

ROPES
& GRAY

INTERNATIONAL ANTI-
BRIBERY AND CORRUPTION
TRENDS AND DEVELOPMENTS

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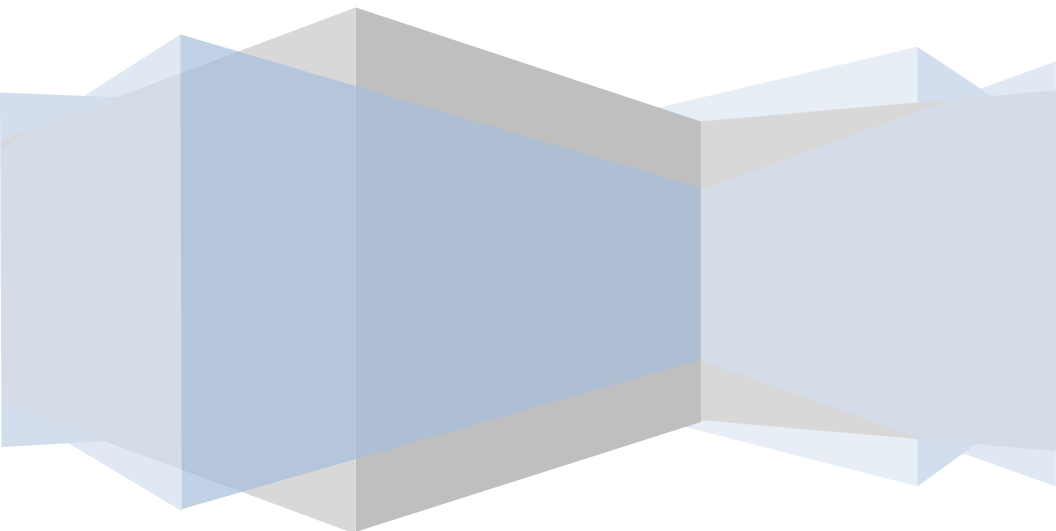


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INTRODUCTION

The last few years have seen quite a bit of commentary on rise in enforcement of the U.S. Foreign Corrupt Practices Act and other related U.S. laws. The gist of most of the commentary can be summed up as follows: *be careful when doing business in emerging markets.*

During this same time, in part due to the ongoing global recession, U.S. and multi-national companies increasingly are “seeking-alpha” in emerging markets. This has created an effect whereby companies increasingly are feeling pressure to focus on the very markets that present the greatest risk from an anti-bribery and corruption perspective. Further exacerbating the risk, as these emerging markets see a flood of cash inflows, the politicians that govern them are facing tremendous pressure to ramp up their own anti-bribery and corruption enforcement regimes. Overall, we have observed a shift in the paradigm from a U.S. centric anti-bribery and corruption approach to what is seemingly a patchwork of overlapping laws and regulations, many of which are extra-territorial in their reach.

In this book, we have attempted to analyze recent anti-corruption trends and developments in a selection of markets that appear to be of interest to our clients. Each chapter contains an overview of the country, a summary of the corruption climate, a review of the current enforcement regime as well as pending anti-corruption legislation, where applicable, and an analysis of recent major scandals. We hope you find this informative.

Best regards,

Asheesh Goel

CHAPTER I

REGIONAL TRENDS AND DEVELOPMENTS EUROPE AND THE MIDDLE EAST (Germany, Russia, United Arab Emirates)

RECENT ANTI-CORRUPTION DEVELOPMENTS IN GERMANY

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OVERVIEW

As Europe's largest economy, and the fourth largest economy in the world by gross domestic product, Germany has traditionally enjoyed a reputation for probity and efficiency in both government and business. Recently, this image has been impacted by a wave of high-profile corruption scandals, involving the country's largest companies and public officials at the highest levels. *Handelsblatt*, a leading business newspaper, has dubbed Germany "a banana republic"¹; Frankfurt prosecutor Wolfgang Schauensteiner charges that corruption in Germany is not a matter of individual cases, but of "structural forms" of "organized corruption," where bribes are "part of business policy."²

In response, German prosecutors—in conjunction with authorities in the United States—have stepped up prosecution of both public and private bribery, in its active and passive forms. Anti-corruption advocates contend that German law still has loopholes and imposes overly lenient sentences, despite a comprehensive revision in 1997 and ratification of several international anti-corruption agreements. Nevertheless, these

¹ Sonia Shinde, *Korruption mit System*, HANDELSBLATT, August 5, 2006, available at <http://www.handelsblatt.com/panorama/aus-aller-welt/schwarze-kassen-korruption-mit-system/2749650.html>.

² Christian Kreutzer, *Interview: Deutschland ist keine Bananenrepublik*, FRANKFURTER ALLGEMEINE ZEITUNG, March 19, 2002, available at <http://www.faz.net/aktuell/gesellschaft/interview-deutschland-ist-keine-bananenrepublik-149119.html>.

activists have also expressed hope that the ongoing series of scandals and prosecutions is ushering in a new era of transparency in politics and business.³

At present, Germany's battle with corruption is in a transitional phase. While corruption scandals have periodically convulsed German politics since the end of World War II, European integration and economic globalization opened up new markets for German companies, providing opportunities for corruption on a vast scale. A lax enforcement regime did little to stop German companies from using bribery both domestically and abroad. But over the last decade and a half, stronger laws and vigorous enforcement have exposed these practices. New cases of corruption continue to appear, and advocates continue to press for more stringent laws and enforcement, even as public attitudes regarding the prevalence and acceptability of corruption continue to shift.

In this volatile climate, German companies have begun reshaping their compliance practices to comply with Germany's newly fortified imperatives of probity in business and government. Foreign companies doing business in Germany would be well advised to follow suit, and anticipate that enforcement may become even stronger in the future.

THE SIZE OF THE PROBLEM

Transparency International ("TI"), a non-governmental organization dedicated to eliminating corruption, ranked Germany the world's 14th least corrupt country in its Corruption Perceptions Index, a study assessing transparency and anti-

³ Judy Dempsey, *Letter from Europe: Germany Cleans Up Its Politics*, N.Y. TIMES, March 19, 2012, available at <http://www.nytimes.com/2012/03/20/world/europe/20iht-letter20.html>.

corruption efforts in 183 countries.⁴ Germany's score was tied with Japan's; among European nations, only the Scandinavian countries, the Netherlands, Switzerland, and Luxembourg received higher rankings.

Statistics show that reported cases of corruption are on the rise. Between 2009 and 2010, instances of corruption reported by the police forces of the German states went up 148%, from 6,354 to 15,746, a rise centered in the provinces of Bavaria (*Bayern*) and Westphalia (*Nordrhein-Westfalen*).⁵ The federal government attributes this surge in part to a shifting focus from public to private corruption.⁶ According to a 2006 University of Konstanz study conducted on behalf of the European Commission, most corruption arises in long-term relationships, especially in the construction industries and the distribution of government funds.⁷ TI warns that statistics such as these are just the tip of the iceberg, estimating that as much as 95% of business-to-business

⁴ TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX, Country Results (2011), available at <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

⁵ BUNDESREPUBLIK DEUTSCHLAND [FEDERAL REPUBLIC OF GERMANY], BUNDESKRIMINALAMT [FEDERAL CRIMINAL OFFICE], KORRUPTION: BUNDESLAGEBILD 2010 [CORRUPTION: THE FEDERAL PICTURE 2010] 7-8 (2011), available at http://www.bka.de/nm_193376/DE/Publikationen/JahresberichteUndLagebilder/Korruption/korruption_node.html?nnn=true.

⁶ *Id.* at 21.

⁷ Dirk Tansler et al., *Perceptions of Corruption in Germany: A Content Analysis of Documents from Politics, Judiciary, Police, Media, Civil Society, and Economy 2* (October 2006), available at http://www.uni-konstanz.de/crimeandculture/docs/CRIME_AND_CULTURE_Scientific_Report_Germany_2006.pdf.

corruption—in transactions such as outsourcing, retailing, and component supply—goes unreported.⁸

Economist Friedrich Schneider estimates that corruption will cost Germany €250 billion in 2012, up from €220 billion in 2005. Most of this financial damage consists of bribery in the awarding of public and private contracts on a corrupt basis, rather than to the best bidder. Schneider suggests that during economic downturns, both private and public sector officials tend to be more susceptible to bribery, exacerbating the already existing interdependence between corrupt state officials and employees of large companies.⁹

A spate of recent high-profile scandals bears out these conclusions. Most notably, Christian Wulff resigned as President (the ceremonial head-of-state) in February 2012, amid allegations of corruption while he was premier of the state of Lower Saxony (*Niedersachsen*).¹⁰ Other scandals involve Germany's largest and most well-known companies. In 2005, the automaker Volkswagen was embroiled in a scandal involving bribery of employee representatives and politicians.¹¹ Employees of an international

⁸ *Dogmeat and the truffle pig: Business-to-business crime is growing in a country that seems not to care*, THE ECONOMIST, Sept. 7, 2006, available at <http://www.economist.com/node/7887902>.

⁹ Anette Dowideit, *Korruption kostet Deutschland 250 Milliarden Euro*, DIE WELT, March 16, 2012, available at <http://www.welt.de/wirtschaft/article13924503/Korruption-kostet-Deutschland-250-Milliarden-Euro.html>.

¹⁰ *German President Resigns; Search for Wulff's Successor Begins*, DER SPIEGEL, Feb. 17, 2012, available at <http://www.spiegel.de/international/germany/0,1518,815910,00.html>.

¹¹ Mark Landler, *Volkswagen Corruption Trial Includes Seamy Testimony*, N.Y. TIMES, Jan. 16, 2008, available at <http://www.nytimes.com/2008/01/16/business/16bribe.html>.

subsidiary of Deutsche Bahn AG, the national railway company, were fired in 2010 upon accusations of bribery in Algeria, Rwanda, and Greece.¹² Daimler, maker of Mercedes-Benz automobiles, paid \$185 million in fines in 2010 to settle charges of bribing officials in 22 countries, including Russia and China.¹³ The largest corruption scandal involves electronics and engineering giant Siemens AG; its employees have been accused of bribery in Argentina, Venezuela, Nigeria, Bangladesh, Greece, and the UN's oil-for-food program in Saddam Hussein's Iraq, resulting in several convictions and multi-million dollar settlements.¹⁴

Some commentators contend that corruption is rooted in the long-standing practices of German business and government since the establishment of the Federal Republic after World War II. Tight personal and financial ties between private banks, industrial corporations, politicians, and labor representatives—a system called “*Deutschland AG*” (Germany, Inc.), the “*Modell Deutschland*” (German Model), or “organized capitalism”—enabled the West

¹² Robert Wright, *Bribe probe for Deutsche Bahn unit*, FINANCIAL TIMES, April 23, 2010, available at <http://www.ft.com/intl/cms/s/0/43abfc50-4f07-11df-b8f4-00144feab49a.html#axzz1qWukV71V>.

¹³ Charlie Savage, *Daimler is Said to Settle Bribing Charges*, N.Y. TIMES, March 23, 2010, available at <http://www.nytimes.com/2010/03/24/business/24daimler.html?dbk#>.

¹⁴ Eric Lichtblau & Carter Dougherty, *Siemens to Pay \$1.34 Billion in Fines*, N.Y. TIMES, Dec. 15, 2008, available at <http://www.nytimes.com/2008/12/16/business/worldbusiness/16siemens.html>; Samuel Rubinfeld, *Greece Settles with Siemens over Bribery Charges*, WALL ST. J., March 8, 2012, available at <http://blogs.wsj.com/corruption-currents/2012/03/08/greece-settles-with-siemens-over-bribery-charges/>.

German “economic miracle” of the 1950s and 1960s,¹⁵ but may also have fostered secrecy and an overreliance on social capital, encouraging corruption and normalizing it as an everyday practice.¹⁶ Others argue that German corruption is a product of economic globalization, as German companies expand into emerging markets where bribery is commonplace. As the Frankfurt prosecutor Wolfgang Schaupensteiner commented to the *International Herald Tribune*, “Globalization has become a motor for corruption in Germany.”¹⁷ A weak regulatory structure did little to deter German companies from using bribes to gain foreign business. For instance, before the modernization of Germany’s anti-corruption law in the late 1990s, bribes paid by German companies to foreign officials were tax deductible.¹⁸

Now that the enforcement regime has been strengthened, each new case of corruption unearthed by the German authorities has the paradoxical effect of further tarnishing the country’s reputation for probity, even as the authorities and private industry work to redeem it. For this reason, reports and public opinion surveys are divided as to whether corruption in Germany continues to rise or is finally decreasing. According to a survey TI conducted in 2010, 70% of Germans believed that corruption had increased during the previous three years, and 76% said that the

¹⁵ Christian Kellerman, *Disentangling Deutschland AG*, in SURVIVING GLOBALIZATION? PERSPECTIVES FOR THE GERMAN ECONOMIC MODEL 111, 111-14 (Stefan Beck, Frank Klobes, & Christoph Scherrer eds. 2005).

¹⁶ See, e.g., *German Firms Need More Diversity*, FORBES, April 20, 2009, available at <http://www.forbes.com/2009/04/19/germany-corruption-police-business-oxford.html>.

¹⁷ Carter Dougherty, *Germany takes aim at corporate corruption*, INT’L HERALD TRIBUNE, Feb. 14, 2007, available at <http://www.nytimes.com/2007/02/14/business/worldbusiness/14iht-scandal.4596099.html>.

¹⁸ *Id.*

German government's actions against corruption were ineffective. Political parties were rated as the most corrupt institutions in civil society, along with the national legislature (the *Bundestag*) and business.¹⁹ However, the 2011 European Fraud Survey, conducted by Ernst & Young, found that only 3% of German managers and 12% of employees regard bribes as legitimate ways of expanding business, down from 25% in 2009. While 45% of employees believe that corruption is commonplace, 90% believe that such crimes will be seriously investigated by the authorities.²⁰

REGULATORY FRAMEWORK

The German Anti-Corruption Act (*Gesetz zur Bekämpfung der Korruption* or "KorrBekG") is contained in the Criminal Code, the *Strafgesetzbuch* ("StGB"); its provisions were last revised in 1997.²¹ This statutory framework prohibits bribery of public officials and in private business transactions, and addresses both active and passive bribery. Germany has signed several international conventions, discussed below, which broaden the scope of these provisions. Prosecutors sometimes bring additional charges, such tax evasion, against those accused of bribery.

¹⁹ TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION BAROMETER 2010, Appendix C, Table 1, available at http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

²⁰ *German corruption recedes as economy holds fast*, DEUTSCHE WELLE, July 20, 2011, available at <http://www.dw.de/dw/article/0,,15251215,00.html>.

²¹ Gesetz zur Bekämpfung der Korruption [KorrBekG] [Anti-Corruption Act], STRAFGESETZBUCH [STGB] [PENAL CODE], August 19, 1997, BUNDESGESETZBLATT [BGBl.] I at 2038, §§ 331-35 (Ger.). English translation available at http://www.gesetze-im-internet.de/englisch_stgb/index.html. This translation renders both *Vorteilsgewährung* and *Bestechung* as "bribe."

Corruption in the Public Sector

The KorrbekG delineates two types of bribery: (1) granting a benefit (*Vorteilsgewährung*) to influence the official in his or her duties; and (2) offering a bribe (*Bestechung*) in order to induce an outright violation of official duties, which earns harsher penalties. First, a public official who demands, accepts, or allows himself to be promised a benefit for himself or a third person for the discharge of an official duty faces a sentence of up to three years. Judges or arbitrators face a stiffer maximum sentence of five years.²² Second, if the benefit was offered in exchange for an official act that violated the public official's duties, it constitutes a bribe. If the offense was serious, the official faces a sentence of between six months and five years.²³ In "especially serious" or "aggravated" cases involving violations of duty, the official faces a sentence of between one and ten years.²⁴

Individuals offering, promising, or granting benefits to German public officials to influence the exercise of their official duties face a maximum sentence of three years or a fine. Those offering benefits to judges or arbitrators face an enhanced maximum sentence of five years or a fine.²⁵ Again, offering

²² KorrbekG, StGB §§ 331(1)–(2). If the benefit – promised or accepted – was not demanded by the public official, and the competent public authority authorizes the benefit either before acceptance or after prompt reporting of the benefit, the public official is not liable. This defense is not available to judges. *Id.* § 331(3).

²³ *Id.* § 332(1)–(2). Liability attaches even if the officer or judge merely indicated a willingness to violate his duties or be influenced by the benefit in the exercise of his discretion. *Id.* § 332(3).

²⁴ *Id.* § 335(1)(a). In aggravated cases involving a judge's or arbitrator's violation of official duties, the minimum sentence is raised to two years. *Id.* § 335(2).

²⁵ *Id.* §§ 333(1)–(2).

benefits to induce a public official to violate his official duties constitutes bribery and results in enhanced penalties: between three months and five years in serious cases involving both public officials and judges,²⁶ and in aggravated cases, between one and ten years.²⁷

Corruption in the Private Sector

In private business transactions, German criminal law prohibits an agent or an employee of a business from both offering and accepting a benefit for himself or another as consideration for giving an unfair preference in the competitive purchase of goods or services.²⁸ German regulations construe the concept of a benefit broadly under these provisions, to include even modest gifts, hospitality, charitable donations, or standard business contracts: “all advantages which benefit the recipient materially or immaterially and to which the recipient has no legal claim.”²⁹ Individuals are subject to criminal investigation and prosecution for offenses committed in the scope of employment or on behalf of a corporation or other legal entity. The maximum penalty is three years’ imprisonment or a fine.³⁰ “Especially

²⁶ *Id.* §§ 334(1)–(2).

²⁷ *Id.* § 335(1)(b).

²⁸ KorrBekG, STGB § 299.

²⁹ BUNDESREPUBLIK DEUTSCHLAND, BUNDESMINISTERIUM DES INNERN [FEDERAL MINISTRY OF THE INTERIOR], PRIVATE SECTOR/FEDERAL ADMINISTRATION ANTI-CORRUPTION INITIATIVE, ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT ACCEPTING GIFTS, HOSPITALITY, OR OTHER BENEFITS 9 (2011), available at http://www.bmi.bund.de/SharedDocs/Downloads/EN/Themen/OED_Verwaltung/Korruption/initiativkreis_korruptionspraevention2.pdf?__blob=publicationFile.

³⁰ KorrBekG, STGB § 299.

serious cases,” involving a “major benefit,” acting “on a commercial basis,” or as a member of a gang, may result in a term of imprisonment between three months and five years.³¹ Advocates such as TI have criticized this sentencing scheme as overly lenient and an insufficient deterrent to criminal corruption.

Under German law, corporations and other legal entities are not criminally liable for bribery. However, they are potentially subject to fines under the Administrative Offenses Act (*Ordnungswidrigkeitengesetz*, the “OWiG”). For corporate liability, the OWiG requires that a criminal offense such as bribery be committed by a person with managerial responsibility, and that as a result, that duties of the company be violated or that the company was either enriched or intended to be enriched.³² The OWiG also imposes liability for companies whose management intentionally or negligently fails to take supervisory measures that would have prevented, or made more difficult, violations such as bribery.³³ Penalties include fines of up to €1 million, in addition to confiscation or disgorgement of illegal profits.³⁴

In response to this regulatory regime, German companies are stepping up their own efforts at compliance. More than half of German companies now have internal compliance departments,

³¹ *Id.* § 300.

³² Gesetz über Ordnungswidrigkeiten [OWiG] [Act on Regulatory Offenses], Feb. 19, 1987, BGBl. I at 602, § 30(1) (Ger.). English translation available at http://www.gesetze-im-internet.de/englisch_owig/index.html. In particular, the statute lists persons authorized to represent the entity, persons with a full power of attorney for the entity, and persons responsible for management of the enterprise, as well as partnership members and executive committee members of organizations lacking legal capacity. *Id.*

³³ *Id.* § 130(1).

³⁴ *Id.* §§ 17(4), 30(2)(1), 30(3).

up from only a fifth in 2007.³⁵ Several major investigations and scandals have been uncovered by these departments, with subsequent internal investigations and reporting to the authorities. For example, in June 2011, Siemens reported to German and U.S. authorities evidence of a bribery scheme in Kuwait; the *Wall Street Journal* reports that the company “has been eager to showcase its revamped compliance program.”³⁶

International Corruption

Germany has ratified two international agreements on public corruption: (1) the OCED Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, enacted as the *Gesetz zur Bekämpfung internationaler Bestechung* (“IntBestG”)³⁷; and (2) the European Union Convention on the Fight Against Corruption, ratified as the *EU-Bestechungsgesetz* (“EUBestG”),³⁸ which covers bribery of public officials in EU member states. Germany has also extended its laws against public corruption to judges and officials of the

³⁵ J. Hartmann & A. Tauber, *Kampf gegen Korruption: Wie Dax-Konzerne den Schmiergeldsumpf überwinden*, DIE WELT, Jan. 22, 2012, available at <http://www.welt.de/wirtschaft/article13827833/Wie-Dax-Konzerne-den-Schmiergeldsumpf-ueberwinden.html>.

³⁶ Joe Palazzolo, *Siemens Compliance Program Made The Catch*, *Company Says*, WALL ST. J., June 10, 2011, available at <http://blogs.wsj.com/corruption-currents/2011/06/10/siemens-compliance-program-made-the-catch-company-says/>. See also Karl Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*, 10 GERMAN L.J. 1343 (2009).

³⁷ Gesetz zur Bekämpfung internationaler Bestechung [IntBestG] [Act Against International Corruption], September 21, 1998, BGBl. II at 2327 (Ger.).

³⁸ EU-Bestechungsgesetz [EUBestG] [EU Anti-Corruption Act], September 21, 1998, BGBl. II at 2340 (Ger.).

International Criminal Court, and its laws against private corruption to business transactions in the global economy and foreign competition.³⁹ Germany is a member of the Council of Europe Group of States Against Corruption (GRECO). However, Germany has signed but not ratified the United Nations Convention Against Corruption and the Council of Europe Convention on Corruption.⁴⁰

The EUBestG extends the criminalization of active and passive bribery to officials of the EU member states and the European Community,⁴¹ while the IntBestG criminalizes only active bribery of other foreign officials and members of international organizations.⁴² Both have extraterritorial effect if the offense was committed by a German national, involved a German or EU public official, or was to the detriment of a German national outside of Germany.⁴³ Both also apply the Criminal Code's provisions criminalizing money laundering to foreign public officials.⁴⁴

Because of the incomplete ratification of international conventions, and the limitations of those conventions that were ratified, the scope of German law governing international corruption is inconsistent. While German law regarding domestic officials prohibits both the granting of a mere benefit and actual

³⁹ See Sebastian Wolf, *Modernization of the German Anti-Corruption Criminal Law by International Legal Provisions*, 7 GERMAN L.J. 785, 787 (2006).

⁴⁰ *Id.* at 790-91.

⁴¹ EUBestG art. II, § 1.

⁴² IntBestG art. II, § 1.

⁴³ IntBestG art. II, § 2; EUBestG art. II, § 2.

⁴⁴ IntBestG art. II, § 4; EUBestG art. III; *cf.* STGB § 261.

bribery, for both past and future actions, the law regarding foreign officials only governs bribery for future action involving a breach of duty. Active bribery is proscribed for EU officials and member states, other foreign officials, and members of foreign organizations. Passive bribery, in contrast, is only prohibited for EU officials, member states, and the International Criminal Court.⁴⁵ Finally, while facilitation payments (intended to facilitate or accelerate an official act to which the payor is legally entitled) to domestic officials are forbidden, a loophole in the IntBestG allows such payments to foreign officials.⁴⁶

GERMAN ENFORCEMENT EFFORTS

After years of lax enforcement, German authorities are now actively investigating and prosecuting violations of anti-corruption law. Recent statistics compiled by the federal government show between 1,600 and 1,900 corruption investigations per year since 2006, with 1,813 investigations in 2010. The three states with the most investigations in 2010 were Bavaria, Westphalia, and Lower Saxony (*Niedersachsen*).⁴⁷ As for cases of foreign bribery, statistics compiled by the OECD show that from 1999 through December 2010, Germany imposed sanctions on 30 individuals, and came to agreement on sanctions for another 35 individuals. Six legal persons also received

⁴⁵ Wolf, *supra* note 39, at 788-89.

⁴⁶ OECD WORKING GROUP ON BRIBERY, GERMANY: PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 20-21 (2011), available at <http://www.oecd.org/dataoecd/5/45/47416623.pdf>.

⁴⁷ BUNDESKRIMINALAMT, KORRUPTION: BUNDESLAGEBILD 2010, *supra* note 5, at 6.

administrative sanctions; none were acquitted.⁴⁸ TI counts Germany alongside five other European nations and the United States as actively enforcing the OECD Anti-Bribery Convention.⁴⁹

As in the United States, law enforcement authority in Germany is vested in the federal states (*Länder*). The *Länder* have established Public Prosecutor's Offices (*Staatsanwaltschaften*) attached to every Regional Court (*Landgericht*) within their borders, for a total of 116 across the country. These offices investigate and prosecute cases of both domestic and international corruption under German law. Increasingly, they have been referring foreign bribery cases to special prosecution units and working together to exchange data and best practices.⁵⁰ A national investigative police agency, the Federal Criminal Office (*Bundeskriminalamt* or BKA), provides assistance to the states and coordinates cooperation between them, the federal government, and foreign police authorities.

Notable recent actions include a settlement between Munich prosecutors and MAN SE, a truck and engineering equipment manufacturer, on bribery charges. The company was fined a total of €150.6 million, and a subsidiary was fined for failing to provide adequate oversight to prevent bribes. The investigation involved the questioning of over 100 individuals and raids of 59 company sites and seven private homes in May 2009.

⁴⁸ OECD WORKING GROUP ON BRIBERY, 2010 ANNUAL REPORT 17 (2011), available at <http://www.oecd.org/dataoecd/7/15/47628703.pdf>.

⁴⁹ FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INTERNATIONAL, PROGRESS REPORT 2010: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 34 (2010), available at http://www.transparency.org/content/download/57988/927658/3rd_Progress_Report_2010_OECD_Anti_Bribery_Convention.pdf.

⁵⁰ HEIMANN & DELL, *supra* note 49, at 8.

One executive pleaded guilty to eight counts of bribery in June 2010 for bribes paid to secure a contract in Kazakhstan, receiving a suspended sentence.⁵¹

The Siemens scandals discussed above have resulted in several investigations, sanctions, and convictions within Germany. Two former managers were found guilty in April 2010 in connection with public and private bribes to win telecommunications contracts in Russia and Nigeria, receiving sentences of probation and fines up to €160,000.⁵² In April 2011, the Munich *Staatsanwaltschaft* brought bribery charges against a former board member of Siemens stemming from a contract to provide national identity cards in Argentina.⁵³ In 2008, the company reached a settlement with the Munich prosecutor of charges of corporate failure to supervise its officers and employees, paying €569 million. In a separate settlement in October 2007, Siemens paid a €201 million fine to settle charges of corrupt payments to foreign officials by the company's telecom

⁵¹ Karin Matussek, *MAN SE Fined 150.6 Million Euros over Bribes at Units (Update2)*, BLOOMBERG, Dec. 10, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aZfuVzPMLpiQ>; Judy Dempsey, *German Manufacturer MAN in Bribery Investigation*, N.Y. TIMES, May 12, 2009, available at <http://www.nytimes.com/2009/05/13/business/global/13man.html>; *Ehemaliger Manager gesteht Bestechung*, FRANKFURTER ALLGEMEINE ZEITUNG, June 23, 2010, available at <http://www.faz.net/aktuell/wirtschaft/unternehmen/man-schmiergeldskandal-ehemaliger-manager-gesteht-bestechung-1572713.html>.

⁵² *Ex-Siemens execs found guilty in bribery case*, REUTERS, April 20, 2010, available at <http://www.reuters.com/article/2010/04/20/siemens-probe-idUSLDE63J1IN20100420>.

⁵³ Samuel Rubinfeld, *German Prosecutors Charge Ex-Siemens Manager with Bribery*, WALL ST. J., June 14, 2011, available at <http://blogs.wsj.com/corruption-currents/2011/06/14/german-prosecutors-charge-ex-siemens-manager-with-bribery/>.

group.⁵⁴ Other investigations by *Staatsanwaltschaften* in Munich and Nuremberg are in progress.⁵⁵

German prosecutors are also investigating domestic bribery by foreign companies, occasionally alongside investigations by other nations. In 2006, prosecutors in Munich were investigating automotive parts suppliers for bribing German carmakers, including the French company Faurecia; Grammer, a German subsidiary of the U.S. company Lear; and a subsidiary of Canadian company Magna International.⁵⁶ That year, the Hamburg *Staatsanwaltschaft* investigated sales staff of the Dutch company Philips for bribing the purchasing officers of various German companies.⁵⁷ Finally, in April 2010, the Dresden prosecutor and Russian authorities were investigating Hewlett Packard for allegedly paying €8 million in bribes to sell computer equipment through a German subsidiary to a Russian

⁵⁴ *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, UNITED STATES DEPARTMENT OF JUSTICE (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

⁵⁵ Siemens AG, Report of Foreign Private Issuer (Form 6-K) (Nov. 10, 2011), available at http://www.sec.gov/Archives/edgar/data/1135644/000119312511305744/d253513d6k.htm#toc253513_8.

⁵⁶ *Korruptionsskandal weitert sich aus*, HANDELSBLATT, Aug. 5, 2006, available at <http://www.handelsblatt.com/unternehmen/industrie/autobranche-korruptionsskandal-weitet-sich-aus/2689338.html>.

⁵⁷ *“Bestechung war anscheinend üblich,”* HANDELSBLATT, Aug. 24, 2006, available at <http://www.handelsblatt.com/unternehmen/handeldienstleister/philips-besteuchung-war-anscheinend-ueblich/2696838.html>.

prosecutor's office. The United States has reportedly joined the investigation.⁵⁸

UNITED STATES ENFORCEMENT EFFORTS

German companies have been the targets of some of the Justice Department's largest and most prominent cases brought under the Foreign Corrupt Practices Act ("FCPA"). Moreover, the Department sometimes cooperates directly with German *Staatsanwaltschaften*. For instance, in December 2008 the Justice Department and Siemens settled charges of bribery with a criminal fine of \$450 million, the largest monetary penalty ever paid under the FCPA. Siemens was charged with violating the internal controls and books and records provisions of the Act. The Justice Department was cooperating with investigations by the Securities and Exchange Commission, resulting in an additional \$350 million disgorgement penalty, and the Munich *Staatsanwaltschaft* investigation noted above. All told, Siemens paid a total of more than \$1.6 billion in fines, penalties, and disgorgement.⁵⁹ In December 2011, the Justice Department initiated another FCPA proceeding against former Siemens executives and contractors, in connection with the bribery scheme in Argentina noted above. The Justice Department noted an "outstanding and extraordinary" level of cooperation from current Siemens officials, and was again working with the Munich *Staatsanwaltschaft*.⁶⁰

⁵⁸ David Crawford, *H-P Executives Face Bribery Probes*, WALL ST. J., April 15, 2010, available at http://online.wsj.com/article/SB10001424052702303348504575184302111110966.html?mod=WSJ_Tech_LEADSecond.

⁵⁹ *Siemens AG and Three Subsidiaries Plead Guilty*, *supra* note 54.

⁶⁰ Edward Wyatt, *Former Siemens Executives Are Charged With Bribery*, N.Y. TIMES, Dec. 13, 2011, available at

The Justice Department reached another high-profile FCPA settlement with Daimler AG in 2010. The Department had charged two Daimler subsidiaries with violation of, and conspiracy to violate, the FCPA's anti-bribery provisions, while the parent company was charged with violation of, and conspiracy to violate, the books and records provisions. These charges stemmed from payments of bribes in the tens of millions of dollars to public officials in 22 countries, to secure government purchases of Daimler vehicles. The total criminal fines and penalties imposed amounted to \$93.6 million.⁶¹ As part of the agreement, former FBI director Louis Freeh was appointed as a monitor to ensure compliance, with the power to inspect records, block promotions, and demand dismissals. His appointment at Daimler lasts until March 2013, and has sparked considerable controversy.⁶²

Charges against Allianz SE, the German insurance and finance giant, illustrate the possibility that concurrent FCPA investigations by the Justice Department and the SEC may result in penalties imposed by one agency, but not the other. Charges were originally brought involving bribery in Indonesia by Manroland AG, a German printing systems company majority-owned by Allianz Capital Partners, Allianz SE's private equity arm. In February 2012, the Justice Department announced that it was closing its investigation and did not plan on bringing

<http://www.nytimes.com/2011/12/14/business/global/former-siemens-executives-charged-with-bribery.html>.

⁶¹ *Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation*, UNITED STATES DEPARTMENT OF JUSTICE (April 1, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-360.html>.

⁶² Dietmar Hawranek, *Daimler Upset with Over-Eager American Oversight*, DER SPIEGEL, Dec. 13, 2011, available at <http://www.spiegel.de/international/business/0,1518,803350,00.html>.

charges.⁶³ However, reports surfaced in October 2011 that Allianz SE was close to a settlement with the SEC, with a possible penalty ranging from \$7 million to \$10 million.⁶⁴ The SEC has not closed its investigation of Allianz.

FCPA charges have also been brought against U.S. companies operating in Germany, mostly in the medical field. In March 2005, Micrus Corporation, a privately-held medical device manufacturer based in California, settled FCPA charges with the Justice Department and paid a penalty of \$450,000. Micrus was charged with bribing doctors at public hospitals in France, Spain, and Turkey as well as Germany; the Department regarded the doctors as public officials under the Act.⁶⁵ In October 2006, the SEC opened an investigation into possible FCPA violations by German subsidiaries of the U.S. pharmaceutical company Bristol-Myers Squibb. The company is cooperating with the SEC, while the Munich *Staatsanwaltschaft* has terminated a parallel investigation.⁶⁶

⁶³ Aruna Viswanatha, *Exclusive – US DOJ closes Allianz bribery probe without charges*, REUTERS, Feb. 22, 2011, available at <http://in.reuters.com/article/2012/02/21/fcpa-allianz-idINDEE81K0LJ20120221>.

⁶⁴ Joe Palazzolo, *Allianz Close to Settlement with SEC Over Bribery Allegations*, WALL ST. J., Oct. 7, 2011, available at <http://blogs.wsj.com/corruption-currents/2011/10/07/allianz-close-to-settlement-with-sec-over-bribery-allegations/>.

⁶⁵ *Micrus Corporation Enters into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability*, UNITED STATES DEPARTMENT OF JUSTICE (March 2, 2005), available at http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm.

⁶⁶ Bristol-Myers Squibb Company, Quarterly Report (Form 10-Q) (Oct. 27, 2011), available at <http://www.sec.gov/Archives/edgar/data/14272/000119312511283608/d245935d10q.htm>.

CONCLUSION

In recent years, Germany has significantly strengthened its anti-corruption laws. Its prosecutors have vigorously enforced these laws, sometimes in cooperation with U.S. authorities, resulting in some of the largest monetary penalties ever imposed in any anti-corruption investigation. Some German companies have also begun to implement internal compliance structures and procedures. However, new scandals continue to emerge, and transparency advocates continue to criticize inadequacies in the regulatory framework.

Because of these facts, both German and international authorities will likely not succumb to complacency in prosecuting corruption, and the issue will likely remain at the forefront of public opinion. Therefore, companies and investors doing business in Germany should be aware of the heightened challenges posed by the country's volatile battle against corruption, and craft comprehensive compliance programs that not only account for current levels of enforcement, but also anticipate the possibility of more stringent enforcement in the future.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN THE RUSSIAN FEDERATION

By: Asheesh Goel and Meghan J. Dolan

March 15, 2012

OVERVIEW

At this year's World Economic Forum in Davos, foreign investors heard first hand from some of Russia's leading public figures about the massive political and economic reforms necessary to improve Russia's business climate.⁶⁷ At a breakfast hosted by state-owned Sberbank, Russia's largest bank, an improvised electronic poll among participants showed that 24 percent thought Russia's main challenge was corruption, 17 percent said it was government intervention and monopolies, and 16 percent thought it was an outdated political system.⁶⁸

In spite of the widely recognized challenges to doing business in Russia, the United Nations Conference on Trade and Development's World Investment Prospects Survey 2010-2012 ranked Russia as the fifth most popular host economy for foreign direct investment by transnational corporations. Russia has recently taken major steps toward integration in the global economy, which should increase investment opportunities. After eighteen years of negotiations, the WTO approved Russia's membership on December 16, 2011, and it is expected that Russia will join in mid-2012.⁶⁹ Last spring, the OECD invited Russia to

⁶⁷ Dmitry Zhdannikov, *Russia Davos Party has Unusual Opposition Flavor*, REUTERS, January 28, 2012, available online at <http://www.reuters.com/article/2012/01/28/us-davos-russia-idUSTRE80R0HZ20120128>.

⁶⁸ *Id.*

⁶⁹ *Russia Becomes WTO Member after 18 Years of Talks*, BBC NEWS, December 16, 2011, available online at <http://www.bbc.co.uk/news/business-16212643>; RIA NOVOSTI, January 31, 2012, available online at <http://en.rian.ru/world/20120131/171044030.html>.

join its anti-bribery convention and working group, following Russia's enactment of legislation prohibiting Russian businesses from bribing foreign public officials.⁷⁰ These developments remove two of the remaining obstacles to Russia's progress toward full OECD membership.⁷¹

Assuming that the international community holds it to account, Russia's developing role as a global economic player will require the government to crack down on the corruption prevalent in so many sectors of its economy. Legislative developments initiated by President Dmitry Medvedev have begun to harmonize Russia's anti-corruption prohibitions with international standards. Vladimir Putin, now poised to begin his third term as President, highlighted the need to combat corruption in the months leading up to his election in early March. Putin published a guest piece calling for an end to Russia's "system-wide corruption" in order to "improve Russia's business climate and the country's attractiveness for long-term investments."⁷² Yet for nearly a decade, Russian politicians have been denouncing corruption and instituting plans purportedly aimed at solving the corruption problem. Despite these efforts, the level of corruption in Russia appears to be increasing.

Whether the latest developments in Russia's efforts to combat corruption will fall victim to the same implementation

⁷⁰ News Release, *OECD invites Russia to join Anti-Bribery Convention*, May 25, 2011, available online at http://www.oecd.org/document/24/0,3746,en_21571361_44315115_47983768_1_1_1_1.00.html.

⁷¹ *Roadmap for the Accession of the Russian Federation to the OECD Convention*, Council of Ambassadors of the Organization for Economic Co-operation and Development, adopted Nov. 30, 2007, available online at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=C\(2007\)103/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=C(2007)103/final&doclanguage=en).

⁷² Vladimir Putin, *Russia Needs More Technology and Less Corruption*, Guest Post, FINANCIAL TIMES BEYONDBRICS BLOG, January 30, 2012, available online at <http://blogs.ft.com/beyond-brics/2012/01/30/guest-post-by-vladimir-putin-russia-needs-more-technology-and-less-corruption/#axzz1le5D1Pf5>.

problems remains to be seen, but companies looking to take advantage of favorable investment opportunities in Russia must be aware of the potential corruption risks in order to legal problems under anti-corruption laws in both Russia and the U.S.

THE SIZE OF THE PROBLEM

Transparency International, the non-governmental organization dedicated to eliminating corruption, publishes an annual Corruption Perception Index, which measures the perceived levels of public sector corruption in 183 countries and territories. For 2011, Russia ranked 143rd on the list, earning the same score as countries such as Belarus, Azerbaijan, Uganda and Nigeria.⁷³ Notably, Russia falls behind all of the other so-called “BRIC” countries, the closest of which is India, at 95th.

In January 2011, Russian Interior Minister Rashid Nurgaliyev stated that the number of corruption-related crimes involving top government officials and large bribes increased 100% in 2010,⁷⁴ and the average bribe amount between 2010 and 2011 more than tripled, to \$7,770.⁷⁵ Russia’s Prosecutor General recently announced that prosecutors initiated almost 4,000 criminal cases against officials on corruption charges in 2011.⁷⁶ Over 8,000 criminal cases were referred to court and more than

⁷³ See *Corruption Perceptions Index 2011 Results*, Transparency International, December 1, 2011, available online at <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

⁷⁴ *Number of Corrupt Russian Top Officials Doubled in 2010*, RIA NOVOSTI, January 13, 2011, available online at <http://en.rian.ru/russia/20110113/162132491.html>.

⁷⁵ *Average Bribe Amount in Russia more than Tripled Last Year*, RUSSIAN LEGAL INFORMATION AGENCY (RAPSI), January 27, 2012, available online at http://rapsinews.com/anticorruption_news/20120127/259820426.html.

⁷⁶ *Tens of Thousands Incur Liability for Corruption in 2011*, RUSSIAN LEGAL INFORMATION AGENCY (RAPSI), January 12, 2012, available online at http://rapsinews.com/anticorruption_news/20120112/259512928.html.

7,000 individuals were convicted.⁷⁷ Nearly 50,000 officials were made “accountable” for corruption in 2011.⁷⁸

According to Transparency International’s Global Corruption Barometer, 53 percent of Russians surveyed believed that the level of corruption in Russia had increased in the past three years, and 39 percent believed it had stayed the same.⁷⁹ Fifty-two percent of Russians surveyed assessed the Russian government’s actions to fight corruption as “ineffective”; only 26 percent of Russians surveyed believed the government was “effective” at fighting corruption.⁸⁰

Yelena Panfilova, General Director of the Center for Anti-Corruption Research and Initiative of Transparency International Russia and a member of the Presidential Council for Civil Society Institutions and Human Rights, was recently interviewed about Russia’s progress against corruption. She notes that, despite tougher anti-corruption legislation and regulations stipulating internal and external control over the activity of public officials, Russia is left with a long list of anti-corruption measures that have not been implemented.⁸¹ Panfilova stated that “[a]ll this leaves one feeling like a child with a beautifully wrapped present, which, when opened, reveals itself to be nothing more than an empty box.”⁸²

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Global Corruption Barometer 2010*, Transparency International, Appendix C, Table 1, available online at

http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

⁸⁰ *Id.* at Table 4.

⁸¹ Yelena Panfilova, *Fighting Corruption in Russia: No Cause for Celebration*, RUSSIAN LEGAL INFORMATION AGENCY (RAPSI), December 13, 2011, available online at

http://rapsinews.com/anticorruption_publication/20111213/258876119.html.

⁸² *Id.*

EFFECT OF INTERNATIONAL ANTI-CORRUPTION TREATIES

Russian politicians have acknowledged the increasing importance of global efforts to combat corruption, and Russia's effort to take part in international anti-corruption conventions and groups has spurred changes in its domestic laws and regulations. In 2006, Russia became a party to the UN Convention against Corruption and the Council of Europe Criminal Law Convention on Corruption.⁸³ In 2007, Russia became a member of the Council of Europe Group of States against Corruption (GRECO), which entails a comprehensive joint evaluation of Russia's anti-corruption efforts by other members – a process which is still ongoing.⁸⁴ Most recently, Russia ratified the OECD Convention on Combating Bribery of Foreign Public Officials and became a member of the OECD's working group on bribery issues.⁸⁵

In order to remain a party to the various international conventions against corruption, Russia needed to bring its anti-corruption laws into alignment with international standards. In 2008, Russia adopted a series of new anti-corruption measures aimed at harmonizing Russia's domestic laws with international conventions and which provide the framework for Russia's anti-corruption laws today. In May 2008, President Medvedev signed a decree *On the Measures of Counteracting Corruption*,⁸⁶ creating the Presidential Council on Counteracting Corruption ("Anti-Corruption Council"). In July 2008, a National Anti-Corruption Plan (the "Plan") was adopted, which set an agenda for development of various measures to combat corruption which would be overseen by the Anti-Corruption Council. On December 25, 2008, Russia adopted a set of laws (the "Anti-

⁸³ *Compliance Report on the Russian Federation*, JOINT FIRST AND SECOND ROUND EVALUATION, Council of Europe - Group of States Against Corruption (GRECO), December 3, 2010.

⁸⁴ *Id.*

⁸⁵ See News Release, *Supra* Note 2.

⁸⁶ Federal Law No. 273-FZ.

Corruption Laws”) intended to create a comprehensive approach to fighting corruption.⁸⁷ The Anti-Corruption Laws amended more than 20 existing laws, including regulations governing the activities of government officials, and the Civil, Criminal, Tax and Labor Codes.

The Anti-Corruption Laws laid out a number of basic principles and measures for fighting corruption, and defined “Corruption” to mean

(a) abuse of public office, giving or receiving bribes, abuse of powers, commercial graft or other illegitimate use by an individual of his/her official status against legal interests of society and the State to receive private gain in the form of money, valuables, other property or services of a monetary nature, other proprietary rights for himself/herself or third persons, or unlawful provision of such benefit to such a person or other individuals;

(b) committing acts indicated in paragraph (a) on behalf or for the benefit of a legal entity.

Importantly, the legislation also contained measures directed at state officials requiring annual declaration of all

⁸⁷ Federal Law No. 274-FZ On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law on Counteraction to Corruption, and Federal Law No. 280-FZ On Amendments to Certain Legislative Acts of the Russian Federation in Relation to Ratification of the UN Anti-bribery Convention dated October 31, 2003 and the Criminal Law Convention on Corruption date January 27, 1999, and Adoption of the Federal Law On Counteraction to Corruption.

taxable income, assets and liabilities of a material nature, reporting of any case where the official is encouraged to participate in corrupt activities, and procedures designed to address conflicts of interest.⁸⁸

Since 2008, the Russian government has built upon the framework laid by the Anti-Corruption Laws. Based on the recommendations from GRECO's 2008 *Evaluation Report on the Russian Federation*, Russia updated its Anti-Corruption Strategy and National Anti-Corruption Plan for 2010-2011 to lay out precise measures for counteracting corruption that can be both implemented and monitored. As part of the Plan, the government made various amendments to the Anti-Corruption Laws in order to strengthen the enforcement regime.

CURRENT ENFORCEMENT REGIME

Russian law prohibits both public and commercial bribery, and contains provisions addressing giving bribes, receiving bribes and acting as an intermediary for bribes.

Bribery in the Public Sector

In the public sector, bribery of a "functionary" can be punished by a fine of between 15 to 90 times the amount of the bribe and up to 12 years in prison.⁸⁹ The term "functionary" is defined to include persons holding positions provided for by the constitution, federal constitutional laws, and federal laws, such as the President, Prime Minister, judges, and members of Parliament and other assemblies, as well as persons who fulfill representative functions within State bodies, self-government bodies and the Armed Forces.⁹⁰ Bribe taking by a "functionary" is similarly prohibited, and can be punished by a fine of between 25 to 100

⁸⁸ Federal Law No. 273-FZ.

⁸⁹ Article 291.

⁹⁰ Article 285.

times the amount of the bribe and up to 12 years in prison.⁹¹ In May 2011, the Code was amended to specifically include bribery of, and receipt of bribes by, foreign government officials and officials of public international organizations in addition to domestic functionaries.⁹²

The May 2011 legislation also addressed the role of intermediaries in bribes, by creating a new offense establishing liability for “aiding and abetting” bribery,⁹³ punishable by fines of up to 80 times the bribe amount and a prison term of 12 years.

Although seemingly at odds with the intent of the Criminal Code, the Civil Code contains limitations on what can be considered an appropriate gift to a public official. The Code generally prohibits gifts to a defined set of public officials, unless it is a “simple gift,” the value of which cannot exceed 3,000 rubles (\$90).⁹⁴ An exception, however, permits gifts with a value higher than simple gifts to certain individuals when the gift is made at a formal event, in which case the gift is simply considered to be state, regional or municipal property.⁹⁵ The gifts provision has been widely criticized as legitimizing gifts to public officials and as contradictory to anti-corruption efforts.⁹⁶

Finally, the Criminal Code contains offenses titled “Abuse of Authority”⁹⁷ and “Abuse of Official Powers”⁹⁸ designed to prosecute individuals who act in defiance of the lawful interests of their organization (for the private sector) or of civil society (in the public sector) in order to derive a benefit for themselves.

⁹¹ Article 290

⁹² Federal Law No. 97-FZ

⁹³ Article 2911

⁹⁴ Articles 574-575.

⁹⁵ *Id.*

⁹⁶ *Compliance Report on the Russian Federation*, *Supra* note 17.

⁹⁷ Article 201

⁹⁸ Article 285

Bribery in the Private Sector

The Criminal Code also prohibits bribery in the private sector--prohibiting bribery of a person who discharges managerial functions in a profit-making or any other organization.⁹⁹ Receipt of bribes by a person discharging managerial functions is similarly prohibited.¹⁰⁰ Punishments for bribery in the private sector include fines of up to 100 times the bribe amount and a prison term of three years. Notably, although titled bribery in a “profit-making organization”, the law also covers public businesses (state-owned enterprises), and has been interpreted as only covering bribes with economic or tangible benefits.

Liability of Corporations

Despite criticism from GRECO and the OECD, offenses under the Russian Criminal Code still do not apply legal entities. The 2008 Anti-Corruption Laws created a Civil offense called “Unlawful Compensation on Behalf of a Legal Entity,” which addresses both public and private sector bribery.¹⁰¹ The law prohibits transfer of money, securities or other property, or providing material services on behalf of or in the interest of a legal entity, with the intention to induce public officials or executives of commercial or non-commercial entities to act or omit actions benefiting the bribe-giver in connection with the bribe recipient’s official functions.¹⁰² This offense is punishable by an administrative fine between three and 100 times the amount of the bribe.¹⁰³

⁹⁹ Article 204.1-2.

¹⁰⁰ Article 204.3-4.

¹⁰¹ Article 19.28.

¹⁰² *Id.*

¹⁰³ *Id.*

Future Developments

In March 2012, President Medvedev signed a new Anti-Corruption Plan for 2012-2013.¹⁰⁴ Comments from the President's Office suggest that the plan will be more focused on enforcement and includes a number of new aspects. First, the range of civil servants whose income and spending is monitored by the government will be broadened to include all staff members at the Pension Fund as well as state corporations.¹⁰⁵ The government is also expanding opportunities for civil society to monitor the activities of civil servants by creating a process for submission of written statements regarding improper conduct. In the same vein, the government is also aiming to increase cooperation with and involvement of civil society in anti-corruption enforcement by issuing special grants to public organizations specializing in countering corruption.

RECENT ENFORCEMENT ACTIONS

Although corruption is known to be a widespread problem in Russia, the Russian government has been slow to bring enforcement actions. However, over the past few years Russian law enforcement officials seem to have increased their cooperation efforts during cross-border investigations being conducted by foreign governments.

Hewlett-Packard

On April 14, 2010, Russian investigators raided HP's offices in Moscow at the request of German prosecutors, who are investigating HP's wholly-owned German subsidiary for alleged

¹⁰⁴ News Release, *Executive Order on National Anti-Corruption Plan for 2012-2013*, March 13, 2012, available at <http://eng.news.kremlin.ru/news/3539>.

¹⁰⁵ Transcript, *Excerpts from Comments to Journalists made by Chief of Staff of the Presidential Executive Office following Meeting of the Council for Countering Corruption*, March 13, 2012, available at http://eng.news.kremlin.ru/ref_notes/75.

bribery in connection with the sale of computer equipment to the Russian Office of the Prosecutor General.¹⁰⁶ HP Germany allegedly paid EUR 8 million in bribes to Russian officials between 2000 and 2007 in order to secure a EUR 35 million contract to supply a computer system designed to provide secure communications for prosecutors throughout Russia.¹⁰⁷ German prosecutors are also investigating whether HP Germany executives funneled the alleged bribes to Russian officials through a network of shell companies and accounts located in countries around the world, including England, Austria, Switzerland, Belize, New Zealand, Latvia, Lithuania and several U.S. states.¹⁰⁸ The DOJ and SEC have commenced their own investigations into HP for possible FCPA violations in Russia and elsewhere—those investigations appear to be ongoing.¹⁰⁹ Russia’s Prosecutor General’s Office is reportedly conducting its own investigation into the matter, as well, although little information is available regarding the process or outcome of such an investigation.¹¹⁰ However, even cooperation by the Russian government in another country’s investigation is seen as a major shift in conduct.

Daimler

According to criminal information filed by the DOJ, Daimler paid over €3 million in bribes to Russian officials in order to sell vehicles to the Russian government, including the Ministry of Internal Affairs, the military and the cities of Moscow, Ufa and Novi Urengoi.¹¹¹ These payments were often made through

¹⁰⁶ David Crawford, *H-P Executives Face Bribery Probes*, WALL STREET JOURNAL, April 15, 2010.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Ben Worthen and David Crawford, *H-P Says Probe Has Expanded*, WALL STREET JOURNAL, December 17, 2010.

¹¹⁰ *Moscow waiting for information in Hewlett Packard bribe case*, RIA NOVOSTI, April 28, 2010, available online at <http://en.rian.ru/russia/20100428/158783105.html>.

¹¹¹ *Information, U.S. v. Daimler AG*, Case No. 1:10-cr-00063-RJL (D.D.C. Mar. 22, 2010).

Daimler's wholly owned subsidiary, Daimler Russia, which used third parties to funnel the payments to the appropriate officials.¹¹² The total value of Daimler's sales to the Russian government between 2000 and 2005 was approximately €64,660,000, or five percent of the company's overall sales in the country.¹¹³ Payments were made to Russian officials using a variety of methods, including over-invoicing the customer and paying the excess amount to the Russian official. Daimler also made cash payments to Russian government officials in order to secure contracts to sell vehicles to Russian municipalities.¹¹⁴

In early April 2010, Russian prosecutors sent a request to the DOJ requesting information about bribes paid by Daimler in Russia.¹¹⁵ The request was apparently prompted by a personal order from President Dmitry Medvedev following a Russian internet petition signed by thousands asking the Prosecutor General's Office and the Interior Ministry to begin an investigation.¹¹⁶ Moscow City Hall then asked Daimler to "clarify the situation" regarding bribes reportedly paid to Moscow city government officials to secure sales contracts for its Mercedes vehicles. City Hall later issued a release stating that it did not own any Mercedes vehicles, that it considered the allegations inaccurate and that Daimler could face legal action as a result.¹¹⁷ On May 20, 2010, Bloomberg reported that the U.S. Department of Justice had given documents to prosecutors in Moscow, prompting Russia to open a formal investigation into the matter.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Prosecutor General Says He Is Following Up on Daimler*, THE MOSCOW TIMES, April 29, 2010, available at <http://www.themoscowtimes.com/news/article/prosecutor-general-says-he-is-following-up-on-daimler/405034.html>.

¹¹⁶ *Id.*

¹¹⁷ *City Hall Asks Daimler to 'Clarify' Bribes Claim*, THE MOSCOW TIMES, April 30, 2010, available at <http://www.themoscowtimes.com/news/article/city-hall-asks-daimler-to-clarify-bribes-claim/405158.html>.

On November 12, 2010, Russian prosecutors confirmed that they had opened a criminal investigation into the matter.¹¹⁸

Transneft

According to a recent report, the Russian government has also launched a probe into the oil pipeline monopoly Transneft in a bid to counter accusations that it has been soft on fighting corruption.¹¹⁹ Nearly a year ago, Putin stated that he would investigate allegations that Transneft managers embezzled \$4 billion during the construction of a \$25 billion pipeline¹²⁰ – the investigation was announced two months prior to the Presidential election, and may have been seen as an important opportunity to appear hard on corruption. Other state firms, including gas export monopoly Gazprom and state-controlled banks Sberbank and VTB are reportedly due to report back to Putin in two months on anti-corruption measures that they have taken.¹²¹

CONCLUSION

Recent legislative developments, Russia's progress toward integration in the global economy, and its continuing efforts to attract foreign investors may suggest that the government is ready to crack down on the corruption prevalent in so many sectors of its economy. Whether the Russian government will find ways to effectively implement solutions to the nation's corruption

¹¹⁸ *Russian Investigators Launch Criminal Case Against Daimler*, TV-NOVOSTI, November 12, 2010, available at <http://rt.com/news/prime-time/russian-criminal-daimler-officials/>.

¹¹⁹ *Russia Launches Graft Probe into Oil Pipeline Firm*, REUTERS, December 30, 2011, available at <http://af.reuters.com/article/energyOilNews/idAFL6E7NU23I20111230?pageNumber=1&virtualBrandChannel=0>.

¹²⁰ *Id.*

¹²¹ *Id.*

problems is unclear, but heightened scrutiny by government regulators seems likely and may increase the risks of doing business in Russia. We expect that companies will be adopting and distributing clear, stand-alone anti-corruption policies, implementing broad training programs and developing internal whistleblower hotlines and other monitoring mechanisms for their operations in Russia in order to combat these risks going forward.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN THE UNITED ARAB EMIRATES

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OVERVIEW

The United Arab Emirates' dynamic economy has made it a destination for foreign investment for over a decade. In recent years, the Gulf state has shown similar dynamism in combating corruption; investors should take notice of that effort.

The U.A.E. has been conscientious in diversifying its economy and encouraging foreign investment. A 2012 World Bank Group report ranked the U.A.E. the 33rd easiest place to do business, and the U.A.E. was second out of 18 countries in its region.¹²² Thanks in part to its openness to foreign investors, the U.A.E. averaged nearly ten percent annual growth in Gross Domestic Product in the four years before the 2008 financial crisis.¹²³ In particular, the emirate of Dubai has sought to earn a reputation for transparency and low taxes.¹²⁴ The city of Dubai was ranked 27th in *Foreign Policy's* Global Cities Index in 2010, a study that attempts to order cities based on their global

¹²² See The World Bank and the International Finance Corporation, *DOING BUSINESS 2012: DOING BUSINESS IN A MORE TRANSPARENT WORLD 6* (2012), available at <http://www.doingbusiness.org/reports/global-reports/doing-business-2012>.

¹²³ See *United Arab Emirates GDP Annual Growth Rate*, TRADING ECONOMICS, <http://www.tradingeconomics.com/ united-arab-emirates/gdp-growth-annual> (last visited Feb. 12, 2012).

¹²⁴ See Jason Benham, *Dubai bank probe sparks calls for compliance*, REUTERS, Jun. 23, 2008, <http://www.reuters.com/article/2008/06/23/dib-probe-idUSL2328169720080623>.

influence.¹²⁵ Dubai is already the Persian Gulf's most important financial center, and, as one observer put it, "U.A.E. leaders are committed to [their country] . . . becoming an economic hub in line with Hong Kong, London or New York."¹²⁶ Even after the financial crisis, the U.A.E. remains a destination for foreign investment and of interest to those doing business in the region.

Not long ago, the U.A.E. had a reputation for opacity and selective enforcement of its prohibitions on bribery. In the last several years, however, a number of developments have changed that reputation. In 2005, the U.A.E. broadened the Federal Penal Code's bribery prohibitions to include more private actors.¹²⁷ 2008 saw Dubai authorities probe public and private companies and initiate prosecutions against high-ranking executives.¹²⁸ In 2009, Dubai passed a financial fraud law that included imprisonment of up to 20 years for violations.¹²⁹ The U.A.E.'s recent efforts to identify and eliminate corruption have improved its reputation and seem a logical extension of its historical commitment to stability for investors. For the moment, however, the changes pose difficulty for foreign entities and individuals

¹²⁵ See *The Global Cities Index 2010*, FOREIGN POLICY, <http://www.foreignpolicy.com/node/373401> (last visited Feb. 12, 2012).

¹²⁶ See *Snapshot of the United Arab Emirates Country Profile*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/united-arab-emirates/show-all> (last updated May 21, 2011).

¹²⁷ See Charles Laubach, *Anti-Corruption Compliance in the United Arab Emirates*, LAW.COM, <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202473459184&slreturn=1#> (last visited Feb. 8, 2012).

¹²⁸ See *Dubai prosecution vows zero-tolerance on corruption*, REUTERS, Aug. 17, 2008, available at <http://www.reuters.com/article/2008/08/17/dubai-corruption-idUSLH57914720080817>.

¹²⁹ See Charles Laubach & Aly Shah, *United Arab Emirates*, in *GETTING THE DEAL THROUGH: ANTI-CORRUPTION 2011* 245, 247 (Callum Campbell, ed., 2011).

doing business in the country and trying to keep pace with the shifting landscape.

THE SIZE OF THE PROBLEM

Corruption in the U.A.E. is not as pervasive as in its Middle Eastern neighbors, and the circumstances are improving, but optimism about the situation should be guarded. The U.A.E. ranked 28th least corrupt in Transparency International's Corruption Perceptions Index, a study assessing transparency and anti-corruption efforts in 183 countries.¹³⁰ Among the 18 Middle Eastern and Northern African countries ranked, the U.A.E. finished second only to Qatar.¹³¹ The Department of State's 2011 Investment Climate Statement on the U.A.E. was also encouraging, adding "[t]here is no evidence that corruption of public officials is a systemic problem."¹³² Transparency International also compiles the Bribe Payers Index, which assesses the likelihood that companies from each of the top 28 exporting countries will pay bribes when doing business abroad.¹³³ Over 3,000 business executives rate each country from 0 to 10, where a maximum score of 10 corresponds with a view that companies from that country never engage in bribery when doing business abroad.¹³⁴ For 2011, the U.A.E was 23rd on the list, with a rating of 7.3.¹³⁵

¹³⁰ See *Corruption Perceptions Index 2011 Results*, TRANSPARENCY INTERNATIONAL, December 1, 2011, available at <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

¹³¹ *Id.*

¹³² *2011 Investment Climate Statement – United Arab Emirates*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF ECONOMIC, ENERGY, AND BUSINESS AFFAIRS, March 2011, www.state.gov/e/eb/rls/othr/ics/2011/157379.htm.

¹³³ See *Bribe Payers Index Report 2011*, Transparency International (2011), available at <http://bpi.transparency.org/results/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

Such studies answer questions about corrupt practices within the U.A.E. while raising others. In reports accompanying the 2008 and 2009 rankings, Transparency International acknowledged the U.A.E.'s improving scores while questioning those scores' significance.¹³⁶ The 2008 report identified "lower perceived levels of corruption in Qatar, the United Arab Emirates (UAE), Oman, Bahrain, and Jordan."¹³⁷ The report queried "whether this improvement . . . [was] due to increased political will to fight corruption or whether the negative effects of corruption [were] being masked by large surpluses, which [were] fueling rapid economic development."¹³⁸ Evidence supporting both possibilities exists.

Several observers lament the U.A.E.'s opaque business practices and the resulting dearth of data on corruption in the country. The Business Anti-Corruption Portal, a multi-national effort to assist businesses, notes that no civil society organization focuses on anti-corruption in the U.A.E.¹³⁹ Anecdotes also suggest that there is more corruption than meets the eye. A 2008 Financial Times article recounted Dubai authorities' alleged torture of a banker detained in a corruption investigation.¹⁴⁰ The article's author observed that even as Dubai has become a hub for business

¹³⁶ 2008 *Corruption Perceptions Index Regional Highlights: Middle East and North Africa*, TRANSPARENCY INTERNATIONAL, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2008/regional_highlights_factsheets (last visited Feb. 8, 2012); and 2009 *Corruption Perceptions Index Regional Highlights: Middle East and North Africa*, TRANSPARENCY INTERNATIONAL, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009/regional_highlights_factsheets (last visited Feb. 8, 2012).

¹³⁷ 2008 *Corruption Perceptions Index Regional Highlights*, *supra* note 130.

¹³⁸ *Id.*

¹³⁹ See *Snapshot of the United Arab Emirates*, *supra* note 120.

¹⁴⁰ See Simeon Kerr, *Detained banker "tortured" in Dubai*, FINANCIAL TIMES, Jun. 9, 2008, <http://www.ft.com/cms/s/0/7327c16c-364f-11dd-8bb8-0000779fd2ac.html#axzz1leVtcbtn>.

in the Middle East, “its rudimentary legal system is regarded as a weakness of the emirate’s regulatory landscape.”¹⁴¹

Recently, the U.A.E. has undertaken efforts to lessen corruption, at least partially explaining the country’s improving record. The 2008 Corruption Perceptions Index report suggested increased prosecutions involving high-level executives and a stronger Financial Audit Department as less cynical explanations for the U.A.E.’s high marks.¹⁴² The picture of corruption in the U.A.E. is an incomplete one to be sure, but also one of considerable recent improvement.

STATUTORY FRAMEWORK

Several legislative acts provide the prohibitions and penalties for bribery and corrupt practices within the U.A.E. First, Articles 234 through 239 of the U.A.E. Penal Code (“Federal Penal Code”) define and prohibit bribery. Those articles define bribery broadly and include offering, paying, soliciting, and accepting bribes.¹⁴³ Article 239, however, exempts from punishment individuals who pay bribes but promptly report the violation or confess before the case is committed to court.¹⁴⁴ Table 1 summarizes the relevant parts of the Federal Penal Code.

¹⁴¹ *Id.*

¹⁴² 2008 *Corruption Perceptions Index Regional Highlights*, *supra* note 130.

¹⁴³ See Laubach & Shah, *supra* note 123, at 247.

¹⁴⁴ *Id.* at 249.

Table 1: Federal Penal Code Provisions¹⁴⁵

Article	Provision	Punishment
234	Public officials cannot solicit or accept anything of value in exchange for an act or omission in violation of the duties of the office. An offense occurs even where the official never performs or intends to perform the act or omission.	Imprisonment not exceeding 10 years.
235	Public officials cannot solicit or accept anything of value in exchange for an act or omission in violation of the duties of the office. Unlike in Article 234, an offense occurs only when the act or omission occurs.	Imprisonment not exceeding 10 years.
236	Public officials cannot solicit or accept anything of value in exchange for performing a task that is not part of his function. Private actors cannot offer bribes.	Imprisonment not exceeding 5 years.
237	Individuals cannot act as mediators in the offering, soliciting, executing, or accepting of bribes.	Imprisonment not exceeding 5 years.
237	Individuals cannot claim or accept bribes in exchange for their interference with official functions.	Imprisonment of no less than 1 year and a fine of no less than 1,000 AED (approx. \$272 USD).
238	The donation offered or accepted shall be confiscated and the	N/A

¹⁴⁵ Source: Laubach & Shah, *supra* note 123, at 247, 250.

	offender fined the greater of the donation or 1,000 AED (approx. \$272 USD).	
239	Individuals paying and mediating bribes are exempt from punishment if they promptly inform authorities or confess before the case goes to court. Confessions after cases are in court are considered attenuating excuses.	N/A

Articles 118 through 122 of the **Dubai Penal Code** (applicable only in that emirate) also prohibit bribery. Punishments are not as strict under the Dubai Penal Code as under its federal counterpart.¹⁴⁶ The Dubai Penal Code prohibits gratifications between public servants and interested parties in the proceedings before those public servants.¹⁴⁷ It does not provide exemption to individuals who confess or report their own violations.¹⁴⁸ Table 2 summarizes the relevant parts of the Dubai Penal Code.

¹⁴⁶ See Laubach & Shah, *supra* note 123, at 249.

¹⁴⁷ See *id.* at 247.

¹⁴⁸ *Id.*

Table 2: Dubai Penal Code Provisions¹⁴⁹

Article	Provision	Punishment
118	Public servants cannot take a gratification in exchange for an official act.	Imprisonment not exceeding 3 years and/or a fine not exceeding 5,000 AED (approx. \$1361 USD).
119	Public servants cannot take a gratification in exchange for illegal or corrupt influence over an official act.	Imprisonment not exceeding 3 years and/or a fine not exceeding 5,000 AED (approx. \$1361 USD).
120	Individuals cannot offer or give a gratification to a public servant in exchange for performing an official act.	Imprisonment not exceeding 2 years and/or a fine not exceeding 3,000 AED (approx. \$817 USD).
121	Public servants cannot obtain anything of value from parties interested in a proceeding or transaction involving that servant.	Imprisonment not exceeding 1 year and/or a fine not exceeding 1,000 AED (approx. \$272 USD).
122	Parties interested in a proceeding or transaction involving a public servant cannot offer anything of value to that public servant.	Imprisonment not exceeding 1 year and/or a fine not exceeding 1,000 AED (approx. \$272 USD).

Finally, Articles 70 and 71 of 2008’s Federal Decree-Law No. 11 (“Federal Human Resources Law”) govern federal employees’ conduct, particularly involving gifts, bribes, and conflicts of interest.¹⁵⁰ The Federal Human Resources Law clarifies the boundaries of bribery and conflicts of interest and may help conscientious private actors avoid scandal. Unlike the

¹⁴⁹ Source: Laubach & Shah, *supra* note 123, at 247, 250.

¹⁵⁰ See Laubach & Shah, *supra* note 123, at 247.

penal codes, the Federal Human Resources Law does not regulate private parties, but instead regulates only “employees,” which it defines as anyone whose job is contained in the U.A.E.’s general budget.¹⁵¹ Article 70 prohibits accepting, requesting, or offering “bribes,” defined as something of value offered to an employee in exchange for the employee completing his required work faster, failing to complete required work, or to influence other employees on behalf of the payer.¹⁵² Article 71 requires employees to avoid participating in formal decisions or operations that might affect relatives and entities with whom the employee has a relationship or a financial interest.¹⁵³ That article also prohibits employees from divulging information obtained during work in exchange for bribes.¹⁵⁴ Though the U.A.E.’s enforcement of anti-corruption statutes has been uneven at times, there is a comprehensive statutory framework in place for dealing with violators.

LOCAL ENFORCEMENT EFFORTS

Since 2008, U.A.E. authorities have made conscientious and fruitful efforts to combat corruption. That year Transparency International identified a strengthened Financial Audit Department as one cause of the U.A.E.’s improved Corruption Perception Index rating.¹⁵⁵ Dubai authorities in particular launched a campaign to combat corruption in real estate and financial firms.¹⁵⁶ In August of 2008, Dubai prosecutors identified fighting corruption as a top priority and promised a zero-tolerance stance towards corruption.¹⁵⁷ Those efforts resulted in several high-profile prosecutions and convictions, which have also

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See id.* at 249.

¹⁵⁴ *Id.*

¹⁵⁵ *See 2008 Corruption Perceptions Index Regional Highlights: Middle East and North Africa, supra* note 130.

¹⁵⁶ *Dubai prosecution vows zero-tolerance on corruption, supra* note 122.

¹⁵⁷ *Id.*

contributed to the U.A.E.'s improving reputation for transparency.¹⁵⁸

One of the most productive investigations conducted as part of Dubai efforts involved Tamweel, one of the Middle East's biggest real estate developers. In August of 2008, Dubai prosecutors announced that the emirate's police were investigating the company's former chief executive and head of investments for wrongdoing.¹⁵⁹ By May 2010, Dubai authorities had arrested, convicted, and sentenced four Tamweel executives.¹⁶⁰ Adel al-Shirawi, former Tamweel chief executive, was convicted of accepting bribes and self-dealing.¹⁶¹ He was fined, ordered to repay funds, and sentenced to three years in jail.¹⁶² Al-Shirawi's deputy, Abdullah Nasser, also received a three-year sentence.¹⁶³ Feras Khalitoun, former head of investments for Tamweel, received a one-year sentence, as did board member Saad Abdul-Razak.¹⁶⁴ Both were found guilty of squandering funds.¹⁶⁵

Authorities also examined Dubai Islamic Bank, the U.A.E.'s biggest Islamic bank at the time of the probe. In mid-2008, Dubai police detained seven individuals as part of its investigation.¹⁶⁶ By April of 2011, two executives had been convicted of appropriating public funds, illegal profiteering, and inflicting intentional loss to the government and sentenced to 10-

¹⁵⁸ See *2008 Corruption Perceptions Index Regional Highlights: Middle East and North Africa*, *supra* note 130.

¹⁵⁹ *Dubai prosecution vows zero-tolerance on corruption*, *supra* note 122.

¹⁶⁰ *Dubai Tamweel execs get jail terms in corruption probe*, REUTERS, May 30, 2010, available at <http://in.reuters.com/article/2010/05/30/idINLDE64T06720100530>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Benham, *supra* note 118.

year prison terms.¹⁶⁷ The two executives were accused of accepting bribes totaling \$1.7 million USD.¹⁶⁸ Four businessmen were also convicted of criminal complicity in relation to fraudulent deals with Dubai Islamic Bank.¹⁶⁹ The businessmen were all foreigners: two from the United Kingdom, one from the United States, and one from Turkey.¹⁷⁰

A third entity investigated in 2008 is Nakheel, a government-owned developer. The Business Anti-Corruption Portal called the resulting scandal the biggest that the U.A.E. had experienced.¹⁷¹ The investigation resulted in white collar criminal charges against several executives and an “exodus” of other key personnel.¹⁷² Two mid-level executives, one a U.A.E. national and the other an Egyptian national, accepted bribes as part of a property deal.¹⁷³ Both received sentences of three years in prison and fines of about \$816,771 USD.¹⁷⁴ Six other individuals were prosecuted but eventually cleared of charges that they had exchanged almost \$6 million USD in bribes.¹⁷⁵ In March 2010,

¹⁶⁷ See Mahmoud Habboush, *Former Dubai bank executives get 10-year prison terms*, REUTERS, Apr. 27, 2011, <http://uk.reuters.com/article/2011/04/27/emirates-court-dib-idUKLDE73Q0U420110427>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *United Arab Emirates Country Profile*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/united-arab-emirates/show-all> (last updated May 21, 2011).

¹⁷² Simeon Kerr, *Nakheel executive joins the exodus*, FINANCIAL TIMES, February 22, 2010, <http://www.ft.com/intl/cms/s/0/804b2720-1fd3-11df-8deb-00144feab49a.html#axzz1p1SrxrFW>.

¹⁷³ Simeon Kerr, *U.A.E. court rejects Nakheel employees' appeal*, FINANCIAL TIMES, March 1, 2010, <http://www.ft.com/intl/cms/s/0/d76f96d0-2488-11df-8be0-00144feab49a.html#axzz1mPD9mfVA>.

¹⁷⁴ *Id.*

¹⁷⁵ Joanne Bladd, *Five acquitted in Nakheel AED22m bribe case*, ARABIAN BUSINESS, April 21, 2011, <http://www.arabianbusiness.com/five-acquitted-in-nakheel-aed22m-bribe-case-395336.html>.

Nakheel's parent, Dubai World, restructured the troubled firm's debt and overhauled its board of directors.¹⁷⁶

The prosecutions stemming from the 2008 probes in Dubai indicate seriousness on the part of U.A.E. authorities in enforcing anti-corruption laws. They indicated that the U.A.E had begun to make good on its promise of "a firm stance against all forms of corruption."¹⁷⁷

UNITED STATES ENFORCEMENT EFFORTS

In addition to local law enforcement authorities, U.S. enforcement agencies have undertaken significant anti-corruption efforts in the U.A.E. Three recent cases illustrate the development.

In October 2007, the Securities and Exchange Commission (S.E.C.) filed anti-bribery, internal controls, and books and records charges under the Foreign Corrupt Practices Act (F.C.P.A.) against York International Corporation, a heating and cooling company.¹⁷⁸ The S.E.C. alleged that York's subsidiary paid approximately \$522,500 USD to an intermediary, intending most of it to be used to bribe U.A.E. officials.¹⁷⁹ The S.E.C. also alleged that York's Dubai subsidiary authorized and made approximately \$647,110 USD in kickback payments under the United Nations Oil for Food Program.¹⁸⁰ All told, York's subsidiaries attempted to conceal kickback payments of over \$7.5 million USD made to

¹⁷⁶ Tarek El-Tablawy, *New board for Dubai World unit Nakheel appointed*, BOSTON GLOBE, March 30, 2010, http://www.boston.com/business/articles/2010/03/30/new_board_for_dubai_world_unit_nakheel_appointed.

¹⁷⁷ *Dubai prosecution vows zero-tolerance on corruption*, *supra* note 122.

¹⁷⁸ Litigation Release No. 20,319, United States Securities and Exchange Commission, *Securities and Exchange Commission v. York International Corporation*, 07 CV 01750 (D.D.C.)(RCL) (Oct. 1, 2007), <http://www.sec.gov/litigation/litreleases/2007/lr20319.htm>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

secure orders on certain commercial and government projects worldwide.¹⁸¹ York agreed to entry of a final judgment in the case, which ordered York to disgorge \$8,949,132 USD in profits, \$1,083,748 USD in pre-judgment interest, and to pay a \$2,000,000 USD civil penalty.¹⁸²

In July 2009, the Department of Justice (D.O.J.) secured three guilty pleas by Control Components, Inc., a manufacturer of control valves.¹⁸³ The criminal information filed alleged that Control Components made over 200 illegal payments between 1998 and 2007, including payments totaling \$4.9 million USD since 2003.¹⁸⁴ The payments were intended to retain business internationally, including in the U.A.E., where funds went to the state-owned National Petroleum Construction Company.¹⁸⁵ The company's conduct violated F.C.P.A. and the Travel Act.¹⁸⁶ A sentence was entered against Control Components in accordance with its plea agreement and included an \$18.2 million USD criminal fine.

In December 2011, the S.E.C. filed a settled enforcement action against Aon Corporation, an insurance and risk management firm.¹⁸⁷ The S.E.C. alleged violations of the books and records and internal controls provisions of F.C.P.A.¹⁸⁸ Aon's subsidiaries were accused of paying over \$3.6 million USD in

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Press Release, United States Department of Justice, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine (July 31, 2009), <http://www.justice.gov/opa/pr/2009/July/09-crm-754.html>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Litigation Release No. 22,203, United States Securities and Exchange Commission, Civil Action No. 1:11-cv-02256 (D.D.C.) (Dec. 20, 2011), <http://www.sec.gov/litigation/litreleases/2011/r22203.htm>.

¹⁸⁸ *Id.*

bribes between 1983 and 2007 to attract and gain business internationally, including in the U.A.E.¹⁸⁹ To settle that and a related case, Aon agreed to pay approximately \$14.5 million USD in disgorgement and prejudgment interest to the S.E.C. and to pay a \$1.764 million USD criminal fine to the D.O.J.

RECENT DEVELOPMENT: THE DUBAI FRAUD LAW

As investigations in 2008 and 2009 revealed facts about the extent of corruption in the U.A.E., Dubai's legislature took steps to deal with the problem. In December 2009, it passed Dubai Law No. 37 ("Dubai Fraud Law"), which defined two distinct offenses applicable in that emirate. First, the Dubai Fraud Law prohibits the receipt of "illicit monies," defined as funds earned as a direct or indirect result of a punishable crime.¹⁹⁰ Second, it prohibits the receipt of "public funds," defined as funds owned by the government, its authorities, or companies it owns.¹⁹¹ Table 3 summarizes sanctions under the Dubai Fraud Law, which are harsher than under the penal codes.¹⁹²

¹⁸⁹ *Id.*

¹⁹⁰ See Laubach & Shah, *supra* note 137, at 250.

¹⁹¹ *Id.*

¹⁹² *Id.*

Table 3: Sanctions under the Dubai Fraud Law¹⁹³

Amount Received	Term of Imprisonment
Over 500,000 AED (approx. \$136,128 USD) but not more than 1,000,000 AED (approx. \$272,257 USD)	5 years
Over 1,000,000 AED (approx. \$272,257 USD) but not more than 5,000,000 AED (approx. \$1,361,285 USD)	10 years
Over 5,000,000 AED (approx. \$1,361,285 USD) but not more than 10,000,000 AED (approx. \$2,722,570 USD)	15 years
More than 10,000,000 AED (approx. \$2,722,570 USD)	20 years

Despite its steep fines and terms of confinement, the law is somewhat lenient, in that sentences and fines are set aside immediately if the convicted party returns the illegally obtained funds to the defrauded party or if the convicted party and the defrauded party reach a settlement.¹⁹⁴ Through harsher punishments and incentives to return the proceeds of fraud, the Dubai Fraud Law aims to deter and correct fraudulent activity. Another facet of the law encourages correcting behavior by convicts: individuals convicted under the law are detained away from the general prison population and permitted to communicate outside the prison.¹⁹⁵ The law is the legislative counterpart to 2008’s enforcement crackdown, as it represents an earnest effort to cope with corruption.

¹⁹³ Laubach & Shah, *supra* note 123, at 250.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

CONCLUSION

The U.A.E.'s enforcement efforts in recent years suggest that old impressions of the country as one with an opaque business climate are outmoded. In the last several years, legislative reforms and prosecuting decisions indicate seriousness about confronting corruption. The promise of a transparent marketplace free from fraud should excite those doing business in the U.A.E. The same individuals and businesses should be cautious, however, and closely follow the country's quickly changing landscape.

CHAPTER II

REGIONAL TRENDS AND DEVELOPMENTS SUB-SAHARAN AFRICA (Angola, Nigeria, South Africa)

RECENT ANTI-CORRUPTION DEVELOPMENTS IN ANGOLA

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OVERVIEW

Consecutive years of GDP growth and low inflation rates have made Angola the second most desirable destination for investors in Africa, according to the Business Anti-Corruption Portal.¹⁹⁶ Since 2002, when the government entered into a peace agreement between the Popular Movement for the Liberation of Angola and the National Union for the Total Independence of Angola after a 27-year civil war, Angola has become a more stable country.¹⁹⁷ Additionally, the government has invested in an intensive effort to rebuild the country's infrastructure and passed laws to encourage foreign investment. The economy of Angola has experienced tremendous growth recently, and according to the International Monetary Fund ("IMF"), GDP growth was projected at around 7.8% in 2011, with additional growth expected for 2012.¹⁹⁸

Much of Angola's economic growth is attributable to its vast natural resources, most notably oil and diamonds. Angola is the second largest producer of oil in Africa, after Nigeria – producing approximately 1.6 million barrels per day – generating

¹⁹⁶ See *Angola Country Profile*, Business Anti-Corruption Portal, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/angola/show-all/> (last updated January 2, 2012).

¹⁹⁷ Central Intelligence Agency, *The World Fact Book: Angola (2012)*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ao.html>.

¹⁹⁸ See *2011 Investment Climate Statement – Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF ECONOMIC, ENERGY, AND BUSINESS AFFAIRS, March 2011, <http://www.state.gov/e/eb/rls/othr/ics/2011/157232.htm>.

billions of dollars of revenue for the country. Oil production and related activities account for 85% of the GDP.¹⁹⁹ Angola's diamond production reached 8.5 million carats in 2010, representing revenues estimated at \$995 million.²⁰⁰ But the industry also has been wrought with corruption, including accusations of smuggling and human rights violations.²⁰¹

Despite Angola's recent economic growth, the business environment in Angola is "one of the most difficult in the world."²⁰² The World Bank's *Doing Business Report* identified Angola as one of the most time-consuming countries to establish a business in, ranking it 163 out of 183 countries surveyed.²⁰³ This is likely a result of the country's underdeveloped financial system, poor infrastructure, incredibly high on-the-ground costs, and pervasive corruption.²⁰⁴

¹⁹⁹ Central Intelligence Agency, *The World Fact Book: Angola* (2012), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ao.html>.

²⁰⁰ See *Background Note: Angola*, UNITED STATES DEPARTMENT OF STATE, October 13, 2011 <http://www.state.gov/r/pa/ei/bgn/6619.htm>.

²⁰¹ See Walters, Denine, *Diamond Mining in Angola: Enter China and South Africa*, Consultancy Africa Intelligence (July 18, 2011) http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=795:diamond-mining-in-angola-enter-china-and-south-africa&catid=82:african-industry-a-business&Itemid=266.

²⁰² See *2010 Human Rights Report: Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, <http://www.state.gov/documents/organization/160519.pdf>.

²⁰³ See The World Bank and the International Finance Corporation, *DOING BUSINESS 2012: DOING BUSINESS IN A MORE TRANSPARENT WORLD* (2012), available at <http://www.doingbusiness.org/data/exploreconomies/angola/>.

²⁰⁴ See *2011 Investment Climate Statement – Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF ECONOMIC, ENERGY, AND BUSINESS AFFAIRS, March 2011, <http://www.state.gov/e/eb/rls/othr/ics/2011/157232.htm>.

Indeed, the U.S. Department of State reported in 2011 that government corruption in Angola is widespread.²⁰⁵ Similarly, Human Rights Watch found that “the scale of corruption and mismanagement in Angola has been immense.” Accountability of government officials is minimal because the country “lacks [adequate] checks and balances, institutional capacity, and has a culture of impunity.”²⁰⁶ Despite the significant amount of money that is invested in Angola, the majority of the country’s population of 18.5 million people lives in poverty.

Government corruption is so widespread that it impacts prosecution efforts as well. The U.S. Department of State found in its 2010 Human Rights Report on Angola that the judiciary was corrupt and has impeded the country’s attempt to prosecute government officials alleged to be engaged in corrupt acts. For example, in 2010, the Constitutional Court overturned the convictions of five high-level immigration officials charged with embezzlement of public funds and accepting bribes; the president of the court and one judge were later found to be associated with defense counsel.²⁰⁷

Efforts to improve Angola’s reputation with foreign governments and investors have been largely unsuccessful. In 2009, Angolan President José Eduardo dos Santos, who has been in power since 1979, declared a zero tolerance policy for corruption and attempted to enact laws to the same effect. However, the laws have been mostly ineffective because there is a

²⁰⁵ See *2010 Human Rights Report: Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, <http://www.state.gov/documents/organization/160519.pdf>.

²⁰⁶ See *2010 Human Rights Report: Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, <http://www.state.gov/documents/organization/160519.pdf>.

²⁰⁷ See *2010 Human Rights Report: Angola*, UNITED STATES DEPARTMENT OF STATE, Bureau of Democracy, Human Rights, and Labor, <http://www.state.gov/documents/organization/160519.pdf>.

lack of infrastructure to support enforcement efforts and because the officials who are spearheading the effort are corrupt themselves.²⁰⁸ As companies consider investments in Angola, they must take careful note of the potential risks that such an investment involve.

THE SIZE OF THE PROBLEM

Transparency International, the international non-governmental organization dedicated to eliminating corruption, ranks 182 countries and their governments' effort to fight corruption on its Corruption Perception Index ("CPI").²⁰⁹ In 2011, Angola ranked 168th on the CPI, tied with Chad, the Democratic Republic of the Congo, and Libya.

According to the World Bank & IFC Enterprise Surveys 2010, nearly 49 percent of surveyed companies in Angola reported that firms are expected to give gifts to public officials "to get things done."²¹⁰ The same report found that over 75 percent of companies identified corruption as a major constraint.

The United States has recently focused on Angola's illegitimate business practices to the extent illegally obtained gains are brought in to the United States. In February 2010, the U.S. Senate Permanent Subcommittee on Investigations released a report titled *Keeping Foreign Corruption Out of the United States*, which found various Angolan politically exposed persons ("PEP")

²⁰⁸ *Transparency and Accountability in Angola: An Update*, Human Rights Watch, http://www.hrw.org/sites/default/files/reports/angola0410webwcover_1.pdf (last updated April 2010).

²⁰⁹ *See Corruption Perceptions Index 2011 Results*, TRANSPARENCY INTERNATIONAL, December 1, 2011, available at <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

²¹⁰ *See Enterprise Survey Data for Angola*, International Finance Corporation, 2010, <http://enterprisesurveys.org/Data/ExploreEconomies/2010/angola>.

have used the services of U.S. professionals and financial institutions to protect and enhance illegally obtained funds from corrupt business practices.²¹¹ The purpose of the Senate report was to determine whether the U.S. policies and procedures to combat corruption and money laundering are effective in preventing such activity in the United States. The report provided case studies from four different countries, including Angola, with various illustrative stories, that demonstrated how PEPs obtained the illegal funds and how those funds made their way to the United States. The report exposed the current failures in the U.S. system and recommended more regulations to prevent illegally obtained assets from being stored in the United States.²¹²

Angola's local laws and practices contribute to the size of its corruption problems. Indeed, policies encourage foreign investors to include contract provisions that promote the "Angolanization" of the investor's work force.²¹³ The purpose of this requirement is to share the money flowing in to Angola with the rest of the population but in practice this does not happen. The authorities that are charged with negotiating and structuring the foreign investment deals utilize this law to their advantage. Foreign investors often are required to, or encouraged to, partner with Angolan companies that serve as a front for corrupt

²¹¹ See United States Senate, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, "Keeping Foreign Corruption Out of the United States: Four Case Histories," Majority and Minority Staff Report, February 4, 2010.

²¹² See *Investigations Subcommittee Holds Hearing on Keeping Foreign Corruption Out of the United States: Four Case Histories*, The Permanent Subcommittee on Investigations, February 4, 2010, <http://www.hsgac.senate.gov/subcommittees/investigations/media/investigations-subcommittee-holds-hearing-on-keeping-foreign-corruption-out-of-the-united-states-four-case-histories>.

²¹³ See *Clinton's visit to Angola skips corruption issues*, rfi (August 8, 2009 4:35 p.m.), http://www.rfi.fr/actuen/articles/116/article_4699.asp.

government officials rather than being partnered with legitimate businesses supported by the local Angolan workforce.²¹⁴

CURRENT ENFORCEMENT REGIME

The Angolan government has tried to implement a system to combat the pervasive culture of corruption in response to international pressure. It has introduced laws and regulations to increase government transparency and decrease the occurrence of corruption. Most of these initiatives, however, have been ineffective.²¹⁵

In 1995, the government established the High Authority Against Corruption (“HAAC”), designed to serve as an independent body to prevent corruption in public institutions. However, the HAAC has yet to begin its work and it has not formulated an anti-corruption strategy.²¹⁶

In 2009, President dos Santos attempted to combat corrupt practices associated with foreign investments by reviewing the National Private Investment Agency (“ANIP”), the agency responsible for facilitating foreign investment in Angola and approving all foreign investments.²¹⁷ President dos Santos appointed a commission of senior economic advisors to overhaul

²¹⁴ See *Angola Country Profile*, Business Anti-Corruption Portal, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/angola/show-all/> (last updated January 2, 2012).

²¹⁵ See *Angola Country Profile*, Business Anti-Corruption Portal, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/angola/show-all/> (last updated January 2, 2012).

²¹⁶ See *Angola Country Profile*, Business Anti-Corruption Portal, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/angola/show-all/> (last updated January 2, 2012).

²¹⁷ See *2011 Investment Climate Statement – Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF ECONOMIC, ENERGY, AND BUSINESS AFFAIRS, March 2011, <http://www.state.gov/e/eb/rls/othr/ics/2011/157232.htm>.

ANIP's policies and procedures. In May 2011, the commission, in partnership with Parliament, drafted and enacted a law that created stricter regulations on financial transactions in an attempt to limit money laundering and combat terrorism.²¹⁸ Angola has not implemented this law.

The country's most widely praised reform is the result of an agreement with the IMF in 2009, whereby as part of a \$1.4 billion loan, Angola committed to greater transparency of its oil revenues. The IMF mandated that the government publish relevant financial statements and commit to greater transparency and oversight of major state-owned enterprises, in particular Sonangol, Angola's state-owned oil production company. The Ministry of Finance now discloses oil revenues on its website,²¹⁹ and Ernst & Young has audited Sonangol. Despite the government's efforts to be more transparent, the Ernst & Young audit report has not been publicized.²²⁰

In another attempt at reform, in March 2010, Parliament passed the Public Probity Law.²²¹ However, like most attempts

²¹⁸ See *Angola: Parliament Approves Money Laundering Law*, Library of Congress, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402022_text (last accessed February 22, 2012).

²¹⁹ See *Angola Country Profile*, Business Anti-Corruption Portal, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/angola/show-all/> (last updated January 2, 2012).

²²⁰ See *IMF Lends Angola \$1.4 Billion to Support Reserves, Reforms*, Informational Monetary Fund, available at <http://www.imf.org/external/pubs/ft/survey/so/2009/car112309b.htm> ((last accessed February 22, 2012); see *Transparency and Accountability in Angola: An Update*, Human Rights Watch, http://www.hrw.org/sites/default/files/reports/angola0410webwcover_1.pdf (last updated April 2010).

²²¹ See *2010 Human Rights Report: Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, <http://www.state.gov/documents/organization/160519.pdf>.

made by the government to reform corruption, the new law does not fully combat the problem. This law endeavors to increase transparency by requiring government officials to disclose their financial assets. The law appears to have far-reaching applicability due to its broad definitions of who must comply and the type of financial disclosure required.²²² The president and other top officials, however, are exempt from the disclosure requirements.²²³

Despite the increased emphasis on transparency in the country's revenue stream, the government has not been equally transparent with expenditures. The government's failure to disclose this information, especially in light of the government's willingness to disclose revenue statistics, has cast doubt whether any meaningful change has been made in the management of funds or decrease in corrupt practices.²²⁴ Many of the officials that have profited from the illegally gotten gains seem to have obtained these funds through business deals hidden as government expenditures. According to the Washington-based anti-corruption advocacy group, Global Financial Integrity (GFI), in 2009, \$6 billion of foreign funds were inappropriately transferred to banks outside of Angola for the benefit of a select group of government officials. In a scheme believed to be mostly targeted at oil corporations, foreign officials engaged in a transaction known as "trade misplacing," whereby government officials falsely claim to pay foreign importers more for an item than they actually paid for the product. The difference between

²²² See *Angola Corruption Legislation*, Angola Corruption Legislation, <http://www.issafrica.org/cdct/mainpages/pdf/Corruption/Legislation/Angola/Corruption%20Notes%20-%20ANGOLA.pdf> (last accessed February 22, 2012).

²²³ See *2010 Human Rights Report: Angola*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, <http://www.state.gov/documents/organization/160519.pdf>.

²²⁴ See *Transparency Snapshot: Angola*, Revenue Watch Institute, available at <http://www.revenuewatch.org/countries/africa/angola/transparency-snapshot> (last accessed February 22, 2012).

the actual cost and the cost officials claim to have paid was then placed in accounts outside of the country for the benefit of the official.²²⁵ This scheme accounted for \$4.6 billion of the ultimate \$6 billion that was siphoned out of the country in 2009. The government's failure to disclose expenditures makes it difficult to truly maintain oversight and transparency of business transactions and it undermines efforts to eradicate corruption because it allows corrupt individuals an avenue to conduct illicit illegal activities.

RECENT MAJOR SCANDALS

Despite the pervasive culture of corruption in Angola, the Angolan authorities have not brought many anti-corruption enforcement actions relating to improper business dealings in Angola.

In one of the few local enforcement actions, Angolan authorities arrested and expelled individuals suspected of money laundering. In September 2011, Angola expelled 140 foreigners upon suspicion of corrupt activities, including money laundering and terrorism.²²⁶ In December 2011, Angolan authorities arrested seven people at Angola's Luanda Airport for their alleged involvement in a money laundering scheme. Five employees of TAAG, the national airline of Angola, were paid to transport a suitcase filled with \$6 million dollars from Angola to Dubai.²²⁷

²²⁵ See Ed Stoddard, *Data reveal huge sums spirited out of Angola*, Reuters Africa (Apr. 6, 2011 2:18 p.m.) <http://af.reuters.com/article/topNews/idAFJJOE7350PK20110406?pageNumber=1&virtualBrandChannel=0>.

²²⁶ See *16 Lebanese among 140 foreigners expelled from Angola*, The Daily Star Lebanon (September 29, 2011 1:36 a.m.) <http://www.dailystar.com.lb/News/Local-News/2011/Sep-29/149993-16-lebanese-among-140-foreigners-expelled-from-angola.ashx#axzz1mxQwogH1>.

²²⁷ See *Angola arrests seven for money-laundering*, Agence France-Presse (December 3, 2011 12:13 p.m.) <http://news.ph.msn.com/business/article.aspx?cp-documentid=5611509>.

These incidents illustrate that Angolan officials are attempting to enforce anti-corruption laws and reverse the pervasive culture of corruption. However, the current culture of corruption in Angola suggests that these actions are most likely isolated incidents of enforcement.

Similarly, in the U.S. there have been only a few high profile enforcement actions relating to corruption activities in Angola. In November 2010, the Department of Justice (“DOJ”) and Securities Exchange Commission (“SEC”) announced a settlement of \$236.5 million with global freight forwarding company Panalpina, and other related entities that worked with Panalpina, regarding alleged improper conduct in a number of countries including Angola.²²⁸ The government settled with seven companies relating to these activities. Panalpina admitted to paying \$27 million in bribes to foreign officers in Angola and several other counties to expedite services for various oil and energy companies. Panalpina also entered in to a three-year deferred prosecution agreement. The other six oil and energy companies that settled with the DOJ and SEC for their involvement in the scheme worked with Panalpina.²²⁹

In 2011, it was announced that the SEC and DOJ are jointly investigating giant oil production company, Halliburton, and its business practices in Angola as possible violations of the FCPA. In December 2010, the company received an anonymous email alleging that current and former employees may be violating both an internal policy and the FCPA through a vendor in Angola. The

²²⁸ See *SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Custom Officials*, U.S. Securities and Exchange Commission available at <http://www.sec.gov/news/press/2010/2010-214.htm> and see also, *Documents relating to Panalpina Settlement*, Department of Justice, available at http://www.justice.gov/opa/opa_documents.htm.

²²⁹ *Panalpina Settlements Announced, With \$235.5 Million in Penalties*, The Wall Street Journal Blog, (November 4, 2010 15:28), <http://blogs.wsj.com/corruption-currents/2010/11/04/panalpina-settlements-announced-with-2365-million-in-penalties/>.

company subsequently began an internal investigation and met with and produced documents to the SEC and DOJ.²³⁰ The SEC has since subpoenaed documents from the company and at least one employee.²³¹

In March 2011, Cobalt International Energy, a deep-water oil explorer, disclosed in its annual report filed with the SEC that the Angolan government forced it to partner with two unfamiliar local oil and gas exploration and production companies.²³² Cobalt stated that it is looking into the companies and whether they are connected to government officials. As of the date of this article, there are no known investigations or enforcement actions pending against Cobalt relating to Angola.²³³

CONCLUSION

Angola's natural resources make it an attractive investment opportunity but foreign investors must enter this market cautiously. Although Angola has made strides to decrease corrupt practices, the lack of transparency and oversight of government officials has significantly curtailed efforts to create an environment of legitimate business practices that abide by international standards. The current business climate in Angola makes it a ripe location for anti-corruption investigations,

²³⁰ See Haliburton, Annual Report (Form 10-K) (Dec. 31, 2011) *available at* http://sec.gov/Archives/edgar/data/45012/000004501211000354/edsept201110q_final.htm.

²³¹ See Halliburton, Quarterly Report (Form 10-Q) (Sep. 30, 2011) *available at* http://sec.gov/Archives/edgar/data/45012/000004501212000075/ed10k2011_final.htm.

²³² See Cobalt Energy, Annual Report (Form 10-K) (Dec. 31, 2009) at 51.

²³³ See James Paton & Edward Klump, *Cobalt Climbs to Record on Angola Well Results: Houston Mover*, Bloomberg (Feb. 10, 2012 16:14), <http://www.bloomberg.com/news/2012-02-10/goldman-backed-cobalt-says-angola-oil-test-exceeds-expectations.html>.

especially in light of increased anti-corruption prosecutions worldwide. Companies considering Angola should take care to adopt a well-constructed anti-corruption compliance program prior to any such forays.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN NIGERIA

By: *Asheesh Goel, Nicholas M. Berg and Nicholas G. Niles*

February 2, 2012

OVERVIEW

In the coming years, Nigeria has the potential to join the ranks of the world's top five oil producers.²³⁴ Even today, Nigeria's proven oil reserves place it among the world's 10 most oil-rich countries,²³⁵ and it has long been a target for investment by international oil companies such as Royal Dutch Shell, Exxon Mobil, and Chevron.²³⁶ Beyond the country's energy reserves, its population demographics suggest another tremendous opportunity for future growth: Nigeria is the most populous country in Africa, and more than 40% of its 155 million citizens are under age 14. Yet Nigeria's basic infrastructure lags behind much of the developing world.²³⁷ Multi-national companies such as

²³⁴ CONGRESSIONAL RESEARCH SERVICES, NIGERIA: ELECTIONS AND ISSUES FOR CONGRESS (2011), available at

<http://fpc.state.gov/documents/organization/161341.pdf>.

²³⁵ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK: NIGERIA (2012), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>.

²³⁶ Elisha Bala-Gbogbo, *Shell Shuts Nigeria's Bonga on Possible Worst Leak in Decade*, BLOOMBERG (Dec. 21, 2011), available at

<http://www.bloomberg.com/news/2011-12-21/shell-shuts-nigeria-s-bonga-field-after-oil-leak-at-platform.html>; EXXON MOBILE, OUR

ACTIVITIES IN NIGERIA, http://www.exxonmobil.com/Nigeria-English/HR/HR_Homepage.asp; CHEVRON, NIGERIA: HIGHLIGHTS OF

OPERATIONS (2011), <http://www.chevron.com/countries/nigeria/>.

²³⁷ *Supra* note 235.

Siemens and Bilfinger-Berger have already invested heavily in Nigerian telecommunications and construction sectors, tapping into industries ancillary to the energy sector that are worth billions annually.²³⁸

Opportunities for development in Nigeria are often overshadowed by its notorious culture of corruption. The cost of Nigeria's corruption has made recent international headlines, with widespread reports of the U.S. Department of Justice having collected over \$1.7 billion in penalties and disgorgement from companies involved in a joint venture to build natural gas facilities in Nigeria. In the most recent settlement to result from the longstanding probe, the DOJ collected \$54.6 million from Marubeni Corporation, alleging the joint venture hired the Japanese company to bribe Nigerian officials to secure natural gas contracts worth an estimated \$6 billion. In entering a January 2012 settlement and deferred prosecution agreement, Marubeni Corp. joined Halliburton, Kellogg Brown & Root, Technip, Snamprogetti, and the JGC Corporation in what one commentator has termed the "Bonny Island Bribery Club"—a long list of companies charged for conduct arising out of the joint venture.²³⁹

Alcatel-Lucent similarly made waves recently when its South African division and three of its subsidiaries agreed to pay \$92 million in penalties and \$45 million in disgorgement to resolve an FCPA investigation into the company's practices in Nigeria, among several other countries. The subsidiaries plead guilty to bribing government officials in order to obtain lucrative contracts.

²³⁸ Thomas Mösch and Nick Amies, *Nigerian Election Marathon to Focus on Fighting Corruption*, DEUTSCHE WELLE (Jan. 4, 2011), available at

<http://www.dw-world.de/dw/article/0,,14960218,00.html?maca=en-r>.

²³⁹ Samuel Rubinfeld, *Marubeni Corp. Agrees to Pay \$54.6 Million to Settle FCPA Probe*, CORRUPTION CURRENTS, (Jan. 17, 2012, 17:11),

<http://blogs.wsj.com/corruption-currents/2012/01/17/marubeni-co>;

Mike Koehler, *JGC of Japan Formally Joins the Bonny Island Bribery Club*,

FCPA PROFESSOR (April 13, 2011), <http://www.fcprofessor.com/jgc-of-japan-formally-joins-the-bonny-island-bribery-club/>.

Prosecutors had also asserted that the companies hired local agents and third-party intermediaries without exercising proper controls and that the companies violated the FCPA's books and records provision by recording payments to "consultants" with no substantive experience who also had ties to political figures in those countries.²⁴⁰

The U.S. government's enforcement actions have also impacted executives on a more personal level. The Department of Justice pursued several of Willbros Group's managers and a former consultant, securing fines and jail time following a 2008 deferred prosecution agreement with the company. Willbros Group had previously agreed to implement compliance programs and pay over \$33 million to resolve allegations that its executives bribed Nigerian government tax officials to lower the company's taxes and bribed judicial officials in order to secure favorable treatment in Nigeria's courts.²⁴¹

The effects of corrupt activity are by no means limited to companies involved in the energy sector. The British Financial Services Authority and several of Britain's leading banks came under fire recently in a lawsuit filed by the Nigerian government seeking to recover millions in deposits by the British banks. Nigeria alleged that the banks accepted the deposits from corrupt Nigerian governors without adequate investigation, suggesting that the banks were therefore complicit in the governors' corrupt activities.²⁴²

²⁴⁰ *Alcatel-Lucent Settles Bribery Case*, THE FCPA BLOG, (Dec. 28, 2010, 07:38), <http://www.fcpablog.com/blog/2010/12/28/alcatel-lucent-settles-bribery-case.html>.

²⁴¹ *Prison for Ex-Willbros Execs*, THE FCPA BLOG (Jan. 28, 2010, 07:51), <http://www.fcpablog.com/blog/2010/1/28/prison-for-ex-willbros-execs.html>.

²⁴² *Daily Mail Reporter, British Banks Warned to Investigate Customers More Rigorously After Watchdog Reveals Five Took Millions from Corrupt Nigerian Governors*, MAIL ONLINE, Oct. 11, 2010, available at

In a speech upon taking office in February 2010, Nigeria's president promised to end its "culture of impunity."²⁴³ Some progress has indeed been made, evidenced by several successful prosecutions by Nigeria's fledgling anti-corruption agencies, and the President's demonstrated willingness to fire and replace ineffective agency heads. But for the time being, these remain occasional bright spots in a war against corruption that one Nigerian newspaper has aptly called "a cyclical unending relay race."²⁴⁴ Companies that do business with Nigeria, whether directly or through third parties, must take note and take care to avoid becoming the next headline.

THE IMPACT AND EXTENT OF NIGERIAN CORRUPTION

Nigeria has failed to leverage its status as one of the world's ten largest exporters of crude oil into a meaningful force to improve the quality of life for its citizens, who are among the poorest in OPEC and who rank near the bottom of the UN's human development scale.²⁴⁵ Nigeria's real *per capita* income is lower today than it was in the years immediately following the discovery of oil in Nigeria in the early 1970s.²⁴⁶ Mismanagement

<http://www.dailymail.co.uk/news/article-1319566/British-banks-warned-investigate-customers-rigorously.html>.

²⁴³ *Supra* note 234.

²⁴⁴ Tonnie Iredia, *2011 Anti-corruption War in Nigeria: A Lost Battle?*, VANGUARD, Oct. 30, 2011, available at

<http://www.vanguardngr.com/2011/10/2011-anti-corruption-war-in-nigeria-a-lost-battle/>.

²⁴⁵ AFRICAN ECONOMIC OUTLOOK, NIGERIA 2011 (2011), available at

http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/Country_Notes/2011/Full/Nigeria.pdf; UNITED NATIONS, HUMAN

DEVELOPMENT REPORT 2011 (2011), available at

<http://hdr.undp.org/en/reports/global/hdr2011/download/>.

²⁴⁶ Nina Budina and Sweder van Wijnbergen, *Managing Oil Revenue Volatility in Nigeria: the Role of Fiscal Policy*, in AFRICA AT A TURNING POINT (World Bank 2008), available at

and outright embezzlement of the country's extensive oil resources by its political, economic, and military leaders are to blame.²⁴⁷ Nigeria's Economic and Financial Crimes Commission estimates that the country's leaders have either misappropriated or wasted \$380 billion since the country's independence in 1960.²⁴⁸ Nigeria ranked 143 out of 182 countries in the 2011 Corruption Perceptions Index.²⁴⁹

It is telling that although oil accounted for 96% of Nigeria's export receipts in 2010, the country has developed almost no infrastructure to refine petroleum. As a result, Nigeria must import nearly all of its useable fuel. Its leadership has recently granted contracts to construct refineries in an effort to cease importing fuel by the year 2020.²⁵⁰ But currently, Nigeria spends nearly \$8 billion annually on fuel subsidies. Just earlier this year, Nigeria's fuel regulator triggered a week of protests that culminated in several deaths when it temporarily stopped the fuel subsidy without warning. Nigeria's Economic and Financial Crimes Commission has launched investigations into the Nigerian state oil company and Nigeria's fuel regulatory agency, raiding

<http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1207588563500/4864698-1207588597197/AFRI427460Ch10.pdf>; see also Chamberlain S. Peterside, *A Crude Awakening: What Happens in Nigeria, When the Oil Wells Run Dry?*, NIGERIAWORLD (2004),

<http://nigeriaworld.com/feature/publication/peterside/110604.html>;

²⁴⁷ HUMAN RIGHTS WATCH, *WORLD REPORT 2012: NIGERIA* (2012), available at <http://www.hrw.org/world-report-2012/world-report-2012-nigeria/>.

²⁴⁸ Darren Foster, *Nigeria: The Corruption of Oil*, FRONTLINE WORLD, May 1, 2007, available at

http://www.pbs.org/frontlineworld/blog/2007/05/nigeria_the_cor.ht ml.

²⁴⁹ TRANSPARENCY INTERNATIONAL, *CORRUPTION PERCEPTIONS INDEX 2011*, <http://cpi.transparency.org/cpi2011/results/>

²⁵⁰ *Supra* note 243 at 11.

the latter's offices and carting off evidence of fraud alleged to have driven the decision to cease the subsidy.²⁵¹

The import and subsidization of refined fuel are one of the many hotspots for corrupt transactions in the energy industry. Distributors purchase fuel on the international market and transport it to Nigeria where it is sold at an artificially low price. Distributors must then engage in a long, drawn-out reimbursement process that often creates incentives to pay bribes to speed up repayment. Distributors may also misrepresent the amount of fuel actually imported or collect a double subsidy by "importing" a shipment of fuel twice. Bribery is also common in the opaque licensing process for oil exploration and production rights, in the award of state contracts to develop refinement and transportation infrastructure, in the government's sale of oil to exporters, and in the numerous interactions with customs officials that ensue when a foreign contractor brings in goods, equipment, and workers for a development project.²⁵²

Beyond the bribery and graft associated with high-stakes oil contracts, companies—either directly or through subsidiaries and intermediaries operating in Nigeria—may run afoul of the FCPA or the U.K. Bribery Act even in their mundane, daily interactions with low-level bureaucrats. To avoid complicated procedures and governmental inefficiencies, it is common to employ a local agent to access government records, obtain official documents, and to apply for basic operating licenses or certificates. Unfortunately, it is equally common for these local agents to sidestep waiting lists and bureaucratic procedures by

²⁵¹ Nigeria's EFCC in Raids over Fuel Importation Probe, BBC NEWS AFRICA, Jan. 17, 2012, available at <http://www.bbc.co.uk/news/world-africa-16592711/>.

²⁵² CHR. MICHELSEN INSTITUTE, REFORMING CORRUPTION OUT OF NIGERIAN OIL? PART ONE: MAPPING CORRUPTION RISKS IN OIL SECTOR GOVERNANCE (2009), available at <http://www.cmi.no/publications/file/3295-reforming-corruption-out-of-nigerian-oil-part-one.pdf>.

making cash payments to low-level Nigerian public servants with whom they have cultivated long-standing, illicit relationships.²⁵³

Bribery among Nigeria's police force imposes a serious impediment to their crime-fighting abilities and presents still another opportunity for FCPA violations. Police eagerly seek out bribes not only from victims hoping the police will investigate a crime, but also from suspects hoping police will look the other way.²⁵⁴ A recent report ranked Nigeria's police force as the most corrupt organization in the country.²⁵⁵

THE CURRENT ENFORCEMENT REGIME AND RECENT ENFORCEMENT ACTIVITIES

Nigerian law provides that offering to a Nigerian public officer "any gratification as an inducement or reward" for voting on a measure, performing or abstaining to perform an official act, helping or hindering the grant of a contract, or even showing "favour or disfavour" constitutes bribery that is punishable by up to five years in prison.²⁵⁶ The statute reaches persons "whether within or outside Nigeria." Although Nigeria has shown its willingness to pursue foreign companies and their officials who

²⁵³ David Elesinmogun, Obumneme Egwuatu, and Marcus Cohen, *From the Experts: Secret Agents Causing FCPA Violations: Due Diligence to Prevent Bribes by Nigerian Touts*, CORPORATE COUNSEL (Oct. 3, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202517144907>.

²⁵⁴ HUMAN RIGHTS WATCH, *supra* note 247.

²⁵⁵ ABIODUN ELIJAH OBAYELU, EFFECTS OF CORRUPTION AND ECONOMIC REFORMS ON ECONOMIC GROWTH AND DEVELOPMENT: LESSONS FROM NIGERIA (2007),

[http://www.uneca.org/aec/documents/Abiodun%20Elijah%20OBAYE LU.pdf](http://www.uneca.org/aec/documents/Abiodun%20Elijah%20OBAYE%20LU.pdf).

²⁵⁶ CORRUPT PRACTICES AND OTHER RELATED OFFENCES ACT OF 2000, (2000) (Nigeria), *available at*

http://www.icpc.gov.ng/abouticpc/?com_option=c4ca4238a0b923820d cc509a6f75849b&p=2&com_content=c81e728d9d4c2f636f067f89cc14862c.

operate within Nigeria's borders,²⁵⁷ it does not appear that the extra-territorial reach of the statute has been clearly established by statute or court decree.

Nigeria has vested two principal anti-corruption agencies with power to combat bribery, along with a wide scope of economic crimes and other corrupt activity. The key agency is the Economic and Financial Crimes Commission ("EFCC"), established in 2002 and amended by the Economic and Financial Crimes Commission (Establishment) Act of 2004.²⁵⁸ The EFCC Act created a commission staffed by a dedicated chairman as well as by the Governor of the Nigerian Central Bank, representatives from the Ministries of Justice, Finance, and Foreign Affairs, other mid-level ministers and their representatives, and even four private individuals from the financial sector.²⁵⁹ The EFCC has broad power to investigate and prosecute "financial crimes," which are defined in the statute to include bribery. The EFCC Act represents the first time that bribery and corruption were statutorily defined as "financial" crimes.²⁶⁰

Passed two years before the EFCC Act, the Independent Corrupt Practices and Other Related Offences Commission Act

²⁵⁷ *Infra* note 271 and accompanying text.

²⁵⁸ ECONOMIC AND FINANCIAL CRIMES COMMISSION (ESTABLISHMENT) ACT, (2004) (Nigeria), *available at* http://www.efccnigeria.org/efcc_homepage_files/establishment_act_2004.pdf.

²⁵⁹ *Id.* at § 2(1).

²⁶⁰ *Id.* at §§ 7, 13, 46; *see also* YUSUF IBRAHIM AROWOSAIYE, THE DEVASTATING IMPACT OF MONEY LAUNDERING AND OTHER ECONOMIC AND FINANCIAL CRIMES ON THE ECONOMY OF DEVELOPING COUNTRIES: NIGERIA AS A CASE STUDY 2 (2008), *available at* <http://www.unilorin.edu.ng/publications/arowosayeyi/The%20Devastating%20Impact%20of%20Money%20Laundering%20and%20other%20Economic%20and%20Financial%20Crimes%20on%20the%20Economy%20of%20Developing%20Countries%20Nigeria%20as%20a%20Case%20Study.pdf>.

(“ICPC Act”) established a similar 13-member commission, the ICPC. The ICPC is Nigeria’s other major anti-corruption agent, and it has power to investigate and prosecute violations of the ICPC Act, including corrupt offers to—or corrupt demands by—public officers. The Commission’s other delineated powers suggest it was also created to play a significant advisory and educational role.²⁶¹

In its first few years, the ICPC had a poor record of prosecutions, which was in part attributable to a constitutional challenge to its enabling statute that initially paralyzed the agency.²⁶² Perhaps for this reason, the Nigerian Senate established the EFCC with a broader mandate and overlapping power several years later. Following the EFCC’s enactment, the ICPC has focused on prosecuting public corruption, while the EFCC’s mandate allows it to pursue other financial crimes as well as private bribery and corruption.²⁶³ But the ICPC and EFCC indisputably have overlapping and often competing roles—so much so that a bill to repeal the ICPC and vest its powers in the EFCC was proposed to the Nigerian senate last fall, as the EFCC has emerged as the more robust of the two agencies.²⁶⁴

²⁶¹ ACT, *supra* note 256 at §§ 8, 9, Cap. 359 LFN 5.

²⁶² INDEPENDENT CORRUPT PRACTICES AND OTHER RELATED OFFENSES COMMISSION, ABOUT ICPC,

http://www.icpc.gov.ng/abouticpc/?com_option=c4ca4238a0b923820d cc509a6f75849b&p=4&com_content=a87ff679a2f3e71d9181a67b7542122c.

²⁶³ KALU ONUOHA, CORRUPTIONS POLICIES IN NIGERIA UNDER OBASANJO AND YAR’DUA: WHAT TO DO AFTER 2011 (2010), *available at*

<http://www.fes-nigeria.org/common/pdf/Anti-Corruption%20Policies%20in%20Nigeria%20under%20Obasanjo%20and%20Yar'dua.pdf>.

²⁶⁴ Henry Umoru and Inalegwu Shaibu, *Senators Reject ICPC, EFCC Merger*, VANGUARD, Oct. 20, 2011, *available at*

<http://www.vanguardngr.com/2011/10/senators-reject-icpc-efcc-merger/>.

Whether they serve duplicative or simply complementary roles, the EFCC and ICPC have demonstrated their willingness to investigate and charge high-ranking officials in Nigeria—a list that includes the former Senate President, former Speaker of the House of Representatives, several cabinet secretaries, bank CEOs, and the former Inspector General of Police.²⁶⁵ In October 2011, the EFCC arrested three former Nigerian state governors for allegedly abusing their power to divert a total of nearly \$675 million of government money for their personal use. However, the EFCC has failed to follow through with prosecution after making similar arrests in the past.²⁶⁶ In fact, while the EFCC has arraigned nearly 40 prominent politicians and political figures since 2003, it has secured convictions of only four. Other corrupt individuals have avoided prosecution entirely. International observers cite the EFCC's internal incompetence, a weak judiciary, and executive interference with the EFCC's operation as reasons for its failure to stamp out a pervasive culture of impunity.²⁶⁷

The EFCC has been participating in the on-going clean up after Nigerian regulators nationalized three of its banks last year and then injected \$4.5 billion to stabilize the country's financial system. The banks' books were hurt by the international debt crisis, and Nigeria was further impacted by falling oil prices in 2009.²⁶⁸ After many of Nigeria's banking executives were fired in connection with the take-over, the EFCC brought charges that the leaders mismanaged depositors' funds by corruptly giving out

²⁶⁵ *Supra* note 244.

²⁶⁶ *Nigeria's EFCC Arrests Ex-governors for Alleged Fraud*, BBC NEWS AFRICA (Oct. 6, 2011), <http://www.bbc.co.uk/news/world-africa-15208522?print=true>.

²⁶⁷ *Supra* note 235; see also *Nigeria's EFCC Failing to Tackle Corrupt Politicians*, BBC NEWS AFRICA (Aug. 25, 2011), 13:51), <http://www.bbc.co.uk/news/world-africa-14671687>.

²⁶⁸ Vincent Nwanma, *Nigeria Plans to Inject \$4.5 Billion into Three Banks to Restore Stability*, Bloomberg (Aug. 8, 2011), available at <http://www.bloomberg.com/news/2011-08-08/nigeria-to-inject-4-5-billion-into-three-banks-nationalized-on-saturday.html>.

under-collateralized loans, failing to keep accurate books and records, granting loans to themselves, and even committing outright theft.²⁶⁹

The EFCC has also shown a willingness to pursue corrupt foreign companies. Early last year the EFCC publicly reported that it had arrested 12 executives from Noble, Tidewater, Murphy Shipping, and Transocean—multi-national oil and gas service companies—in connection with alleged bribes these firms and their subsidiaries had paid to Nigerian customs agents.²⁷⁰ Noble later settled with Nigeria and agreed to pay \$2.5 million in disgorgement and fines.²⁷¹

The 2011 arrests highlight another trend in the Nigerian anti-corruption movement: the EFCC is piggybacking on anti-corruption investigations previously conducted by other countries, including the United States. Three months before the Nigerian arrests, Noble, Transocean, and Tidewater were among several entities that settled with the U.S. Department of Justice, paying more than \$150 million in penalties to resolve alleged violations of the Foreign Corrupt Practices Act (“FCPA”). Noble admitted to paying \$74,000 to a Nigerian agent with the knowledge that the agent would pass on some of the money as

²⁶⁹ Asset Recovery Knowledge Centre, *Nigeria’s Anti-Corruption Agency Charges 16 Sacked Bank Executives*, available at <http://www.assetrecovery.org/kc/node/04900f53-9793-11de-94f7-954423abf288.0.jsessionid=2D8677F969CC027D6255E4B294DA71A2>; Emmanuel Chidiogo, *Court Orders Adigwe and 5 Others Remanded in EFCC Custody*, DAILY TIMES NIGERIA, June 2, 2011, available at <http://dailytimes.com.ng/article/court-orders-adigwe-and-5-others-remanded-efcc-custody>.

²⁷⁰ *Nigeria Arrests 12 Oil Executives over Alleged Bribery*, WALL STREET JOURNAL, Jan. 13, 2011, available at <http://blogs.wsj.com/corruption-currents/2011/01/13/nigeria-arr>.

²⁷¹ *Noble Corp. Settles Nigerian Corruption Probe*, WALL STREET JOURNAL, Jan. 31, 2011, available at <http://blogs.wsj.com/corruption-currents/2011/01/31/noble-corp>.

bribes to Nigerian customs officials. Noble also recorded these bribes as proper business expenses in its books and records. Tidewater and Transocean were similarly accused of paying bribes to Nigerian officials to avoid customs regulations. They entered into deferred prosecution agreements with the U.S. Department of Justice in connection with the settlement.²⁷²

With the ability to exercise jurisdiction over customs officials and other corrupt local officers, follow-on Nigerian prosecutions have the added promise of punishing corrupt individuals who might escape the FCPA's reach.²⁷³ But despite the apparent opportunity to follow up on American anti-corruption investigations, Nigeria lags far behind other countries in this regard. In recent years the United States, U.K, and Germany collected more than \$3.5 billion in penalties from multinational corporations for corrupt practices directed at Nigeria, while Nigeria has only recovered about \$150 million from these same companies for the same conduct.²⁷⁴

Faced with these numbers, many Nigerians feel that their government has not gone far enough to pursue corporations for their corrupt activity in Nigeria.²⁷⁵ Commentators suggest that

²⁷² UNITED STATES DEPARTMENT OF JUSTICE, OIL SERVICE COMPANIES AND A FREIGHT FORWARDING COMPANY AGREE TO RESOLVE FOREIGN BRIBERY INVESTIGATIONS, <http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html> (last visited Jan. 29, 2012).

²⁷³ CHR. MICHELSEN INSTITUTE, REFORMING CORRUPTION OUT OF NIGERIAN OIL? PART TWO: PROGRESS AND PROSPECTS (2009), *available at* <http://www.cmi.no/publications/file/3348-reforming-corruption-out-of-nigerian-oil-part-two.pdf>.

²⁷⁴ Marcus Cohen, David Elesinmogun & Obumneme Egwuatu, *Will Nigeria Take Another Bite?* FCPA BLOG (Aug. 4, 2011, 07:08) <http://www.fcpablog.com/blog/tag/tidewater-inc/>.

²⁷⁵ Foluso Ogunmodede, *SERAP Asks EFCC to Prosecute Shel, Siemens, Others over Bribery Allegation*, NIGERIAN COMPASS, Aug. 11, 2011, *available at* http://www.nigeriancompass.com/index.php?option=com_content&vi

Nigeria's reluctance to take stronger steps to enforce its anti-corruption laws against international companies stems from a fear of driving away foreign investment.²⁷⁶ Others blame its "weak and overburdened judiciary," as well as instances of judicial impropriety.²⁷⁷ The Chief Judge of the Federal High Court, although he acknowledged that Nigeria's judicial system could be improved, pointed the finger at Nigeria's prosecutors. He said the EFCC needs to spend more time investigating and building its cases before filing charges to avoid the delays associated with amending and supplementing the charges during the course of a prosecution.²⁷⁸

NIGERIAN OFFICIALS' ANTI-CORRUPTION RHETORIC AND THEIR CHECKERED PASTS

In recent years, Nigeria's leaders have embraced the fight against corruption in their political rhetoric. But they often find the strength of their words undercut by their own embarrassing ties to corruption. Against this backdrop, charges of corruption are frequently wielded as political weapons, and even legitimate charges are sometimes shrugged off as opposition tactics.

[ew=article&id=3088&Itemid=654](#). SERAP is a Nigerian NGO with a history of activism. It successfully brought suit against Nigeria before a tribunal of the Economic Community of West Africa States. See *SERAP v. Federal Republic of Nigeria, et al.*, ECW/CCJ/JUD/07/10 (Nov. 30, 2010), available at

http://www.worldcourts.com/ecowascj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm (finding embezzlement and/or theft of funds intended for basic public education and ordering that Nigeria fully fund its education program to make up the shortfall).

²⁷⁶ *Supra*, note 274.

²⁷⁷ HUMAN RIGHTS WATCH, CORRUPTION ON TRIAL? THE RECORD OF NIGERIA'S ECONOMIC AND FINANCIAL CRIMES COMMISSION (2011), http://www.hrw.org/sites/default/files/reports/nigeria0811WebPost_R.pdf.

²⁷⁸ Erasmus Alaneme, *Graft: EFCC Responsible for Slow Pace of Prosecutions – Chief Judge*, CHAMPION, June 14, 2011, available at <http://www.champion.com.ng/displaycontent.asp?pid=8968>.

Nuhu Ribadu, the former chairman of the EFCC, ran for president last year on an anti-corruption platform. Speaking shortly before the April 2011 election at a forum along with two other presidential candidates, he promised, "I will not be corrupt, and I will not allow corruption in my government."²⁷⁹ During his tenure at the EFCC, Mr. Ribadu brought over 1,000 cases before Nigeria's courts, and the EFCC under his leadership is credited with bringing the first-ever bribery case against a Nigerian company.

Mr. Ribadu's opponents alleged that his prosecutions were selective and were politically motivated, however, and Mr. Ribadu was eventually removed from office at the EFCC and charged with failing to follow a disclosure law. He fled to the United States after he was threatened with his life. When the charges against him were dropped in May 2010, Mr. Ribadu returned to Nigeria and started his campaign for the presidency.²⁸⁰ Some feared that Ribadu had further compromised his anti-establishment message in order to secure adequate funding and support from his political party, headed by former governor Bola Tinubu. Mr. Tinubu has been linked to money laundering and fraud during his time in office.²⁸¹ When the results of the April 2011 election came back, Mr. Ribadu was third in a field of four major candidates, winning only 5.4% of the vote to President Jonathan's 58.9%.²⁸²

²⁷⁹ Festus Owete, *I Will Jail Corrupt Party Leaders, Says Ribadu*, NEXT, Mar. 10, 2011, available at

<http://234next.com/csp/cms/sites/Next/News/Metro/Politics/56823>.

²⁸⁰ Caroline Duffield, *Nigeria's Nuhu Ribadu in Profile*, BBC NEWS AFRICA, Mar. 25, 2011, available at <http://www.bbc.co.uk/news/world-africa-12704967/>.

²⁸¹ *Id.*; see also Tinubu, *Ribadu Battle over Running Mate*, SUNDAY TRIBUNE, Feb. 6, 2011, available at <http://www.tribune.com.ng/sun/front-page-articles/3109-tinubu-ribadu-battle-over-running-mate/>.

²⁸² *Supra* note 237.

President Goodluck Jonathan has similarly embraced an anti-corruption message. Speaking at the National Seminar on Economic Crime in September 2011, President Jonathan called for increased cooperation between the EFCC and Nigeria's Minister of Justice and Attorney General:

We will give all the necessary support and encouragement to all the anti-corruption agencies to vigorously enforce the enabling anti-corruption laws. I urge these agencies to do their works fairly but firmly within the ambit of the law without regard to position or status. There shall be no sacred cows. This government will not protect any so-called sacred cows. The wheel of justice must run its full course in tackling anti-corruption cases.²⁸³

Yet only one month before his "sacred cows" speech, President Jonathan found himself implicated in a lawsuit filed by a Nigerian NGO against the EFCC that brought renewed national scrutiny to an episode from his past. The plaintiff in the lawsuit asserted that the EFCC had failed to fully investigate and prosecute President Jonathan's wife, Patience, after she was stopped at Nigeria's international airport attempting to leave the country with approximately \$13 million in cash in 2006. Jonathan was a state governor at the time. Following the incident, the EFCC announced that it had impounded the money, but after waiting four years for follow up on the seizure, Nigerians concluded that the EFCC did not intend to pursue a case against the First Lady. The Coalition Against Impunity and Illegality filed its lawsuit soon after President Jonathan's successful re-election campaign, timed to avoid the appearance that the suit was merely

²⁸³ *No Sacred Cows in Anti-graft War, President Vows*, VANGUARD, Sept. 6, 2011, available at

<http://www.vanguardngr.com/2011/09/no-scared-cows-in-anti-graft-war-president-vows/>.

a political device.²⁸⁴ In response to the revived interest in the case, the EFCC's chairwoman, Mrs. Farida Waziri—an appointee who did not lead the EFCC in 2006 when the allegations first arose—publicly stated that she had reviewed the Commission's records and concluded she could not make out a successful case of money laundering against Mrs. Jonathan.²⁸⁵

Furthermore, notwithstanding his public stance against corruption, President Jonathan has declined to follow his predecessor's example by publicly disclosing his assets. A reporting provision in Nigeria's Constitution requires officials to report their assets before taking office. Although the law does not require that the declaration be reported to the public, the previous Nigerian president, the late Umaru Musa Yar'Adua, publicly disclosed his assets and suggested that future officials should do the same. President Jonathan was serving as Mr. Yar'Adua's vice president at the time he made the disclosure. However, even in the face of escalating pressure, President Jonathan has not followed his predecessor's example.²⁸⁶

RECENT DEVELOPMENTS IN NIGERIA'S ANTI-CORRUPTION FIGHT

Nigeria's efforts to fight corruption must be placed in context. The country only transitioned from military rule to civilian governance in 1999 and in just over a decade it has made

²⁸⁴ *Money Laundering: Group Sues EFCC Over First Lady Patience Jonathan's \$13 Million Fraud*, SAHARA REPORTERS, July 18, 2011, available at <http://saharareporters.com/news-page/money-laundering-group-sues-efcc-over-first-lady-patience-jonathans-13-million-fraud/>.

²⁸⁵ *We Have No Case Against Patience Jonathan – EFCC*, NIGERIAN TRIBUNE, Sept. 8, 2011, available at <http://www.tribune.com.ng/index.php/news/27915-we-have-no-case-against-patience-jonathan-efcc/>.

²⁸⁶ *Rebekah Curtis, Paper Urges Nigeria President to Declare Assets*, TRUSTLAW, July 27, 2011, available at <http://www.trust.org/trustlaw/news/paper-urges-nigeria-president/>.

great strides, enacting well-intentioned laws designed to stamp out corruption. Although corruption, favoritism, and selectivity seem to pervade all levels of its government, Nigeria's leadership has shown a willingness to "stir the pot" in the past year, firing and replacing heads of agencies when stagnation and complacency predominate.

Nigeria's new Freedom of Information Act may help empower allies in the fight against corruption. President Jonathan signed the bill in May 2011.²⁸⁷ The Act had been proposed 11 years earlier and went through several rounds of legislative sessions, public hearings, and a prior presidential veto. Its passage has been recognized as a meaningful step towards a more open government. It is too early to say exactly to what extent access to information has improved with the bill, but Nigeria's free press and its NGOs are actively testing their limits. Nigeria has been working with USAID to implement the new legislation.²⁸⁸

In late November 2011, President Jonathan fired Farida Waziri seven months before the scheduled end to her tenure as leader of the EFCC. Her termination was the most visible portion of a broader attempt to shake up the organization. Some speculate that the move was a response to an American report sent to the EFCC and to recent comments by Secretary of State Hillary Clinton that Nigerian anti-corruption efforts had "kind of fallen off" in the last year.²⁸⁹

²⁸⁷ *Supra* note 267.

²⁸⁸ Egun Aleshinloye, *Nigeria's Information-Freedom Triumph*, FRONTLINES, Jan. 2012, available at http://www.usaid.gov/press/frontlines/fl_jan12/FL_jan12_DRG_NIGERIA.html.

²⁸⁹ *The EFCC Shake-Up*, THE NIGERIAN VOICE, Nov. 26, 2011, available at <http://www.thenigerianvoice.com/nvnews/76158/1/the-efcc-shake-up.html/>.

In Commissioner Waziri's place, the President appointed Mr. Ibrahim Lamorde as acting chairman of the EFCC. Mr. Lamorde was integral to the Commission's creation and has previously served the agency during his long career fighting corruption in Nigeria. President Jonathan has also sent Mr. Lamorde's name to the Nigerian Senate for his confirmation as permanent chairman.²⁹⁰ Some find reason to be optimistic at this turn of events. Mr. Lamorde is well qualified for the position and he does not appear tied to any major scandals that would undermine his anti-corruption message.²⁹¹

The recent government shake-up was not limited to the EFCC. Some saw another positive sign when the President fired the entrenched directors of the Nigerian Ports Authority and the Nigerian Maritime Administration and Safety Agency last year. The latter was subsequently arraigned on fraud charges by the EFCC.²⁹²

Since taking office, the new director of the Maritime Administration has promised to regain control of Nigerian

²⁹⁰ Gbenga Omokhunu, *For Lamorde, a Hurdle to Cross*, THE NATION, Jan. 17, 2012, available at <http://www.thenationonlineng.net/2011/index.php/law/33445-for-lamorde-a-hurdle-to-cross.html/>; *Who Is Mr. Ibrahim Lamorde, New Acting Crime-fighting Boss?*, CHANNELS, Nov. 24, 2011, available at http://www.channelstv.com/global/news_details.php?nid=30309&cat=Politics/.

²⁹¹ Oscarline Onwuemenyi, *Lamorde's EFCC: How the New Boss Is Settling In*, VANGUARD, Dec. 11, 2011, available at <http://www.vanguardngr.com/2011/12/lamordes-efcc-how-the-new-boss-is-settling-in/>.

²⁹² Temisan Omatseye, *Ex-NIMASA DG Arraigned for Fraud*, The Nigerian Voice (Feb. 3, 2011), available at <http://www.thenigerianvoice.com/nvnews/45511/1/temisan-omatseye-ex-nimasa-dg-arraigned-for-fraud.html>; Godfrey Bivbere, *Reviewing the Maritime Industry Operation in 2011*, VANGUARD, Jan. 9, 2010, available at <http://www.vanguardngr.com/2012/01/reviewing-the-maritime-industry-operation-in-2011/>.

shipping from foreign companies and to revive the domestic shipping industry. In an effort to empower its citizenry to profit from the oil services industry, Nigeria had passed a law in 2003 limiting domestic shipping to Nigerian-owned ships. But foreign-chartered ships continued to dominate Nigeria's waterways and coastline years after the law's passage, and frustrated domestic shippers cited corrupt government officials' willingness to accept bribes and look the other way rather than enforce the law.²⁹³ After a rocky start marked by internal conflict in the Administration, the director surprised a skeptical national audience by firing three high-level officials associated with the old administration, and seizing or detaining ten foreign vessels accused of violating Nigerian law.

Nevertheless, a culture saturated with corruption at all levels presents a challenge to would-be reformers. Following the Maritime Administration's renewed efforts to enforce Nigerian shipping laws, some of its staff were implicated when one of the seized vessels and its crew vanished from Nigerian custody late in 2011. And despite the Administration's stepped-up enforcement efforts, the chair of Nigeria's domestic shipping league complained that its members had no more business in 2011 than in previous years.²⁹⁴

The British have recently brought new methods for fighting corruption among low-level ministers to Nigeria. The U.K. Department for International Development partnered with Nigeria in a program called "Justice for All," which is aimed at increasing accountability for Nigeria's public officers.²⁹⁵ One of its

²⁹³ Robyn Dixon, *Nigerians' Oil Tankers Float Idle as Foreign Ships Score the Jobs*, LOS ANGELES TIMES, May 14, 2011, available at <http://articles.latimes.com/2011/may/14/business/la-fi-nigeria-shipping-20110514>.

²⁹⁴ Bivbere, *supra* note 292.

²⁹⁵ Will Connors, *In Nigeria, a Cop Takes on Cops*, WALL STREET JOURNAL, Sept. 29, 2011, available at

central tools has been the “naming and shaming” approach to compliance, under which lists of non-complying officers are posted in print and electronic media for the public to see. The U.K. has found success bringing this approach to other African countries, and its recent partnership with the EFCC, Code of Conduct Tribunal, and ICPC has revived hopes of compliance and transparency on the part of Nigeria’s public servants.²⁹⁶

The Wall Street Journal recent profiled a police supervisor who has employed similar tactics to fight corruption and complacency among officers in his district in Lagos, Nigeria. Foremost among his concerns upon taking over the post: ending police bribery. Mr. Monday Agbonika’s experience simultaneously reveals the entrenched nature of the problem while offering hope for the future. He reported that when he announced his tough anti-bribery stance, almost half of his officers requested transfers to other stations. Nevertheless, through warnings, public rebukes, and threats of reassignment and even termination, Mr. Agbonika has begun to cultivate a culture of responsibility in which his police officers are more inclined to patrol their territory and bring criminals to justice, rather than spend their time shaking down Nigeria’s citizens for bribes. His approach may have made a difference—eighty percent of residents in Lagos reported to an independent organization in 2010 that crime in Lagos “had noticeably decreased” as compared to the previous year.²⁹⁷

<http://online.wsj.com/article/SB10001424053111903895904576546491366328436.html#mjDropdown>.

²⁹⁶ “Justice for All” Hosts CCB Strategy Workshop in Nigeria, BRITISH COUNCIL, Sept. 13, 2011, available at

<http://britishcouncilblogs.org/africa/2011/09/13/nigeria-justice-for-all-j4a-host-a-code-of-conduct-bureau-strategy-workshop/>.

²⁹⁷ *Supra* note 295.

CONCLUSION

Anti-corruption forces have new partners in Nigeria's government and are making use of new legislation to expose corrupt activity. It remains to be seen whether Nigeria's renewed anti-corruption push will have a meaningful long-term impact on its culture of corruption, or whether these changes are merely lip service to the idea of anti-corruption. For the foreseeable future, the danger for foreign companies of being implicated in bribery and corruption remains very real. Companies hoping to invest in Nigeria's tremendous potential must establish and adhere to strict anti-corruption policies, paying particular attention to their local agents and intermediaries that interact with the Nigerian government. Anti-corruption developments in Nigeria deserve close observation over the next few years, as there is a great deal at stake for all concerned.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN SOUTH AFRICA

By: *Asheesh Goel, Nicholas G. Niles and Michelle H. Behrens*

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OVERVIEW

Since the fall of apartheid, South Africa has experienced steady economic growth, which can in part be attributed to the country's thriving service industry and abundant natural resources.²⁹⁸ The Business Anti-Corruption Portal notes, "South Africa is the largest economy in the region with a large private sector and a growing private tax base."²⁹⁹ South Africa's government has welcomed foreign investment, as foreign investors are assisted through the Department of Trade and Industry's Trade and Investment South Africa division.³⁰⁰ A 2012 World Bank Group report ranked South Africa as the 35th easiest place to do business out of 183 economies.³⁰¹

²⁹⁸ WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2011-2012, at 322 (2011), available at <http://reports.weforum.org/global-competitiveness-2011-2012/>; GLOBAL HEALTH STRATEGIES INITIATIVES, *Shifting Paradigm: How the BRICS are Reshaping Global Health and Development*, at 71 (2012), available at http://www.ghsinitiatives.org/downloads/ghsi_brics_report.pdf

²⁹⁹ See *Snapshot of the South Africa Country Profile*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/south-africa/> (December, 2011).

³⁰⁰ *2011 Investment Climate Statement – South Africa*, UNITED STATES DEPARTMENT OF STATE, BUREAU OF ECONOMIC, ENERGY, AND BUSINESS AFFAIRS (March, 2011), www.state.gov/e/eb/rls/othr/ics/2011/157358.htm.

³⁰¹ See The World Bank and the International Finance Corporation, *DOING BUSINESS 2012: DOING BUSINESS IN A MORE TRANSPARENT WORLD: EASE OF*

While South Africa is in many ways an attractive environment in which to conduct business, the country continues to confront economic and political challenges. The 2008 financial crisis severely weakened the South African economy, and GDP growth dipped considerably between 2008 and 2010.³⁰² Although South Africa's economy has rebounded recently and has experienced growth since 2010, this growth has been somewhat slow and has not been equally distributed throughout the country.³⁰³ As Trading Economics notes, "South Africa has a two-tiered economy; one rivaling other developed countries and the other with only the most basic infrastructure."³⁰⁴ Navigating this two-tiered economy in a country left particularly vulnerable from the financial crisis presents a unique set of challenges for those interested in conducting business in South Africa.

Furthermore, South Africa continues to grapple with corruption, a practice that creates challenges for foreign investors and threatens to hurt the country's continued development.³⁰⁵ Many South Africans perceive their politicians to be corrupt, making them distrustful of the government itself and skeptical of politicians' ability to fight corruption in the private sector. A recent Daily News article noted that forty percent of South

DOING BUSINESS IN SOUTH AFRICA (2012), available at <http://www.doingbusiness.org/data/exploreeconomies/south-africa/>.

³⁰² See *South Africa GDP Growth Rate*, TRADING ECONOMICS, <http://www.tradingeconomics.com/south-africa/gdp-growth>, (last visited April 11, 2012).

³⁰³ See *South Africa GDP Growth Rate*, TRADING ECONOMICS, <http://www.tradingeconomics.com/south-africa/gdp-growth>, (last visited April 11, 2012).

³⁰⁴ See *South Africa Consumer Confidence*, TRADING ECONOMICS, <http://www.tradingeconomics.com/south-africa/consumer-confidence> (last visited April 11, 2012).

³⁰⁵ See *Snapshot of the South Africa Country Profile*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/south-africa/> (December, 2011).

Africans felt that politicians in the country are corrupt, which marked an increase from 2008, where 25 percent of South Africans thought “almost all” or “most” members of parliament were involved in corruption.³⁰⁶ Extensive anti-corruption legislation exists in South Africa; however, the country suffers from enforcement issues.

THE SIZE OF THE PROBLEM

South Africa has numerous mechanisms in place to combat corruption, but these efforts are not always enforced and corruption continues to hinder economic growth. South Africa ranked 64th in Transparency International’s Corruptions Perceptions Index, a study assessing transparency and anti-corruption efforts in 183 countries.³⁰⁷ While South Africa fared better than many of its Sub-Saharan neighbors, this ranking places South Africa well behind many developed economies.³⁰⁸

Transparency International notes “high-profile anti-corruption cases and scandals continue to be regularly reported in countries including South Africa, Ghana and Senegal and risk undermining political stability as well as the governments’ capacity to provide effective basic services in sectors such as education, health and water.”³⁰⁹ Transparency International’s

³⁰⁶ See *Forty Percent Say Politicians are Corrupt*, DAILY NEWS, March 29, 2012, <http://www.iol.co.za/dailynews/news/40-say-politicians-are-corrupt-1.1266443>.

³⁰⁷ See *Corruption Perceptions Index 2011 Results*, TRANSPARENCY INTERNATIONAL, December 1, 2011, available at <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

³⁰⁸ See *Corruption Perceptions Index 2011 Results*, TRANSPARENCY INTERNATIONAL, December 1, 2011, available at <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

³⁰⁹ *2009 Corruption Perceptions Index Regional Highlights: Sub-Saharan Africa*, TRANSPARENCY INTERNATIONAL, available at

Global Corruption Barometer survey assesses public attitudes towards corruption in countries around the world, and according to its 2010 survey, 62% of those surveyed felt that the level of corruption in South Africa had actually increased in the past three years.³¹⁰ Those surveyed also felt that police, public officials, political parties, and parliament were the most corrupt institutions in the country, while the military, religious bodies, and the media were perceived as relatively less corrupt.³¹¹

In a 2010 Global Integrity Report measuring “integrity indicators” on a scale of 100, South Africa earned a score of 88 for its legal framework but only earned a score of 70 for implementation of that framework.³¹² The report noted that the civil service suffered from issues with hiring and bonus payments, while law enforcement exhibited problems with discrimination and favoritism in employment selection as well as issues with political interference.³¹³ The report also noted that there are no

http://www.transparency.org/policy_research/surveys_indices/cpi/2009/regional_highlights

(last visited April 9, 2012); *2009 Corruption Perceptions Index Regional Highlights: Sub-Saharan Africa*,

TRANSPARENCY INTERNATIONAL, *available at*

http://www.transparency.org/policy_research/surveys_indices/cpi/2009/regional_highlights_factsheets

(last visited April 5, 2012).

³¹⁰ *Global Corruption Barometer 2010*, Transparency International, *available online at*

http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

³¹¹

http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

³¹² GLOBAL INTERGRITY REPORT, SOUTH AFRICA SCORECARD 2010, *available at* <http://www.globalintegrity.org/report/South-Africa/2010/scorecard>.

³¹³ GLOBAL INTERGRITY REPORT.SOUTH AFRICA 2010, *available at* <http://www.globalintegrity.org/report/South-Africa/2010/>.

financial disclosure requirements with respect to donations to political parties and candidates.³¹⁴

While South Africa has fared poorly in some areas of fighting corruption, the country has successfully implemented anti-corruption measures in other areas. Judges are required to disclose financial interests for the acceptance of gifts, a mechanism that increases transparency in the judicial branch.³¹⁵ Transparency in budgetary disclosures is another area where South Africa has made meaningful headway.³¹⁶ In 2010, on a scale of 100, South Africa scored a 92, and the International Budget Partnership notes that South Africa “provides extensive information to the public in its budget documents during the year.”³¹⁷ While disclosure is not mandatory in every branch of government, these two areas mark noticeable successes.

Recent enforcement actions show an effort on the part of the national government to tackle corruption. One such example is the national government’s response to the mismanagement of the Limpopo province. In 2011, the South African national government took over five departments of the Limpopo province after the province experienced severe financial troubles and was accused of mismanagement.³¹⁸ President Zuma recently approved the Special Investigating Unit’s investigation of “maladministration and possible corruption” in the five

³¹⁴ GLOBAL INTEGRITY REPORT.SOUTH AFRICA 2010, available at <http://www.globalintegrity.org/report/South-Africa/2010/>.

³¹⁵ GLOBAL INTEGRITY REPORT.SOUTH AFRICA 2010, available at <http://www.globalintegrity.org/report/South-Africa/2010/>.

³¹⁶ *Lifting the Lid on Secret Budgets*, FCPA BLOG (September 28, 2010), <http://www.fcpablog.com/blog/2010/9/28/lifting-the-lid-on-secret-budgets.html>.

³¹⁷ INTERNATIONAL BUDGET PARTNERSHIP OPEN BUDGET INDEX 2010: SOUTH AFRICA, available at <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-SouthAfrica.pdf>.

³¹⁸ *Anti-corruption Unit to Probe Limpopo Departments*, Business Day (March 30, 2012), <http://www.businessday.co.za/articles/Content.aspx?id=168741>.

departments that the federal government took over.³¹⁹ Although the existence of this corruption is itself concerning, the national government's intervention and subsequent investigation mark an effort to eradicate corrupt practices.

South Africa might fare well in a few anti-corruption benchmarks; however, the overall economic fallout from existing corrupt practices in South Africa is severe. An Economist article notes the Special Investigation Unit of South Africa estimates that "as much as 20 - 25% of state procurement expenditure, amounting to around 30 billion rand (\$3.8 billion) a year, is wasted through overpayment and corruption."³²⁰ This article also notes that the SIU is "probing dodgy deals worth 12 billion rand" and that "an investigation of the ministry of public works, one of the biggest-spending government departments, revealed 3 billion rands' worth of improperly awarded tenders."³²¹ Further, the auditor-general in South Africa estimates that 26 billion rand has "been wasted or spent 'irregularly' in the past year."³²² From a financial standpoint, the size of the corruption problem in South Africa is enormous.

CURRENT ENFORCEMENT REGIME

The 2004 Prevention and Combating of Corrupt Activities Act is the most significant piece of domestic legislation that addresses corruption in South Africa. This act provides a statutory framework that defines and criminalizes corruption, targeting corrupt practices in both the public and private sector. Under the act, the general offense of corruption occurs when a person "directly or indirectly accepts or agrees or offers to accept

³¹⁹ *Id.*

³²⁰ *A Can of Worms*, The Economist (October 29, 2011), <http://www.economist.com/node/21533410>.

³²¹ *Id.*

³²² *Id.*

any gratification from any other person, whether for the benefit of himself or herself or the benefit of another person.”³²³ One can also commit the general offense of corruption by giving, agreeing, or offering to give “any other person any gratification, whether for the benefit of that other person or for the benefit of another person in order to act, personally or by influencing another person so to act.”³²⁴ Additionally, attempted corruption is illegal under the act, as is conspiracy, and aiding, abetting, inducing, inciting, instigating, instructing, commanding, counseling, or procuring another person to commit an offense under the act.³²⁵ Further, the act made the common law crime of extortion a statutory offense.³²⁶

In addition to the 2004 Prevention and Combating of Corrupt Activities Act, South Africa has passed other key pieces of legislation that touch on corruption. The table below outlines some of the significant legislative acts:

³²³ Republic of South Africa: Prevention and Combating of Corrupt Activities Act [No. 12 of 2004], *available at* http://www.saflii.org/za/legis/num_act/pacocaa2004470.pdf

³²⁴ Republic of South Africa: Prevention and Combating of Corrupt Activities Act [No. 12 of 2004], *available at* http://www.saflii.org/za/legis/num_act/pacocaa2004470.pdf; *See also*: Guide to the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004. Published through the National Anti-Corruption Forum. Commissioned by Federal Ministry for Economic Cooperation and Development. <http://www.gdard.gpg.gov.za/Documents/GUIDETOTHEPREVENTIONANDCOMBATINGOFCORRUPTACTIVITIESACT-booklet.pdf>.

³²⁵ Republic of South Africa: Prevention and Combating of Corrupt Activities Act [No. 12 of 2004], *available at* http://www.saflii.org/za/legis/num_act/pacocaa2004470.pdf <http://www.globalintegrity.org/report/South-Africa/2010/scorecard>. *See also* GLOBAL INTERGRITY REPORT, SOUTH AFRICA SCORECARD 2010, *available at* <http://www.globalintegrity.org/report/South-Africa/2010/scorecard>.

³²⁶ Republic of South Africa: Prevention and Combating of Corrupt Activities Act [No. 12 of 2004], *available at* http://www.saflii.org/za/legis/num_act/pacocaa2004470.pdf . *See also* GLOBAL INTERGRITY REPORT, SOUTH AFRICA SCORECARD 2010, *available at* <http://www.globalintegrity.org/report/South-Africa/2010/scorecard>.

Table 1: South Africa Legislation Addressing Corruption³²⁷

Title	Enacted	How Law Addresses Corruption
Code of Conduct for Public Servant	1997	<ul style="list-style-type: none"> • Requires public servants to be honest when dealing with public money and report fraud or corruption to authorities • Public servants are not permitted to favor friends or relatives, abuse their authority, or use their position to obtain gifts or benefits
Public Finance Management Act	1999	<ul style="list-style-type: none"> • Regulates the management of national and provincial governments
Promotion of Access to Information Act	2000	<ul style="list-style-type: none"> • Increases transparency
Promotion of Administrative Justice Act	2000	<ul style="list-style-type: none"> • Fair procedures are to be followed in decision-making • Gives people the right to request written reasons for decisions; individuals can question whether corruption influenced decisions
Protected Disclosures Act	2000	<ul style="list-style-type: none"> • Protects whistleblowers
Municipal Finance Management Act	2003	<ul style="list-style-type: none"> • Addresses corruption in local governments

³²⁷ *Information in table compiled from:* Guide to the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004. Published through the National Anti-Corruption Forum. Commissioned by Federal Ministry for Economic Cooperation and Development.
<http://www.gdard.gpg.gov.za/Documents/GUIDETOTHEPREVENTIONANDCOMBATINGOFCORRUPTACTIVITIESACT-booklet.pdf> ; see also Anti-Corruption Legislation, National Anti-Corruption Forum (2006/2009)
<http://www.nacf.org.za/anti-corruption-legislation/index.html>

Title	Enacted	How Law Addresses Corruption
The 2004 Prevention and Combating of Corrupt Activities Act	2004	<ul style="list-style-type: none"> • Extensive anti-corruption provisions, including provisions targeting South African companies engaging in corruption abroad

In addition to legislation that addresses corruption, South Africa has created the South African Special Investigation Unit (SIU), a body dedicated to fighting corruption.³²⁸ This unit was originally created in 1996 and since 2005 adopted a new vision and mission to fight corruption through both investigation and litigation.³²⁹ In addition to this unit, other divisions that deal with corruption in South Africa include the Directorate for Priority Crime Investigation, the National Prosecuting Authority, the Financial Intelligence Centre, the South African Revenue Service, and the accountant-general.³³⁰ Further, the Office of the Public Protector has played a crucial and prominent role in speaking out against corruption and pushing the government to investigate potentially corrupt activities.

Certain organizations aim to bring together the public and private sectors in fighting corruption. The National Anti-Corruption Forum is an organization in South Africa represented by business, civil society, and government sectors.³³¹ Formed in 2001, this organization combats corruption in South Africa by

³²⁸Special Investigating Unit: The Special Investigating Unit (SIU) General Information Fact-Sheet (2012) <http://www.siu.org.za/index.asp?include=about/SIUbackground.html>

³²⁹ Special Investigating Unit: The Special Investigating Unit (SIU) General Information Fact-Sheet (2012) <http://www.siu.org.za/index.asp?include=about/SIUbackground.html>.

³³⁰ *Anti-corruption Unit to Probe Limpopo Departments*, Business Day (March 30, 2012), <http://www.businessday.co.za/articles/Content.aspx?id=168741>.

³³¹ National Anti-Corruption Forum, <http://www.nacf.org.za/index.html> (last visited April 12, 2012)

raising awareness and advising both the private and public sector on best practices to decrease corruption.³³² Corruption Watch, a civil society initiative launched in January 2012 to combat corruption, represents efforts from those outside the government to make the public aware of corrupt activities in South Africa.³³³ The organization plans to use social media and the internet to publicize wrongdoing by government officials and also plans to submit evidence of crimes to authorities.³³⁴

In addition to domestic efforts, South Africa has ratified regional and international treaties, demonstrating an interest in participating in a greater community that discourages and combats corruption. One such regional treaty is the African Union Convention on Preventing and Combating Corruption. The African Union was founded in July 2002 with the aim of promoting democracy, human rights, and development in Africa.³³⁵ The African Union Convention on Preventing and Combating Corruption was adopted on July 11, 2003, during the African Union Summit.³³⁶ Transparency International categorizes the three major obligations of the African Union Convention on Preventing and Combating Corruption as preventative measures,

³³² *Id.*

³³³ Bryson, Donna. *Unions Back Anti-Corruption Campaign in S. Africa*, Newsday, (January 26, 2012), <http://www.newsday.com/news/nation/unions-back-anti-corruption-campaign-in-s-africa-1.3480556>

³³⁴ Bryson, Donna. *Unions Back Anti-Corruption Campaign in S. Africa*, Newsday, (January 26, 2012), <http://www.newsday.com/news/nation/unions-back-anti-corruption-campaign-in-s-africa-1.3480556>

³³⁵ TRANSPARENCY INT'L, THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION, *available at* http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/au_convention

³³⁶ TRANSPARENCY INT'L, THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION, *available at* http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/au_convention

criminalization, and international cooperation, and notes that this convention contains features not found in other regional anti-corruption conventions, some of which are not even found in the United Nations Convention Against Corruption.³³⁷ Of note are provisions that call for participation of the private sector in the fight against unfair competition, a provision calling for minimum guarantees of a fair trial, and a detailed provision on how international cooperation can be achieved in implementing the treaty.³³⁸ Additionally, South Africa is part of the Southern African Development Community and in 2001 adopted the South African Development Protocol Against Corruption.³³⁹ This protocol has the aim of promoting anti-corruption efforts within the signatory countries and encouraging cooperation to prevent corruption in the region by including both preventative and enforcement mechanisms.³⁴⁰

South Africa has ratified international treaties that address corruption, including the United Nations Convention Against Corruption.³⁴¹ And even though South Africa is not a member of the OECD, it has implemented the OECD Anti-Bribery

³³⁷ TRANSPARENCY INT'L, THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION, *available at* http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/au_convention

³³⁸ TRANSPARENCY INT'L, THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION, *available at* http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/au_convention.

For a full text of the treaty, please see <http://au.int/en/content/african-union-convention-preventing-and-combating-corruption>

³³⁹ BIAC Anti-Bribery Resource Guide: http://www.biac.org/pubs/anti-bribery_resource/section_1.htm#south_africa,

³⁴⁰ BIAC Anti-Bribery Resource Guide: http://www.biac.org/pubs/anti-bribery_resource/section_1.htm#south_africa,

³⁴¹ United Nations Convention Against Corruption, United Nations Office on Drugs and Crime <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

Convention.³⁴² Unfortunately, in spite of ratifying these treaties, enforcement is not always successful. Transparency International currently describes South Africa as a country with “little or no enforcement” of the OECD Anti-Bribery Convention, which is representative of South Africa’s general issues with corruption.³⁴³

Nevertheless, despite its laudable efforts on both a national and domestic level, few of South Africa’s businesses are even aware of the country’s anti-corruption legal framework or have policies in place to prevent corrupt activity. An attorney at a leading South African firm observed that only the largest multinational companies appear to be taking serious steps to satisfy anti-corruption laws. He added that South Africa’s failure to enforce penalties for corrupt activity may be responsible for fostering complacency among its companies.³⁴⁴

RECENT ENFORCEMENT ACTIONS AND CORRUPTION SCANDALS

A crop of recent scandals suggests that South African corruption is a “top-down” enterprise: South African President Jacob Zuma—who has a reputation for being “soft” on corruption—is himself implicated in a series of corruption scandals, as are other leaders past and present.

President Zuma was recently confronted with renewed allegations in a bribery scandal that now spans three decades. Zuma was removed from his old post as deputy president of

³⁴² BIAC Anti-Bribery Resource Guide: http://www.biac.org/pubs/anti-bribery_resource/section_1.htm#south_africa

³⁴³ *See Anti-Bribery Progress: Indefinitely Delayed?*, TRANSPARENCY INTERNATIONAL (May 23, 2001), available at www.transparency.org/news_room/in_focus/2011/oecd_progress_2011.

³⁴⁴ *SA Firms Lack Grasp of Anti-bribery Law*, Corruption Watch (April 13, 2012), <http://www.corruptionwatch.org.za/content/%E2%80%98sa-firms-lack-grasp-anti-bribery-law%E2%80%99>.

South Africa after his financial adviser, Schabir Shaik, was convicted of accepting bribes from a French arms company in connection with a 1999 deal worth \$5 billion.³⁴⁵ Zuma was later charged in the scandal, but South Africa's prosecuting authority decided to drop the charges just weeks before the 2009 presidential election that saw Zuma elevated to President. President Zuma's chief anti-corruption investigator recently resigned in disgrace after publically accusing former President Thabo Mbeki, Zuma's opponent in the 2009 presidential race, of initiating the bribery investigation for political leverage. Although President Zuma maintains he is "the victim of a 'political conspiracy,'" in March 2012 the Supreme Court granted a political opposition party's request to review the decision to drop the bribery charges. The prosecutor's reasons for dropping the charges before the 2009 election have never been made public.³⁴⁶

President Zuma was also named as one recipient of a R30 million bribe in an arms deal that also involved former President Mbeki and the African National Congress. A 2007 British report concluded that the German shipbuilder MAN Ferrostaal paid 30 million Rand to then-President Thabo Mbeki to secure a contract to provide submarines to the South African navy. Mbeki, when questioned, asserted that the bribe money in fact went to the African National Congress and to Zuma—then Mbeki's deputy. The British report concluded it was unlikely the allegations would result in any charges, however, because President Mbeki controlled South Africa's National Prosecuting Authority.³⁴⁷

³⁴⁵ *South Africa: Zuma's Anti-Corruption Chief Heath Quits*, BBC News Africa (December 15, 2011), <http://www.bbc.co.uk/news/world-africa-16209461>

³⁴⁶ *South African Jacob Zuma Corruption Case to be Reviewed*, BBC News UK (March 20, 2012), <http://www.bbc.co.uk/news/world-africa-17442486>

³⁴⁷ *Mbeki Paid R30m Arms-Deal Bribe*, Mail and Guardian Online (August 3, 2008), <http://mg.co.za/article/2008-08-03-mbeki-paid-r30m-armsdeal-bribe>

Allegations of corruption surrounding a procurement contract with BAE Systems, Europe's largest military contractor, continue to haunt President Zuma. In 2008, The Guardian reported that BAE, through arms tycoon John Bredenkamp, identified "key decision-makers" in the South African government and "financially incentiv[ized] them" to make a multi-billion dollar purchase of BAE's warplanes. BAE's bribe targets in the South African government allegedly included Chippy Shaik, its chief military procurement officer and brother to President Zuma's now-incarcerated former advisor Schabir Shaik.³⁴⁸ Chippy later left South Africa, citing a "toxic" situation created by "a campaign against [him]"—a reference to both the bribery scandal and accusations that he had plagiarized his dissertation while in school.³⁴⁹ In 2010, BAE settled charges with the Justice Department and Britain's Serious Fraud Office that implicated corrupt activity all around the world.³⁵⁰

Deputy President Kgalema Motlanthe's credibility has also been tainted by a recent scandal. In March of this year, South Africa's Public Protector's office announced that it would look into bribery allegations leveled against his partner, Ms. Gugu Mtshali,³⁵¹ after a military contractor reported that Ms. Mtshali solicited a 104 million rand bribe—\$13.8 million in U.S. dollars—in exchange for a promise of governmental support for the contractor to sell helicopters to Iran.³⁵² The proposed transaction

³⁴⁸ *BAE Accused of £100m Secret Payments to Seal South Africa Arms Deal*, The Guardian (December 5, 2009), <http://www.guardian.co.uk/world/2008/dec/06/bae-arms-trade>.

³⁴⁹ *Chippy Shaik Packs His Bags*, iOL News (May 27, 2007), <http://www.iol.co.za/news/politics/chippy-shaik-packs-his-bags-1.354766>

³⁵⁰ *BAE Settles Corruption Charges*, The New York Times (February 5, 2010), <http://www.nytimes.com/2010/02/06/business/global/06bribe.html>.

³⁵¹ *Madonsela to Investigate Motlanthe "Bribe" Claim*, Business Day (March 30, 2012), <http://www.businessday.co.za/articles/Content.aspx?id=167894>

³⁵² *South Africa Probes a Leader as Presidential Race Looms*. The Wall Street Journal (March 20, 2012),

would have violated a United Nations Security Council resolution prohibiting sales of such equipment to Iran.³⁵³ Responding to the allegations, Deputy President Motlanthe requested that South Africa's Public Protector launch an investigation, in the hope that his name would be cleared before the African National Congress party meets later in 2012 to determine South Africa's next leader. According to South African political observers, it is not unusual to see such information strategically leaked for political gain in the run-up to election season.³⁵⁴

South Africa's culture of corruption implicates not only its politicians, but its domestic companies, too. A recent lawsuit filed in United States federal court alleges that MTN Group, South Africa's leading telecommunications provider, offered bribes to win a license to provide cell phone service to in Iran in 2004.³⁵⁵ The plaintiff, an Istanbul-based cellular service provider whose bid lost to MTN's, accused MTN of using its influence with the South African government to bribe Iranian officials with South African support for Iran's nuclear weapons program and other military equipment.³⁵⁶ South Africa has pledged to investigate these allegations through its Directorate for Priority Crime

<http://online.wsj.com/article/SB10001424052702303812904577293582930053976.html?KEYWORDS=Motlanthe>

³⁵³ *Madonsela to Investigate Motlanthe "Bribe" Claim*, Business Day (March 30, 2012), <http://www.businessday.co.za/articles/Content.aspx?id=167894>

³⁵⁴ *South Africa Probes a Leader as Presidential Race Looms*. The Wall Street Journal (March 20, 2012), <http://online.wsj.com/article/SB10001424052702303812904577293582930053976.html?KEYWORDS=Motlanthe>

³⁵⁵ Dolan, David: *South Africa's MTN Slides on Iran Corruption Lawsuit*, Reuters (March 30, 2012), <http://www.reuters.com/article/2012/03/30/us-mtn-iran-shares-idUSBRE82T0N620120330>

³⁵⁶ *Id.*

Investigation (nicknamed “the Hawks”), a unit of the South African Police Force with a focus on international crime.³⁵⁷

CONCLUSION

South Africa has demonstrated the potential to be a leader not only in its region but throughout the world as a country that has made a successful political and economic transition. However, as South Africa’s Public Protector, Thuli Mandonsele, recently noted: “if we don’t deal with corruption decisively it will not only impact on good governance, but has the potential to distort our economy and to derail democracy.”³⁵⁸

South Africa has the appropriate framework to target corruption; what remains to be seen is whether the country will enforce the laws already on its books. Companies seeking to do business in South Africa must pay particular attention to their own compliance programs, and ensure that their employees and agents are aware of the restrictions as well as the consequences for corrupt practices.

³⁵⁷ *South Africa: the Hawks Must Investigate Corruption Allegations Against MTN*, AllAfrica March 30, 2012.

<http://allafrica.com/stories/201203301046.html>; International Association of Anti-Corruption Activities, Police Service Directorate for Priority Crime Investigation, *online at*: http://www.iaaca.org/AntiCorruptionAuthorities/ByCountriesandRegions/S/SouthAfrica1/201202/t20120215_804910.shtml.

³⁵⁸ “Endemic” Corruption in South Africa is at its “Tip” NewsTrak India. April 4, 2012 <http://www.newstrackindia.com/newsdetails/2012/04/04/228--Endemic-corruption-in-South-Africa-is-at-its-tip-.html>.

CHAPTER III

REGIONAL TRENDS AND DEVELOPMENTS SOUTH AMERICA (Brazil, Argentina)

RECENT ANTI-CORRUPTION DEVELOPMENTS IN BRAZIL

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February 2, 2012

OVERVIEW

Brazil is quickly becoming one of the world's leading economic powers. As the largest and most populous country in South America, Brazil has long been the region's top economic player. In terms of purchasing power parity, Brazil has the eighth largest economy in the world. Brazil has the seventh largest nominal Gross Domestic Product, of \$2.09 trillion. With roughly 203 million people and over 102 million workers, Brazil is the world's fifth most populous country and has the world's sixth largest labor force. According to an article in *Finance and Development*, a publication by the International Monetary Fund, "Brazil's economic success has raised the bar for that country, at home and abroad."³⁵⁹

As one of the first emerging markets to begin a recovery after the global financial crisis hit in 2008, Brazil has become a major recipient of foreign direct investments. The United Nations Conference on Trade and Development's World Investment Prospects Survey 2010-2012 ranked Brazil as the third most popular country for foreign direct investment by transnational corporations.

Despite the Brazilian economy's tremendous potential, public corruption remains a significant obstacle to doing business in Brazil. Public corruption in Brazil dates back to the colonial

³⁵⁹ *Great Expectations*, FINANCE AND DEVELOPMENT, March 2011, available online at <http://www.imf.org/external/pubs/ft/fandd/2011/03/mesquita.htm>.

period and persists today due, in large part, to cultural acceptance. A number of recent, high-profile public corruption scandals have focused the country's attention on the issue, and citizen discontent has grown markedly. With President Dilma Rousseff taking a strong stance against corruption in her own ministry and new legislation on the books aimed at tackling the problem, Brazil may be on the cusp of a lasting anti-corruption movement. According to Marcos Fernandes, economist at the Getulio Vargas Foundation, "[m]any Brazilians...sense that their continent-sized country is ready to realize its potential as a world economic power, and that the old way of doing business, based on personal connections and under-the-table agreements, is holding the country back."³⁶⁰

There are a number of complex and interrelated reasons for the prevalence of corruption in Brazil. A lack of anti-corruption legislation is not among them. In fact, Brazil has a strong legal framework in place aimed at fighting corruption, which has been used as a model for the establishment of similar frameworks in other developing countries. But lack of implementation and enforcement has rendered this framework largely ineffective, resulting in a culture of impunity. There have been frequent instances of high-profile government corruption and bribery, with many senior public officials going unpunished for their crimes. When Jose Roberto Arruda, the former Governor of the Federal District, was arrested in February 2010 for his involvement in a government contracts kickback scheme, *The Economist* noted that the arrest was an exception to the general rule: "[t]his is unusual in a country where politicians accused of corruption often lose nothing more precious than their mandates or their dignity—and even then they seem to bounce back quickly."³⁶¹

³⁶⁰ *Brazil Takes Hard Line on Corruption*, CBS NEWS, October 16, 2011, available online at

<http://www.cbsnews.com/stories/2011/10/16/ap/business/main20121038.shtml>.

³⁶¹ *Corruption in Brazil: The Money Trail*, THE ECONOMIST, February 25, 2010, available online at <http://www.economist.com/node/15580390>.

In 2011, six of President Rousseff's ministers resigned amid corruption allegations. Most observers have lauded the President for her firm stance against corruption, crediting her with removing the corrupt ministers from office. One of Brazil's most prominent journalists, Eurípedes Alcântara, commented, "It seems to me that [President Rousseff] is much more intolerant with corruption than [her predecessor, Luiz Inacio Lula da Silva] . . . There now exists a strong awareness, and I think much of it is down to the President, that this kind of extortion is unacceptable."³⁶²

Recent high-profile scandals and resignations such as those of President Rousseff's ministers, along with extensive media coverage, have forced the issue of anti-corruption legislative reform to the forefront of Brazilian political dialogue. In multiple demonstrations taking place at the end of 2011, thousands of Brazilians took to the streets to protest corruption and the culture of impunity surrounding corruption in Brazil. In September, 594 giant brooms, painted in the green and yellow of Brazil's flag, were positioned in front of the country's congressional building. The brooms, one for each federal politician, were meant to symbolize the need to clean up politics.³⁶³ *The Guardian* reported that 2011 may "be remembered as the year in which public frustration over rampant political corruption finally boiled over."³⁶⁴

In addition to the President's apparent intolerance for government corruption and strong grassroots activism, a group of

³⁶² *Brazil Is The Latest Country to Get Angry About Corruption*, THE GUARDIAN, October 27, 2011, available online at <http://www.guardian.co.uk/world/2011/oct/27/brazil-latest-country-angry-corruption/print>.

³⁶³ *How Brazil Is Opening Up Access to Official Information*, BBC NEWS LATIN AMERICA & CARIBBEAN, December 30, 2011, available online at <http://www.bbc.co.uk/news/world-latin-america-16292843?print=true>.

³⁶⁴ *Brazil Is The Latest Country to Get Angry About Corruption*, *supra* note 4.

lawmakers called the anti-corruption caucus has dedicated itself to the cause. According to a *CBS News* story, the caucus has “dusted off 21 bills that target corruption, some having been stuck in the process for more than 15 years.”³⁶⁵ One of the draft bills would impose civil and administrative liability on corporations for bribery of national and foreign public officials.

Despite these recent efforts, it is unclear what new legislation, penalties, and oversight, if any, will ultimately be enacted by the Brazilian Congress, as significant political obstacles stand in the way.³⁶⁶ Multi-national companies doing business in Brazil should keep abreast of legislative developments, as the passage of certain pending bills would have important compliance implications. Companies should also be aware of the grassroots efforts against corruption that have gained strength and prominence in recent months. According to Gil Castello Branco, founder of the non-profit watchdog group Contas Abertas, which advocates for transparency in government, “[s]ociety must remain engaged for the anti-corruption movement to produce real results...There is no police, no federal accounting investigation, that will fight corruption with the intensity that it deserves if the public is not behind them.”³⁶⁷

THE SIZE OF THE PROBLEM

Transparency International, the international non-governmental organization dedicated to eliminating corruption, ranks 178 countries and their governments’ efforts to fight corruption on its Corruption Perceptions Index. For 2011, Brazil

³⁶⁵ *Brazil Takes Hard Line on Corruption*, *supra* note 2.

³⁶⁶ See *Analysis: Brazil’s Rousseff Rides Anti-Graft Wave, For Now*, REUTERS, November 7, 2011, available online at <http://www.reuters.com/article/2011/11/07/us-brazil-corruption-idUSTRE7A63G420111107> (discussing the political constraints faced by President Rousseff in tackling the deep roots of public corruption).

³⁶⁷ *Brazil Takes Hard Line on Corruption*, *supra* note 2.

tied Tunisia for 73rd on the list.³⁶⁸ In addition to the six ministerial resignations in 2011, Brazil has suffered a number of other high-profile public corruption scandals in recent years. Officials at all levels of government have been accused of accepting bribes, awarding public contracts in exchange for kickbacks, and personally profiting from taxpayer money. A 2011 study by the Industrial Federation of São Paulo State estimated the annual cost of corruption in Brazil to be between \$28.7 billion and \$47.7 billion—equaling 1.4 to 2.3 percent of GDP—in 2010.³⁶⁹ According to Transparency International, 54 percent of Brazilians surveyed assessed the Brazilian government’s actions to curb corruption as “ineffective;” only 29 percent of respondents perceived the government to be “effective” at fighting corruption.³⁷⁰ Sixty-four percent of Brazilians surveyed believed that the level of corruption in Brazil has increased over the past three years.³⁷¹

Brazilians have long accepted corruption as the cost of doing business, in both private commerce and public service. According to regional poll Latinobarómetro, 23 percent of Brazilian households surveyed in 2011 claimed that bribes are needed when interacting with public officials.³⁷² The perception of companies doing business in Brazil is similarly negative on the status of anti-corruption efforts. The Enterprise Surveys 2009 data, collected by the World Bank and International Finance Corporation, demonstrate that 70 percent of surveyed companies

³⁶⁸ See *Corruption Perceptions Index 2011 Results*, Transparency International, December 1, 2011, available online at

<http://cpi.transparency.org/cpi2011/results/#CountryResults>.

³⁶⁹ *Rousseff Battles Brazil’s Graft Machine*, BLOOMBERG BUSINESSWEEK, September 22, 2011, available online at

<http://mobile.businessweek.com/magazine/rousseff-battles-brazils-graft-machine-09222011.html>.

³⁷⁰ *Global Corruption Barometer 2010*, Transparency International, Table 4, at 47, available online at

http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

³⁷¹ *Id.*, Table 1, at 42.

³⁷² *2011 Report*, Latinobarómetro, at 66, available online at

<http://www.latinobarometro.org/latino/latinobarometro.jsp>.

identified corruption as a “major constraint” for doing business in Brazil.³⁷³ Almost 12 percent of companies polled expected to give gifts or make payments to public officials “to get things done.”³⁷⁴

CURRENT ENFORCEMENT REGIME

Brazil has in place a strong legislative framework aimed at fighting corruption. But legislation alone, without a political commitment to enforcement, will not curb the rampant corruption that plagues the country’s economy. For example, Brazil does not have a specialized, independent anti-corruption agency with the authority to investigate and prosecute allegations of corruption. Instead, local agencies throughout Brazil’s states and municipalities are charged with tackling the problem. The Comptroller General, the Supreme Audit Institution, the Public Prosecutor, and the Federal Police also have mandates to address corruption. Instead of an independent Ombudsman institution, Brazil has *Ouvidores* (“hearers”) within each ministry who receive corruption-related complaints. The *Ouvidores* are not independent and cannot initiate corruption investigations; they simply communicate complaints between the offices in question. This lack of independence, in addition to the high degree of decentralization, is a significant obstacle to efficient enforcement of anti-corruption measures in Brazil.

Another obstacle to effective anti-corruption enforcement is the lack of whistleblower protection. Public officers and private business employees who report corruption are not legally protected from recrimination, retaliation, and other negative consequences. While most ministerial offices have some form of a whistleblowing mechanism, complaints are generally not accepted if made anonymously. There are exceptions. For example, the Comptroller General has a whistleblower mechanism on its

³⁷³ *Enterprise Surveys, Brazil (2009)*, International Finance Corporation & World Bank, available online at <http://enterprisesurveys.org/Data/ExploreEconomies/2009/brazil>.

³⁷⁴ *Id.*

website through which corruption in the federal government can be reported anonymously. Nevertheless, employees rarely report instances of corruption given the risk of retaliation, especially in the private sphere.

While Brazil has ratified important international anti-corruption conventions—the U.N. Convention Against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Inter-American Convention Against Corruption—it has not yet enacted all domestic implementing legislation required by the conventions. For example, Brazil does not yet have domestic laws, similar to the U.K. Bribery Act and the U.S. Foreign Corrupt Practices Act (“FCPA”), that prohibit corporate entities from bribing of foreign public officials in international business transactions. While a draft bill to this effect was introduced in early 2010, it has yet to be taken up for opinion by the Brazilian legislature’s Special Commission.³⁷⁵ In addition, the OECD has urged Brazil to take more steps against corruption.³⁷⁶

Corruption is addressed in Brazil’s Penal Code as well as in multiple specific federal laws. Article 333 of the Penal Code prohibits offering or promising an undue advantage to a public official to induce him or her to perform, omit, or delay an official act. Persons in violation of this provision face two to twelve years of imprisonment and a fine. Article 337-B criminalizes the same conduct when it involves foreign public officials in international business transactions. The penalty for such bribery is one to eight years imprisonment and a fine. Importantly, only individuals, not

³⁷⁵ See *Projects of Laws and Other Proposals*, Câmara dos Deputados, available online at <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=466400>.

³⁷⁶ See *OECD Urges Brazil to Take More Steps Against Corruption*, THE WALL STREET JOURNAL, October 27, 2011, available online at <http://blogs.wsj.com/corruption-currents/2011/10/27/oecd-urges-brazil-to-take-more-steps-against-corruption/>.

entities, can be held liable under these laws. The Brazilian Penal Code also prohibits so-called “passive bribery” on the part of public officials. Article 317 holds public officials criminally liable for soliciting, receiving, or accepting the promise of an undue advantage, for themselves or other persons, either directly or indirectly. Other provisions establish penalties for embezzlement of public funds, breach of public duty, and violation of the confidentiality of an offer tendered in competitive bidding.

Two additional pieces of anti-corruption legislation were recently enacted in Brazil, both of which have been viewed as crucial to a cleaner and more transparent government. The first is the so-called *Ficha Limpa* (“clean record”) law. Passed in June 2010, the law disqualifies politicians from running for office for eight years if they have been convicted of a serious crime. It also applies to politicians who have resigned from office to avoid impeachment.³⁷⁷ As the result of a petition signed by approximately 1.5 million Brazilians, the *Ficha Limpa* law has been heralded as “a revolution,”³⁷⁸ and as “[o]ne of the greatest bills of popular initiative in Brazilian history.”³⁷⁹ Designed to combat the impunity that has become an entrenched reality of Brazil’s political system, this law, if enforced effectively, could go a long way to root out public corruption.

The second piece of recently enacted anti-corruption legislation is a far-reaching freedom of information law that requires the government to publish information on public spending and to respond to citizen requests for information. The freedom of information bill enshrines citizens’ right to public information in Brazil’s constitution. Because a lack of

³⁷⁷ See *Brazil’s Congress: Cleaning Up*, THE ECONOMIST, July 8, 2010, available online at <http://www.economist.com/node/16542611>.

³⁷⁸ *Id.*

³⁷⁹ *Ficha Limpa: Politicians in Brazil Must Have Clean Criminal Records*, INFOSUR HOY, June 22, 2010, available online at http://www.infosurhoy.com/cocoon/saii/xhtml/en_GB/features/saii/features/main/2010/06/22/feature-03.

transparency is thought to play a significant role in Brazil's public corruption problem, Brazilians view this law as having the potential to change the political landscape. With the law due to take effect in May 2012, public officials and organizations are rushing to comply with its demands.³⁸⁰ If effectively enforced, the *Ficha Limpa* and access to information laws, along with increased enforcement of current laws, may significantly alter Brazil's current anti-corruption regime.

RECENT MAJOR SCANDALS

Although public corruption is known to be a widespread and entrenched problem in Brazil, recent events have showcased the problem in dramatic fashion. In the last few years, there have been a number of scandals involving high-profile politicians. These scandals have been extensively covered by the Brazilian media, which played a huge part in bringing the stories to light. The corruption scandals have also been a major impetus behind the grassroots activism that has taken hold of the country.

President Rouseff's widely-popular predecessor, Luiz Inacio Lula da Silva, ostensibly dedicated himself to the anti-corruption cause. However, his presidency witnessed several high-profile scandals involving money laundering, misuse of state funds, and bribery relative to government contracts. And unlike President Rouseff, the former president "often turned a blind eye to corruption allegations for the sake of maintaining political support."³⁸¹ In one of the largest public corruption scandals in recent Brazilian history, members of Lula da Silva's Workers Party ("PT") were accused of involvement in an illegal vote-buying scheme. Known as the *Mensalão* ("monthly pay-off") scandal, the scheme involved monthly payments to opposition politicians in

³⁸⁰ *How Brazil Is Opening Up Access to Official Information*, *supra* note 5.

³⁸¹ *Brazil Tourism Minister Quits, Fifth This Year*, REUTERS, September 14, 2011, available online at <http://www.reuters.com/article/2011/09/14/brazil-rousseff-minister-idUSS1E78D24120110914>.

return for their votes.³⁸² Because the PT had a minority in Congress at the time, it governed through a coalition of several parties. The payments, said to be around \$13,000 a month, were used to buy the support necessary to build these voting coalitions.³⁸³ The PT was also accused of using illicit funds to finance the campaigns of its members and allies. The *Mensalão* scandal first came to light in 2005; in August 2007, Brazil's Supreme Court indicted 40 people involved in the scandal, marking the first time the Court has ever brought criminal charges against politicians.³⁸⁴

A more recent scandal involved former Governor of the Federal District, Jose Roberto Arruda, and various members of the district legislature, who were accused of taking bribes from companies seeking public works contracts. The scandal became widely publicized after video footage surfaced in 2009 showing Arruda accepting large amounts of money during his 2006 election campaign.³⁸⁵ Footage also showed Arruda's secretary handing over bundles of cash to Arruda's various allies, who could be seen stuffing the cash "down trousers, into handbags and, when other pockets were full, into socks."³⁸⁶ After denying any wrongdoing and refusing to step down from office, Arruda ultimately surrendered to police when Brazil's Supreme Court voted 12-2 in favor of his arrest.³⁸⁷ This marked the first time in 25

³⁸² *Q&A: Brazil Corruption Scandal*, BBC NEWS AMERICAS, September 4, 2007, available online at <http://news.bbc.co.uk/2/hi/americas/4676435.stm>.

³⁸³ *Id.*

³⁸⁴ *Corruption in Brazil: Enter The Judges*, THE ECONOMIST, August 30, 2007, available online at <http://www.economist.com/node/9725400>.

³⁸⁵ *Governor of Brazil's Capital City Surrenders to Police*, BBC NEWS AMERICAS, February 12, 2010, available online at <http://news.bbc.co.uk/2/hi/8512204.stm>.

³⁸⁶ *Corruption in Brazil: The Money Trail*, *supra* note 3.

³⁸⁷ *Brazil Governor Arrested on Fraud Scandal*, REUTERS, February 11, 2010, available online at <http://www.reuters.com/article/2010/02/11/brazil-politics-idUSN1118989820100211>.

years that an elected governor was detained during his time in office.³⁸⁸

As to the recent governmental resignations involving President Rousseff's ministers, Antonio Palocci, Rousseff's Chief of Staff, was the first to go. After only 23 days on the job, Palocci resigned in June 2011 after media reports began questioning his rapid accumulation of wealth.³⁸⁹ A São Paulo newspaper reported that Palocci's wealth grew 20 times over a four-year period during which he was a legislator; in response, several lawmakers requested a formal investigation into the matter.³⁹⁰ Palocci denied any wrongdoing and claimed he was stepping down to avoid a scandal that would harm the President.³⁹¹ While the case against Palocci was reportedly closed, his resignation was initially viewed as a blow to President Rousseff's administration, which gave Palocci the high-profile position despite the fact that he had resigned from a governmental post once before due to corruption allegations.

Next to resign was President Rousseff's Transport Minister, Alfredo Nascimento. Nascimento stepped down in July 2011 after a news magazine accused four of his staff of charging apparently irregular commissions on state infrastructure contracts.³⁹² Agriculture Minister Wagner Rossi then resigned in

³⁸⁸ *Brasilia's Governor Arruda Arrested*, THE RIO TIMES, February 16, 2010, available online at <http://riotimesonline.com/brazil-news/rio-politics/brasilias-governor-arruda-arrested/>.

³⁸⁹ *Brazilian Cabinet Chief Resigns Amid Ethics Scandal*, CNN WORLD, June 8, 2011, available online at http://articles.cnn.com/2011-06-08/world/brazil.chief.of.staff_1_antonio-palocci-resignation-letter-ethics-scandal?_s=PM:WORLD.

³⁹⁰ *Id.*

³⁹¹ *Brazil's President Rousseff Grapples with Corruption*, BBC NEWS LATIN AMERICA & CARIBBEAN, September 1, 2011, available online at <http://www.bbc.co.uk/news/world-latin-america-16288184>.

³⁹² *Brazil's Transport Minister Quits in Corruption Scandal*, BBC NEWS LATIN AMERICA & CARIBBEAN, July 6, 2011, available online at <http://www.bbc.co.uk/news/world-latin-america-14055768>.

August following allegations that he had accepted bribes and free air travel from agricultural companies.³⁹³ September saw the exit of Tourism Minister Pedro Novais. His resignation followed newspaper reports that he had used public money to employ a maid and a driver for his wife while he was a congressman.³⁹⁴ These were only the latest allegations pertaining to Novais's ministry—in August, over 30 Tourism Ministry officials were arrested on charges of misusing public money.³⁹⁵ The fifth corruption-related resignation came in October. Sports Minister Orlando Silva stepped down amid allegations that public funds for ministry social projects were kicked back to Silva and numerous associates in exchange for contracts to carry out the social programs.³⁹⁶ Lastly, Brazil's Labor Minister, Carlos Lupi, resigned in December after being accused of demanding kickbacks from charities and non-governmental organizations in exchange for funding from the ministry.³⁹⁷ All six officials have denied any wrongdoing. Interestingly, Rouseff does not seem to have been politically harmed by these resignations. Indeed, "the public seems to reward her for separating herself from them as soon as allegations come to light."³⁹⁸

³⁹³ *Brazil Corruption: President Loses Fourth Minister*, BBC NEWS LATIN AMERICA & CARIBBEAN, August 17, 2011, available online at <http://www.bbc.co.uk/news/world-latin-america-14569168>.

³⁹⁴ *Brazil Tourism Minister Pedro Novais Resigns*, BBC NEWS LATIN AMERICA & CARIBBEAN, September 14, 2011, available online at <http://www.bbc.co.uk/news/world-latin-america-14925248>.

³⁹⁵ *Id.*

³⁹⁶ *Brazil Probe Nets Sports Minister*, THE WALL STREET JOURNAL, October 27, 2011, available online at http://online.wsj.com/article/SB10001424052970203554104577000051516379504.html?mod=googlenews_wsj.

³⁹⁷ *Brazil Labour Minister Carlos Lupi Is Latest to Resign*, BBC NEWS LATIN AMERICA & CARIBBEAN, December 4, 2011, available online at <http://www.bbc.co.uk/news/world-latin-america-16026561>.

³⁹⁸ *Alejandro Salas: Has Dilma Rouseff Found The Anti-Corruption Formula for Latin America?*, FOX NEWS LATINO, January 6, 2012, available online at <http://latino.foxnews.com/latino/politics/2012/01/06/alejandro-salas-has-dilma-rousseff-found-anti-corruption-formula-for-latin/print>.

While the media has focused primarily on corruption involving Brazilian politicians, a number of recent FCPA enforcement actions have touched the country. For example, in October 2011, Avon Products, Inc. (“Avon”) disclosed that the U.S. Securities and Exchange Commission (“SEC”) had issued a formal order of investigation into possible FCPA violations.³⁹⁹ The SEC order came after Avon disclosed evidence from an internal investigation that reportedly uncovered millions of dollars of questionable payments to government officials in a number of countries where the company’s beauty products are sold, including Brazil.⁴⁰⁰ Avon’s legal costs in connection with the internal investigation were \$59 million in 2009, \$95 million in 2010, and \$22.5 million for the first quarter of 2011.⁴⁰¹

Two other recent, high-profile FCPA settlements involved bribes paid to government officials in Brazil. In September 2011, Bridgestone Corporation agreed to plead guilty and pay a \$28 million fine in connection with FCPA and anti-trust violations.⁴⁰² The tire and rubber company admitted to conspiring to pay bribes to officials in Brazil⁴⁰³ and other Latin American countries to win business. In late 2010, global logistics company Panalpina World Transport (Holding) Ltd. and its U.S.-based subsidiary, Panalpina Inc., admitted to bribing foreign officials on behalf of customers for customs clearance.⁴⁰⁴ Between 2002 and 2007, the companies paid thousands of bribes, totaling at least \$27 million, in a number

³⁹⁹ The FCPA Blog, <http://www.fcpablog.com/blog/2011/10/28/avon-discloses-sec-investigation.html> (October 28, 2011).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Bridgestone to Plead Guilty in Bid-Rigging Case*, THE WALL STREET JOURNAL, September 15, 2011, available online at <http://online.wsj.com/article/SB10001424053111903927204576572791449886856.html>.

⁴⁰³ *See Where The Bribes Are*, James Mintz Group, available online at <http://fcpamap.com/>.

⁴⁰⁴ The FCPA Blog, <http://www.fcpablog.com/blog/2010/11/4/seven-companies-settle-for-2365-million-updated.html> (November 4, 2010).

of countries, including Brazil.⁴⁰⁵ The Panalpina entities were fined \$70.5 million, and Panalpina Inc. agreed to pay \$11.3 million in disgorgement of profits.⁴⁰⁶

“LIABILITY OF LEGAL PERSONS FOR ACTS OF CORRUPTION” DRAFT BILL AND OTHER RECENT DEVELOPMENTS

As part of Brazil’s recent anti-corruption movement, the Brazilian Congress is currently considering Draft Bill 6.826/2010—“Liability of Legal Persons for Acts of Corruption.” The draft bill was introduced in February 2010 in a move toward full compliance with the OECD Convention. The proposed legislation would impose civil and administrative liability on corporations for bribery of national and foreign public officials. If enacted, the law would allow a company to be held liable for the corrupt conduct currently proscribed for individuals when such conduct is committed by the company’s representatives for the benefit of the company or when the company receives a benefit. Companies would face harsh penalties under the law—fines of up to 30 percent of their gross revenue and debarment from public contracts, among other sanctions.⁴⁰⁷

While the proposed sanctions are severe, the bill does provide two avenues by which companies may avoid or decrease those sanctions in face of a violation. First is a provision akin to the “adequate procedures” defense of the U.K. Bribery Act. Brazil’s draft bill provides that “the existence of mechanisms and internal integrity procedures, audit and incentive denunciation of irregularities in applying the code of conduct and ethics within the legal entity,” in addition to other factors, will be taken into consideration when determining the sanctions to be applied.⁴⁰⁸ This feature effectively allows for a company to receive a lesser

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ Carlos Henrique da Silva Ayres, *Compliance in Brazil: Current and Future Perspectives*, 27 No. 4 INT’L ENFORCEMENT L. REP. 667 (2011).

⁴⁰⁸ *Id.*

sanction if it had a pre-existing and effective compliance program in place.⁴⁰⁹ Like the U.K. Bribery Act, Brazil's draft bill does not provide a list of procedures that a company must have in place in order to qualify for a reduction in penalties.⁴¹⁰

The second avenue toward reduced sanctions is the bill's "credit for cooperation" provision. The bill provides that a company's "cooperation with investigation of infractions, through means such as communication of the illegal act to the public authorities before the initiation of a proceeding, and the celerity to provide information in the course of the investigation" will also be taken into account when determining the sanction to be applied.⁴¹¹ A strong compliance program is also vital to the effective use of this provision—companies must have a program in place that works to detect any wrongdoing in order to get "credit for cooperation."

Passage of the "Liability of Legal Persons for Acts of Corruption" bill would significantly strengthen Brazil's anti-bribery framework. It would also represent a major development in the country's broader anti-corruption movement. The legal concepts of direct corporate and *respondeat superior* liability have received very limited recognition in Brazil. The establishment of such liability for bribery thus marks a considerable shift for the country. With the 2014 World Cup and 2016 Summer Olympics set to take place in Rio de Janeiro, corporate liability for bribery would represent a serious "risk of doing business" for corporations taking part in these events.

Another significant development in Brazil's anti-corruption movement is the country's participation in the Open Government Partnership, an international coalition of countries and organizations dedicated to increasing government

⁴⁰⁹ *Id.*

⁴¹⁰ *See id.*

⁴¹¹ *Id.*

transparency. President Rousseff officially launched the partnership in conjunction with U.S. President Barack Obama in September 2011; the partnership is to be co-chaired by the United States and Brazil throughout its first year. According to the initiative's concept paper, founding governments will "embrace a set of high-level open government principles, pledge country-specific commitments for putting the principles into practice, and invite civil society organizations to assess their individual and collective progress going forward."⁴¹² According to Alejandro Salas, Regional Director for the Americas at Transparency International, Brazil's involvement in the partnership, and President Rousseff's leadership role, "[puts pressure on] Brazil to be the forerunner in transparency commitments."⁴¹³

CONCLUSION

While it is not clear whether the recent anti-corruption developments in Brazil will result in a lasting anti-corruption movement with concrete results, it does appear that corruption's grip on the country may be loosening. "[T]he resignation of six ministers from Brazil's government, the approval of transparency laws, and the emergence of an angry middle class show that Latin America's giant is stumbling toward cleaner government. That should eventually make Brazil . . . more efficient in its public spending and a better place to do business."⁴¹⁴ Regardless of whether Brazil becomes a better place to do business, it has no doubt become a riskier place to do business. With the Brazilian media and public citizenry highly focused on the corruption issue,

⁴¹² *U.S., Brazil Announce Open Government Partnership*, Bureau of International Information Programs, U.S. Department of State, July 12, 2011, available online at <http://iipdigital.usembassy.gov/st/english/article/2011/07/20110712142905eiznekcaml0.2062952.html#axzz1kn71BqhB>.

⁴¹³ *Alejandro Salas: Has Dilma Rousseff Found The Anti-Corruption Formula for Latin America?*, *supra* note 40.

⁴¹⁴ *Analysis: Brazil's Rousseff Rides Anti-Graft Wave, For Now*, *supra* note 8.

and with new anti-corruption laws both enacted and pending, companies doing business in Brazil should be prepared for greater scrutiny and increased activity from government bodies. The importance of anti-corruption compliance in Brazil cannot be overemphasized, especially given the wide range of business opportunities presented by the upcoming 2014 World Cup and 2016 Olympics.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN ARGENTINA

By: Asheesh Goel, Nicholas G. Niles and Miguel Lopez

May 9, 2012

OVERVIEW

Argentina seems to have shared in South America's period of stability and growth during the global economic downturn of the past four years. Indeed, since its historic default in the monetary crisis of 2001–2002, Argentina has enjoyed growth reminiscent of the 1990s-era comeback of economies such as Ireland, South Korea, and Taiwan. From 2003 to 2007, Argentina enjoyed five consecutive years of greater than eight-percent annual growth in GDP.⁴¹⁵ The trend seems to have continued through the global financial crisis: In 2011, the country saw a 31% increase in imports and a 23% increase in exports.⁴¹⁶ Investment in the Argentine economy increased 16% during the first three quarters of 2011, accounting for 24% of GDP.⁴¹⁷ All this data, together with the benefits of rich natural resources, a highly educated population, and a diversified industrial base,⁴¹⁸ would seem to make Argentina a highly attractive environment for foreign investors.

⁴¹⁵ BUREAU OF W. HEMISPHERE AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: ARGENTINA (2012).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

But the sheer scale of trade and investment in recent years masks what is seen by many as an unstable economic and political environment. The Peronist policies put in place by the late President Néstor Kirchner – and further extended by his wife and current president, Cristina Fernández – have actively favored certain sectors at the expense of others, and have made foreign business dependent on the government’s highly particularized exercise of corporate taxation and import controls. The result is that investment is flowing into uncompetitive sectors favored by ruling party politicians and bureaucrats – mainly in the area of urban manufacturing.⁴¹⁹ It is perhaps for this reason that, counter to historical trends in Argentina, growth has been led by construction and manufacturing, which has outpaced agricultural output.⁴²⁰

The move away from market-oriented economic policies may increase the risk to foreign businesses operating in Argentina. In the face of a diminishing current-account surplus, the government has imposed curbs on imports and stricter capital controls.⁴²¹ Effective private sector responses to these measures are made difficult by a pronounced lack of transparency in government figures and statements under President Fernández.⁴²² Experts have tied the country’s

⁴¹⁹ Robert Looney, *Argentina’s Dubious Boom*, FOREIGN POLICY, Mar. 14, 2012.

⁴²⁰ WORKING GROUP ON BRIBERY, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ARGENTINA: PHASE 2 – REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 6 (2008).

⁴²¹ *Don’t Lie to me, Argentina*, ECONOMIST, Feb. 25, 2012.

⁴²² *Id.* (stating that the IMF has noted Argentina’s recent failure in its obligation to provide the Fund with reliable figures).

corruption problem to its recent economic and political troubles, and have cited the weaknesses in Argentina's independent institutions as both a consequence of these developments and a contributing factor.⁴²³

THE SIZE OF THE PROBLEM

Corruption in Argentina is less a creeping problem than it is an institutionalized facet of economic life. This state of affairs has been acknowledged not just by non-governmental organizations, but by official sources as well. Secret diplomatic cables from the U.S. embassy in Buenos Aires, released by WikiLeaks in early 2011, portray corruption in Argentina as widespread and usually unpunished.⁴²⁴ "Corruption" is a catch-all phrase that includes various kinds of extortionary acts and relationships, and the degree of the problem in Argentina varies by context.

One important measure of corruption is the extent to which a country's public officials engage in bribery. Transparency International, a non-governmental organization dedicated to eliminating corruption, publishes an annual Corruption Perception Index, which measures the perceived levels of public sector corruption in 183 countries and territories.⁴²⁵ In 2011, Argentina ranked 100 on the CPI, below states with recent histories of internal conflict, such as Sri Lanka (86) and Bosnia & Herzegovina (91).⁴²⁶ On a scale of 0 to 10, with 0 signifying that a country is "highly corrupt," and 10 signifying that a country is "very clean,"

⁴²³ See *Embassy Cables Point to 'Glaring Weaknesses' in Argentina Ant-Corruption Architecture*, WALL ST. J. (Feb. 9, 2011).

⁴²⁴ *Id.*

⁴²⁵ <http://cpi.transparency.org/cpi2011/results/>

⁴²⁶ *Id.*

Argentina scored a 3. The country tied with Mexico, Indonesia, and Burkina Faso, among others, but lagged far behind neighbors Uruguay (#25, score of 7) and Chile (#22, score of 7.2).⁴²⁷ These figures coincide with what observers, including the World Bank, have seen as a marked deterioration in government effectiveness, the rule of law, and regulatory quality in recent years.⁴²⁸

Transparency International also publishes the Bribe Payers Index, which assesses the likelihood that firms from each of the world's 28 largest economies will pay bribes when doing business abroad.⁴²⁹ For the 2011 report, 3,016 business executives from 30 countries were surveyed.⁴³⁰ The executives were asked to rank each country from 0 to 10, with a score of 10 corresponding to a view that firms in that country never engage in foreign bribery.⁴³¹ Argentina ranked 23rd out of 28.⁴³² With a score of 7.3, Argentine firms were seen as slightly more likely to engage in foreign bribery than average (7.8), and occupied a position intermediate to firms from the other two Latin American countries in the Index: Brazil ranked 14th (7.7) and Mexico ranked 26th (7.0).⁴³³

Some sources suggest that Argentina nonetheless fares better than the "average" economy in Latin America

⁴²⁷ *Id.*

⁴²⁸ See WORLD BANK INST., WORLDWIDE GOVERNANCE INDICATORS: COUNTRY DATA REPORT FOR ARGENTINA, 1996-2010 (2011), available at info.worldbank.org/governance/wgi/pdf/c9.pdf.

⁴²⁹ TRANSPARENCY INT'L, BRIBE PAYERS INDEX REPORT 2011, available at <http://bpi.transparency.org/results>.

⁴³⁰ *Id.* at 24.

⁴³¹ *Id.* at 4.

⁴³² *Id.* at 5.

⁴³³ *Id.*

and the Caribbean (LAC). According to the World Bank & IFC Enterprise Surveys 2010, a lower percentage of firms in Argentina expected to give gifts to secure a government contract (10.3%) than in the average LAC country (11.5%).⁴³⁴ The same was true for the percentage of Argentine firms that expected to give gifts to get a construction permit (5.5% vs. 13%), or the percentage of Argentine firms that expected to give gifts in order to get an operating license (3.3% vs. 9.6%).⁴³⁵ However, a greater percentage of Argentine firms expected to give gifts in meetings with tax inspectors (8.7%) as compared to the LAC average (6.1%).⁴³⁶

The findings of these surveys are supported by other studies that have polled the sentiment of average Argentine citizens. According to Hernan Charosky, director of Poder Ciudadano (a local chapter of Transparency International), there is a “strong perception among the Argentine public that nothing is being done to reduce and control corruption.”⁴³⁷ According to Charosky’s organization, six out of ten Argentines surveyed in 2010 felt that the level of corruption in their society had grown in the preceding three

⁴³⁴ INT’L FIN. CORP., WORLD BANK GROUP, ENTERPRISE SURVEYS: ARGENTINA COUNTRY PROFILE 2010, at 13, *available at* <http://enterprisesurveys.org/~media/FPDKM/EnterpriseSurveys/Documents/Profiles/English/argentina-2010.pdf>.

⁴³⁵ *Id.*

⁴³⁶ *Id.*; *see also* Business Anti-Corruption Portal: Argentina Country Profile, <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/argentina/corruption-levels/tax-administration/>.

⁴³⁷ Jorgelina do Rosario, *Las causas judiciales sobre corrupcion avanzan con tiempos politicos*, CRONISTA.COM, Jan. 28, 2011, *available at* <http://www.cronista.com/we/Las-causas-judiciales-sobre-corrupcion-avanzan-con-tiempos-politicos-20110128-0001.html>.

years.⁴³⁸ A Bertelsmann Stiftung study showed that 54% of Argentines are “convinced” that it is possible to bribe a judge.⁴³⁹ Even the U.S. State Department expressed this concern in its 2010 Country Report for Argentina.⁴⁴⁰

This low level of confidence in the transparency of Argentina’s government and economy has practical adverse effects for investors. The Bertelsmann Report concludes that “the most significant deterrent to investors is the legal uncertainty surrounding creditor, contract and property rights.”⁴⁴¹ Outside of the judicial system, excessive bureaucracy leads to facilitation payments for many companies doing business in Argentina.⁴⁴² For foreign business, the temptation to use such “grease payments” is made stronger by the fact that customs laws are not enforced equally and without discrimination.⁴⁴³

⁴³⁸ *Id.*

⁴³⁹ BERTELSMANN STIFTUNG, BTI 2012: ARGENTINA COUNTRY REPORT 10.

⁴⁴⁰ See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORTS: ARGENTINA (2011) (noting “continued concerns about judicial efficiency and independence; official corruption”).

⁴⁴¹ *Id.* at 17; see also Land Administration, Business Anti-Corruption Portal: Argentina Country Profile (noting that corruption within judiciary and public administration makes it difficult to regulate property acquisition and enforce property rights), <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/argentina/corruption-levels/land-administration/>.

⁴⁴² See Licenses, Infrastructure and Public Utilities, Business Anti-Corruption Portal: Argentina Country Profile, <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/argentina/corruption-levels/licences-infrastructure-and-public-utilities/>.

⁴⁴³ *Id.*

EFFECT OF INTERNATIONAL ANTI-CORRUPTION TREATIES

Despite its widely recognized difficulty in dealing with corruption—or perhaps because of it—Argentina has been an early signatory to various international accords intended to eradicate this pernicious facet of economic life. Successful implementation of these accords has been a gradual process, and pre-existing domestic legal standards dominate despite Argentina's new anti-corruption legislation.

INTER-AMERICAN CONVENTION AGAINST CORRUPTION

In March of 1996, Argentina signed the Inter-American Convention against Corruption (IACAC) in Caracas, Venezuela. This treaty, the first of its kind, was adopted by the Organization of American States (OAS) and thus corresponds to broader efforts to remove barriers to economic integration within Latin America. Article II states that the Convention has two goals. The Convention's primary aim is to promote and strengthen each signatory state's development of mechanisms to prevent, detect, punish, and eradicate corruption.⁴⁴⁴ Its secondary goal is to promote cooperation among its signatory states in implementing these anti-corruption mechanisms.⁴⁴⁵

The IACAC has the advantage of being associated with the relatively active OAS. Since the Convention's inception, its signatory states have instituted a system of reciprocal monitoring, reporting on each others' progress toward full compliance and implementation. This is

⁴⁴⁴ Inter-American Convention Against Corruption, art. 2, *adopted on* Mar. 26, 1996, 35 ILM 724.

⁴⁴⁵ *Id.*

achieved through the Follow-up Mechanism for the Implementation of the Inter-American Convention against Corruption (MESICIC). For example, in 2009, Honduras and the Dominican Republic analyzed and reported on Argentina's progress.⁴⁴⁶ However, Honduras and the Dominican Republic are themselves no models of anti-corruption, both ranking 129th in Transparency International's Corruption Perceptions Index, faring significantly worse than Argentina.⁴⁴⁷

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS

Argentina signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December 1997. This Convention entailed a much larger undertaking for Argentina, and it did not fully enter into force in Argentina until April of 2001. The OECD's Working Group on Bribery, a creation of the organization's Directorate for Financial and Enterprise Affairs, conducts on-site evaluations of signatory states' compliance with the Convention and publishes reports on its findings. The Working Group's most recent report on Argentina⁴⁴⁸ identified some major areas of

⁴⁴⁶ OFICINA DE ANTICORRUPCION, INFORME ANUAL DE GESTION 2010, at 83-84, *available* at <http://www.anticorrupcion.gov.ar/documentos/INFORME%20ANUAL%202010.pdf>.

⁴⁴⁷ <http://cpi.transparency.org/cpi2011/results/>

⁴⁴⁸ WORKING GROUP ON BRIBERY, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ARGENTINA: PHASE 2 – REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (2008), *available online at* <http://www.oecd.org/dataoecd/35/28/40975295.pdf>.

concern in the country's implementation of the Convention, along with a series of more minor technical recommendations.⁴⁴⁹ Argentina falls short of the Convention's model provisions in its failure to remove the distinction between natural persons and legal entities such as corporations, in its differing treatment of domestic bribery and foreign bribery, and in failing to effectively enforce against "passive" bribery as compared to "active bribery."

Argentina codified the OECD Convention's anti-corruption standards in its Penal Code in 1999 and amended the statute in 2003. Its "foreign bribery offense," Article 258 *bis*, provides one to six years of imprisonment and a perpetual bar on holding public office for:

Any person who, directly or indirectly, offers or gives a public official from a foreign State or from an international public organization, for this official's benefit or for the benefit of a third party, money or any object of pecuniary value, or other compensations, such as gifts, favours, promises or advantages, for the purpose of having such official do or not do an act in related to the performance of his official duties, or to use the influence derived from the office he holds, in a matter linked to a transaction of an economic, financial or commercial nature . . .

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Although the law does not expressly define "public officials," legislative history suggests courts should apply

⁴⁴⁹ *Id.* at 4.

⁴⁵⁰ *Id.* at 70 (providing an unofficial English translation of the foreign bribery offense).

the expansive definition found elsewhere in the Penal Code: a “public official” likely means “any person who temporarily or permanently discharges public functions, whether as a result of popular election or appointment by the competent authority.”⁴⁵¹ Less certain is whether a payment must be “undue” to run afoul of the foreign bribery offense; although the OECD Convention draws this distinction, Argentina’s law could be read on its face to apply to legitimate payments for proper official action. The Working Group’s report suggests that this deficiency may leave Argentina’s foreign bribery offense open to a constitutional challenge.⁴⁵²

Rounding out the statutory scheme, articles 259 and 266 of the Penal Code complement Article 258’s foreign bribery offense by providing criminal penalties both for domestic public officials that corruptly solicit or accept gifts, and for those who offer or present such gifts.⁴⁵³

As with many of the OECD Convention’s signatory states, Argentina has not yet adopted provisions expressly imposing criminal liability on legal entities—such as corporations—for bribery offenses.⁴⁵⁴ The failure to impose liability on the legal entities for which agents enter into corrupt dealings leaves a yawning gap between aspirational goals and practical achievements in curbing corruption in which it is unclear whether Argentine courts could even exercise jurisdiction over corporations accused of bribery. In

⁴⁵¹ *Id.* at 45, 70 (citing CODIGO PENAL [COD. PEN.] [CRIMINAL CODE] art. 77(4)).

⁴⁵² *See id.* at 46.

⁴⁵³ COD. PEN. arts. 259 and 266, *available online at*:

http://www.infojus.gov.ar/pdf/codigos/grt_codigo_penal.pdf.

⁴⁵⁴ *Working Group on Bribery, supra* note 448 at 42.

order to bring domestic legislation into full compliance with the Convention, the Working Group on Bribery recommended that “the standards for jurisdiction over legal persons should be considered and adopted in conjunction with the necessary reform of the substantive liability of legal persons for foreign bribery.”⁴⁵⁵

Argentina’s anti-corruption efforts have largely focused on strengthening domestic corruption enforcement, with little development in the fight against foreign bribery. Although the OECD Convention aims to eradicate corruption generally, its focus is on the bribery of foreign officials by signatory states’ businesses. Ten years after Argentina’s foreign bribery offense was enacted in 1999, there had been no court decisions or prosecutions in relation to the offense.⁴⁵⁶ Nor had any of the company officials interviewed during the Working Group’s on-site visit ever heard of the offense.⁴⁵⁷

The anemic state of foreign bribery prosecution coincides with the somewhat unsettled question of the law’s extraterritoriality. One of the country’s Supreme Court decisions seems to indicate that the law does have extraterritorial effect, holding that an offense is considered to have been committed in all jurisdictions where part of the act took place, as well as where *the effects* of the offense took place.⁴⁵⁸ However, Argentine legal experts who participated in the Working Group’s on-site visit were not at all certain as to whether Argentina could establish territorial jurisdiction

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 7.

⁴⁵⁷ *Id.* at 11.

⁴⁵⁸ “*Vinakur de Piratto Mazza*”, Fallos 311:2571 (Corte Suprema de Justicia de la Nacion 2008).

in foreign bribery cases occurring mainly abroad.⁴⁵⁹ But the law does explicitly provide for jurisdiction over *Argentine* public officials who engage in bribery abroad.⁴⁶⁰ In practical terms, then, a state official who travels abroad and secures business by corrupt means faces potential prosecution at home, but the agent of an Argentine corporation doing the same likely faces no such threat. Even were such prosecutions to take place, the sentencing court is authorized to consider the prevalence of bribery in the foreign jurisdiction and tolerance of such payment by foreign authorities as mitigating circumstances.⁴⁶¹

One final distinction between the OECD Convention and Argentine domestic law is the distinction between “active” and “passive” bribery. So-called “passive bribery” is only prohibited insofar as an individual receives or accepts the promise of an advantage by a public official.⁴⁶² Where the public official is the party that actively solicits a bribe, the would-be “active briber” is recast as a victim of an “illegal demand” – a crime that can only be committed by a public official.⁴⁶³ This defense undercuts the impact of the Convention by immunizing bribery by private actors in those instances where public officials’ corruption is most acute. Argentine officials have noted, however, that this “passive bribery” defense would likely not apply in a foreign bribery case brought under art. 258.⁴⁶⁴

⁴⁵⁹ ARGENTINA: PHASE 2, *supra* note 448, at 41.

⁴⁶⁰ COD. PEN. art. 1(2).

⁴⁶¹ COD. PEN. art. 41.

⁴⁶² COD. PEN. art. 256.

⁴⁶³ COD. PEN. arts. 266–68; *see also* ARGENTINA: PHASE 2, *supra* note 448, at 47.

⁴⁶⁴ ARGENTINA: PHASE 2, *supra* note 448, at 47.

CURRENT ENFORCEMENT REGIME

The structure of Argentina's law enforcement institutions has had a detrimental impact on the development of a comprehensive anti-corruption enforcement regime. As explained in a U.S. embassy cable leaked last year: "Glaring weaknesses in key components of Argentina's anti-corruption architecture point to an emasculated institutional framework incapable of providing needed checks and balances."⁴⁶⁵ These structural defects are aggravated by certain political and economic realities.

PUBLIC PROSECUTOR'S OFFICE

Argentina's system of government is federal in nature, with parallel federal and provincial courts. The prosecution of federal crimes, including the bribery offenses, falls to the Public Prosecutor's Office (*Ministerio Publico*, MP).⁴⁶⁶ MP prosecutors are rigidly organized along judicial lines, with each court having a particular corps of prosecutors assigned to it.⁴⁶⁷ In this sense, the MP is not unlike the organization of U.S. Attorney's Offices in the United States. However, there is no institutionalized subject-matter specialization within the MP, and thus expertise in the investigation and prosecution of the relatively recent anti-bribery laws has been slow to develop.

There are also some important non-structural obstacles to the MP's effective prosecution of bribery offenses. For example, prosecutors and judges have noted

⁴⁶⁵ *Embassy Cables Point to 'Glaring Weaknesses' in Argentina Ant-Corruption Architecture*, *supra* note 423.

⁴⁶⁶ Art. 120, CONSTITUCION NACIONAL [CONST. NAC.] (Arg.).

⁴⁶⁷ ARGENTINA: PHASE 2, *supra* note 448, at 24.

difficulty in obtaining corporate information critical to an effective investigation, because company registries generally fall within provincial jurisdiction, and no national registry of companies currently exists.⁴⁶⁸ Another impediment to comprehensive detection and investigation of corruption is that Argentine law does not currently provide for any whistleblower protections, although the OA (discussed below) has proposed legislation that would protect such complainants from physical, employment, and economic consequences.⁴⁶⁹

THE FIA AND THE ANTI-CORRUPTION OFFICE

Although the main body of federal prosecutors lacks institutional specialization in combating bribery, the separate *Fiscalia de Investigaciones Administrativas* (FIA) specializes in the investigation of corruption and “administrative irregularities” committed by agents of the National Administration (i.e., federal officials).⁴⁷⁰ Although the FIA offers expertise and dedicated resources, its ambit is a limited one within the larger sphere of corruption. The agency only investigates and prosecutes corrupt acts by *federal* officials, and is not authorized to investigate or prosecute instances of foreign bribery. As with other specialized anti-corruption agencies in Argentina, the FIA is generally viewed as having well-trained and able personnel,

⁴⁶⁸ *Id.* at 30.

⁴⁶⁹ See OFICINA DE ANTICORRUPCION, *supra* note 446, at 14; see also Proyecto de Ley de Proteccion de Denunciantes, Informantes y Testigos de Actos de Corrupcion, available at <http://www.anticorrupcion.gov.ar/Proyec%20Testigo.pdf>.

⁴⁷⁰

<http://www.fia.gov.ar/web/guest;jsessionid=7877727285DDD29C03AD8BF3215A621D>.

but insufficient political capital to realize its institutional potential.⁴⁷¹

The *Oficina Anticorrupción* (Anticorruption Office, OA) is a specialized agency belonging to the *Ministerio de Justicia y Derechos Humanos* (Ministry of Justice and Human Rights). The OA was officially created in December of 1999 and is charged with investigating and pursuing cases of *political* corruption within the federal government.⁴⁷² It also exercises responsibility over the investigation of conduct that violates the IACAC.⁴⁷³ Although the OA cannot, unlike the FIA, prosecute corruption cases directly, it does collect and investigate complaints, and in certain cases either refers the matter to an investigative judge, or brings suit as a party, itself.⁴⁷⁴ In 2010, the OA opened 7,563 investigative files.⁴⁷⁵ In the same year, the OA “resolved” 303 cases, although this figure includes, for example, 59 cases which were referred to an investigative judge.⁴⁷⁶ It is unclear how many cases were actually pursued to a conclusion on the merits.

RECENT SCANDALS AND ENFORCEMENT ACTIONS

Although major accusations of political corruption are fairly common, few such scandals result in true judicial action. In recent years, there have been certain high-profile cases of corruption that *have* reached resolution—or at least

⁴⁷¹ See Rosario, *supra* note 437.

⁴⁷² Law No. 25233, Dec. 12, 1999.

⁴⁷³ OFICINA DE ANTICORRUPCION, *supra* note 446, at 2 (citing Decreto No. 102/99, B.O. 29/12/99).

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 9.

⁴⁷⁶ *Id.* at 10, 12.

official scrutiny – though not always as a result of domestic initiative.

In December of 2011, U.S. authorities charged eight former executives and agents of Siemens AG for their role in an alleged \$100 million bribery scheme meant to secure a \$1 billion contract to produce national identity cards for every Argentine citizen.⁴⁷⁷ The men were charged with conspiracy to violate the Foreign Corrupt Practices Act (FCPA) and the wire fraud statute, money laundering conspiracy and wire fraud. Although the acts of bribery took place entirely in Argentina, the charges marked an important milestone for the U.S., as pointed out by Assistant Attorney General Lanny Breuer, for it was “the first time a board member of a Fortune Global-50 company has been charged with FCPA violations.”⁴⁷⁸ As part of a related settlement, the company’s Argentine subsidiary pleaded guilty to a one-count information charging conspiracy to violate the books and records provisions of the FCPA.⁴⁷⁹

At the behest of the OA, an official inquiry was opened into the conduct of 22 individuals allegedly involved in the Siemens scheme.⁴⁸⁰ The OA described the case as an investigation into “the abusive conditions conspired to in the procurement” of the national identity card contract.⁴⁸¹ The inquiry was opened in federal criminal court.

⁴⁷⁷ *US Charges Former Siemens Execs, Agents in Alleged \$100 Million Argentine Bribery Scheme*, WALL ST. J., Dec. 13, 2011.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ OFICINA DE ANTICORRUPCION, *supra* note 446, at 22 (citing Causa No. 2645/98).

⁴⁸¹ *Id.*

A more recent scandal pits the Argentine Stock Exchange Chief, Adelmo Gabbi, against the Vice President of Argentina, Amado Boudou, in cross-claims of bribery. The Vice President had his Buenos Aires apartment searched by officials investigating whether he improperly helped Ciccone Calcografica SA, a printing company, exit bankruptcy during his time as economy minister from 2009–2011.⁴⁸² The claim had previously been publicly made by Gabbi, who stated his intention of seeking legal action in the matter. Boudou in turn filed an affidavit in court ratifying his claim that Gabbi, in 2011, solicited a bribe on behalf of another company, in a *quid pro quo* meant to secure resolve personal legal troubles of his own.⁴⁸³ Both men deny any wrongdoing.

The OA's annual report names a number of other cases implicating multinational firms. Among them is an action brought against Ferrostaal, a German firm, with the OA itself acting as complainant. The matter alleges the payment of bribes to officials of the Ministry of Defense and the Navy, with the aim of acquiring certain engineering necessary for the construction of oceanfaring ships.⁴⁸⁴ In another case, the OA initiated an official inquiry into the acts of 64 individuals, including agents of the Sweden-based construction company, Skanska.⁴⁸⁵ At least one U.S.-based multinational company, IBM, is currently implicated in an anti-corruption investigation.⁴⁸⁶

⁴⁸² Bill Faries, *Argentina Stock Exchange Chief Denies Boudou's Bribe Claim*, BLOOMBERG, Apr. 9, 2012.

⁴⁸³ *Id.*

⁴⁸⁴ OFICINA DE ANTICORRUPCION, *supra* note 446, at 21 (citing Causa No. 7544/10).

⁴⁸⁵ *Id.* at 22.

⁴⁸⁶ *Id.* at 25.

CONCLUSION

While Argentina's anti-corruption institutions appear capable of constituting a bona fide enforcement regime, this will depend on the outcome of the country's fluid political and economic situation. Companies seeking to do business in Argentina should remain mindful of the current enforcement landscape and look to their compliance controls to offer guidance and protection as they do business in the region.

CHAPTER IV

REGIONAL TRENDS AND DEVELOPMENTS ASIA and PACIFIC RIM (India, Indonesia, Vietnam and Korea)

RECENT ANTI-CORRUPTION DEVELOPMENTS IN INDIA

By: Asheesh Goel and Edward K. Sebelius

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OVERVIEW

Interest in the Indian economy is easy to understand. The United Nations Conference on Trade and Development's World Investment Prospects Survey 2010-2012 ranked India as the #2 most popular country for foreign direct investment by transnational corporations. In terms of purchasing power parity, India has the fourth-largest economy in the world. India has the ninth-largest nominal Gross Domestic Product, of \$1.63 trillion. With roughly 1.2 billion people, India is home to over 17% of the world's population and the world's second-largest labor force, of over 478 million workers. Yet, despite its tremendous size and potential, the Indian economy continues to struggle with public corruption. Even as early as 1964, the Santhanam Commission noted that 44,238 civil servants were penalized for corruption from 1957 to 1962.⁴⁸⁷ More recently, high profile Indian business leaders have taken to publicly speaking out against the problems arising from public corruption. For instance, earlier this year, Mr. Ratan Tata, Chairman of the Tata Group stated, "I think corruption has become worse and if you choose not to participate in this, you leave behind a fair amount of business."⁴⁸⁸ He further stated, "[y]ou have a non-level playing field and those who do not

⁴⁸⁷ C. Raj Kum, Corruption and Human rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India, 17 COLUM. J. ASIAN L. 31, 42 2003-2004.

⁴⁸⁸ *Corruption in India has become worse: Ratan Tata*, The Hindu, August 24, 2011.

participate in this live at a disadvantage. A large part of the business community is cautious...."⁴⁸⁹

As exemplified by Mr. Tata's statement, for some time, Indian businesses and those foreign companies who invest in India have been aware of the lack of an effective anti-corruption enforcement regime in India. Some of the most important anti-corruption laws in India involve bringing potentially corrupt situations into the public eye, either through requests for information or through the publication of audits of how public money is spent. Yet, these laws lack the significant punishments used by other countries to deter corruption. In certain instances, those who have attempted to take action against corrupt actors have suffered violence and retaliation.

In August 2011, massive public demonstrations centered around the hunger strike of social activist Anna Hazare brought the issue of anti-corruption legislative reform to the forefront of the Indian political dialogue. The attention drawn to Hazare's fasting, driven by social media and 24-hour news cycles, has given popularity to the idea that all Indians should be concerned about corruption and should take action. Although millions of people joined Hazare supporters in encouraging the government to take action and enact new legislation to curb corruption, the bill drafted by the sitting government remains unpassed by the Indian parliament. Currently, there is no solid indication that Prime Minister Singh's government shares the public's sense of urgency to combat corruption by passing new legislation. While companies should be aware of the potential for new, tougher anti-corruption laws, they should also be cognizant of the grassroots efforts of the Indian public to curb corruption on their own through the use of social media and self-reporting instances of public corruption. It is unclear what new penalties and oversight, if any, will be enacted by the Indian government. In the meantime, companies should be aware of the new spirit of

⁴⁸⁹ Id.

activism and grassroots regulation that is beginning to take hold in India. Even prominent leaders such as Mr. Tata are now stating, “[t]he youth of today will need to recognise that they shoulder a great responsibility...They will need to fight for rooting out corruption, for ensuring that no one is above the law, and uniting the citizens of India as ‘Indians first’ instead of communal or geographic factions.”⁴⁹⁰

THE SIZE OF THE PROBLEM

Transparency International, the international non-governmental organization dedicated to eliminating corruption, ranks 178 countries and their governments’ efforts to fight corruption on its Corruption Perceptions Index. For 2011, India tied Kiribati, Swaziland, and Tonga for 95th on the list.⁴⁹¹ Over the last few years, India has suffered several high-profile, multi-billion dollar public corruption scandals. Officials at all levels of government have been accused of accepting bribes, awarding government contracts to business associates, and personally profiting from wasteful government spending.⁴⁹² According to Transparency International, 44 percent of Indians surveyed assessed the Indian government’s actions to fight corruption as “ineffective”; only 25 percent of Indians surveyed believed the government was “effective” at fighting corruption.⁴⁹³ Fifty-four percent of Indian households paid a bribe in a 12-month period for basic government services.⁴⁹⁴

⁴⁹⁰ *Ratan Tata exhorts Indian youth for Fighting Corruption*, THE ECONOMIC TIMES, December 23, 2011.

⁴⁹¹ See *Corruption Perceptions Index 2011 Results*, Transparency International, December 1, 2011, available online at <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

⁴⁹² See e.g., *India’s corruption scandals*, BBC NEWS SOUTH ASIA, August 19, 2011, available online at <http://www.bbc.co.uk/news/world-south-asia-12769214>.

⁴⁹³ *Global Corruption Barometer 2010*, Transparency International, Table 4, at 47.

⁴⁹⁴ *India: Speaking up for integrity*, Transparency International, August 26, 2011, available online at

Transparency International India estimates that “poor households paid 9 billion rupees (\$205 million) in bribes to access basic services.”⁴⁹⁵ The perception of corporate executives in India is similarly negative on the status of anti-corruption efforts. According to KPMG’s survey of corporate executives, 51 percent of respondents fear that rising corruption will make India less attractive to foreign investors, 68 percent of respondents believed many cases of public corruption were induced by the private sector, and 84 percent of respondents believed the Indian government has not been effective in enforcing anti-bribery and corruption laws.⁴⁹⁶ KPMG’s 2010 Indian Fraud survey found that 42 percent of respondents found that bribery has come to be considered acceptable behavior, while 38 percent believe that bribery is an integral feature of getting things done in their industry.⁴⁹⁷

CURRENT ENFORCEMENT REGIME

Because of its tremendous economic growth and potential, India is a key component of any global initiative. India is attempting to establish itself, not as one of the most important developing countries in the world, but as most important countries in the world. In May 2011, India ratified the U.N. Convention Against Corruption. But the Convention alone, without domestic implementing legislation, fails to establish a rigorous enforcement mechanism. For example, India does not yet have domestic laws that prohibit corruption of foreign public

http://www.transparency.org/news_room/in_focus/2011/india_speaking_up_for_integrity.

⁴⁹⁵ *Id.*

⁴⁹⁶ Press Release, *KPMG unveils survey on bribery and corruption*, March 14, 2011, available online at

http://www.kpmg.com/IN/en/Press%20Release/Press_Release_Bribery_Corruption_Survey.pdf.

⁴⁹⁷ KPMG, *India Fraud Survey Report 2010*, at 25, available online at

https://www.in.kpmg.com/SecureData/aci/Files/KPMG_Fraud_Survey_2010.pdf.

officials, similar to the U.K. Anti-Bribery Act or the U.S. Foreign Corrupt Practices Act.⁴⁹⁸ Perhaps more problematic, India does not have a national office of anti-corruption enforcement with the authority to investigate whomever it deems appropriate. The centerpiece of new proposed legislation pushed by Hazare and others is the introduction of a Lokpal (national ombudsman) who would have the authority to investigate and prosecute without the need for additional authorization. For the time being, however, India lacks such a position and instead attempts to deal with corruption through segmented, state-based approaches.

India's Prevention of Corruption Act of 1988 (the "PCA") establishes that a public servant is prohibited from accepting or agreeing to accept any gratification for himself or on behalf of any other person for doing or refraining from doing any official act. "Gratification" is not restricted to financial gain, but can include non-monetary benefits. Pursuant to Section 20[1][2] and [3] of the PCA, any gratification, accepted or agreed to be accepted, is presumed to be for a prohibited purpose; provided, that a court may decline to draw such a presumption of guilt if the gratification accepted is in the form of casual meals or gifts of trivial amounts. Both public servants who accept bribes and individuals who offer them face six months to five years imprisonment and a fine if convicted.

Although the PCA does not specifically define public servants, it includes all branches of government and any person exercising a public function, including employees of public agencies and public enterprises. The Indian Penal Code also prohibits public servants from knowingly disobeying any law when it is likely that such disobedience will cause injury to a person. Public servants face imprisonment of up to one year and potential fines for this offense. Although the PCA has existed for over 20 years, it has not yet established a well-known record of

⁴⁹⁸ *India ratifies U.N. Convention against Corruption*, THE HINDU TIMES, May 12, 2011, available online at <http://www.thehindu.com/news/national/article2012804.ece>.

convictions or enforcements. Currently, there is no chief anti-corruption officer in India.

Instead, each Indian state has its own Lokayukta (ombudsman). Currently, there are a number of problems critics raise about the Lokayuktas. Many believe that the Lokayuktas lack sufficient authority to provide any real anti-corruption enforcement. Each Lokayukta is set up according to the laws of that particular Indian state, depriving the system of uniform jurisdiction. The Lokayuktas also lack binding powers to issue punishments and are widely criticized as “ceremonial posts” or “post-retirement employment for judges.”⁴⁹⁹ Recently the Lokayukta in Kanataka, the state in southwest Indian in which the city of Bangalore is located, resigned after only 47 days in office, amid allegations of corruption.⁵⁰⁰

The Central Vigilance Commission⁵⁰¹ (“CVC”) is the agency designated by the Government of India to receive “written complaints for disclosure on any allegation of corruption or misuse of office and recommend appropriate action.”⁵⁰² Although the CVC is free of control from any executive authority, the jurisdiction of the CVC is limited to certain ranks of government officials.⁵⁰³ The CVC does not have jurisdiction over employees of the state government, persons above the rank of Joint Secretary, nor those seeking or holding elective office, officers of political parties or political parties themselves at either

⁴⁹⁹ See e.g., Nagendar Sharma, *Lokayukta: anti-corruption watchdog*, HINDUSTAN TIMES, August 27, 2011, available online at <http://www.hindustantimes.com/Lokayukta-anti-corruption-watchdog/Article1-738662.aspx>

⁵⁰⁰ See Sadananda Gowda and Raj Bhavan, *Justice Sodhi frontrunner for Lokayukta*, THE TIMES OF INDIA, September 21, 2011, available online at http://articles.timesofindia.indiatimes.com/2011-09-21/bangalore/30183948_1_resignation-n-k-sodhi-governor

⁵⁰¹ <http://www.cvc.nic.in/>.

⁵⁰² http://cvc.gov.in/cvc_back.htm.

⁵⁰³ <http://cvc.gov.in/jurisdiction.htm>.

the state or federal level.⁵⁰⁴ The CVC does not investigate allegations of corruption, nor does it have the authority to punish those found to have committed corrupt acts. Instead, the CVC maintains a list of officials against whom the CVC recommends punishment. The list in 2011 lists 121 central government employees.⁵⁰⁵

Another key piece of anti-corruption legislation in India is the Indian Right to Information Act (“RTI”), passed on June 15, 2005.⁵⁰⁶ The RTI allows Indian citizens to gain access to government information, including meetings, funding proposals, and details on how governmental decisions are made. Supporters of the RTI describe it as “landmark legislation” with the potential to change the way India is governed.⁵⁰⁷ According to the official website, the RTI “mandates timely response to citizen requests,” including having to respond to information requests within 30 days.⁵⁰⁸ Although the RTI is only six years old, Bloomberg News counted over 529,000 requests filed through March 2011 since the law was enacted. Yet, not everyone is fan of this new tool of transparency. Since 2010, 12 people who have sought to use the RTI to expose local corruption are believed to have been killed specifically because of their information requests.⁵⁰⁹

⁵⁰⁴ See Anand S. Dayal, *The Prevention of Corruption Act: Closing the Structural Gaps That Hinder Its Enforcement*, India Law News, Spring 2011, at 14, available online at

<http://meetings.abanet.org/webupload/commupload/IC906787/newsletterpubs/IndiaLawNews.pdf>.

⁵⁰⁵ 121 central govt official under CVC scanner, MONEYCONTROL.COM, June 29, 2011, available online at http://www.moneycontrol.com/news/current-affairs/121-central-govt-officials-under-cvc-scanner_561273.html.

⁵⁰⁶ For text of the statute, see <http://righttoinformation.gov.in/webactrti.htm>.

⁵⁰⁷ Akash Kapur, *Prying Open India’s Vast Bureaucracy*, N.Y. TIMES, June 17, 2010, available online at <http://www.nytimes.com/2010/06/18/world/asia/18iht-letter.html>.

⁵⁰⁸ <http://righttoinformation.gov.in/>.

⁵⁰⁹ Mehul Srivastava and Andrew MacAskill, *Whistleblowers Murdered in India Show Fatal Hazard of Exposing Corruption*, Bloomberg.com, October 19, 2011, available online at <http://www.bloomberg.com/news/2011-10-19/whistleblowers-face-deadly-hazards-in-india.html>.

To understand why new anti-corruption legislation is not quickly adopted in India, one need only look to the current officeholders in the Indian parliament. For example, in the Lok Sabha (*“House of the People”*), the lower house of the Parliament of India, over thirty percent of the current Ministers of Parliament have corruption charges pending against them.⁵¹⁰ The Comptroller and Auditor General (*“CAG”*), Vinod Rai, whose office has published several recent reports critical of corruption and the Indian government’s response to recent corruption scandals,⁵¹¹ has recently been targeted for an audit of its own, by the Controller of General Accounts, who reports to the Indian parliament. Some suggest that this audit of the auditor is intended as a signal of retribution and a tacit threat of things to come if the CAG continues to be critical of the sitting government’s performance.⁵¹²

RECENT MAJOR SCANDALS

Although corruption is known to be a widespread problem in India, in the last few years, there have been a handful of very large, very public examples of how bad the corruption problem has become. Three recent corruption scandals – the 2G Spectrum, the IPL, and the Commonwealth Games – have touched upon key areas of the Indian economy and daily life in India. These scandals likely motivated members of the Indian middle class to take part in the Hazare-led demonstrations in August 2011.

⁵¹⁰ *Anna Hazare Recovers from Fast*, REUTERS, September 1, 2011, available online at <http://in.reuters.com/article/2011/08/31/idINIndia-59077120110831>

⁵¹¹ James Lamont, *India’s corruption fighter ruffles feathers*, FINANCIAL TIMES, September 13, 2011, available online at <http://www.ft.com/intl/cms/s/0/730d2532-de0d-11e0-a115-00144feabdc0.html#axzz1ZH1jDxIA>.

⁵¹² Appu Esthose Suresh, *Government wants CAG to be audited*, LIVEMINT.COM, September 19, 2011, available online at <http://www.livemint.com/2011/09/18225232/Government-wants-CAG-tobeaud.html?atype=tp>.

India has one of the largest telecommunication markets in the world. In fact, according to the Telecom Regulatory Authority of India, India has nearly 858 million cellular phone subscribers,⁵¹³ making the telecommunications market incredibly important to the Indian economy. Yet, this important cornerstone of the Indian economy was the centerpiece of the largest recent public corruption scandal in India. This scandal, known generally throughout the media as the “2G Spectrum Scam,” involves allegations that government officials intentionally rigged the bidding process on the 2007 government auction of licenses for the 2G spectrum - used by telecommunications companies for cellular telephone coverage. The auction awarded over 1,200 licenses to 85 companies in 2008 and was overseen by the Minister of Communications and Information Technology, A. Raja.⁵¹⁴ According to reports, A. Raja and others both undervalued the 2G spectrum - resulting in severe losses to the exchequer (national treasury) - and manipulated the bidding to award licenses to certain companies over others. The scandal was revealed after the government auctioned off the 3G spectrum in 2010. According to the Comptroller and Auditor General, the loss to the exchequer in undervaluing the 2G spectrum is estimated to be over \$38 billion.⁵¹⁵ An investigation by the Indian Income Tax Department of a political lobbyist, Niira Radia, in 2008 led to over 300 days of wiretaps, some of which were subsequently leaked to the media. A. Raja eventually resigned over the reports of the scandal and faces criminal prosecution for his involvement.

⁵¹³ *Highlights of Telecom Subscription Data as on 30 June 2011*, Telecom Regulatory Authority of India, Press Release, available online at <http://www.trai.gov.in/WriteReadData/trai/upload/PressReleases/835/Press%20Release%20June11.pdf>.

⁵¹⁴ *What is the 2G spectrum scam about?*, DECCAN HERALD, November 15, 2010, available online at <http://www.deccanherald.com/content/112984/what-2g-spectrum-scam-about.html>.

⁵¹⁵ For a detailed explanation of the 2G Scam, see *2G Spectrum Scam, The Biggest in Indian History*, THE INDIA DAILY, February 3, 2011, available online at <http://www.theindiadaily.com/2g-spectrum-scam-the-biggest-in-indian-history/>.

Unfortunately, the problem of corruption in India is not limited to one particular market or sector of the economy. Nor does it appear that the very public revelations involving the 2G Spectrum Scam sufficiently deterred others from seeking to illegally benefit from public monies.⁵¹⁶ The Indian Premier League (IPL) was one of the most popular and lucrative sports leagues in India. For the first three years of its existence, the IPL brought Indian cricket to the heights of popularity among fans and celebrities alike. Bollywood stars wanted to be seen at games and become owners of teams.⁵¹⁷ All of that changed, however, when Lalit Modi, the charismatic commissioner of the IPL, was suspended indefinitely in April 2010.⁵¹⁸ The Board of Control for Cricket in India (BCCI), which owns the IPL, suspended Mr. Lodi over allegations regarding the ownership interests in two different IPL teams and an alleged broadcasting contract kickback worth over \$1.6 billion. Shashi Tharoor, a junior foreign minister, was forced to resign over his role in helping a consortium, including his girlfriend, land the winning bid for a new IPL team.⁵¹⁹ The IPL continues to be extremely popular, but some of the luster has been lost. The IPL was once toasted as a shining example of the “New India,” modern, world-class, and devoid of the corruption problems of the “Old India.” Now, many believe that the IPL is simply the “Old India” in newer packaging.

⁵¹⁶ Eric Bellman, *India's Cricket Scandal Ensnarers IPL's Modi*, WALL STREET JOURNAL, April 22, 2010, available online at <http://online.wsj.com/article/SB10001424052748704133804575198083188367638.html>

⁵¹⁷ Jim Yardley, *As Cricket Grew in India, Corruption Followed*, N.Y. TIMES, May 10, 2010, available online at <http://www.nytimes.com/2010/05/11/world/asia/11cricket.html>.

⁵¹⁸ Jeremy Page and Rhys Blakely, *IPL ringmaster suspended as scandal fallout sparks Parliament protest*, THE TIMES, April 27, 2010, available online at <http://www.timesonline.co.uk/tol/sport/cricket/article7108953.ece>.

⁵¹⁹ Dean Nelson, *Indian Minister resigns over IPL cricket scandal*, THE TELEGRAPH, April 19, 2010, available online at <http://www.telegraph.co.uk/sport/cricket/twenty20/ipl/7607549/Indian-minister-resigns-over-IPL-cricket-scandal.html>.

In October 2010, India hosted the Commonwealth Games (CWG) in New Delhi. Similar to the IPL, the hosting of the CWG was pitched to the public as a way for India to demonstrate that it was among the world's elite nations. Yet, problems plagued the CWG and created several embarrassing situations for its supporters. The Games received severe criticism in India for the billions of dollars spent on the sporting events while India continues to have one of the largest concentration of impoverished people in the world.⁵²⁰ The juxtaposition of gleaming new stadiums next to starving children was not well received. Among the numerous complaints about the 2010 Commonwealth Games were the allegations of rampant corruption among the contractors and service providers. The CVC released a report noting several irregularities with the quality of work performed, the amount charged for the work, and the involvement of public officials in awarding the contracts.⁵²¹ In particular, 16 projects for stadium upgrades, construction, and beautification were identified as using sub-standard material, rigged bids, favoritism in selection of contractors, and each ended up on the CVC's scanner (the list maintained by the CVC of potential corruption to be investigated). Additional arrests are still possible. The Central Bureau of Investigation has arrested former Organizing Committee Chairman Suresh Kalmadi, and has sent to teams to France and England to investigate the private firms which had contracts in partnership with their Indian counterparts.⁵²²

⁵²⁰ For a general listing of the myriad of problems with the 2010 Commonwealth Games, *see*

http://en.wikipedia.org/wiki/Concerns_and_controversies_over_the_2010_Commonwealth_Games

⁵²¹ *See Major irregularities in 2010 Games projects: CVC Report*, Indo-Asian News Service, July 30, 2010, available online at

<http://www.ndtv.com/article/india/major-irregularities-in-2010-games-projects-cvc-report-40977>.

⁵²² *More skeletons may tumble out of CWG closet*, THE ECONOMIC TIMES, September 29, 2011, available online at

<http://economictimes.indiatimes.com/news/politics/nation/more-skeletons-may-tumble-out-of-cwg-closet/articleshow/10170734.cms>.

JAN LOKPAL BILL AND GRASSROOTS ANTI-CORRUPTION ACTIVISM

With so many high-profile corruption scandals recently, it is little wonder why so many Indians were interested in joining the social movement to try to force the government to crack down on corruption. At the heart of the movement was Anna Hazare, a 74- year old social activist and anti-corruption advocate. Hazare has utilized hunger strikes in recent years as a way of drawing attention to particular instances of public corruption and as a way of exacting concessions from the Government of India to make anti-corruption reforms. Hazare was awarded the Padma Bhushan award – the third-highest civilian award given by the Government of India – in 1992 for his efforts in establishing Ralegan Siddhi as a model village for environmental conservation in 1992.⁵²³ In 1991, Hazare started the People’s Movement Against Corruption (*Bhrashtachar Virodhi Jan Aandolan*), to fight against the corruption of timber officials near Ralegan Siddhi. Since 1991, Hazare has been involved in several protests against government corruption. These protests have included his pledge at various times that he would fast until death unless the government took action.

Hazare began an indefinite hunger strike in Delhi on April 5, 2011 to put pressure on the Indian parliament to adopt sweeping anti-corruption legislation, the “Jan Lokpal Bill,” including the establishment of a public ombudsman (the “Lokpal) and greater authority for the Lokayuktas empowered to root out corruption in public places in the Indian states. In Sanskrit, Lokpal means “*protector of the people.*” The Jan Lokpal Bill is designed to protect whistleblowers, deter corruption, and create an independent ombudsman empowered to deal with corruption of politicians and civil servants. The Jan Lokpal Bill was drafted by N. Santosh

⁵²³ See <http://www.rainwaterharvesting.org/Rural/Ralegan.htm>.

Hegde, a former justice of the Supreme Court of India, along with several senior social activists and attorneys active in the India Against Corruption movement.

A key difference between the Jan Lokpal Bill and the Lokpal bill proposed by the Indian government in 2010⁵²⁴ is that the Jan Lokpal Bill would place the Indian Prime minister within the purview of the ombudsman (Lokpal).⁵²⁵ On July 28, 2011, the union cabinet approved a version of the bill that exempted the Prime Minister, the judiciary, and certain lower bureaucrats from the purview of the Lokpal. Prime Minister Manmohan Singh rejected Hazare's demands for a stronger bill with longer criminal sentences and greater independence for the Lokpal and Lokayutas.

Hazare announced in August 2011 that he would begin a new hunger strike to force Prime Minister Singh's government to pass the Jan Lokpal Bill. Hazare timed his hunger strike to coincide with India's Independence Day (August 16), in hopes of rallying national attention and unity to his cause. Hazare publicly refused to comply with the restrictions the Government attempted to impose on his hunger strike, including the restriction that the hunger strike could last no longer than 3 days. On August 15, 2011, just hours before Hazare was set to begin a new hunger strike in Delhi in support of the Jan Lokpal bill, Prime Minister Manmohan Singh had Hazare arrested. Along with Hazare, more than 1,000 of his supporters were also arrested, sparking tens of thousands to take to the streets in protest all across India.⁵²⁶

⁵²⁴ For a recent version of the Government's version of the Lokpal Bill, [see](http://www.box.net/shared/k9bz7pfzj6q6s0us9mil) <http://www.box.net/shared/k9bz7pfzj6q6s0us9mil> .

⁵²⁵ For a more detailed description of the differences between the Jan Lokpal Bill and the version of the Government's Lokpal bill which sparked Anna Hazare's August 2011 indefinite fast, [see](#) India Against Corruption, *Jan Lokpal VS Govt.Lokpal.pdf*, July 6, 2011, *available online at* <http://www.box.net/shared/ndtmbhdxpnhgvqqemgis>.

⁵²⁶ [See](#) Jason Burke, *Anna Hazare: anti-corruption activist's arrest sparks protests across India*, THE GUARDIAN, August 16, 2011, *available online at*

The response of the media and the middle class in India to Hazare's August 2011 arrest was enormous. Celebrities, social media platforms, and the twenty-four hour news cycle helped contribute to the popularity of Hazare's protest. Over 2.5 million more people a week turned to news channels during the protest than during earlier weeks.⁵²⁷ On August 28, 2011, Hazare broke his fast after gaining concessions from Singh's government. Yet, those concessions have not translated into significant parliamentary actions. The core tenet of Anna Hazare ending his August 2011 fast was that the government would agree to pass the Jan Lokpal Bill (instead of a different version of the Lokpal Bill drafted by the Government).⁵²⁸

In late December 2011, Prime Minister Singh recalled the Indian parliament to address the Lokpal legislation. Yet, Mr. Hazare and his supporters are unimpressed with the current legislation and commenced a new, three-day hunger strike in Mumbai to coincide with the Indian Parliament's debate on the Lokpal bill.⁵²⁹ One of Mr. Hazare's chief complaints of the Lokpal bill before Parliament appears to be that the Central Bureau of Investigation, the federal investigative body in India, would remain under governmental control and therefore vulnerable to governmental influence in corruption investigations.⁵³⁰ At the

<http://www.guardian.co.uk/world/2011/aug/16/anna-hazare-arrest-india-protests>.

⁵²⁷ See <http://blogs.wsj.com/indiarealtime/2011/09/05/why-was-hazare-such-a-media-hit/>

⁵²⁸ See generally Nilanjana Bhowmick and Jyoti Thottam, *India's Anticorruption Activist Read to End Fast – with a Few Conditions*, TIME, August 26, 2011, available online at

<http://www.time.com/time/world/article/0,8599,2090562,00.html>.

⁵²⁹ *India MPs debate anti-corruption Lokpal bill*, BBC News, December 27, 2011, available online at <http://www.bbc.co.uk/news/world-asia-india-16336614>.

⁵³⁰ Paul Beckett, *India Faces Endgame on Anticorruption Bill*, WALL STREET JOURNAL, December 27, 2011, available online at

time of publication of this article, it is unclear what form the final Lokpal legislation will take, if it passes at all.

Nonetheless, despite the lack of legislative action, Hazare's protests have drastically increased the scrutiny of corrupt practices in India. The focus of the media and popular culture on the anti-corruption message has helped encourage Indian citizens to take greater ownership of policing the actions of the members of the bureaucracy and government. One example is the growing popularity of the website "www.ipaidabribe.com." The website is run by the Janaagraha Centre for Citizenship and Democracy, a non-profit based in Bangalore, India. The website is Janaagraha's initiative to "tackle corruption by harnessing the collective energy of citizens," by allowing any person to log onto the website and report the "nature, number, pattern, types, location, frequency and values of actual corrupt acts." The website allows anonymous postings and provides a free form section to describe exactly what the payor experienced. By September 2011, the website had accrued over 756,000 hits.

According to the Kroll Global Fraud Report 2011-2012, 78 percent of Indian respondents indicated that their organization is "highly or moderately vulnerable to corruption & bribery." From that same response group, fewer than 50 percent of respondents stated that their companies invest in anti-fraud measures "such as employee background screening, partner or third-party due diligence, and risk management systems."⁵³¹ Criminal prosecution is no longer the only concern a company must consider when evaluating anti-corruption efforts. Although tracking legislative changes in India is important, companies who invest in India must also continue to monitor to the non-governmental developments which seek to use public awareness and social media platforms to identify those engaging in corrupt acts. As the Indian public becomes more interested in combating

<http://online.wsj.com/article/SB10001424052970203391104577122091854216590.html>.

⁵³¹ See Kroll, *Global Fraud Report: Economist Intelligence Unit Survey Results 2011-2012*, at 11.

corruption, more tools become available to empower them to take non-governmental action to curb corruption. Likewise, the activism of individuals will bolster officials who are interested in raising awareness of current offenders. Current officials, like Comptroller Vinod Rai, have made it apparent that they are interested exposing corrupt practices and calling attention to corruption even if prosecutions are slow to follow. As the tools for individual anti-corruption reporting become more prevalent, there is a greater likelihood that companies will be made an example of in the public eye.

CONCLUSION

On December 27, 2011, the Indian Parliament began debate on a version of the Jan Lokpal bill. Mr. Hazare dismissed that action, and the current version of the bill, as weak and ineffective, stating “[t]he government has betrayed the people,” and “[o]ne day, the people will teach them a lesson.”⁵³² On December 28, 2011, the Lok Sabha, the lower house of Indian Parliament, passed the government’s latest version of the Lokpal bill, the Lokpal and Lokayutas Bill 2011.⁵³³ On December 29, 2011, the Rajya Sabha (“Council of States”), the upper house of Indian Parliament, recessed without putting to a vote the Lokpal and Lokayutas Bill 2011. Politicians from both the Congress Party and the BJP are blaming one another for the failure to pass the legislation.⁵³⁴

⁵³² Jim Yardley and Vikas Bajaj, *Indian Parliament Begins Debate on Corruption Bill*, N.Y. TIMES, December 27, 2011, available online at <http://www.nytimes.com/2011/12/28/world/asia/indian-parliament-begins-debate-on-corruption-bill.html>.

⁵³³ See *Lok Sabha passes Lokpal bill with changes, but without constitutional status*, TIMES OF INDIA, December 28, 2011, available online at http://articles.timesofindia.indiatimes.com/2011-12-28/india/30564362_1_116th-amendment-lokpal-bill-constitutional-status.

⁵³⁴ *BJP delegation to meet President over Lokpal*, IBNLive.com, January 3, 2012, available online at <http://ibnlive.in.com/news/bjp-delegation-to-meet-president-over-lokpal/217232-37-64.html>.

Regular Indians seemingly are not confident that any of this will matter.⁵³⁵

All that can really be said right now is that the Indian anti-corruption movement is in flux, with a strong lean towards substantially greater scrutiny in the future. Further, the current uncertainty heightens the risk that companies doing business in India will increasingly deal with purported whistleblowers, scrutiny from the Indian media and lastly, increased activity from government bodies. We expect that Indian companies and foreign companies alike will be adopting and distributing clear, stand-alone anti-corruption policies, implementing broad training programs and developing effective internal whistleblower hotlines and other monitoring mechanisms to combat the risk of embarrassment - or worse - in the future.

⁵³⁵ See Yardley, *supra* Note 46 (“Amit Jani, 38, doctor of homeopathy, said he was attending the rally because of the slow pace of change in India. ‘Every election, at every rally, Sonia Gandhi speaks about corruption,’ Mr. Jani said. ‘But nobody does anything about it.’”).

RECENT ANTI-CORRUPTION DEVELOPMENTS IN INDONESIA

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OVERVIEW

Indonesia is on the rise. Indonesia is the world's third largest democracy and is ranked as the ninth most popular country in the world for foreign direct investment, ahead of Germany, Poland, and Australia. Foreign direct investment in Indonesia is expected to top \$20 billion by the end of 2011.⁵³⁶ The nation's large and dynamic economy ranks sixteenth in the world with a GDP of \$1.03 trillion, adjusted for purchasing power parity. The country was clocked as the third fastest growing G-20 economy, with its current real GDP growing at the robust clip of 6.4 percent.⁵³⁷ Indonesia's fast growth and sound fiscal management have established strong economic footing. Its debt burden has been drastically reduced, its credit rating has been upgraded, and its rate of savings and investment are increasing.⁵³⁸

Indonesia is the world's fourth most populous nation with more than 245 million people and boasts the fifth largest labor

⁵³⁶ World Investment Prospects Survey 2010-2012, United Nations Conference on Trade and Development, at 13, Fig. 14, *available online at* http://www.unctad.org/en/docs/diaeia20104_en.pdf.

⁵³⁷ United States Central Intelligence Agency, World Fact Book, *last updated* Jan. 3, 2012, *available online at* <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>; Jason Tedjasukmana, *In Indonesia, Corruption Scandals Plague Anti-Graft President*, TIME, Sept. 26, 2011, *available online at* <http://www.time.com/time/world/article/0,8599,2094188,00.html>.

⁵³⁸ See World Economic Forum, Indonesian Competitiveness Report 2011, at vii, *available online at* http://www3.weforum.org/docs/WEF_GCR_Indonesia_Report_2011.pdf.

force with 116.5 millions workers. Of major interest to local business and foreign investors alike is the rapid growth of the Indonesian middle class, representing an enormous pool of potential consumers.⁵³⁹ The country is rich in natural resources, including oil, of which it produces about a million barrels a day. Indonesia is also a major supplier of textiles, apparel, footwear, mined resources, cement, chemical fertilizers, plywood, rubber, and food. Tourism is also a major component of the Indonesian economy.⁵⁴⁰ Indonesia also holds geopolitical sway in Asia and beyond, as a founding member of the Association of South East Asian Nations (“ASEAN”) and the East Asia Summit, and as a member of the G-11, G-15, and G-20.⁵⁴¹

Yet despite these signs of great promise, including its impressive 6.4 percent GDP growth, observers and economists believe Indonesia could be even further ahead if it were not hamstrung by public corruption. Umar Juoro, a senior economist at the Center for Information and Development Studies, a Jakarta-based think tank, estimates that Indonesia’s growth potential could be as high as 9 percent per year if its economy were not slowed by the government’s inability to deploy funds without the fear of graft.⁵⁴²

The potential impact of corruption is no graver than when lives are lost. Just this past November, 2011, a suspension bridge on Borneo Island collapsed, killing more than 20 people. Police are already investigating suspicions that the bridge’s materials

⁵³⁹ Id.

⁵⁴⁰ *U.S. Investigating Indonesia Bribes*, FCPA BLOG, March 16, 2010, available online at <http://www.fcpablog.com/blog/2011/5/16/us-investigating-indonesia-bribes.html>.

⁵⁴¹ United States Central Intelligence Agency, World Fact Book, last updated Jan. 3, 2012, available online at <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>.

⁵⁴² Jason Tedjasukmana, *In Indonesia, Corruption Scandals Plague Anti-Graft President*, TIME, Sep. 26, 2011, available online at <http://www.time.com/time/world/article/0,8599,2094188,00.html>.

were of poorer quality than the contractor claimed. Indonesian Chamber of Commerce chairman Suryo Bambang Sulisto commented that, “[t]he bridge collapse is one example of how quality is being compromised by corruption, where A-grade materials are substituted with lower-grade ones. That’s very dangerous.” Sulisto observed, “It’s common for corruption to happen at all stages in Indonesian infrastructure projects, whether it’s during the tender process or extortion along the way.” In response to the tragedy, the Indonesian Parliament ordered an audit of all major bridges in the country and, in Java province alone, nine were found to be on the brink of buckling.⁵⁴³

Like Indonesia’s infrastructure, the stability and success of Indonesia’s economy will depend on continued foreign investment. But private investment in Indonesia also cannot reach its potential until investors can truly assess investment risks in the country, which is not possible until Indonesia’s governmental, regulatory, and legal systems prove predictable and reliable.⁵⁴⁴

THE SIZE OF THE PROBLEM

The roots of corruption grew deep in Indonesia under the rule of President Suharto’s authoritarian “New Order” administration from 1967 to 1998. The Suharto regime became synonymous with *korupsi*, *kollusi*, *nepotisme*—or corruption, collusion, and nepotism. For one illustration, the regime’s “privatization” campaign in the late 1980s in effect merely transferred state assets to Suharto’s inner circle of political advisors and associates. After that, any foreign investor wishing to undertake development in Indonesia had to seek a “partner”

⁵⁴³ Shirley Wibisono, *Graft Fuels Indonesia's Infrastructure Woes*, ASSOCIATED FOREIGN PRESS, Dec. 10, 2011, available online at http://www.straitstimes.com/BreakingNews/SEAsia/Story/STIStory_743819.html.

⁵⁴⁴ Joanna MacMillan, *Reformasi and Public Corruption: Why Indonesia's Anti-Corruption Agency Strategy Should Be Reformed to Effectively Combat Public Corruption*, 25 EMORY INT'L L. REV., 587, 596 (2011).

among Suharto's political elite. Indeed, Suharto himself is alleged to have misappropriated roughly \$73 billion during his tenure.⁵⁴⁵

The end of the Suharto regime and the advent of democracy contributed to significant improvements in the transparency and accountability of the Indonesian government. However, a culture of corruption remains very much engrained.⁵⁴⁶ Officials at the highest levels of government have recently been implicated or arrested for accepting bribes and awarding government contracts to themselves or associates. In recent years, Indonesia's Corruption Eradication Commission—known locally as the "KPK"—has received tens of thousands of complaints involving judges, governors, ambassadors, and parliamentarians.

Transparency International, the international non-governmental organization dedicated to eliminating corruption, ranks 183 countries and their governments' efforts to fight corruption on its Corruption Perceptions Index. For 2011, Indonesia tied Mexico, Malawi, and Suriname, among others, for 100th on the list.⁵⁴⁷ In a survey on fraud and corruption in Asia conducted by KPMG, Indonesia is tied with China for most incidents of fraud or corruption, with each nation making up 23 percent of all incidents.⁵⁴⁸

A Gallup poll released in October 2011 found that 91 percent of Indonesians characterize corruption in government as "widespread," compared to 84 percent in 2006.⁵⁴⁹ According to Transparency International's Global Corruption Barometer, 58

⁵⁴⁵ *Id.* at 591.

⁵⁴⁶ World Economic Forum, *supra* note 3, at vii, 11.

⁵⁴⁷ See *Corruption Perceptions Index 2011 Results*, Transparency International, December 1, 2011, available online at

<http://cpi.transparency.org/cpi2011/results/#CountryResults>.

⁵⁴⁸ KPMG, *Fraud and Misconduct Survey 2010*, Australia & New Zealand, at 22, available online at

<http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Fraud-Survey/Documents/Fraud-and-Misconduct-Survey-2010.pdf>

⁵⁴⁹ Wibisono, *supra* note 8.

percent of Indonesians surveyed paid a bribe in a 12-month period in order to receive attention from a basic services provider. Thirty-five percent characterized their government's efforts to fight corruption as "ineffective." Asked about the country's institutions, apart from non-governmental organizations and religious institutions, *every* Indonesian institution was scored as being more corrupt than not, including the legislature, judiciary, police, business sector, and the education system.⁵⁵⁰

Corruption and perceived corruption continues to take a heavy toll on Indonesia's economic expansion. Kickbacks and bribery seriously undermine efforts to build the new roads, ports, and power plants necessary for economic growth.⁵⁵¹ A World Bank analysis found corruption could add up to 20 percent to the existing costs of projects in Indonesia.⁵⁵² A KPK official announced that as much as 40 percent of money slated for some government projects is pocketed by corrupt officials and around 70 percent of KPK's corruption cases involve government contracts. Such graft routinely takes the form of a scheme where a politically connected contractor or a politician with a dummy contracting company rigs the bidding to win a government contract at an inflated price, subcontracts the project at market value, and then pockets the difference.⁵⁵³

In addition to siphoning government development, graft further strangles economic growth through its devastating effects on private business and investment. In 2009, the World Bank performed an Enterprise Survey of a representative sample of the

⁵⁵⁰ *Global Corruption Barometer 2010*, Transparency International, 2010 Data, App. C, available online at http://www.transparency.org/policy_research/surveys_indices/gcb/2010/in_detail#4.

⁵⁵¹ Eric Bellman, *Jakarta Pursues Corruption Battle*, WALL ST. J., July 20, 2011, available online at http://online.wsj.com/article/SB10001424052702304567604576455850180531080.html?mod=googlenews_wsj

⁵⁵² Wibisono, *supra* note 8.

⁵⁵³ Bellman, *supra* note 16.

Indonesian economy's private sector. It is no surprise that corruption is one of the top ten business environment constraints according to the firms surveyed: a quarter of them expected to give gifts to obtain an operating license and an astounding 38.1 percent expected to give gifts to secure government contracts.⁵⁵⁴ To start a business in the United States takes 6 days; in Indonesia it takes 45. Dealing with construction permits in Indonesia takes an average of 158 days versus 26 in the United States.⁵⁵⁵ In another survey of Indonesian executives, almost 30 percent selected corruption as the single most problematic factor for doing business.⁵⁵⁶ And according to a national study on corruption, 35 percent of responding firms reported that the reason they avoided investing in Indonesia was widespread corruption.⁵⁵⁷ The London-based risk consultancy, Business Monitor International (BMI), reports that, "Although the Indonesian government is working hard to attract private investors, there is still an underlying threat of corruption and a lack of transparency in the tendering process."⁵⁵⁸

DOMESTIC ENFORCEMENT REGIME

Indonesia's anti-corruption initiatives are best understood by first inspecting the laws on the books and the state organs in place that police corruption, and then observing how the enforcement of those laws and the operation of those organs are developing over time.

⁵⁵⁴ The World Bank, International Finance Corporation Enterprise Surveys, Indonesia Country Profile 2009, *available online at*

<http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/indonesia>

⁵⁵⁵ The World Bank, International Finance Corporation, Doing Business, *available online at* <http://www.doingbusiness.org/data/exploreconomies/>.

⁵⁵⁶ World Economic Forum, *supra* note 3, at 11.

⁵⁵⁷ Cash-to-Credit Advisor, Country Risk Report: Indonesia, *available online at* <http://www.credit-to-cash-advisor.com/Articles/CountryRisk/Indonesia>.

⁵⁵⁸ Wibisono, *supra* note 8.

Anti-corruption Laws and Regulations

After the fall of the Suharto regime in 1998, Indonesia entered a period referred to as *Reformasi* (“reforms”). Integral to Indonesia’s campaign of reform was (and still is) the eradication of corruption and the laws passed in furtherance of its campaign.⁵⁵⁹ In the years following Suharto’s regime, Indonesia passed two significant laws aimed at ending corruption.

The most important enactment in the campaign to root out corruption was the passage in 2002 of the Law on the Commission for the Eradication of Criminal Acts of Corruption (“Law No. 30/2002”). Law No. 30/2002 officially created Indonesia’s centralized anti-corruption agency, the Corruption Eradication Commission (“KPK”).⁵⁶⁰ The law’s preamble states that corruption is an “extraordinary problem that needs to be tackled by extraordinary means.” The KPK was created as the corruption superbody to fulfill this extraordinary role, with a mandate to: (1) coordinate with and supervise other anti-corruption agencies, (2) conduct corruption prevention activities, (3) investigate and prosecute corrupt acts, and (4) monitor state administration. The KPK is empowered to strip cases from the National Police and Attorney General’s Office where the integrity of their investigation is in doubt. In furtherance of its mandate, the KPK may tap and record suspects’ communications, access their bank accounts, ban international travel, and inquire into suspects’ wealth and taxation. The KPK has surveillance equipment and other cutting-edge technology to assist their investigations. To maintain independence, the KPK has full discretion over the appointment and dismissal of its personnel and provides better training and pay to its staff than other government employees

⁵⁵⁹ MacMillan, *supra* note 9, at 588.

⁵⁶⁰ The Indonesian government has instituted other anti-corruption agencies, such as the Joint Investigation Team, The National Ombudsman, and the Public Officials Audit Commission, but none have had an impact on corruption close to that of the KPK.⁵⁶⁰ Indeed, according to Transparency International, any progress against corruption accomplished in Indonesia in the last half decade can be attributed to the KPK.⁵⁶⁰

receive. To counteract the common trend of corruption prosecutions often being bargained away or dismissed, unique to Law No. 30/2002 is the provision that all investigations initiated by the KPK *must* proceed to prosecution.⁵⁶¹

The other significant development in Indonesia's statutory fight against corruption is Law No. 31 of 1999 (amended by Law No. 20 of 2001) ("Law No. 31") on the Eradication of the Criminal Act of Corruption, which criminalizes active and passive corruption in the public sector. The basic offense is made out where a person gives or promises something to a government employee: (1) with the intention that the government employee take or not take an action in their position that conflicts with their obligation; or (2) in relation to something the government employee has done or not done in their position that conflicts with their obligation. As for the recipient of improper payments, the law makes it a crime for any government employee to receive such presents or promises "where it is known or can be suspected" that such consideration was given in exchange for—or to influence—the government employee in doing or not doing something under their position that contradicts with their obligation.⁵⁶²

Law No. 31 also made a number of other revisions strengthening and clarifying the original criminal code. First, it defined corruption more broadly, as involving "[a]nyone who illegally commits an act to enrich oneself or another person or a corporation, thereby creating losses to the state finance or state economy." The offense of corruption is chargeable based upon more than thirty forms of criminal conduct, including bribery, embezzlement, extortion, fraud in procurement, conflict of interest

⁵⁶¹ MacMillan, *supra* note 9, at 603-06.

⁵⁶² Indonesian Law No. 3/1971, Art. 5-12, *summary thereof available online at* Makarim & Taira S., *Indonesia: Indonesia's Anti-Corruption Laws*, MONDAQ, Jan. 18, 2012, *available online at* <http://www.mondaq.com/x/160720/White+Collar+Crime+Fraud/Indonesias+AntiCorruption+Laws>.

in procurement, acceptance of an undue gift, and loss to the state.⁵⁶³ These reforms also broadened the definition of “government employee,” to include anyone receiving wages or salaries from state or regional finance, or from corporations that receive assistance from state or regional finance or that use capital or facilities from the state or the public. Through these changes, Law No. 31 substantially widened the class of recipients that it is a criminal violation to bribe.⁵⁶⁴

The new law established more severe penalties for corruption, including possible prison sentences of four years to life. Also set forth are harsher financial penalties including fines as high as one billion rupiah (\$112,000 USD). Law No. 31 also mandates that corruption cases have priority over other cases, likely a response to criticism that the Attorney General and Chief Prosecutor were ineffective in investigating and prosecuting graft.⁵⁶⁵

These broadened anti-corruption provisions marked a huge step forward against public corruption at home, but there are still major gaps in the law. At present, the bribery of *foreign* officials is not an offense under Indonesian law, nor is bribery that occurs purely in the private sector. These are viewed as flaws in a comprehensive anti-corruption regime, and they represent shortcomings in Indonesia’s commitments under the United Nations Convention against Corruption (“UNCAC”).

⁵⁶³ Law on the Eradication of the Criminal Act of Corruption (Indonesian Law No. 31/1999); MacMillan, *supra* note 9, at 608-09.

⁵⁶⁴ Makarim & Taira S., *Indonesia: Indonesia's Anti-Corruption Laws*, MONDAQ, Jan. 18, 2012, available online at <http://www.mondaq.com/x/160720/White+Collar+Crime+Fraud/Indonesias+AntiCorruption+Laws>.

⁵⁶⁵ Indonesian Law No. 31/1999; MacMillan, *supra* note 9, at 608-09.

Anti-corruption Enforcement

At its inception, the KPK sparked the public's optimism that corruption was being taken seriously when it quickly began bringing high-profile cases against judges, millionaires, and members of parliament.⁵⁶⁶ These and other previously "untouchable" members of Indonesian society were made to discover a phenomenon new to Indonesia: the "perp walk."⁵⁶⁷

In 2004, in its first direct presidential elections after decades of authoritarian rule, the people of Indonesia elected Susilo Bambang Yudhoyono. President Yudhoyono vowed to administer "shock therapy" to rid the country's institutions of their endemic corruption.⁵⁶⁸ Since 2004, the KPK has instituted more than 300 cases against high-ranking officials and recovered billions in money tainted by graft.⁵⁶⁹ The KPK has won global praise for its prosecutorial accomplishments, and greatly improved Indonesia's image in the process. After initially exhibiting suspicions concerning the United Nations Convention against Corruption ("UNCAC"), Indonesia changed course and ratified the agreement in September 2006. Going further, Indonesian officials volunteered the nation for a pilot program allowing peer review of its compliance with the convention.⁵⁷⁰ In

⁵⁶⁶ Bellman, *supra* note 16.

⁵⁶⁷ Norimitsu Onishi, *Corruption Fighters Rouse Resistance in Indonesia*, N.Y. TIMES (July 25, 2009), <http://www.nytimes.com/2009/07/26/world/asia/26indo.html>.

⁵⁶⁸ Tedjasukmana, *supra* note 7.

⁵⁶⁹ Bellman, *supra* note 16.

⁵⁷⁰ United Nations Office on Drugs & Crime, United Nations Convention against Corruption, Table, *available online at* <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>; Joe Palazzolo, *Indonesia Marks A First In AML Enforcement.*, WALL ST. J., CORRUPTION CURRENTS BLOG, Feb. 3, 2011, *available online at* <http://blogs.wsj.com/corruption-currents/2011/02/03/indonesia-marks-a-first-in-aml-enforcement/>.

2010, the G-20 picked Indonesia to chair its working group on corruption.⁵⁷¹

But a number of recent bribery scandals within President Yudhoyono's own party have raised doubts about the true effectiveness of the KPK and President Yudhoyono's government. While officials in the United States have pronounced Indonesia something of an anti-corruption success story, U.S. diplomatic cables leaked by Wikileaks reportedly implicated President Yudhoyono himself in committing bribery, intimidation, and self-enrichment.⁵⁷²

Despite its touted 100% conviction rate, the KPK acknowledges that corruption has gotten worse in recent years. One KPK official remarked to reporters that corruption is "bigger than [in] the Suharto period" and that it usually takes the form of "mark-ups and abuse of regional budgets." Put simply, he said, "In the area of public service, corruption is still rampant."⁵⁷³ Responding to criticism, however, that the KPK looks the other way when it comes to the actions of Democratic Party members, the KPK's vice chairman responded, "[w]e don't care about the Democrat Party, we don't care about the government. Whenever we have the evidence, nobody can stop us."⁵⁷⁴

However, those who profit from corruption, and corrupt institutions who have found themselves under KPK scrutiny—such as the police and Attorney General's office—continue to undermine the KPK's efforts. "It's now a very dangerous time for the K.P.K.," said Teten Masduki, the secretary general of Transparency International's chapter in Indonesia. "Whether it's

⁵⁷¹ Joe Palazzolo, *Indonesia Moves Ahead with Foreign Bribery Legislation*, WALL ST. J., Corruption Currents Blog, March 16, 2011, available online at <http://blogs.wsj.com/corruption-currents/2011/03/16/indonesia-moves-ahead-with-foreign-bribery-legislation/>.

⁵⁷² *Id.*

⁵⁷³ Tedjasukmana, *supra* note 7.

⁵⁷⁴ Bellman, *supra* note 16.

the police, attorney general's office or Parliament, there is a systematic agenda to destroy the K.P.K."⁵⁷⁵ In September 2009, for example, two highly reputable KPK commissioners were arrested on alleged blackmail charges that were later proved to be part of a police frame-up. Indonesian Corruption Watch reports that there are at least 13 judicial reviews of KPK action, most intended to undermine its authority. The legislature cut KPK funding by a third in 2011, with threats to reduce funding further, and applied pressure to prioritize specific cases over others.⁵⁷⁶ The KPK also faces practical challenges. With only 700 personnel, it is understaffed to handle the more than 50,000 complaints they have received. Further, the Commission faces challenges recruiting applicants that live up to the KPK's strict interview and vetting process. In the future, it is likely the KPK will become increasingly reliant on whistleblowers within government, as well as private citizens, bureaucrats, and company auditors.⁵⁷⁷

Nonetheless, the KPK continues to make major arrests in spite of the political and practical headwinds it faces. In 2011, twenty-eight current and former lawmakers were sentenced to prison for accepting bribes to vote for a candidate for deputy central bank governor in 2003.⁵⁷⁸

Competing Forces in the Ongoing Campaign against Corruption

The ongoing conflict between the campaign against anti-corruption and the efforts to halt that mission is evident beyond the progress of the KPK. The continuing debate in Indonesia's political arena also illustrates the struggle between the true

⁵⁷⁵ Onishi, *supra* note 32.

⁵⁷⁶ Ilham B. Saenong, *Indonesian NGOs protest an unnecessary revision of anti-corruption laws*, TRANSPARENCY INT'L BLOG, July 22, 2011, available online at <http://blog.transparency.org/2011/07/22/indonesian-ngos-protest-an-unnecessary-revision-of-anti-corruption-laws/>.

⁵⁷⁷ Bellman, *supra* note 16; Onishi, *supra* note 32.

⁵⁷⁸ *Corruption everywhere*, THE ECONOMIST, Sept. 2, 2011, available online at <http://www.economist.com/blogs/banyan/2011/09/indonesias-politics>.

reformers and the obstructionists whose interests lie with business as usual.

Efforts to erode anti-corruption law illustrate the entrenched interests in patronage still pervasive in the Indonesian legislature. In 2009, the House of Representatives passed a law that arguably stripped the KPK of some of its powers, including its ability to try all anti-corruption cases in Jakarta. Many believed this would force corruption cases into outlying district courts where the judges could themselves not be trusted to remain above board.⁵⁷⁹ In 2011, the House of Representatives again attempted (unsuccessfully, for now) to revise the Anti-Corruption Act and the KPK Act to decrease penalties and sentences for graft and reduce the power of the KPK. These initiatives raised intense suspicion given their sudden introduction, with no consultation with the public or the KPK, not to mention the fact that certain House members were then under investigation by the KPK.⁵⁸⁰

Other developments suggest that movement is also being made to *strengthen* anti-corruption law. Indonesia's Attorney General has introduced anti-corruption legislation of his own, which would finally criminalize the bribery of foreign officials as well as private-sector bribery. The new law would prohibit all bribery, including that in the private sector, and would allow prosecution of foreigners for corruption.⁵⁸¹ This would move Indonesian law into closer compliance with the UNCAC. In another positive development, in a pivotal case decided in early 2011, Indonesia's former tax director was sentenced to 10 years in

⁵⁷⁹ Markus Junianto Sihalohe & Febriamy Hutapea, *Indonesia Passes 'Ambiguous' Anti-Corruption Court Bill*, JAKARTA GLOBE, Sept. 30, 2009, available online at <http://www.thejakartaglobe.com/home/indonesia-passes-ambiguous-anti-corruption-court-bill/332601>.

⁵⁸⁰ Ilham B. Saenong, *Indonesian NGOs protest an unnecessary revision of anti-corruption laws*, Transparency Int'l, July 22, 2011, available online at <http://blog.transparency.org/2011/07/22/indonesian-ngos-protest-an-unnecessary-revision-of-anti-corruption-laws/>.

⁵⁸¹ Palazzolo, *supra* note 36.

prison for money laundering and corruption. The case represented the first corruption adjudication applying a reverse burden of proof—that is the *defendant* must prove that he acquired the money at issue legally rather than illicitly. The decision marked an important win for pro-reformers and spurred calls for legislation resolving the conflict in favor of wider application of the reverse burden of proof.⁵⁸²

U.S. AND UK ENFORCEMENT OF CORRUPT PRACTICES IN INDONESIA

Bribery taking place in Indonesia also has major consequences outside the country. As the result of aggressive enforcement of anti-corruption laws in the United States (primarily through the Foreign Corrupt Practices Act or “FCPA”) and the United Kingdom (the United Kingdom Bribery Act 2010 or “UK Bribery Act”), international companies doing business in Indonesia have paid a steep price for failing to adhere to high standards of anti-corruption compliance.

The United States Securities and Exchange Commission (“SEC”) and Department of Justice (“DOJ”) have vigorously pursued international firms for whom bribes and kickbacks are part of their business practices in Indonesia. For instance, in 2011, employees at Europe’s largest insurer, Allianz SE, were investigated for paying bribes through a joint venture company in Indonesia in exchange for contracts with Allianz to insure major infrastructure projects. Allianz is expected to pay \$7-10 million in penalties as part of a settlement with the SEC.⁵⁸³ In 2010, Alliance One, a global tobacco company, paid millions in civil and criminal fines and disgorgement to settle charges with the SEC and DOJ

⁵⁸² Palazzolo, *supra* note 35.

⁵⁸³ Jost Arnsperger, *Allianz SE to settle SEC charges linked to bribes in Indonesia*, Squire Sanders Anticorruption Blog, Nov. 1, 2011, available online at <http://www.anticorruptionblog.com/allianz-se-to-settle-sec-charges-linked-to-bribes-in-indonesia/>.

that they violated the FCPA by making improper payments to Indonesian tax officials.⁵⁸⁴

And U.S. authorities show no signs of letting up. In May 2011, a U.S. law enforcement official announced that “several” listed U.S. companies were under investigation for bribery in Indonesia. The investigations are said to be in cooperation with Indonesia’s KPK, with which the U.S. Federal Bureau of Investigation has a memorandum of understanding stating shared anti-corruption goals. The official also signaled an increased effort between countries to simplify and coordinate domestic anti-bribery regulation so that international cases could proceed more efficiently.⁵⁸⁵

Even before the UK Bribery Act came into force in 2011, a crackdown on bribery involving Indonesia was already under way in the United Kingdom. In 2010 for example, a U.K. subsidiary of a major chemical company pleaded guilty to charges of paying bribes to Indonesian officials to secure sales, remitting \$12.7 million in criminal fines. A company executive also pleaded guilty.⁵⁸⁶ Anti-bribery enforcement is not limited to the U.S. and U.K. For example, in July 2011, Australian Federal Police charged two companies with paying bribes to officials in Indonesia to secure bank note contracts over the course of six years.⁵⁸⁷

⁵⁸⁴ Litigation Release, Securities & Exchange Commission, No. 21618 (Aug. 6, 2010).

⁵⁸⁵ Made Arya Kencana, *FBI Says Large American Companies Suspected of Paying Graft in Indonesia*, JAKARTA GLOBE, May 12, 2011, available online at <http://www.thejakartaglobe.com/home/fbi-says-large-american-companies-suspected-of-paying-graft-in-indonesia/440574>.

⁵⁸⁶ *Innospec's \$40 Million Global Settlement*, FCPA Blog, March 18, 2010, available online at <http://www.fcpablog.com/blog/2010/3/18/innospecs-40-million-global-settlement.html>.

⁵⁸⁷ *Is your company willing to do what it takes?*, Holman Fenwick Willan, Publications, July 2011, available online at <http://www.hfw.com/publications/client-briefings/uk-bribery-act>.

RECENT MAJOR SCANDALS

Though the KPK and foreign agencies have succeeded with major corruption arrests, the continued outbreak of corruption scandals highlights the fact that opportunistic government officials, lawmakers, and businessmen continue to collude on the awarding of state contracts, budget funds, big business deals, and even tax breaks in exchange for a piece of the action.⁵⁸⁸

This past August 2011, two officials in Yudhoyono's Ministry of Manpower and Transmigration were charged with accepting kickbacks from a businesswoman aimed at directing government development funds to her region.⁵⁸⁹ That same month, parliament member Muhammed Nazaruddin, the former treasurer of President Yudhoyono's Democratic Party, was arrested after fleeing the country when he was implicated in a major bribery scandal involving bid rigging for construction contracts to build athlete housing for the Southeast Asia Games ("SEA Games"). National and provincial officials, a fellow lawmaker, and an executive from the company that won the construction contract were also arrested or implicated. In addition to his involvement in the SEA Games scandal, Mr. Nazaruddin was accused of making unsolicited payments to a court official and using his influence as a party leader to have a former business partner thrown in jail. Adding to the furor over the scandal, after his arrest, Nazaruddin publicly accused Democratic Party chairman Anas Urbaningrum, widely thought to be a presidential contender in 2014, of corruption as well. Then, after a group of lawmakers from rival political parties visited him in jail, Mr. Nazaruddin claimed he had "forgotten everything" about the SEA Games scandal. In both cases, the heads of the ministries involved in these scandals denied any

⁵⁸⁸ *Corruption everywhere*, *supra* note 43.

⁵⁸⁹ Tedjasukmana, *supra* note 7.

knowledge of their subordinates' activities and have refused to step down.⁵⁹⁰

As a result of these and other scandals, public confidence in the Democratic Party and the President's anti-corruption credentials has dropped precipitously, and pressure has increased for a shakeup in the President's party, as well as a renewed zeal to combat corruption.⁵⁹¹

PUBLICLY-LEAD ANTI-CORRUPTION ACTIVISM

Despite its progress in both law and enforcement, it is clear that Indonesia needs stronger political will and public participation to truly eradicate corruption.⁵⁹² As anti-corruption efforts move forward, public participation through whistleblowing will play an increasingly important role. However, the laws and resources in place for whistleblowers are inadequate—another area where Indonesian law falls short of the UNCAC mandate. Law enforcement personnel are not adequately trained and there are not sufficient resources in place to protect whistle-blowers and other witnesses. Though the law protects whistle-blowers from physical harm, it does nothing to prevent workplace retaliation or legal consequences, even when the information is tendered in good faith.⁵⁹³

Collective action is also of growing importance, and there are signs that the Indonesian public not only understands where the corruption in their institutions exists but is mobilizing against it. In December 2011, hundreds of protesters across Indonesia staged targeted demonstrations in observance of World Anti-corruption Day. In Jakarta, protesters attempted to reach the house of Democratic Party chairman Anas Urbaningrum, who after having been implicated in the SEA Games bribery scandal is

⁵⁹⁰ *Id.*; *Corruption everywhere*, *supra* note 43.

⁵⁹¹ Bellman, *supra* note 16; *Corruption everywhere*, *supra* note 43.

⁵⁹² MacMillan, *supra* note 9, at 619.

⁵⁹³ *Id.* at 609-11.

deemed by many “a national icon of corruption.” Across the country, hundreds of demonstrators publicly protested the government’s failure to seriously fight corruption, including the apparent limbo in which several big graft cases remain. The protesters exhorted the KPK and other government officials to investigate a number of suspected corruption incidents, including the SEA Games scandal and a case implicating former Bantul regent Idham Samawi.⁵⁹⁴

CONCLUSION

Corruption in Indonesia remains a “fact of life.”⁵⁹⁵ Spurred on by public outrage, the Indonesian government is taking serious steps to combat corruption. Though these steps are proceeding against a fierce countercurrent of entrenched interests, political will appears to be shepherding progress further and faster.

Nevertheless, the increased costs of doing business because of Indonesia’s deep-rooted corruption problem are palpable and will likely remain so for the immediate future. Indonesia’s thriving and expanding economy mean there is little doubt that the country will continue to be a magnet for development and investment. Given the rampant corruption problems Indonesia is facing, neither domestic nor foreign companies can conduct “business as usual” in Indonesia without facing serious enforcement risks both in Indonesia and abroad. Sound practice dictates that the adoption of relatively low cost anti-corruption compliance policies—including internal risk assessment and monitoring, broad training programs, and internal reporting mechanisms—can allow a business to avoid expensive

⁵⁹⁴ Nani Farida, *Protesters Target Democratic Party Chief*, JAKARTA POST, Dec. 10, 2011, available online at <http://www.thejakartapost.com/news/2011/12/10/protesters-target-democratic-party-chief.html>.

⁵⁹⁵ MacMillan, *supra* note 9, at 622.

and embarrassing repercussions as it pursues the wealth of opportunity presented by Indonesia, an emerging global power.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN VIETNAM

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OVERVIEW

Vietnam has had sustained economic growth since implementing market-oriented economic reforms, known as *doi moi* (renovation), in 1986.⁵⁹⁶ Vietnam's Gross Domestic Product ("GDP") has grown steadily over this period⁵⁹⁷ and at an average rate of 7% throughout the 2000s.⁵⁹⁸ While the World Bank believes that Vietnam's GDP will grow at a slightly lower rate of 6% for 2011, it projects that the GDP growth will increase to 7.2% in 2013.⁵⁹⁹

Due to this period of economic growth, many foreign investors are looking to Vietnam as an emerging market for investment potential.⁶⁰⁰ By way of example, Vietnam had \$8.2

⁵⁹⁶ TRANSPARENCY INT'L, NATIONAL INTEGRITY SYSTEMS: VIETNAM 7 (2006), available at http://www.transparency.org/policy_research/nis/nis_reports_by_country (most recent report published).

⁵⁹⁷ WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2011-2012, at 368 (2011), available at <http://reports.weforum.org/global-competitiveness-2011-2012/>.

⁵⁹⁸ United States Central Intelligence Agency, World Fact Book, last updated Jan. 17, 2012, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html>.

⁵⁹⁹ John Greenwood, *Moving on From BRICS*, WALL. ST. J., Sept. 19, 2011, available at <http://online.wsj.com/article/SB10001424053111904716604576544492334928256.html?KEYWORDS=vietnam+corruption>.

⁶⁰⁰ *Id.*

billion in foreign direct investment in 2010.⁶⁰¹ According to a survey of large transnational corporations conducted by the United Nations Conference on Trade and Development, transnational corporations view Vietnam as the eighth highest priority country for foreign direct investment in the world.⁶⁰² American companies are optimistic about Vietnam's future with "85% of U.S. companies in Southeast Asia plan[ning] to expand their business in the region over the next two years."⁶⁰³

Vietnam is attractive for reasons other than its two and half decades of growth. It has low-cost labor and ample natural resources.⁶⁰⁴ Foreign investors hope to capitalize on increasing levels of domestic consumption as Vietnam's large population of young people ages.⁶⁰⁵ Vietnam also has a relatively diverse economy which should make it less dependent on external demand for economic growth.⁶⁰⁶ But high levels of corruption that have existed for years may derail Vietnam's economic growth and scare away foreign investors. A variety of factors contribute to corruption in Vietnam, most notably its status as a one-party state, but also the fact that corruption is socially accepted. While Vietnam has a well-developed anti-corruption legal framework,

⁶⁰¹ UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2011 (2011), *available at* http://www.unctad.org/sections/dite_dir/docs/wir11_fs_vn_en.pdf.

⁶⁰² World Investment Prospects Survey 2010-2012, United Nations Conference on Trade and Development, at 13, Fig. 14, *available at* http://www.unctad.org/en/docs/diaaia20104_en.pdf. Vietnam gained three places after being ranked eleventh in last year's survey. *Id.* For comparison, the transnational companies surveyed ranked China first, the United Kingdom seventh, and Germany tenth. *Id.*

⁶⁰³ Charmian Kok, *Most U.S. Firms Plan to Expand Business in SE Asia: Amcham*, REUTERS, Sept. 5, 2011, *available at* <http://www.reuters.com/article/2011/09/05/us-firms-asia-idUSTRE78411L20110905>.

⁶⁰⁴ *Vietnam Country Profile: General Information*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/vietnam/general-information/> (last visited Feb. 7, 2012) [*hereinafter* *General Information*].

⁶⁰⁵ Greenwood, *supra* note 4.

⁶⁰⁶ *Id.*

the challenge for Vietnam is to effectively implement the laws that it has.

Recent developments indicate that the government is serious about reducing corruption in Vietnam. In the past several years, the Vietnamese government has signed two international anti-corruption agreements, passed several new anti-corruption laws, and developed a long-term plan to reduce corruption. Yet Vietnam's corruption problems persist. Activists have pointed out continued weaknesses in Vietnam's anti-corruption laws.⁶⁰⁷ Recent high-profile corruption scandals, such as those involving the government owned shipbuilder, Vinashin, have further highlighted these issues.

THE SIZE OF THE PROBLEM

Transparency International, the international non-governmental organization dedicated to eliminating corruption, ranks 178 countries and their governments' efforts to fight corruption on its Corruption Perceptions Index. For 2011, Vietnam tied Algeria, Egypt, Kosovo, Moldova, and Senegal for 112th on the list.⁶⁰⁸ The World Economic Forum confirms Transparency International's numbers. It ranks Vietnam 104 out of 142 countries for the possibility of "irregular payments and bribes" in its institutions.⁶⁰⁹

⁶⁰⁷ Long S. Le, *Vietnam's Endless Corruption Campaign*, EAST ASIA FORUM (April 16, 2010), <http://www.eastasiaforum.org/2010/04/16/vietnams-endless-corruption-campaign/>; see also *Corruption Fight to Drag On*, VIET NAM NEWS, Sept. 8, 2011, <http://vietnamnews.vnagency.com.vn/Opinion/215154/corruption-fight-to-drag-on.html>; *Meeting Urges Increased Action Against Corruption*, VIET NAM NEWS, Nov. 30, 2011, <http://vietnamnews.vnagency.com.vn/social-issues/218159/meeting-urges-increased-action-against-corruption.html> [*hereinafter Meeting Urges*]; *Vietnam Under Pressure from International Anti-Corruption Laws to Act*, TRUSTLAW (Sept. 15, 2011 16:30), <http://www.trust.org/trustlaw/news/vietnam-under-pressure-from-international-anti-corruption-laws-to-act/>.

⁶⁰⁸ TRANSPARENCY INT'L, INTERNATIONAL CORRUPTION PERCEPTIONS INDEX 2011 (2011), available at <http://cpi.transparency.org/cpi2011/results/> [*hereinafter CORRUPTION PERCEPTIONS INDEX*].

⁶⁰⁹ WORLD ECONOMIC FORUM, *supra* note 2, at 369.

Between 2006 and 2011, Vietnam has prosecuted an average of 600 individuals for corruption charges in 280 cases each year.⁶¹⁰ The Diagnostic Survey, a study of corruption conducted by the Communist Party of Vietnam (“CPV”) in conjunction with the Swedish International Development Cooperation Agency, found that “nearly one-third of public officials and civil servants were willing to accept bribes [and] [o]ver 50 percent of public officials and civil servants responded that intermediate and higher-level offices are involved in corrupt activities.”⁶¹¹ Corruption is rampant in public procurement,⁶¹² the police force (especially traffic police),⁶¹³ and land inspectors.⁶¹⁴ Corruption in land management is so pervasive that an investigation into land inspectors found illegal acts worth \$216 million in the first eight months of 2011 alone,⁶¹⁵ and that “people expect [corruption in land management] like they do floods whenever there is a rain downpour in Hanoi.”⁶¹⁶ According to a 2009 survey by the International Finance Corporation, 52.5% of firms expected to give gifts to public officials to “get things done,” compared to 25.7% of firms worldwide, with the value of the gift equaling 2.5% of the value of the government contract that the firm sought to win.⁶¹⁷

⁶¹⁰ *Meeting Urges*, *supra* note 12.

⁶¹¹ TRANSPARENCY INT’L, *supra* note 1, at 11.

⁶¹² *Id.* at 26.

⁶¹³ *Police Warned They Face Dismissal for Corruption*, VIET NAM NEWS, Sept. 17, 2011, <http://vietnamnews.vnagency.com.vn/social-issues/215548/police-warned-they-face-dismissal-for-corruption.html>.

⁶¹⁴ *New Findings in Corruption Probe*, VIET NAM NEWS, Sept. 21, 2011, <http://vietnamnews.vnagency.com.vn/Economy/215652/new-findings-in-corruption-probe-.html>.

⁶¹⁵ *Id.*

⁶¹⁶ *Vietnamese Used to Land-related Corruption*, VIETNAM.NET BRIDGE (Jan. 26, 2011 06:28:30), <http://english.vietnamnet.vn/en/politics/4291/vietnamese-used-to-land-related-corruption.html>.

⁶¹⁷ *Enterprise Surveys: Vietnam (2009)*, INTERNATIONAL FINANCE CORPORATION,

<http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/vietnam> (last visited Feb. 7, 2012).

Corruption is also a large part of civilian life. Forty-four percent of people in Vietnam admitted to bribing a member of a service provider, defined as customs, education, the judiciary, land-related services, medical services, the police, registry and permit services, tax authorities, and utilities in 2010.⁶¹⁸ It is common to offer bribes to doctors for better medical treatment.⁶¹⁹ A survey of Vietnamese people between the ages of fifteen and thirty years old found that 35-48% of them were willing to bribe officials even though they understand the negative impact of corruption.⁶²⁰ Corruption is so widespread that some politicians have described it as being a “systemic problem in Vietnam,” and in 2006, the CPV remarked publically that it threatened the survival of the Communist state.⁶²¹

Widespread corruption in Vietnam is also negatively affecting Vietnam’s image among the international business community. A survey of business executives from 142 countries conducted by the World Economic Forum found that executives believed corruption was the eighth, out of fifteen, most problematic factor for doing business in Vietnam.⁶²² Both the British and Canadian Ambassadors to Vietnam have remarked that corruption in Vietnam negatively affects business in

⁶¹⁸ TRANSPARENCY INT’L, GLOBAL CORRUPTION BAROMETER 2010, at 46 (2010), available at

http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results [hereinafter BAROMETER].

⁶¹⁹ *Patients Play a Part in Eroding Medical Ethics by Offering Bribes*, VIETNAM NEWS, Jan. 14, 2012,

<http://vietnamnews.vnagency.com.vn/Opinion/219726/patients-play-a-part-in-eroding-medical-ethics-by-offering-bribes.html>.

⁶²⁰ Transparency Int’l., *Corruption in Vietnam: What do Young People Think*, TRANSPARENCY INTERNATIONAL (Aug. 8, 2011),

http://www.transparency.org/news_room/in_focus/2011/corruption_in_vietnam_youth_views.

⁶²¹ TRANSPARENCY INT’L, *supra* note 1, at 11.

⁶²² WORLD ECONOMIC FORUM, *supra* note 2, at 368. For comparison, executives ranked inflation first, with 16.7% of executives selecting it, and they ranked poor public health last, with 0% of respondents selecting it. 5.7% of respondents selected corruption. *Id.*

Vietnam.⁶²³ From December 2008 through February 2009, Japan suspended aid loans to Vietnam after journalists exposed a scandal involving Japanese officials using bribes to obtain Vietnamese government contracts.

Developments over the past several years, including the passage of new anti-corruption laws, may signify that the Vietnamese government is serious about reducing corruption. The World Bank considers the 2005 Anti-Corruption Law (“ACL”) one of the best anti-corruption laws in Asia.⁶²⁴ Further, two laws passed in 2011 require government officials to declare their assets to co-workers.⁶²⁵ Lack of public declaration of assets was a large weakness in Vietnam’s anti-corruption laws because without it, activists had difficulty obtaining evidence of bribery. In addition to reforming its laws, Vietnam has joined two international anti-corruption agreements in the past decade: the United Nations Convention Against Corruption, joined on June 30, 2009,⁶²⁶ and the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, which it joined in June 2004.⁶²⁷

The government also appears to be more responsive to reports of corruption in recent years. In 2011, the Ministry of Public Security increased scrutiny on police officers around the country after many documented reports of police corruption,⁶²⁸ and the Ho Chi Minh City police department imposed regulations prohibiting traffic policemen from carrying more than the equivalent of US \$4.70, or from using a cell phone while on

⁶²³ *Meeting Urges Increased Action Against Corruption*, *supra* note 12.

⁶²⁴ *2011 Investment Climate Statement – Vietnam*, U.S. DEP’T OF STATE, <http://www.state.gov/e/eb/rls/othr/ics/2011/157384.htm> (last visited Feb. 7, 2011).

⁶²⁵ *Corruption Fight to Drag On*, *supra* note 12; *Vietnam Under Pressure from International Anti-Corruption Laws to Act*, *supra* note 12.

⁶²⁶ *Vietnam Accedes to UNCAC*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/eastasiaandpacific/en/2009/07/viet-nam-accedes-to-uncac.html> (last visited Feb. 7, 2012).

⁶²⁷ TRANSPARENCY INT’L, *supra* note 1, at 13.

⁶²⁸ *Police Warned They Face Dismissal for Corruption*, *supra* note 19.

duty.⁶²⁹ A year earlier, in September 2010, the Prime Minister suspended issuing licenses for mineral mining until the industry's operations and management could be investigated.⁶³⁰

The government has also put more effort into analyzing the causes of corruption and the best methods to reduce it in recent years. In 2005, the Internal Affairs Committee of the Central Committee of the CPV published the "Diagnostic Survey" in conjunction with the Swedish International Development Cooperation Agency. This was the first time the CPV helped an international agency analyze corruption in Vietnam.⁶³¹ Since 2007, the government has held bi-annual meetings with international groups to discuss methods to combat corruption.⁶³² And in May 2009, the government issued the National Strategy on Anti-Corruption to 2020 that proposed a plan to reduce corruption over the next 11 years. The plan includes such measures as increasing public access to information, raising salaries for public officials, and publishing the names of entities and individuals that bribe public officials.⁶³³

CURRENT ENFORCEMENT REGIME

Vietnam's anti-corruption system is complicated by its unique political system. Vietnam is a one-party state, and the CPV exercises great control over all levels of government.⁶³⁴ The executive branch, headed by a Prime Minister, three deputy prime ministers and numerous other officials beneath them and the legislative branch, governed by The National Assembly, are filled

⁶²⁹ *Is it Funny to Ban Traffic Cops from Carrying Over \$5*, VIETNAM.NET BRIDGE (Sept. 12, 2011 02:19:23 PM), <http://english.vietnamnet.vn/en/print/society/16322/is-it-funny-to-ban-traffic-cops-from-carrying-over--5-.html>.

⁶³⁰ *Meeting Urges*, *supra* note 12.

⁶³¹ TRANSPARENCY INT'L, *supra* note 1, at 11.

⁶³² *Meeting Urges*, *supra* note 12.

⁶³³ Hoa, *supra* note 30, at 281.

⁶³⁴ TRANSPARENCY INT'L, *supra* note 1, at 15.

almost entirely with members of the CPV.⁶³⁵ All of these individuals are subject to anti-corruption laws.

Bribery of persons with “powers or a position of certain responsibility” who serve in a “government body or public entity or organization” is illegal in Vietnam under the Criminal Code and the ACL.⁶³⁶ The bribe must generally be more than 2,000,000 VND, or US \$96. Those convicted of receiving a bribe face stiffer penalties than those who have paid a bribe.⁶³⁷ Individuals who give or receive a bribe can be imprisoned up to life, prohibited from holding certain jobs for one to five years, fined by as much as five times the amount of the bribe, or stripped of their assets. Those that receive bribes may be sentenced to death. These laws apply to anyone who works in a public capacity, including public officials, civil servants, and managers of wholly or partially state-owned entities.⁶³⁸ However, the Criminal Code and the ACL do not apply to the private sector, and Vietnam does not have a law prohibiting bribery of foreign public officials.

The ACL also prohibits covered individuals⁶³⁹ from engaging in certain other behaviors. Such as participating in, creating, or managing commercial activities; consulting on commercial matters related to areas in which the person has knowledge of state secrets; or consulting on matters which he or she has the power to resolve.⁶⁴⁰ The ACL, as well as other regulations, restrict how and what gifts can be given to a public official.⁶⁴¹ Gifts from an individual, entity, body, or organization that is involved with a matter before a public official, or that are offered with no reason, are prohibited.⁶⁴² The ACL also criminalizes attempted corruption, extortion, abuse of office and

⁶³⁵ *Id.*

⁶³⁶ Hoa, *supra* note 30, at 280.

⁶³⁷ *Id.*

⁶³⁸ *Id.*

⁶³⁹ Covered individuals include public officials, civil servants, “heads and managers of state owned enterprises,” and agents of the state. *Id.* at 280-281

⁶⁴⁰ *Id.* at 281.

⁶⁴¹ Gifts include money, property, or other material interests. *Id.*

⁶⁴² *Id.*

money laundering. The law contains asset disclosure provisions, but implementation and monitoring mechanisms are still in development.⁶⁴³

Several agencies are tasked with enforcing these laws. The Government Inspectorate is nominally the lead anti-corruption agency, but the National Anti-Corruption Steering Committee (created in 2005 to coordinate anti-corruption efforts), the State Audit, the People's Procuracy (in charge of prosecuting cases of corruption), the Central Inspection Commission of the CPV, and an anti-corruption department in the Prime Minister's Office of the Government also play a role. These agencies do not have well defined roles, and they struggle to coordinate their efforts.⁶⁴⁴

Due to the control the CPV exerts in Vietnam, its members are attractive targets for bribes and many have become involved in corruption. As a result, many CPV members lack the motivation to reduce corruption or to launch investigations.⁶⁴⁵ When an investigation is launched, there is little likelihood of a fair trial because many of the officials that work in the investigation agencies are themselves CPV members.⁶⁴⁶ The amount of power wielded by the CPV also deters whistleblowers who fear reprisal by party members.⁶⁴⁷ "Over 85 percent of public officials and civil servants and 78 percent of enterprise managers said they were unwilling to participate in the fight against corruption for fear of being victimized by their superiors."⁶⁴⁸ Low pay for government employees further reduces the likelihood of

⁶⁴³ *Vietnam Country Profile: Public Anti-Corruption Initiatives*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/vietnam/initiatives/public-anti-corruption-initiatives/>; see also *Corruption Fight to Drag On*, *supra* note 12.

⁶⁴⁴ TRANSPARENCY INT'L, *supra* note 1, at 14.

⁶⁴⁵ *Id.* at 13.

⁶⁴⁶ CORRUPTION PERCEPTIONS INDEX, *supra* note 14, at 7, 11, 13. See also *Vietnam Country Profile: Judicial System*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/vietnam/corruption-levels/judicial-system/>.

⁶⁴⁷ *Id.* at 11.

⁶⁴⁸ *Id.*

whistleblowing because government employees are motivated to accept bribes in order to earn a decent wage.⁶⁴⁹

The CPV does not allow the media the freedom it needs to operate as an effective watchdog, because doing so could lead people to question the supremacy of the CPV.⁶⁵⁰ The press is defined by law as “the mouthpiece of various organizations of the Party and State,”⁶⁵¹ and the press is legally prohibited from encouraging dissent.⁶⁵² Consistent with the goal of limiting dissent, the government is actively involved in the daily operations of the press. All media outlets are state owned, and members of the CPV Central Committee as well as the Ministry of Culture and Ideology have weekly meetings with editors of central newspapers to review articles.⁶⁵³ The press is limited in its ability to investigate corruption because Vietnam has no freedom of information laws.⁶⁵⁴ Recently, the government has been particularly aggressive in stifling opposition by prosecuting journalists and bloggers.⁶⁵⁵

Bureaucracy and lack of coordination among the numerous anti-cooperation agencies are other factors that limit the effectiveness of Vietnam’s anti-corruption policies. For example, the Government Inspectorate’s annual inspection plan must be submitted to the Prime Minister for advance approval and even impromptu inspections require proof of violations and official

⁶⁴⁹ See 2011 Investment Climate Statement – Vietnam, *supra* note 32.

⁶⁵⁰ TRANSPARENCY INT’L, *supra* note 1, at 13.

⁶⁵¹ *Id.* at 28 (referring to the 1989 Press Law).

⁶⁵² *Id.*

⁶⁵³ *Id.*

⁶⁵⁴ *Id.* at 29.

⁶⁵⁵ Editorial, *Vietnam Rights and Wrongs*, WALL ST. J., JULY 21, 2010, <http://online.wsj.com/article/SB10001424052748704684604575380311756082350.html?KEYWORDS=vietnam+corruption>. A journalist was jailed as recently as January of 2012 after writing an expose on corruption in the police force. *Vietnam Urged to Free Anti-Corruption Journalist*, NANYANG POST, Jan. 4, 2012, <http://www.nanyangpost.net/2012/01/vietnam-urged-to-free-anti-corruption.html>.

approval by the Prime Minister.⁶⁵⁶ Another bureaucratic barrier, would-be whistleblowers don't know which organization to complain to, because none of the agencies are explicitly tasked with receiving citizen complaints.⁶⁵⁷ The fact that so many anti-corruption agencies exist is itself a problem, because institutional rivalry prevents cooperation.⁶⁵⁸

Another weakness in Vietnam's anti-corruption laws is inadequate protection for whistleblowers.⁶⁵⁹ Complainants are not granted anonymity, and they must disclose their name, address, and signature. This lack of anonymity deters would-be whistleblowers because citizens fear retaliation by the CPV.⁶⁶⁰ Furthermore, public consultation is not required as part of the investigation of civilian complaints, and the results of the investigations are never published. Thus, neither the complainant nor the media can verify that the complaint was adequately investigated.

RECENT MAJOR SCANDALS

Vietnam has seen two high-profile corruption scandals in the past six years. Most recently, police agencies investigated three cases related to the state-owned Vietnam Shipbuilding Industry Group, Vinashin. According to the Government Inspectorate, law-breaking and corrupt acts by Vinashin executives in the past several years have resulted in a total debt held by the company of over US \$4.1 billion. Nine Vinashin executives were prosecuted and found guilty of fraud.⁶⁶¹ Charges included overpaying for "new" equipment that was actually old,

⁶⁵⁶ TRANSPARENCY INT'L, *supra* note 1, at 27.

⁶⁵⁷ *Id.* at 26.

⁶⁵⁸ CORRUPTION PERCEPTIONS INDEX, *supra* note 14, at 7, 11, 13.

⁶⁵⁹ TRANSPARENCY INT'L, *supra* note 1, at 7.

⁶⁶⁰ *See 2011 Investment Climate Statement – Vietnam, supra* note 32, at 26-27.

⁶⁶¹ *Public Security Ministry Orders Corruption Investigation at Vinashin*, VIETNAM.NET BRIDGE (Nov. 31, 2011 11:57:57), <http://english.vietnamnet.vn/en/society/14780/public-security-ministry-orders-corruption-investigation-at-vinashin.html>.

and otherwise intentionally acting against the state's economic interest.

In 2006, investigators discovered a large corruption scandal within the Project Management Unit of the Ministry of Transport.⁶⁶² The scandal involved ministers embezzling millions of dollars, awarding contracts to friends and family, gambling, and bribery.⁶⁶³ Eight defendants were sentenced to jail time, receiving sentences of three to twenty-three years in jail.⁶⁶⁴

Smaller corruption cases happen more frequently. For example, in July 2011, a former government official in Ho Chi Minh City was sentenced to thirty years for receiving and taking bribes in excess of \$30,000. One of the individuals who paid the bribes received a life sentence, and the other received eleven years.⁶⁶⁵

Corruption is not solely a domestic matter. In one incident, a Vietnamese man helped funnel bribes so that Securrency, the Reserve Bank of Australia's currency maker, could win the contract to switch Vietnam's currency from paper to plastic bills. The matter is the largest bribery scandal in Australian history.⁶⁶⁶ In 2009, a court in Tokyo convicted three

⁶⁶² TRANSPARENCY INT'L, *supra* note 1, at 13.

⁶⁶³ *Id.*

⁶⁶⁴ *Corrupt Official Gets Seven Years in Jail*, VIET NAM NEWS, July 7, 2011, <http://vietnamnews.vnagency.com.vn/politics-laws/law-justice/213064/corrupt-official-gets-seven-years-in-jail.html>.

⁶⁶⁵ *District People's Committee Chairman Sentenced to 30 Years*, VIET NAM NEWS, July 20, 2011, <http://vietnamnews.vnagency.com.vn/social-issues/213533/district-peoples-committee-chairman-sentenced-to-30-years.html>.

⁶⁶⁶ Richard Baker & Nick McKenzie, *Bribe Scandal Extends to Vietnamese Spy Colonel*, AGE (Melbourne), July 4, 2011,

<http://www.theage.com.au/national/bribe-scandal-extends-to-vietnamese-spy-colonel-20110703-1gxca.html>; Nick McKenzie & Richard Baker, *RBA Firm Accused of Bribing Vietnam Central Bank Boss*, SYDNEY MORNING HERALD, Jan. 24, 2011, <http://www.smh.com.au/business/rba-firm-accused-of-bribing-vietnam-central-bank-boss-20110123-1a18p.html>; Maris Beck, *Securrency Executive Charged*, SYDNEY MORNING HERALD, Aug. 11, 2011, <http://www.smh.com.au/business/securrency-executive-charged-20110810-1imtt.html>.

Japanese executives of bribing a Vietnamese government official, Huynh Ngoc Sy, with \$820,000 to secure contracts for road projects.⁶⁶⁷ As mentioned previously, this scandal prompted the Vietnamese government to develop a specific code of conduct for individuals involved in the bidding process for projects funded by Japan.⁶⁶⁸

ENFORCEMENT UNDER U.S. FOREIGN CORRUPT PRACTICES ACT

Since 2008, the SEC and DOJ have brought enforcement actions against several companies arising from bribes paid to Vietnamese government officials.⁶⁶⁹

In 2008, the SEC and DOJ brought an enforcement action against Siemens Aktiengesellschaft (“Siemens”), for using an elaborate payment scheme to bribe foreign officials in order to obtain business. The SEC alleged that Siemens bribed government officials in Vietnam, Venezuela, Israel, Mexico, Bangladesh, Argentina, China, and Russia. The bribes involved approximately \$1.4 billion worldwide.⁶⁷⁰ In relation to Vietnam, Siemens was charged with making two payments totaling \$383,000 to officials in the Vietnamese Ministry of Health in order to obtain a contract to provide medical devices worth \$6

⁶⁶⁷ *Vietnam in the News*, FCPA BLOG (Feb. 15, 2009, 7:58 PM), <http://www.fcpablog.com/blog/2009/2/16/vietnam-in-the-news.html>.

⁶⁶⁸ Hoa, *supra* note 30, at 281.

⁶⁶⁹ See *SEC v. Aon Corp.*, 1:11-cv-02256 (D.D.C. 2011); *SEC v. Daimler AG*, No. 10-cv-00473 (D.D.C. 2010); *SEC v. Siemens Aktengesellschaft*, No. 08-cv-02167 (D.D.C. 2008); *SEC v. Veraz Network, Inc.*, No. 10-cv-2849 (N.D. Cal. 2010); *A Life Sentence in Vietnam*, *supra* note 82; *Four Sentenced for Vietnam Graft*, FCPA BLOG (Sept. 16, 2010, 11:04 AM), <http://www.fcpablog.com/blog/2010/9/16/four-sentenced-for-vietnam-graft.html>; *Veraz Announces Expected Settlement*, FCPA BLOG (Mar. 12, 2010, 3:29 AM), <http://www.fcpablog.com/blog/2010/3/12/veraz-announces-expected-settlement.html>.

⁶⁷⁰ Press Release, Securities and Exchange Commission, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* <http://www.sec.gov/news/press/2008/2008-294.htm>.

million.⁶⁷¹ Siemens paid \$350 million in disgorgement to settle the case, a \$450 million dollar fine to the DOJ to settle criminal charges, and a \$569 million fine to the Office of the Prosecutor General in Munich.⁶⁷²

In 2008, the DOJ brought charges against Nexus Technologies Inc. (“Nexus”), a Delaware-based export company, three of its employees, and a former partner for allegedly bribing Vietnamese government officials from 1999 through 2008. According to the indictment, Nexus employees paid at least \$150,000 in bribes to Vietnamese officials so that Nexus could win contracts to supply Vietnamese government agencies, including the Ministries of Transport, Industry, and Public Safety.⁶⁷³ Bribes allegedly were listed as “commissions” in company records. In total, the defendants admitted to paying bribes in excess of \$250,000.⁶⁷⁴

In that case, the Court ordered Nexus to hand over all its assets and cease all business. Nam Nguyen, the president and owner, was sentenced to 16 months in prison with two years of supervised release following the prison term. An Nguyen, an employee, was sentenced to nine months in prison with three years of supervised release. Kim Nguyen, another employee, was sentenced to two years of probation and ordered to pay a \$20,000 fine. Joseph Lukas, a former partner, was sentenced to two years of probation and ordered to pay a \$1,000 fine.⁶⁷⁵

⁶⁷¹ *SEC v. Siemens Aktiengesellschaft*, 1:08-cv-02167, at 22-23 (D.D.C. 2008), available at <http://www.sec.gov/litigation/complaints/2008/comp20829.pdf>.

⁶⁷² Press Release, *supra* note 78.

⁶⁷³ Press Release, United States Department of Justice, Philadelphia Export Company and Employees Indicted for Paying Bribes to Foreign Officials (Sept. 5, 2008), available at <http://www.justice.gov/opa/pr/2008/September/08-crm-782.html>.

⁶⁷⁴ Press Release, United States Department of Justice, Nexus Technologies Inc. and Three Employees Plead Guilty to Paying Bribes to Vietnamese Officials (Mar. 16, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-270.html>.

⁶⁷⁵ Press Release, United States Department of Justice, Former Nexus Technologies Inc. Employees and Partner Sentenced for Roles in Foreign

In 2010, the SEC filed an enforcement action against Veraz Networks, Inc. (“Veraz”). The SEC charged that Veraz, a California-based telecommunications company, violated the FCPA by bribing officials in China and Vietnam. Specifically, in 2007 and 2008, Veraz allegedly bribed the CEO of a government-controlled telecommunications company in Vietnam in order to win business. Veraz, without admitting or denying the allegations in the complaint, consented to the entry of a final judgment permanently enjoining Veraz from future violations, and agreed to pay a penalty of \$300,000.⁶⁷⁶

Also in 2010, the SEC and DOJ brought charges against Daimler AG (“Daimler”) for having a decade-long worldwide policy of using bribes to win business. The SEC accused Daimler of making payments totaling over \$56 million, in more than 200 transactions occurring in 22 countries, including Vietnam. According to the charging documents, Daimler paid government officials in Vietnam and elsewhere to obtain vehicle contracts. Daimler allegedly used dozens of ledger accounts known as “internal third-party accounts” to maintain funds to bribe government officials. Daimler allegedly funded these accounts through sham pricing mechanisms such as price surcharges, price inclusions, or excessive commissions. Daimler also allegedly bribed government officials through fake discounts or rebates on sales contracts, which they would then pay to a foreign official instead of to the government entity party to the contract. Daimler agreed to pay \$91.4 million in disgorgement to settle the SEC’s charges and paid \$93.6 million in fines to the DOJ to settle criminal charges in a related proceeding.⁶⁷⁷

Bribery Scheme Involving Vietnamese Officials (Sept. 16, 2010), *available at* <http://www.justice.gov/opa/pr/2010/September/10-crm-1032.html>.

⁶⁷⁶ Litigation Release, Securities and Exchange Commission, SEC Charges California Telecommunications Company With FCPA Violations (June 29, 2010), *available at* <http://www.sec.gov/litigation/litreleases/2010/lr21581.htm>.

⁶⁷⁷ Press Release, Securities and Exchange Commission, SEC Charges Daimler AG With Global Bribery (April 1, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-51.htm>.

In 2011, the SEC and DOJ filed an enforcement action against Aon Corporation (“Aon”) for paying over \$3.6 million in bribes to officials in Vietnam and several other countries. The bribes allegedly were used to obtain or retain insurance business. The complaint charges that the bribes were in the form of training, travel, and entertainment provided to employees of foreign government-owned clients. Aon also allegedly made payments to third-party facilitators, who transferred the money to government officials. To settle the case, Aon paid \$14.5 million in disgorgement and prejudgment interest to the SEC, and a \$1.764 million criminal fine to the DOJ.

CONCLUSION

Over the past several years, the Vietnamese government has implemented significant new legislation cracking down on corruption. Recent scandals have further forced corruption into the limelight. Companies hoping to invest in Vietnam’s potential should establish their own anti-corruption programs, and ensure that they are enforced throughout the organization in order to avoid violating foreign anti-corruption laws. Due to its attractiveness as a location for investment, Vietnam bears watching to determine if the positive steps it has taken to reduce corruption are evidence of a committed anti-corruption policy, or simply window dressing by the CPV to preserve its power.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN KOREA

By: *Asheesh Goel, Nicholas M. Berg and Arefa Shakeel*

February 2, 2012

OVERVIEW

With strong intellectual property protection and a highly educated labor force, the Republic of Korea (“Korea”) enjoys a great deal of foreign investment. Korea has achieved record growth and global integration since the 1960s. Once a predominantly rural, agricultural nation and one of the poorest countries in Asia, Korea now boasts a high-tech industrialized economy in the trillion dollar club of world economies. Korea’s gross domestic product per person, at \$31,750, is higher than the European Union average of \$31,550.⁶⁷⁸ And Korea’s rapid success is not limited to its economy. Korea has transformed into a successful liberal democracy from a series of military dictatorships in the 1960s up to the 1980s.

Despite its prolific growth and progress, Korea continues to struggle with public corruption. According to experts, Korea’s corruption is rooted in its bureaucratic structure and a Confucian-based culture that emphasizes personal relationships.⁶⁷⁹ As one academic stated, “corruption in Korea is a kind of time-honored tradition without which social success would be almost impossible.”⁶⁸⁰ As Korea faces numerous corruption scandals and a global financial crisis, the government is cracking down and

⁶⁷⁸ *South Korea’s Economy: What Do You Do When You Reach the Top?*, ECONOMIST, Nov. 12, 2011, <http://www.economist.com/node/21538104>.

⁶⁷⁹ *Legacy of Corruption Still Exists in South Korea*, WASH. POST, July 7, 2011, <http://www.washingtontimes.com/news/2011/jul/7/legacy-of-corruption-still-exists-in-south-korea/?page=all>.

⁶⁸⁰ *Id.*

taking a strong stance against corruption. Most recently, Korea's President Lee Myung-bak stated "unless we eradicate [corruption], we will not be able to become a leading, advanced nation."⁶⁸¹

Implicit in President Lee Myung-bak's statement is a popular theory that there exists a "Korea discount," a systemic undervaluing of Korean equities by foreign investors due to a lack of transparency and suspicions of corruption.⁶⁸² While corruption is accepted by Korea's largest corporations as a standard way of doing business, the government has also historically been ambivalent towards the practice.⁶⁸³ Although Korean corruption scandals frequently come to light, most corrupt politicians and businessmen convicted of committing corruption-related crimes are able to obtain a stay of execution or a pardon without facing punishment.⁶⁸⁴ In 2008, President Lee pardoned 341,000 executives, politicians and bureaucrats convicted of corruption-related crimes including crimes such as bribery, fraud and embezzlement.⁶⁸⁵ Frequently, managers of large Korean corporations return to their positions after being convicted of corruption-related crimes.⁶⁸⁶ Additionally, Korean prosecutors and judges are often lenient on successful business leaders facing

⁶⁸¹ *S Korea President Says Corruption 'Rampant'*, FIN. TIMES, June 13, 2011, <http://www.ft.com/intl/cms/s/0/a571cf18-95cf-11e0-8f82-00144feab49a.html#axzz1kmapNo4q>.

⁶⁸² Hannah Kuchler, *South Korea President Says Corruption Threatens DM Status*, FIN. TIMES TILT, June 14, 2011, <http://tilt.ft.com/#!/posts/2011-06/22786/south-korea-president-says-corruption-threatens-transition-developed-economy>.

⁶⁸³ Christian Oliver, *South Korea to Pardon Businessmen*, FIN. TIMES, Aug. 13, 2010, available online at <http://www.ft.com/intl/cms/s/0/16d3a502-a6a0-11df-8d1e-00144feabdc0.html#axzz1kmapNo4q>.

⁶⁸⁴ Craig P. Ehrlich and Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 3 (2002).

⁶⁸⁵ *Global Corruption Report 2009*, Transparency International, at 297 (2009).

⁶⁸⁶ See, Christian Oliver and Song Jung-a in Seoul, *Raids on SK Open Old Wounds for S Korea*, FIN. TIMES, Nov. 14, 2011, <http://www.ft.com/intl/cms/s/0/1802894-0e94-11e1-b83c-00144feabdc0.Authorised=false.html#axzz1kxzUToHG>.

charges of corruption-related crimes because their role in the economy is considered to be too important.⁶⁸⁷

Each recent incoming executive administration in Korea has made the need for anti-corruption initiatives a key campaign issue.⁶⁸⁸ However, in almost every case, these administrations lost their credibility through a corruption scandal before the end of their terms.⁶⁸⁹ Indeed, just a few months after stating, "I myself simply cannot contain my anger over what is happening these days, it may be painful and difficult but we should now eradicate corruption and irregularities in a stern way,"⁶⁹⁰ President Lee Myung-bak faced a series of corruption allegations leveled against his cabinet and close family members.⁶⁹¹

Despite the failure of politicians to tackle Korea's widespread corruption beyond mere rhetoric, recent high-profile scandals have led Korean regulators to aggressively pursue indictments and convictions in corruption cases. In 2011, Korean prosecutors charged two individuals for violating Korea's Foreign Bribery Prevention Act by bribing officials of a Chinese government-owned airline, the first major enforcement action under the law in over twenty years since its enactment.⁶⁹²

⁶⁸⁷ Choe Sang-Hun, A Seoul Court Suspended a Prison Term for Hyundai Motor's Chairman, NY TIMES, Sept. 6, 2007, <http://www.nytimes.com/2007/09/06/business/worldbusiness/06iht-hyundai.4.7410042.html>.

⁶⁸⁸ Hae-yong Song, *Anti-Corruption Policy Implementation in Korea*, Fighting Corruption and Safeguarding Integrity, Global Forum V, at 2, (April 2007), available at http://www.nacf.org.za/global_forum5/CVs/009%20e%20Song.pdf.

⁶⁸⁹ *Id.*

⁶⁹⁰ *Korea Crippled by Chronic Corruption*, KOREA HERALD, Jul. 13, 2011, <http://news.asiaone.com/News/AsiaOne%2BNews/Crime/Story/A1Story20110713-288911.html>.

⁶⁹¹ Park Si-soo, *Lee's Last Year in Presidency Mired in Corruption Scandals*, KOREA TIMES, Jan. 24, 2010, http://www.koreatimes.co.kr/www/news/nation/2012/01/116_103348.html.

⁶⁹² *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Korea* at 9, OECD, October 2010, available at <http://www.oecd.org/dataoecd/59/31/48897608.pdf>.

Companies investing and conducting business in Korea must be careful and thoughtful in their approach given the current state of Korean anti-corruption law and enforcement. Although Korean companies consider gifts and benefits to government officials and business partners to be an expected and inevitable part of doing business, Korean regulators are now taking a sterner stance on such corrupt practices.

THE SIZE OF THE PROBLEM

Transparency International, the international non-governmental organization dedicated to eliminating corruption, ranks 178 countries and their governments' efforts to fight corruption on its Corruption Perceptions Index. For 2011, Korea was ranked 43rd on the list, right above Brunei and Dominica tied at 44th on the list.⁶⁹³ Comparatively, other Asian countries fared much better with Japan ranked 14th and Hong Kong ranked 12th.⁶⁹⁴ Numerous high-profile, multi-billion dollar public scandals have afflicted Korea over the last few years. Officials at all levels of government, including ministers, former presidents, and leaders of Korea's chaebol, its long-standing global conglomerates, have been found guilty of bribery, embezzlement, nepotism, and personally profiting from wasteful government spending.⁶⁹⁵ According to Transparency International, 54% of Koreans surveyed believed the Korean government's efforts to fight corruption as "ineffective" while 20% of those surveyed believed the efforts to be neither "ineffective" nor "effective."⁶⁹⁶ Transparency International also reported that Koreans see

⁶⁹³ See *Corruption Perceptions Index 2011 Results*, Transparency International, December 1, 2011, available at

<http://cpi.transparency.org/cpi2011/results/#CountryResults>.

⁶⁹⁴ *Id.*

⁶⁹⁵ See, e.g., *Korea Crippled by Chronic Corruption*, KOREA HERALD, Jul. 13, 2011,

<http://news.asiaone.com/News/AsiaOne%2BNews/Crime/Story/A1Story20110713-288911.html>.

⁶⁹⁶ *Global Corruption Barometer 2010*, Transparency International, Table 4, at 47.

political parties as the most corrupt institution in the country, followed closely by the police.⁶⁹⁷

Transparency International also surveys 3,000 business people to rank the top 28 exporting countries based on the likelihood their companies will pay bribes when doing business abroad. For 2011, Korea was ranked 13th on the list, directly above Brazil, which was ranked 14th.⁶⁹⁸ According to a survey conducted by the Korea Institute of Public Administration, 86.5% of 1,000 business people surveyed believed that there was a grave level of corruption among senior public officials, a ten-year high for the annual survey.⁶⁹⁹ Korea's Anti-Corruption & Civil Rights Commission reported that 1,436 individuals violated the public servants' ethics code in 2010, almost two times the 764 such violators in 2008.⁷⁰⁰

CURRENT ENFORCEMENT REGIME

Along the course of its rapid growth, Korea has recognized the need to develop strong regulatory reforms that promote transparency in order to be competitive as a player in the global market. Historically, corruption has been an inevitable reality of Korea's economy. Korea's 1997 liquidity crisis was largely attributed to pervasive corruption within the chaebol, Korea's family-owned large multi-national conglomerates.⁷⁰¹

⁶⁹⁷ *Id.*, Table 2, at 43.

⁶⁹⁸ See Bribe Payers Index Report 2011, Transparency International (2011), available at <http://bpi.transparency.org/results/>.

⁶⁹⁹ Editorial: *Public Sector Corruption*, KOREA TIMES, Jun. 16, 2011, <http://www.koreaherald.com/opinion/Detail.jsp?newsMLId=20110616000475>.

⁷⁰⁰ See, e.g., *Korea Crippled by Chronic Corruption*, KOREA HERALD, Jul. 13, 2011,

<http://news.asiaone.com/News/AsiaOne%2BNews/Crime/Story/A1Story20110713-288911.html>.

⁷⁰¹ Craig P. Ehrlich and Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 9 n. 11 (2002).

Taking advantage of a business culture that emphasizes personal relationships and regional ties, the chaebol capitalized on close ties to the government and political elite and universally implemented a system of corruption.⁷⁰² In the years leading up to 1997, the chaebol were over-saddled with debt, paying bribes and using fraudulent accounting practices. Eleven chaebol, accounting for a large part of Korea's economy, eventually collapsed under massive debts in the face of the Asian Financial Crisis.⁷⁰³ Following the 1997 crisis, the government recognized the need to fight corruption and undertook a number of reforms to do so. Over the past ten years, Korea has adopted a number of measures aimed at establishing an adequate anti-corruption framework.

Historically, bribery was outlawed in Korea under the Korean Criminal Code (the "Criminal Code" and the Aggravated Specific Crimes Act (the "Specific Crimes Act"). Under Korean law, it is unlawful to provide a public official with an economic benefit in connection with his or her official duties. The Criminal Code defines "public official" to include employees of government entities, agencies or ministries as well as selected employees of government-controlled corporations or entities in which the government has a stake. The corporations and entities considered government-owned or government-controlled for the purposes of official bribery are explicitly identified in either the presidential enforcement decree promulgated under the Specific Crimes Act or in a supplementary list published annually by the Ministry of Strategy and Finance. The term "economic benefit" under the Criminal Code is interpreted broadly to prohibit providing anything of value, including meals, gifts or entertainment. The Korean Criminal Code only prohibits bribery by natural persons and does not provide for corporate liability. Moreover, the offense is not limited to Korean citizens; foreigners can be subject to the bribery provisions under territoriality

⁷⁰² Tony Allison, *Corruption under the Spotlight*, ASIA TIMES, Dec. 13, 2000, <http://www.atimes.com/reports/BL13Ai01.html>.

⁷⁰³ Craig P. Ehrlich and Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 9 n. 11 (2002).

principles. Individuals convicted of bribery under the Criminal Code are punishable with a fine of up to approximately \$20,000 or a maximum of five years in prison.

Although neither the Criminal Code nor the Specific Crimes Act explicitly mention social customs, a “social courtesy exception” has been well established through court precedent. Korean culture mandates that business partners and contacts provide one another with gifts, often in cash, on special occasions. Such gifts are often exchanged at significant events such as weddings and funerals. Gift-giving is also expected on Korea’s two gift-giving holidays, the Lunar New Year, which usually occurs early in the calendar year and Chuseok, a holiday similar to Thanksgiving that lands in the fall. There is no clear line between when a gift is a customary gesture and when a gift is actually a bribe. Under the Public Officials’ Code of Conduct, the head of each agency determines the maximum of meals, gifts or entertainment that can be provided to its employees. However, courts may still determine that a gift was a bribe if there is evidence that it was an attempt to influence a public official.

In 1999, Korea enacted the Act on Combating Bribery of Foreign Officials in International Business Transactions (the “Foreign Bribery Prevention Act” or “FBPA”). The FBPA makes it a crime for any Korean national to intentionally engage in the bribery of a foreign public official in order to obtain an improper advantage. The FBPA also applies to foreign citizens under general territoriality rules. In contrast to the laws addressing the bribery of domestic officials, the FBPA created criminal liability for corporations as well as individuals and can lead to fines proportionate to the profits, proceeds or other gains that can be linked to the illicit payments. However, the law was rarely used for over twenty years. In 2011, Korean prosecutors charged two individuals for violating Korea’s Foreign Bribery Prevention Act

by bribing officials of a Chinese government-owned airline, the first major enforcement action under the law.⁷⁰⁴

In June 2001, Korea passed the Anti-Corruption Act (“ACA”). The purpose of the ACA broadly states that it is intended “to create the clean climate of civil service and society by preventing and regulating the acts of corruption effectively.”⁷⁰⁵ Given that the Criminal Code had long criminalized bribery, the ACA does not explicitly criminalize public corruption. However, the ACA does provide a code of conduct for public officials. The ACA also requires government officials to make disclosures on assets and gifts from foreign entities and also provides whistleblower protections. However, the ACA does not provide for an independent prosecutor or independent investigative unit to pursue claims of corruption. Critics of the ACA believe that without such a provision, the ACA provides little substantial change to Korea’s anti-corruption landscape.⁷⁰⁶ Additionally, the ACA does not prevent the judiciary from handing down lenient sentences nor does it prevent the President from pardoning convicted individuals.⁷⁰⁷

The ACA provided for the creation of the Korea Independent Commission Against Corruption (“KICAC”), an independent commission charged with developing anti-corruption policy, receiving and handling public complaints, and providing educational programs. The KICAC reports directly to the President. The KICAC was Korea’s first comprehensive, localized government entity formed to fight against corruption. However, similar to the ACA, the KICAC did not have the ability

⁷⁰⁴ *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Korea* at 9, OECD, October 2010, at 9, available at <http://www.oecd.org/dataoecd/59/31/48897608.pdf>.

⁷⁰⁵ Anti-Corruption Act, Act No. 6494, Jul 24, 2001, available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan019104.pdf>.

⁷⁰⁶ Craig P. Ehrlich and Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 3 n. 11 (2002).

⁷⁰⁷ *Id.* at 40.

to independently investigate allegations of corruption. Due to its weak enforcement powers, the KICAC was combined with the Ombudsman of Korea and the Administrative Appeals Commission in 2008 to create the new Anti-Corruption and Civil Rights Commission (“ACRC”). The purpose of the change was to provide a more efficient mechanism for fighting corruption. The ACRC states that one of three main functions is to “build a clean society by preventing and deterring corruption in the public sector.”⁷⁰⁸

In 2005, the KICAC signed an alliance with representatives of public and private companies, political groups, and private citizens across all industries called the Korean Pact on Anti-Corruption & Transparency (“K-PACT”). The K-PACT represents a voluntary commitment across different members of Korean society to reduce corruption in Korea. Accordingly, a K-PACT Council was created with the intention of increasing transparency and raising awareness of corruption violations. The K-PACT led to the creation of a K-PACT Business Council, a group of Korea’s major business organizations and a K-Pact for Public Corporations. The K-PACT remains a voluntary social commitment and is not legally binding. Nonetheless, the K-PACT movement has been very successful, with 16 different K-PACTS being signed since the alliance began in 2007. However, in 2009, Transparency International reported that despite K-PACT’s success and “impressive developments as an active movement following its launch,” the ACRC withdrew its funding to the K-PACT in 2008, citing “the need for the ‘establishment of an efficient paradigm for government-civilian cooperation corresponding to the administrative philosophy of the new administration.’”⁷⁰⁹ Following the ACRC’s decision, the public sector withdrew from the K-PACT. As a result, the future of the K-PACT is unclear.

⁷⁰⁸ Anti-Corruption & Civil Rights Commission, www.acrc.go.kr/eng_index.html.

⁷⁰⁹ *Global Corruption Report 2009*, Transparency International, at 296 (2009).

RECENT MAJOR SCANDALS

A recent series of large-scale corruption scandals have shown that despite government initiative to fight corruption, it remains a pervasive practice in every corner of Korea's economy. Between the revelation of Samsung's huge corruption scandal in 2008 and a multi-billion dollar fraud investigation into Korea's regional savings banks, Korean prosecutors are becoming more aggressive in combating corruption.

Accounting for almost 20% of Korea's total exports and 15% of its GDP, Samsung is Korea's largest chaebol.⁷¹⁰ Samsung has 59 affiliate companies and employs 250,000 employees around the world.⁷¹¹ As of 2006, the World Bank ranked Samsung the 13th largest company in the world.⁷¹² Samsung is the world's biggest IT producer,⁷¹³ with higher sales revenue in LCD and LED displays and memory chips than any other company in the world.⁷¹⁴

Yet despite its exceedingly high level of influence in the Korean economy, Samsung was the focus of Korea's biggest corruption scandal in recent history. In 2007, Kim Yong-chul, Samsung's top legal counsel, claimed that high-level Samsung executives maintained a bribery fund of up to \$9 billion dollars

⁷¹⁰ Taejin Jung, Ron Graeff, and Woomi Shim, *Good for Samsung is Good for Korea: Image Restoration Strategies Used by Samsung After a Whistle-Blowing Corruption Scandal*, *The Open Communication Journal*, at 1 (2011).

⁷¹¹ *Id.*

⁷¹² *Id.*

⁷¹³ Song Jung-a and Christian Oliver, *Samsung Beats HP to Pole Position*, *FIN. TIMES*, Jan. 29, 2010, <http://www.ft.com/intl/cms/s/2/c48d477a-0c3b-11df-8b81-00144feabdc0.html#axzz1kxzUToHG>.

⁷¹⁴ Kim Yoo-chul, *Samsung Races Ahead in Tech Industry*, *KOREA TIMES*, Jan. 30, 2012, http://www.koreatimes.co.kr/www/news/tech/tech_view.asp?newsIdx=103714&categoryCode=129.

and hid it in illegal slush accounts.⁷¹⁵ Kim Yong-chul further alleged that Samsung bribed a number of prosecutors and other government officials in an effort to conceal its ongoing fraud.⁷¹⁶ In response to such an extreme accusation and the resulting media frenzy, the government appointed a special counsel to investigate the allegations. The investigation's ultimate findings were unclear. The prosecutors did not find evidence of bribery but found that Chairman Lee Kun Hee evaded over \$100 million in taxes and entered into improper agreements with Samsung's affiliates in order to preserve his son's position as his successor at Samsung.⁷¹⁷ Lee Kun Hee resigned from Samsung, was fined and received a three-year suspended prison sentence. In addition to Lee Kun Hee, nine other executives were charged with similar offenses.

In 2009, Lee Kun Hun was pardoned by President Lee Myung-bak.⁷¹⁸ At the time, President Lee Myung-bak defended the decision to pardon Lee Kun Hee by stating that Korea needed his help to get support for its 2018 Winter Olympics bid. A few months later, Lee Kun Hee returned to Samsung as Chairman once again. The other Samsung executives implicated in the scandal were also pardoned later that same year. In the summer of 2011, Lee Kun Hee announced that Samsung found "irregularities" in a subsidiary and was actively addressing

⁷¹⁵ Choe Sang-hun, *Book on Samsung Divides Korea*, NY TIMES, Apr. 25, 2010, <http://www.nytimes.com/2010/04/26/technology/26samsung.html?pagewanted=all>.

⁷¹⁶ Choe Sang-hun, *Corruption Scandal Spreads at Samsung*, NY TIMES, Nov. 7, 2010, <http://www.nytimes.com/2007/11/07/business/worldbusiness/06cnd-samsung.html>.

⁷¹⁷ Yoolim Lee, *Samsung Bribery Probe Points to Pattern of Graft in South Korea*, BLOOMBERG, Apr. 17, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&refer=home&sid=aH3aDwXXnvqc>.

⁷¹⁸ Jun Yang, *Samsung's Lee Pardoned as Old Guard Return to Lead Korea's Biggest Group*, BLOOMBERG, Aug. 13, 2010, <http://www.bloomberg.com/news/2010-08-13/samsung-s-lee-pardoned-as-old-guard-return-to-lead-korea-s-biggest-group.html>.

corruption concerns.⁷¹⁹ Observing that Samsung's "clean corporate culture" had been tarnished, Lee Kun Hun released a statement warning against committing fraud: "Global companies have been forced out of markets due to internal corruption and complacency. Samsung can be no exception. All group members must realize the magnitude of problems that could arise, should they commit fraud." Lee's comments do little to comfort Korean citizens and foreign investors. Critics, baffled at the idea of a criminally-convicted manager returning to a top position, responded to his call by saying that Lee has no credibility to be a whistleblower and should not be involved in Samsung or any other Korean company.⁷²⁰

Corruption in Korea extends beyond the practices and traditions of the chaebol. In early 2011, prosecutors began investigating Korea's regional banks as part of an inquiry into the Financial Services Commission's failure to properly supervise the industry.⁷²¹ Over the course of the investigation, prosecutors raided and investigated seven banks. By November that same year, over 100 individuals were indicted for illegal lending, bribery, embezzlement, and fraud.⁷²² Prosecutors filed charges against executives and controlling shareholders of one of the banks, Busan Savings Bank, for creating \$6 billion in illegal loans and committing accounting fraud and bribery to cover up the loans.⁷²³ In September 2011, the head of Jeil 2 Savings Bank

⁷¹⁹ *Samsung Chief Concerned about Corruption in the Company*, BBC, June 9, 2011, <http://www.bbc.co.uk/news/business-13708927>.

⁷²⁰ Song Jung-a, *The Pot Calling the Kettle Black? Samsung Chief Calls Time on Corruption*, FIN. TIMES, June 9, 2011, <http://blogs.ft.com/beyond-brics/2011/06/09/the-pot-calling-the-kettle-black-samsung-chief-calls-time-on-corruption/#axzz1kyHRPfyE>.

⁷²¹ Seonjin Cha, *Korea Prosecutors Indict More Than 100 on Savings Bank Probe*, BLOOMBERG, Nov. 2, 2011, <http://www.businessweek.com/news/2011-11-02/korea-prosecutors-indict-more-than-100-on-savings-bank-probe.html>.

⁷²² *Id.*

⁷²³ Kelly Olsen, *Legacy of Corruption Still Exists in South Korea*, WASH. TIMES, July 7, 2011, <http://www.washingtontimes.com/news/2011/jul/7/legacy-of-corruption-still-exists-in-south-korea/?page=all>.

committed suicide, jumping out a window as prosecutors raided the bank.⁷²⁴ Two additional executives implicated in the scandal have since committed suicide. In November 2011, the executive director of Tomato 2 Savings Bank was found dead after being questioned by prosecutors about illegal lending practices.⁷²⁵ Kim Hak-heon, chairman of Ace Mutual Savings Bank, was found dead in January 2012 after receiving a summons from prosecutors to appear for questioning in relation to an illegal \$600 million loan.⁷²⁶ Government officials implicated in the bank scandal include a senior aide to President Lee Myung-bak and a member of Korea's Board of Audit and Inspection.⁷²⁷ The government officials are accused of accepting cash, and even a diamond worth nearly \$30,000, in exchange for turning a blind eye to the banks' illegal practices.⁷²⁸

The problem of corruption in Korea is not limited to any particular industry or area of government. In addition to large-scale scandals involving millions of dollars in bribes and high-level government officials, corruption affects the everyday life of average Koreans citizens. The Korea Professional Football League ("K-League") is the only professional football association in Korea. Comprising of 16 clubs, the K-League is one of the most prestigious sports associations in Korea, frequently attracting foreign players from Europe and South America. In 2011, 46

⁷²⁴ Choe Sang Hun, *South Korean Bank Chief Apparently Kills Himself*, *Police Say*, NY TIMES, Sept. 23, 2011,

<http://www.nytimes.com/2011/09/24/world/asia/south-korean-bank-chief-apparently-kills-himself-police-say.html>.

⁷²⁵ *South Korean Bank Executive in Apparent Suicide*, ASIA ONE, Nov. 17, 2011, <http://www.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20111117-311207.html>.

⁷²⁶ *Summoned Head of Suspended Savings Bank Commits Suicide*, KOREA TIMES, Jan. 12, 2012,

http://www.koreatimes.co.kr/www/news/nation/2012/01/117_102722.html.

⁷²⁷ Jeremy Laurence, *Graft Scandal Signals Lame Duck S.Korea Presidency*, REUTERS, May 30, 2011,

<http://af.reuters.com/article/worldNews/idAFTRE74T0J220110530>.

⁷²⁸ *Id.*

players were arrested as part of a match-fixing scandal in which prosecutors alleged fifteen football matches were fixed.⁷²⁹ Under the widespread scandal, numerous players accepted bribes from criminal gangs and ex-players who placed bets on fixed matches.⁷³⁰ Some clubs had up to ten players accepting bribes in exchange for agreeing to fix matches. Two players implicated in the scandal committed suicide. Yoon Ki-won, a goalkeeper, was found dead in his car in what was deemed to be suicide.⁷³¹ Another player, Chun Jung-kwan, hung himself in a hotel room and left a note, "I feel ashamed to be a part of the match-rigging."⁷³²

Corruption has even hit the Korean pop music industry. Korean pop represents a \$300 million market in Korea, the second largest pop music market in Asia.⁷³³ In 2011, a number of individuals on staff at Korea's radio stations and television networks were arrested for allegedly accepting bribes from Korean pop stars and their managers.⁷³⁴ Korean pop stars were found to have bribed their way on to the charts as employees at radio and television stations accepted payments in exchange for manipulating playlists and data to place songs on the charts that had never even been broadcast.

⁷²⁹ *Corruption in South Korea: Rotten Shot*, ECONOMIST, Jul. 21, 2011, <http://www.economist.com/node/18989193>.

⁷³⁰ *Id.*

⁷³¹ Alastair Gale, *K-League Match-Fixing Scandal Continues*, WSJ, June 3, 2011, <http://blogs.wsj.com/korearealtime/2011/06/03/south-korea%E2%80%99s-soccer-match-fixing-scandal-continues-unabated/>.

⁷³² *Corruption in South Korea: Rotten Shot*, ECONOMIST, Jul. 21, 2011, <http://www.economist.com/node/18989193>.

⁷³³ Donald Macintyre, *Flying Too high?*, TIME MAGAZINE, July 28, 2002, <http://www.time.com/time/world/article/0,8599,2056115,00.html>.

⁷³⁴ *Corruption in Korean Pop Music: K-ola*, ECONOMIST, Jul. 26, 2011, <http://www.economist.com/node/21524586>.

ENFORCEMENT UNDER FOREIGN ANTI-CORRUPTION LAWS

Companies operating in Korea may wind up subject to liability under the anti-corruption laws of multiple jurisdictions. Laws such as the Foreign Corrupt Practices Act (“FCPA”) and the U.K. Bribery Act broadly allow prosecutors to assert jurisdiction over foreign companies and individuals. In the United States, the trend for prosecutors to aggressively target foreign businesses is evident in recent settlements: nine out of ten of the largest FCPA fines have been paid by foreign companies. In each of these cases, U.S. officials worked closely with local prosecutors in other countries. Over the past several years, there have been a number of FCPA enforcement actions involving conduct in Korea.

In April 2006, Tyco International Ltd. (“Tyco”) entered into a settlement agreement with the United States Securities and Exchange Commission (“SEC”), agreeing to pay \$50 million in fines for violations of a number of securities laws, including FCPA violations in Korea and Brazil.⁷³⁵ The FCPA violations in Korea involved a fire protection services company, Dong Bang Industrial Co. Ltd. (“Dong Bang”) acquired by Tyco in 1999.⁷³⁶ The SEC alleged that from 1999 to 2002, Dong Bang made payments to government officials in exchange for government contracts and concealed the fraud by adding non-existent employees to its payroll. The SEC further alleged that Tyco was aware of the payments through the course of due diligence in its acquisition of Dong Bang. In its complaint, the SEC noted that Tyco did not have a “uniform, company-wide FCPA compliance program” and that Tyco failed to adequately instruct Dong Bang to comply with the FCPA, “despite Tyco’s knowledge and awareness that illicit payments to government officials were a common practice in . . .

⁷³⁵ SEC, Press Release: SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud, Apr. 17, 2006, available at <http://www.sec.gov/litigation/litreleases/2006/lr19657.htm>.

⁷³⁶ Complaint at 19, *SEC v. Tyco International Ltd.*, 06 CV 2942 (S.D.N.Y. filed April 17, 2006).

South Korean construction and contracting industries.”⁷³⁷ Tyco’s settlement is an important reminder that as companies expand into high-risk countries like Korea, both organically and through acquisitions, it is important to maintain a robust global anti-corruption compliance program.

In 2011, Diageo plc (“Diageo”) agreed to pay more than \$16 million in fines for FCPA violations in a settlement with the SEC.⁷³⁸ Diageo is a London-based producer of alcoholic beverages, such as Johnnie Walker and Guinness beer, and is listed on the New York Stock Exchange. According to the SEC, in addition to making payments in India and Thailand, Diageo made payments to Korean customs officials, paid travel and entertainment expenses for government officials, and gave hundreds of gifts to military officials. In addition to making a sizeable payment to settle FCPA charges in the U.S., Diageo lost its Korean import license and two Diageo Korea employees were convicted of bribery in Korea.⁷³⁹ Because the conduct occurred before the U.K. Bribery Act went into effect, Diageo did not face liability under the U.K. statute. However, it is important to note that if the conduct occurred today, Diageo could face additional liability under the U.K. Bribery Act.

CONCLUSION

Although Korea took a strong stand against rampant corruption within its economy by enacting a full set of reforms, the Korean anti-corruption movement is still in progress. The culture of nepotism and gift-giving, rooted in the chaebol,

⁷³⁷ *Id.* at 20.

⁷³⁸ SEC, *Press Release: SEC Charges Liquor Giant Diageo with FCPA Violations*, July 27, 2011, available at <http://www.sec.gov/news/press/2011/2011-158.htm>.

⁷³⁹ Samuel Rubinfeld, *Diageo Nears SEC Settlement Over Bribery Probe*, June 10, 2011, <http://blogs.wsj.com/corruption-currents/2011/06/10/diageo-nears-sec-settlement-over-bribery-probe/>.

impedes any progress Korea has made on paper by enacting reforms. The Samsung scandal provides a perfect example of the conflict between tradition and the push for change. The investigation into the bribery allegations against Samsung led to a great deal of public protest. However, the public protest was deeply divided between those who believed that corruption within Korea's biggest international corporation should be punished severely and those who believed that Samsung is Korea's greatest strength and should be left alone to prosper.⁷⁴⁰ When Samsung's whistleblower, Kim Yong-chul, wrote a book detailing his allegations of corruption, Korean newspapers refused to carry advertisements for the book for fear of losing Samsung as an advertiser.⁷⁴¹ According to the book's publisher, the newspaper's refusal to promote the book led to an increase in sales.⁷⁴²

Korean government and business leaders alike recognize that in order for Korea to continue to prosper in the global economy, it must eradicate its culture of corruption. With an anti-corruption framework already in place, the focus in Korea's anti-corruption movement is now on increased enforcement. Indeed, over the past few years, prosecutors have been increasingly aggressive in their pursuit of anti-corruption violations. As Korea enters an election year in the midst of numerous corruption scandals, the need for strict enforcement of existing anti-corruption laws will attract a great deal of attention. As a result, we expect that Korean companies and foreign companies doing business in Korea will increasingly develop robust compliance

⁷⁴⁰ Yoolim Lee, *Samsung Bribery Probe Points to Pattern of Graft in South Korea*, BLOOMBERG, April 17, 2008,

<http://www.bloomberg.com/apps/news?pid=newsarchive&refer=home&sid=aH3aDwXXnvqc>.

⁷⁴¹ Choe Sang-hun, *Book on Samsung Divides Korea*, NY TIMES, Apr. 25, 2010, <http://www.nytimes.com/2010/04/26/technology/26samsung.html?pagewanted=all>.

⁷⁴² *Id.*

policies, with employee training, and diligent monitoring to protect themselves and their employees.

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