man. The bribe

was a 2% of revenue kickback for the Karachaganak oil project and 3% on future contracts in Kazakhstan.[248]

Chevron
On November 14, 2007, Chevron agreed to pay combined civil and criminal penalties of $30 million for FCPA books and records violations in a scheme to pay kickbacks to the former Iraqi government under the United Nation's Oil for Food program. The Oil for Food program, which was riddled with corruption and enabled Saddam Hussein to accumulate vast wealth despite the embargo, generated many FCPA investigations and settlements.[249]

Aibel Group Ltd
On November 21, 2008, this U.K. Company pled guilty and agreed to pay a $4.2 million fine for participating in a scheme to make corrupt payments to Nigerian Customs Service officials to obtain preferential treatment in the customs clearance process for its goods and equipment. This preference gave Aibel a competitive advantage in its deepwater oil drilling operation. Aibel used a third-party freight-forwarding company to make the payments.[250]

Schnitzer Steel
This company purchased a Korean corporation to establish a foreign subsidiary to take advantage of Chinese markets for scrap steel. In the acquisition of the company, Schnitzer acquired some of the subsidiary's business practices including regular bribes of the principals of Chinese steel companies so that they would purchase Schnitzer's scrap steel. Under the Chinese communist system, nearly everyone is a government employee, and so Schnitzer's bribes fell under FCPA. Schnitzer self-disclosed, and on October 19, 2006 agreed to pay a $7.5 million fine and $7.7 million disgorgement. Resolution of the problem for Schnitzer's executives resulted in criminal charges and fines as described later.[251]

Siemens AG
On December 15, 2008, they pled guilty to FCPA violations and agreed to pay $800 million fines and disgorgements to the DOJ and SEC in addition to the $540 million paid to German authorities. Siemens' high penalties, 17 times the next highest penalty, were assessed because, for years, its leaders ignored employee and auditor complaints about corrupt business practices. Corrupt business practices were so entrenched within the company that it routinely used false invoices and off-the-book accounts to conceal corrupt payments, mischaracterized bribes as consulting fees and legitimate expenses, used removable Post-It notes to affix signatures to approval forms authorizing payment to conceal the identity of the signors and obscure the audit trail, and more.[252]

Halliburton subsidiary Kellogg Brown & Root LLC
On February 11, 2009, LLC entered a guilty plea to foreign bribery charges and agreed to pay a $402 million criminal fine[253] and disgorgement of $177 million for total payments of $579 million.[254] According to the criminal indictment,[255] Kellogg, Brown & Root, LLC was a subsidiary of Halliburton under the directorship in part of Albert "Jack" Stanley who during the period at issue, served at various times, as its President, Chief Executive Officer or Chairman. In 1991, Kellogg, Brown & Root entered into a "Joint Venture" with unidentified French, Italian, and Japanese corporations to secure engineering, procurement, and construction contracts related to contracts totaling $6 billion for the construction of liquid natural gas facilities in Bonny Island, Nigeria. In 1995, to secure the contracts, the Joint Venture used Madeira, Portugal, special purpose entities to hire a U.K. consultant and a Japanese consultant to bribe Nigerian officials. The payments, which continued for almost 10 years, were made to Nigerian officials including three successive former holders of a top level office of the executive branch of the Nigerian government. By the end of 2004, the U.K. consultant had been paid over $132 million to pay bribes to the highest level Nigerian officials, and a political party, through its bank accounts in Switzerland and Monaco. The Japanese consultant was paid over $50 million during the same period. The payments to the Japanese consultant were made through its bank in the Netherlands and they were used to pay bribes to lower level Nigerian officials. At times, Stanley and other Joint Venture officers negotiated directly with the Nigerian officials. "The sanctions represent the largest combined settlement ever paid by the U.S. companies since the FCPA's inception."[256]

Individuals

Si Chan Wooh
On June 29, 2007, this former Schnitzer Steel Industries, Inc. executive pled guilty to criminal charges for bribing Chinese executives. On December 13, 2007, the former Chairman and CEO of Schnitzer Steel, Robert W. Philip, without admitting or denying responsibility, agreed to pay $250,000 to settle FCPA charges with the SEC.[257]

Christian Sapsizian
On June 7, 2007, this French citizen and former executive of French cell phone corporation, Alcatel CIT, pled guilty to two counts related to making $2.5 million in corrupt payments to Costa Rican officials. The DOJ obtained jurisdiction because Alcatel CIT's American depository receipts were traded on the New York Stock Exchange. On September 23, 2008, Sapsizian was sentenced to 30 months incarceration.[258]

Albert ''Jack'' Stanley
In a September 3, 2008 plea that foreshadowed the Kellogg, Brown & Root, LLC's plea, and may herald additional oil industry FCPA cases, Kellogg, Brown & Root, this LLC executive admitted to a decade-long scheme to bribe Nigerian government officials to obtain oil for development-related engineering, procurement, and construction (EPC) contracts. During this process, Stanley authorized payments of $182 million to two-third parties with the understanding that the money would be used, in part, to bribe Nigerian officials. Stanley, who faces 10 years in prison and must pay $10.8 million in restitution for kickbacks he received from the third parties, continues to cooperate with investigators. Some kickbacks were funneled through the known tax haven of Madeira Island.[259]

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Cobus de Swardt – Managing Director; Transparency International.

David Stulb – Global Leader; Fraud Investigation and Dispute Services, Ernst & Young LLP.

John S. Pistole – Deputy Director; Federal Bureau of Investigation.

Kevin Loftus – Counsel; Paul, Weiss, Rifkind, Wharton & Garrison LLP.

Mark Mendelsohn – Former Deputy Chief; Criminal Division, Fraud Section, Securities and Exchange Commission.

Michael G. Considine – Partner, Day Pitney, LLP.

Richard L. Cassin – Founder; CassinLaw LLC and founder of FCPA Blog.

Scott Moritz – Daylight Forensic & Advisory LLC.

Margot Cleveland and Thomas J. Frecka
Mendoza College of Business,
University of Notre Dame,
Notre Dame, IN, U.S.A.
E-mail: frecka.1@nd.edu

Christopher M. Favo
Supervisory Special Agent,
Office of Integrity and Compliance,
Federal Bureau of Investigation,
Washington, DC, U.S.A.

Charles L. Owens
Fraud Investigation and Dispute Services,
Ernst & Young LLP,
Chicago, IL, U.S.A.
E-mail: charles.owens@ey.com