
Volume 53
Issue 1 *Volume 53, Issue 1 (Fall 2015)*
*Understanding and Taming Public and Private
Corruption in the 21st Century*
Guest Editors: Ron Atkey, Margaret E. Beare &
Cynthia Williams

Article 10

9-10-2015

Corruption and Development: The Need for International Investigations with a Multijurisdictional Approach Involving Multilateral Development Banks and National Authorities

Juan G. Ronderos

Michelle Ratpan

Andrea Osorio Rincon

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Criminal Law Commons](#), and the [Law and Economics Commons](#)
Supplement



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Ronderos, Juan G.; Ratpan, Michelle; and Rincon, Andrea Osorio. "Corruption and Development: The Need for International Investigations with a Multijurisdictional Approach Involving Multilateral Development Banks and National Authorities." *Osgoode Hall Law Journal* 53.1 (2015) : 334-368.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss1/10>

This Supplement is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Corruption and Development: The Need for International Investigations with a Multijurisdictional Approach Involving Multilateral Development Banks and National Authorities

Abstract

We argue that while Multilateral Development Banks (“MDBs”) and national governments have mechanisms to fight corruption, the objectives and outcomes of these enforcement mechanisms diverge. MDBs are interested in the causes and effects of corruption from a development perspective and, as such, tend to sanction small and medium enterprises and individuals, while national governments are focused on a more punitive outcome, targeting larger multinational corporations. This article examines the enforcement objectives articulated in national legislation, namely the US Foreign and Corrupt Practices Act and its Canadian counterpart, the Corruption of Foreign Public Officials Act, as well as several Canadian cases, on the one hand, and the tools and outcomes of MDBs’ sanctions systems on the other. We conclude that national enforcement efforts and MDBs’ sanctions outcomes intersect in their fight against international corruption in that their results are complementary; the former punishing large-scale offenders while the latter ensuring the integrity of development projects.

Keywords

United States. Foreign Corrupt Practices Act of 1977; Canada. Corruption of Foreign Public Officials Act; Corruption—Law and legislation; Development banks; Canada; United States

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Special Issue Supplement: Perspectives from Practice

Corruption and Development: The Need for International Investigations with a Multijurisdictional Approach Involving Multilateral Development Banks and National Authorities[†]

JUAN G. RONDEROS*, MICHELLE RATPAN**,
ANDREA OSORIO RINCON***

We argue that while Multilateral Development Banks (“MDBs”) and national governments have mechanisms to fight corruption, the objectives and outcomes of these enforcement mechanisms diverge. MDBs are interested in the causes and effects of corruption from a

† An earlier version of this article was presented at the Second OHLJ Symposium, Understanding and Taming Public and Private Corruption in the 21st Century, 6-7 November 2014, Osgoode Hall Law School, Toronto.

* Sanctions Officer for the Inter-American Development Bank Group; former Regional Team Leader for the LAC Investigative Team at the World Bank’s Integrity Vice Presidency; former Assistant Director of the Nathanson Center for the Study of Organized Crime and Corruption, Osgoode Hall Law School.

** Litigation Specialist with the Integrity Vice Presidency of the World Bank; former Counsel for the Attorney General of Canada, Department of Justice Canada.

*** Consultant to the Office of Institutional Integrity of the Inter-American Development Bank Group; former adviser to the Sanctions Officer for the Inter-American Development Bank. The findings, interpretations, and conclusions expressed herein are those of the authors and do not necessarily reflect the views of the Inter-American Development Bank Group, the World Bank, the Inter-American Development Bank Group, any of the Board of Directors of those organizations, or the governments they represent. The authors would like to acknowledge the kind contribution of Julia Wojtowicz who assisted in writing this article.

development perspective and, as such, tend to sanction small and medium enterprises and individuals, while national governments are focused on a more punitive outcome, targeting larger multinational corporations. This article examines the enforcement objectives articulated in national legislation, namely the US *Foreign and Corrupt Practices Act* and its Canadian counterpart, the *Corruption of Foreign Public Officials Act*, as well as several Canadian cases, on the one hand, and the tools and outcomes of MDBs' sanctions systems on the other. We conclude that national enforcement efforts and MDBs' sanctions outcomes intersect in their fight against international corruption in that their results are complementary; the former punishing large-scale offenders while the latter ensuring the integrity of development projects.

Nous avançons que, même si les banques multilatérales de développement (« BMD ») et les gouvernements nationaux disposent tous deux de mécanismes pour combattre la corruption, les objectifs et les résultats de ces mécanismes coercitifs divergent. Les BMD s'intéressent aux causes et aux effets de la corruption du point de vue du développement et, de ce fait, ont tendance à sanctionner les PME et les particuliers, alors que les gouvernements nationaux privilégient des résultats plus punitifs et ciblent les grandes entreprises multinationales. Cet article examine les objectifs coercitifs mis de l'avant par les lois nationales, plus particulièrement la *Foreign and Corrupt Practices Act* des États-Unis et son pendant canadien, la *Loi sur la corruption d'agents publics étrangers*, de même que plusieurs cas canadiens, d'une part, et les outils du système de sanctions des BMD et leurs résultats d'autre part. Il conclut que les efforts coercitifs nationaux et le résultat des sanctions des BMD se rencontrent dans leur combat de la corruption à l'échelle mondiale car leurs résultats sont complémentaires : les premiers cherchent à punir les coupables d'importance alors que les secondes tentent d'assurer l'intégrité des projets de développement.

I.	THE FCPA	340
A.	Origins and Development of the FCPA	342
II.	THE CANADIAN CFPOA	350
III.	CORRUPTION IN DEVELOPMENT PROJECTS: THE INTERSECTION OF THE INVESTIGATIONS AND SANCTIONS IMPOSED BY MDBS AND THE ACTIONS TAKEN BY NATIONAL AUTHORITIES ..	357
A.	MDBs' Main Concern in Relation to Corruption in Development Projects and Tools to Address It	359
B.	Areas of Divergence between National Enforcement Efforts and MDBs' Fight Against International Corruption: SMEs and Large Multinationals	363
IV.	CONCLUSION	367

SINCE THE ENACTMENT OF THE US *Foreign Corrupt Practices Act* (“FCPA”) in 1977, the world has witnessed the creation of a number of international conventions, agreements, and national laws aimed at tackling international corruption. The Organization of American States, the United Nations, the Organisation for Economic Co-operation and Development (“OECD”),

Multilateral Development Banks (“MDBs”),¹ and an ever-growing number of nations have adopted tools to address international corruption from diverse angles. International treaties and agreements have aimed at enticing nations to adopt anti-corruption legislation to forbid the bribing of foreign officials by their nationals, while MDBs and national jurisdictions have created specific tools to target international corruption. Although there seems to be unity of purpose among these treaties, agreements, organizations, and nations, there are some significant differences. National jurisdictions are interested in punishing corporations and individuals for bribing foreign officials in an effort to protect commercial national interest in the international market. MDBs, on the other hand, are more interested in confronting the pervasive effect of corruption in development projects in the countries they serve. These two objectives may coincide in some instances, such as in the international bribery case of Canadian construction company SNC-Lavalin, where the World Bank was interested in the actions of this company in Bangladesh while the Royal Canadian Mounted Police (“RCMP”) looked into the company’s dealings in Montreal. But in the majority of cases, MDBs are more interested in the causes and effects of corruption in development projects in member countries² than in targeting big

-
1. For the purpose of this article, MDBs refer to those MDBs that are signatories of the 2010 *Agreement on Mutual Enforcement of Debarment Decisions or Cross Debarment Agreement*. These MDBs are the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the World Bank, and the Inter-American Development Bank (“IDB”) Group.
 2. Member countries are the member states that own each of the MDBs. In the case of the IDB, it is owned by forty-eight member states of which twenty-six are borrowing members in Latin America and the Caribbean. The IDB was founded in 1959 as a partnership between nineteen Latin American countries and the United States. Over the next several decades, the IDB expanded its membership, initially through the Western Hemisphere. Trinidad and Tobago became a member in 1967, to be soon joined by Barbados (1969), Jamaica (1969), Canada (1972), Guyana (1976), the Bahamas (1977), and Suriname (1980). The twenty-two non-regional or non-Western Hemisphere member countries joined between 1976 and 1986. Belize became a member in 1992 and Croatia and Slovenia joined as successor states of Yugoslavia in 1993. The Republic of Korea became a member country in 2005 and the People’s Republic of China became a member country in 2009. See Inter-American Development Bank, “How Are We Organized,” online: <www.iadb.org/en/about-us/member-countries,6291.html>.

multinational corporations, leading to the sanctioning of smaller national or regional corporations and individuals.³

The OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (“*OECD Convention*”) and similar international instruments aim at ensuring that all jurisdictions adopt legislation comparable to the *FCPA*, outlawing foreign bribery across the board. As a consequence of the enacted legislation, national anti-corruption enforcement systems are directed at punishing offenders criminally or imposing fines and civil sanctions on those entities that have violated national laws related to foreign bribery. In the case of the United States, one of the main concerns for US authorities in relation to bribery of foreign officials has been to “level the playing field” so that US corporations can compete fairly abroad with other corporations.⁴ The United States considers that international corruption takes away fair and competitive business, inhibiting American corporations from doing business abroad. The United States has decided to fight corruption to protect the ability of US companies to compete on the global scale.⁵

MDBs have had a different thrust. They are concerned with the pervasive effects of corruption in development in the countries and sectors they serve. More specifically, MDBs are entrusted to ensure that the funds they have received and administer are used only for the purpose for which they were intended: Development. The creation of anti-corruption mechanisms is a tangible way by which MDBs fulfill this fiduciary duty of ensuring proper use of funds.⁶ But most importantly, it is one of the ways in which MDBs can ensure that communities are properly served by projects sponsored by MDBs, making sure that funds are not squandered or diverted. The key difference between MDBs’ anti-corruption systems and those of national authorities is their objective. The purpose of MDBs’ anti-corruption sanctioning system is to ensure that the funds are not being

-
3. “Regional corporations” are referred hereinafter as Small and Medium Enterprises (“SMEs”). That MDBs are less interested in targeting big multinational corporations is not to say that MDBs avoid investigating and pursuing leads related to alleged misconduct by large multinational corporations. The size of a corporation is not one of the major parameters in deciding what is investigated and/or who is sanctioned.
 4. Roger P Alford, “A Broken Windows Theory of International Corruption” (2012) 73:5 Ohio St LJ 1253 at 1272-73.
 5. Leslie R Caldwell, Address (Remarks delivered at Duke University School of Law, Durham, NC, 23 October 2014), online: <www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law>.
 6. See *Agreement Establishing the Inter-American Development Bank*, 8 April 1959, art III, s 1. See also *The International Bank for Reconstruction and Development Articles of Agreement*, 16 February 1989, art III, s 1.

misused and to avoid doing business with entities or individuals who have been found to have committed prohibited practices, including corruption.⁷ In other words, the objective is to safeguard the developmental objectives of projects, taking into account the communities that are being served and excluding those actors who have demonstrated that they do not adhere to the ethical standards expected in a development project.

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

To that end, Part I of this article will explore the origins of the *FCPA* in the late 1970s and how the statute was later transformed in the late 1980s. This section will present a brief description of the history of the enforcement of the *FCPA*. This will provide an understanding of the current purpose and objectives of the US foreign anti-corruption system.

7. A prohibited or sanctionable practice as defined under the Uniform Framework for Preventing and Combating Fraud and Corruption (the “IFI Framework”) includes: (1) corrupt practice: “the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party”; (2) fraudulent practice: “any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation”; (3) collusive practice: “an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party” (e.g., leaking of bid information, rigged specifications); and (4) coercive practice: “impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.” See African Development Bank Group et al, “International Financial Institutions Anti-Corruption Task Force” (September 2006), online: <siteresources.worldbank.org/INTDOII/Resources/FinalIFITaskForceFramework&Gdlines.pdf>.

Part II will concentrate on the development of the *CFPOA* and its history of enforcement. Cases discussed will include *Niko Resources*,⁸ *Griffiths*,⁹ and *Karigar*,¹⁰ each of which illustrates the implementation of the *CFPOA* as a punishment and deterrence tool. This section will also examine two case studies strongly connected to the international development context. The first is Acres International, a Canadian civil engineering firm found guilty by the Lesotho courts for corrupt acts but never prosecuted by Canadian authorities. The second is SNC-Lavalin, which highlights an evolution towards greater enforcement of the *CFPOA* and increased collaboration between Canadian authorities and the World Bank.

Part III will explain how MDBs got involved in the fight against corruption after 1996 and how they created and perfected an enforcement mechanism in the first decade of the twenty-first century. Specifically, this section will address the rationale behind MDBs' involvement in the fight against corruption and why this fight is international in nature. It will describe the different tools used by the Inter-American Development Bank ("IDB") and the World Bank to address corruption in development projects. In order to illustrate the effects of corruption in development projects and demonstrate the importance of the involvement of MDBs in this field, two cases will be analyzed that will highlight the importance of pursuing small and medium enterprises ("SMEs").¹¹ These cases will also illustrate MDBs' ultimate objective in fighting corruption.

In closing, this article will address the question of where national enforcement efforts and MDBs intersect in their fight against international corruption. It will also present the areas in which the objectives of the actions taken by national jurisdictions and MDBs differ. Canadian and US authorities have concentrated their enforcement efforts against sizable corporations with international reach, while MDBs have concentrated their efforts on SMEs, which in the majority

8. *R v Niko Resources Ltd* (2011), 101 WCB (2d) 118, [2012] AWLD 4536 (Alta QB) [*Niko*].

9. *R v Griffiths Energy International Inc* (2013), [2013] AJ No 412 (QL) (Alta QB) [*Griffiths*].

10. *R v Karigar*, 2014 ONSC 3093, 113 WCB (2d) 373 [*Karigar*].

11. The World Bank defines SMEs by the number of its employees. However, the World Bank does not present a distinct number. It varies from 5 to 99 employees or even up to 250 employees. The IDB defines small firms as those with 5 to 49 employees and medium-sized enterprises as those with 50 to 499 employees. See Independent Evaluation Group, "Evaluation of the World Bank Group's Targeted Support for Small and Medium Enterprises," (7 January 2013), online: <ieg.worldbankgroup.org/Data/reports/ap_evaluationof_smes.pdf>. See also Arturo Galindo & Alejandro Micco, "Bank Credit to Small and Medium-Sized Enterprises: The Role of Creditor Protection" (2005) Inter-American Development Bank Working Paper No 527, online: <www.iadb.org/res/publications/pubfiles/pubWP-527.pdf>.

of cases are local or regional. This article submits that although the outcomes are significantly different at the national level and at the MDB level, they are complementary. However, measuring success in both instances relates to their different origins and objectives, and, hence, drawing comparisons in enforcement efforts could be misleading.

I. THE FCPA

In the United States, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) share the authority to enforce the *FCPA*.¹² The DOJ’s jurisdiction covers criminal and civil enforcement of the *FCPA*’s anti-bribery provisions in relation to domestic concerns, which include (1) US citizens, nationals, and residents and (2) US businesses and their officers, director, employees, agents, or stockholders acting on the domestic concern’s behalf.¹³ The SEC is responsible for the civil enforcement of the *FCPA* against issuers and their officers, directors, employees, agents, or stockholders acting on the issuer’s behalf.¹⁴ Even though the DOJ and the SEC have the authority to enforce the *FCPA*, they work in close collaboration with many other federal agencies,¹⁵ including the US Federal Bureau of Investigation (“FBI”).¹⁶ Collaboration between these agencies has been a key to the successful prosecution of *FCPA* violations.

Although the *FCPA* was enacted in 1977 and amended in 1988 and 1998, significant enforcement only began in the late 2000s.¹⁷ In the first few years of the *FCPA*’s existence, the SEC tried only a few cases.¹⁸ Between 1978 and 2000, the SEC and the DOJ conducted less than three *FCPA* cases per year, on

12. US, Criminal Division of the US Department of Justice & Enforcement Division of the US Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 2-4, online: <www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [*FCPA Resource Guide*].

13. Dieter Juedes, “Taming the FCPA Overreach Through an Adequate Procedures Defense” (2013) 4:1 *Wm & Mary Bus L Rev* 37 at 40.

14. D Michael Crites, “The Foreign Corrupt Practices Act at Thirty-Five: A Practitioner’s Guide” (2012) 73:5 *Ohio St LJ* 1049 at 1058.

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

16. *FCPA Resource Guide*, *supra* note 12 at 4.

17. Mike Koehler, “Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era” (2011) 43:1 *U Tol L Rev* 99 at 108 [Koehler, “Big, Bold, and Bizarre”].

18. Emily Willborn, “Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors,” Note (2013) 22:2 *Minn J Intl L* 422 at 428.

average.¹⁹ In contrast, in 2007, the DOJ had about sixty cases under investigation or prosecution.²⁰ In 2009, the DOJ secured convictions of fifty individuals for *FCPA* violations.²¹ In 2010, seventy-four investigations were initiated and at least eight *FCPA*-related settlements were reached.²² In recent years, the DOJ and the SEC have demonstrated even more interest in investigating *FCPA* violations.²³ Since 2013, the DOJ has brought *FCPA* cases against twenty-one corporations, charged or pled out twenty-five individuals, and obtained penalties of approximately eight hundred million US dollars (“USD”).²⁴ This change is the result of multiple factors such as the increase of global business transactions, the recent global financial crisis, and the multiple US corporate scandals.²⁵

Although many corporations and individuals have been prosecuted as a result of SEC and DOJ’s joint investigations, most of these prosecutions have resulted in settlement agreements. Sanctions imposed by the SEC and the DOJ made US corporations aware of the monetary and reputational consequences of these investigations.²⁶ Therefore, corporations prefer to settle or plead guilty once they are faced with possible *FCPA* charges instead of enduring the prosecution process.²⁷ In the United States, more than 88 per cent of cases related to criminal foreign bribery have been resolved by settlement, whereas only about 12 per cent have proceeded to trial.²⁸ Recently, Siemens, Ralph Lauren Corporation, Tyco, Hewlett Packard, and ALCOA have paid millions of dollars to the US

19. *Ibid.*

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

21. Yin Wilczek, “SEC to Unveil FCPA Actions Against Individuals by Year’s End,” *Bloomberg BNA* (10 October 2014), online: <www.bna.com/sec-unveil-fcpa-n17179896476>.

22. Juedes, *supra* note 13 at 41.

23. Priya Cheria Huskins, “FCPA Prosecutions: Liability Trend to Watch” (2008) 60:5 *Stan L Rev* 1447 at 1449.

24. Miller & Chevalier Chartered, “FCPA Winter Review 2015” (22 January 2015), online: <www.millerchevalier.com/Publications/MillerChevalierPublications?find=139809>; Wilczek, *supra* note 21.

25. Juedes, *supra* note 13 at 41.

26. *Ibid* at 48.

27. Heidi L Hansberry, “In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster,” *Comment*, (2012) 102:1 *J Crim L & Criminology* 195 at 197.

28. Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington: World Bank, 2014) at 34, online: [Stolen Asset Recovery Initiative <star.worldbank.org/star/sites/star/files/9781464800863.pdf>](http://StolenAssetRecoveryInitiative.star.worldbank.org/star/sites/star/files/9781464800863.pdf).

government in settlement agreements.²⁹ Other settlements reached between 1999 and 2012 resulted in the imposition of 6.9 billion USD of monetary sanctions against corporations.³⁰

However, the funds resulting from these settlements seldom return to the nations that were affected by the bribes. The *United Nations Convention against Corruption* (“*UNCAC*”) establishes as one of its fundamental principles that assets should be returned to their countries.³¹ However, it is interesting to note that only 3.3 per cent of the 6.9 billion USD in sanctions has either been ordered to be returned or has effectively been returned to those countries where officials were bribed.³² On the contrary, the monetary sanctions imposed have stayed within the jurisdiction of those countries imposing the sanctions or where the corporations are headquartered, such as the United States. Nearly six billion USD in monetary sanctions have been imposed by bribe-originating countries.³³ The fact that these funds have remained in the United States can be traced to the history, goals, and objectives of the *FCPA*.

A. ORIGINS AND DEVELOPMENT OF THE *FCPA*

The *FCPA* was enacted in 1977 to address bribes paid to foreign government officials by American corporations or individuals.³⁴ In many cases, these payments were made to foreign government officials to obtain or retain business.³⁵ Prior to the adoption of the *FCPA*, bribing foreign officials was not expressly prohibited by US legislation.³⁶ Although there were some laws to control improper activities by Americans abroad, such as the *Wire Fraud Statute* and the *Mail Fraud Act*,

29. U.S. Securities and Exchange Commission, “SEC Enforcement Actions: FCPA Cases,” online: <www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> [“FCPA Cases”].

30. Caroline Bradley, “Recovering the Proceeds of Crime” (2014) at 9, online: <blenderlaw.umlaw.net/wp-content/uploads/2013/10/intfinmats2014kleptocracy.pdf>.

31. *United Nations Convention against Corruption*, 31 October 2003, art 51 (entered into force 14 December 2005). Article 51 provides that “the return of assets pursuant to this chapter is a fundamental principle of this Convention and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”

32. Oduor et al, *supra* note 28 at 67.

33. *Ibid* at 97-98.

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

35. US, Department of Justice, “Foreign Corrupt Practices Act: An Overview,” online: <www.justice.gov/criminal/fraud/fcpa>.

36. Scott J Lochner, “The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977” (1981) 13:3 *NYU J Intl L & Pol* 645 at 647.

none addressed the payment of bribes to foreign officials.³⁷ Due to the lack of legislation to address this issue, payments made by many American corporations to foreign officials were public knowledge.³⁸ Evidence suggests that US government agencies like the Department of State (“DOS”) and the Department of Defense (“DOD”) were aware of these bribes and in some cases even provided information regarding whom and how much to pay.³⁹

The *FCPA* criminalized foreign bribery and created special accounting provisions to address the corresponding accounting irregularities generated by the payment of bribes (*i.e.*, the resulting inaccuracy of corporate books and records).⁴⁰ Two main provisions are the driving force of the *FCPA*: (1) an enforcement mechanism that criminalizes the payment of bribes to foreign government officials, enforced by the DOJ⁴¹ and (2) an accounting requirement to properly reflect transactions in order to help prevent corruption,⁴² designed as a civil enforcement tool entrusted to the SEC.⁴³ The first provision establishes the criminal enforcement mechanism and prohibits US corporations to give anything of value to foreign government officials for the purpose of obtaining or retaining business, with a broad understanding of jurisdiction.⁴⁴ The second provision, civil in nature and known as the books-and-records provision, requires US issuers⁴⁵ to establish and maintain internal controls, including accounting

37. *Ibid* at 648.

38. *Ibid* at 13; Tanya Rolo, “Retaking the Helm Against International Bribery: The Facilitating Payments Exception and Sovereign Dominance” (2012) 35:6 *Fordham Intl LJ* 1884 at 1890-91.

39. Raymond J Dowd, “Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act” (1990) 14:4 *Fordham Intl LJ* 946 at 948; Lochner, *supra* note 36 at 648.

40. Rafael A Porrata-Doria Jr, “Amending the Foreign Corrupt Practices Act of 1977: Repeating the Mistakes of the Past?” (1985) 38:1 *Rutgers L Rev* 29 at 30.

41. 15 USC §§ 78dd-1-78dd-3 (2012).

42. 15 USC §§ 78m-78m-1 (2012).

43. Francesca M Pisano, “The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations” (2013) 62:3 *Emory LJ* 607 at 613.

44. Gregory Kaler Smith et al, “Foreign Corrupt Practices Act” (1991) 28:3 *Am Crim L Rev* 541 at 542. The *FCPA* has a broad understanding of jurisdiction and a sense of the extraterritorial application of this law. For more on this issue, see Philip M Nichols, “Regulating Transnational Bribery in Times of Globalization and Fragmentation” (1999) 24:1 *Yale J Intl L* 257 at 290-91. See also Steven R Salbu, “The Foreign Corrupt Practices Act as a Threat to Global Harmony” (1999) 20:3 *Mich J Intl L* 419.

45. The SEC considers a corporation an issuer if (1) it is listed on a national securities exchange in the United States or (2) its stock trades in the over-the-counter market in the United States and it is required to file SEC reports. See *FCPA Resource Guide*, *supra* note 12 at 11.

standards (maintain detailed records, books, and accounts that reflect the real transactions of the corporation), to avoid violations.⁴⁶

The United States was the first nation to pass legislation that prohibits bribery of foreign officials and sets clear rules regarding proper keeping of financial books and records in relation to this type of activity.⁴⁷ The US Congress had a number of reasons to pass the *FCPA*, among which was to create an “alliance-building” instrument between the United States and developing countries.⁴⁸ During 1976, prior to the enactment of the *FCPA*, the press exposed multiple corruption scandals such as Watergate and Bananagate. These exposés led to congressional hearings on the activities of US corporations abroad and investigations by different agencies.⁴⁹ The apparent widespread surge of corporate foreign bribery and its exposure by Congress, the SEC, and DOJ investigations became part of the motivation for Congress to enact the *FCPA*.⁵⁰ Additionally, foreign policy considerations, such as multiple bribes paid by American corporations operating abroad that could have inadvertently linked bribe-payers to the US government and the battle between capitalism and communism, were key factors in the discussion that led Congress to embark on this effort.⁵¹

The Watergate scandal was perhaps one of the main drivers for the enactment of the *FCPA*.⁵² President Nixon’s re-election campaign was subject

46. Pisano, *supra* note 43 at 613.

47. Eric C Chaffee, “From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade” (2014) 65:3 Mercer L Rev 701 at 714; Kristin Isaacson, “Minimizing the Menace of the Foreign Corrupt Practices Act” (2014) 2014:2 U Ill L Rev 597 at 599.

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

49. Rolo, *supra* note 38 at 1892.

50. Preston Tull Eldridge, “Without Bounds: Navigating Corporate Compliance Through Enforcement of the Foreign Corrupt Practices Act” (2013) 66:3 Ark L Rev 732 at 736.

51. See *e.g.* “Mr. Tanaka and Lockheed,” Editorial, *The Washington Post* (21 August 1976) A10 [“Tanaka”]. The editorial discusses the Japanese bribery investigation of former Prime Minister Kakuei Tanaka and the payments received by the Lockheed Corporation to persuade a Japanese airline to buy airplanes from the American company. It warns of the perceived link between Lockheed as a bribe payer and the fact that at the time it was the largest contractor for the DOD. See also Mike Koehler, “The Story of the Foreign Corrupt Practices Act” (2012) 73:5 Ohio St LJ 929 at 935 [Koehler, “Story”]; Michael P Tremoglie, “FCPA: Protect investors at home or America’s image abroad?,” *Legal Newsline* (17 August 2012), online: <legalnewsline.com/in-the-spotlight/237030-fcpa-protect-investors-at-home-or-americas-image-abroad>.

52. Koehler, “Story,” *supra* note 51 at 960-63.

to an investigation for alleged illegal contributions by corporate executives.⁵³ As a result, the SEC and the Attorney General's Office conducted subsequent inquiries into illegal payments made by US corporations.⁵⁴ The US Attorney General appointed a special prosecutor (the Watergate Special Prosecutor) to investigate the legality of the payments made by US corporations to foreign government officials.⁵⁵ The Watergate Special Prosecutor and Congress directed their investigation to determine the legality of these questionable payments.⁵⁶

Following the Watergate scandal, the SEC also opened a series of investigations. The SEC evaluated the payments from a different perspective than that of Congress and the Watergate Special Prosecutor. The SEC investigation concentrated on the fact that the corporations did not disclose the questionable payments to their investors. The SEC tried to identify the mechanisms used by these corporations to document the illegal payments in their books and records.⁵⁷ The investigations by the SEC and the Watergate Special Prosecutors revealed that hundreds of US corporations had spent millions of dollars bribing foreign government officials.⁵⁸ The inquiries exposed the use of secret slush funds to make the illegal payments.⁵⁹ In addition, these corporations had falsified their corporate financial records, disguising or concealing the source and illegal use of these funds.⁶⁰

The Bananagate scandal was an additional consideration for the creation of the *FCPA*.⁶¹ In 1975, the President and CEO of the United Brands Company, a major importer of bananas to the United States, jumped from a New York City building window and fell to his death.⁶² The suicide investigation revealed that the CEO authorized payments to the President of Honduras to reduce taxes

53. Michael B Bixby, "The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010" (2010) 12:1 San Diego Intl LJ 89 at 93.

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

55. Mr. Elliot Richardson acted as General Attorney of the United States during the Watergate scandal. Once he became aware of the scandal, Mr. Richardson appointed Archibald Cox as the Special Prosecutor for the Watergate scandal.

56. Koehler, "Story," *supra* note 51 at 962-64.

57. Bixby, *supra* note 53 at 93.

58. Public Broadcasting Service, "Spotlight: History of the FCPA" (13 February 2009), online: <www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html>.

59. Koehler, "Story," *supra* note 51 at 932.

60. *Ibid.*

61. Isaacson, *supra* note 47 at 602.

62. *Ibid.*

on banana exports.⁶³ This scandal exposed, on the one hand, a practice used by US companies to further their business agenda by paying bribes to foreign officials and, on the other hand, the lack of legislation to prevent or punish this type of conduct.⁶⁴

The investigations of the Bananagate scandal led to the discovery of questionable activities by the Lockheed Corporation.⁶⁵ In 1976, after the post-Watergate and Bananagate scandal investigations led by the SEC, the media reported that US government contractors, including the Lockheed Corporation, had bribed several government officials in Japan, Italy, the Republic of Korea, and the Netherlands.⁶⁶ Lockheed officials admitted paying bribes to Japanese executives and government officials to promote Lockheed aircraft sales in that country.⁶⁷ The corporation argued that bribe payments were customary in these countries.⁶⁸ As a consequence of the Lockheed case, the former Japanese Prime Minister, other Japanese politicians, and two former Italian defense ministers were arrested.⁶⁹ This led to public outcry in the United States, including a stern editorial in the *Washington Post* in 1976 requesting concrete action by US authorities.⁷⁰

The US Congress also took foreign policy into consideration for the enactment of the *FCPA*. Given that at the time the Cold War was in full force, US officials feared that if examples of foreign bribery by US corporations—such as

63. Lena E Smith, “Is Strict Liability the Answer in the Battle against Foreign Corporate Bribery?” (2014) 79:4 *Brook L Rev* 1801 at 1801.

64. Isaacson, *supra* note 47 at 603.

65. Smith, *supra* note 63.

66. Rolo, *supra* note 38; Lockheed Corporation, the largest US defence contractor, received at the time a 250 million USD federal loan to keep the company out of bankruptcy. Therefore, other countries perceived a close relation between the US government and Lockheed Corporation. The public perception was that this money could have been used to bribe foreign officials. The US government was very sensitive regarding the foreign perception of the bribes. See Isaacson, *supra* note 47 at 603-604; Spalding, *supra* note 48.

67. Isaacson, *supra* note 47 at 603.

68. *Ibid.*

69. Josh Goodman, “The Anti-Corruption and Antitrust Connection” (April 2013) at 1-2, online: <www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_goodman.authcheckdam.pdf>. Based partly on these developments, the SEC established the Voluntary Disclose Program for those corporations willing to self-report their wrongdoing to avoid punishment. As a result of this program, SEC was able to collect information regarding questionable payments of more than four hundred corporations for three hundred million USD. See Rolo, *supra* note 38 at 1890-92. See also Alvaro Cuervo-Cazurra, “The effectiveness of laws against bribery abroad” (2008) 39:4 *J Intl Bus Stud* 634 at 635-36.

70. “Tanaka,” *supra* note 51.

defense contractors—were made public, it could reaffirm communist assertions that the United States was made of greedy, socially destructive capitalists.⁷¹ The US Congress gave special attention to bribery payments such as the ones made in Italy and the political consequences that they could bring.⁷² The worry at the time was that these bribes could threaten the credibility of the United States as an advocate of democracy and jeopardize US alliances around the world.⁷³ The United States decided that it was necessary to create legislation to address ethical business practices related to bribery of foreign officials in order to build and maintain economic and political alliances with developing countries and represent its democratic values around the world.⁷⁴ Congress resolved to foster worldwide consumer confidence in US corporations by promoting morally sound business practices by US corporations in the United States and abroad.⁷⁵ Senator Frank Church and Representative Robert Nix⁷⁶ held multiple hearings to create an appropriate solution for this issue.⁷⁷ Discussions focused on two options: (1) establish a system of US reporting and disclosure to discourage questionable payments and advocate for proper record keeping and accounting or (2) criminalize bribes paid to foreign officials.⁷⁸ The former implied that bribing a foreign government official was legal as long as it was disclosed to US authorities. This option was not considered to be the best approach.⁷⁹ The US Congress opted for the second alternative, creating a deterrence factor by criminalizing bribery with directly enforceable measures.

Up to this point in time, it was clear that the *FCPA* owed its existence to press exposés, the perceived wrongness of US companies' actions abroad, and the harmful foreign policy implications of this perception. However, it was US businesses that helped transform the rhetoric of the *raison d'être* of the *FCPA* to the widely used term "levelling the playing field," influencing changes to the law. In fact, the *FCPA* was modified twice after its inception, first by the *Omnibus Trade and Competitiveness Act of 1988*⁸⁰ ("*OTCA*") and then in 1998 by

71. Spalding, *supra* note 48.

72. Isaacson, *supra* note 47 at 604.

73. Pisano, *supra* note 43 at 613. See also Spalding, *supra* note 48.

74. Koehler, "Story," *supra* note 51 at 951.

75. Isaacson, *supra* note 47 at 604.

76. Chaffee, *supra* note 47 at 710-12.

77. Lochner, *supra* note 36 at 649.

78. *Ibid.* See also Cuervo-Cazurra, *supra* note 69 at 636.

79. Lochner, *supra* note 36 at 649.

80. Steven R Salbu, "Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act" (1997) 54:1 Wash & Lee L Rev 229 at 243 [Salbu, "Critical Analysis"].

the *International Anti-Bribery Act*.⁸¹ The amendments introduced by the *OTCA* extended the *FCPA* to cover issuers of securities, domestic concerns, and the officers, director, employees, agents, or stockholders of either issuers or domestic concerns. These modifications responded to concerns raised by American corporations after the enactment of the *FCPA*.⁸² One of these concerns was that the existence of the *FCPA* compromised American corporations' competitiveness vis-à-vis foreign businesses.⁸³ Corporate America argued that foreign companies were not subjected to the same guidelines and limits while operating abroad.⁸⁴ Unregulated foreign competitors paying bribes were even allowed to claim these payments as tax deductions.⁸⁵ American companies complained that they risked losing important sales, transactions, and investment opportunities due to the lax stance of some foreign jurisdictions in relation to foreign bribery.⁸⁶ For example, until 1997 in some European countries such as Germany, businesses were allowed to deduct bribes from their taxes as business expenses. Bribe payments were deductible as "useful expenditures" for the company and commonly accepted as a gentlemen's agreement.⁸⁷

This led the US Congress to entice foreign allies to adopt similar legislations.⁸⁸ Specifically, the *OTCA* established the following:

It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning

81. *International Anti-Bribery and Fair Competition Act of 1998*, Pub L No 105-366, 112 Stat 3302 (1998).

82. Koehler, "Story," *supra* note 51 at 975. *of 1998*

83. Bixby, *supra* note 53 at 98.

84. *Ibid.*

85. Salbu, "Critical Analysis," *supra* note 80 at 243. See also Bixby, *supra* note 53 at 100, n 41.

86. Koehler, Koehler, "Big, Bold, and Bizarre," *supra* note 17 at 108.

87. "The Siemens scandal: Bavarian baksheesh," *The Economist* (17 December 2008), online: <www.economist.com/node/12800474>; Interview of Josef Wieland by Dietmar H Lamparter [nd] in "Verpfeifen kommt zuletzt," *Zeit Online* (23 November 2006), online: <www.zeit.de/2006/48/Siemens-Interview>.

88. Other amendments to the *FCPA* in that first reform included decriminalizing the failure to comply with *FCPA*'s accounting requirements unless it was done "knowingly" in order to avoid *FCPA* accounting requirements for issuers. One of the most interesting modifications introduced by the *OTCA* was the decriminalization of facilitation payments. Under the new legislation, it was no longer considered a criminal act to make payments to foreign government officials who perform "ministerial or clerical" duties. See Bixby, *supra* note 53 at 98; Judith L Roberts, "Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact?" (1989) 1989:2 BYUL Rev 491 at 496-97. See also Salbu, "Critical Analysis," *supra* note 80 at 246.

acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.⁸⁹

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

- i. the progress of the negotiations referred to in paragraph 1 [above],
- ii. those steps which the executive branch and the Congress should consider taking in the event that these negotiations do not successfully eliminate any competitive disadvantage of United States businesses that results when persons from other countries commit the acts described in paragraph (1) [above]; and
- iii. possible actions that could be taken to promote cooperation by other countries in international efforts to prevent bribery of foreign officials, candidates, or parties in third countries.⁹⁰

The *OTCA* made it clear that the *FCPA* may have created a potential trade disadvantage and therefore the “playing field” for American corporations had to be levelled. This was one of the precursors that led to the *OECD Convention*, as the US government was mandated by Congress to pursue it.

The second modification to the *FCPA* occurred in 1998, as a consequence of the creation of the *OECD Convention*.⁹¹ In order to align the *FCPA* to the *OECD Convention*, the scope of the *FCPA* was expanded to include some foreign nationals.⁹² In addition, the reform added an alternative basis for jurisdiction based on nationality⁹³ (*FCPA* anti-bribery provisions have extraterritorial jurisdiction),⁹⁴ empowered the DOJ to subpoena witnesses and documents in

89. *Omnibus Trade and Competitiveness Act of 1988*, Pub L No 100-418, 102 Stat 1107 at 1424.

90. *Ibid* at 1424-25.

91. Bixby, *supra* note 53 at 100; Phil Underwood, “The OECD Bribery Convention as Cover for US FCPA Enforcement Abroad” (28 March 2014), *The Global Anticorruption Blog* (blog), online: <globalanticorruptionblog.com/2014/03/28/the-oecd-bribery-convention-as-cover-for-us-fcpa-enforcement-abroad>.

92. Bixby, *supra* note 53 at 100.

93. Mike Koehler, “FCPA 101” *FCPA Professor* (blog), online: <www.fcpaprofessor.com/fcpa-101>. The nationality principle states “that the FCPA’s anti-bribery provisions will apply even if the conduct at issue has no U.S. nexus,” which means “that the FCPA can be violated even if an improper payment scheme is devised and executed entirely outside of the U.S.”

94. *FCPA Resource Guide*, *supra* note 12.

certain civil investigations,⁹⁵ and expanded the reach of US authorities outside of US territory.⁹⁶

II. THE CANADIAN CFPOA

As outlined in Part I, above, the *FCPA* was enacted in response to national corruption scandals and allegations that US companies were paying bribes abroad. These scandals and allegations precipitated a change in social attitudes to favour the punishment and deterrence of domestic and foreign corruption. They also prompted great concern in the US Congress about the foreign policy implications of US corporations bribing foreign public officials. After the *FCPA*'s enactment, US corporations advocated for the enactment of similar legislation around the globe in order to "level the playing field," a sentiment that was captured by the US Congress in the *OTCA*, which resulted in the adoption of the *OECD Convention*. Subsequently, Canada's signature of the 1997 *OECD Convention* led to the enactment of the Canadian *CFPOA* in 1999, twenty-two years after the *FCPA* and eleven years after the *OTCA*. However, unlike the *FCPA* enforcement in the United States, Canadian authorities have pursued only a handful of cases under the purview of the *CFPOA*. As a reference point, the United States has initiated more than 270 civil or criminal enforcement proceedings since 2007 under the *FCPA*, resulting in more than 6.9 billion Canadian dollars ("CAD") in fines.⁹⁷ While Canada's enforcement of the *CFPOA* may be in its infancy, it has not gone unnoticed. It appears that as a result of Canada's enforcement actions in the past few years, Transparency International has moved Canada from the category of "little enforcement" to that of "moderate enforcement," which includes countries that have initiated at least one major case and active investigation.

Notwithstanding this limited enforcement, Canadian anti-corruption efforts related to Canadian companies have been recently at the center of anti-corruption advocates' attention, particularly in light of corruption scandals surrounding SNC Lavalin, which was debarred by the World Bank for bribery in relation to the Padma Multipurpose Bridge Project in Bangladesh and which is the subject of ongoing Canadian investigations in relation to its dealings in

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

96. Bixby, *supra* note 53 at 100.

97. Bradley, *supra* note 30; "FCPA Cases," *supra* note 29.

Montreal, Libya, and Tunisia.⁹⁸ Furthermore, unlike its American counterpart, the enforcement of the *CFPOA* has been subject to much criticism.⁹⁹ The critiques have focused primarily on the reticence of Canadian authorities to enforce the existing legislation.

The *CFPOA* provides for Canadian jurisdiction over the bribery of foreign public officials only when a listed offence has a real and substantial connection to the territory of Canada. In other words, the offence must occur in whole or in larger part in Canada.¹⁰⁰ A close look at the *CFPOA*, in particular, section 3(1), which defines the offence of bribing a public official, shows that the *CFPOA*'s purpose is specifically the punishment of individuals who bribe or attempt to bribe a foreign public official. Violation of the *CFPOA* is an extraditable offence and is punishable, in the case of an individual, by imprisonment for up to fourteen years with the possibility of fines imposed in addition to imprisonment. This means that there is no availability of a conditional sentence or discharge for the offence of bribing a foreign public official. The standard of proof for the offence is "beyond a reasonable doubt," since the offence is criminal.

Prior to the enactment of the *CFPOA*, there were several missed opportunities to pursue corruption cases in Canada. One glaring example was the case of Acres International ("Acres"). Acres, a civil engineering firm, together with Lahmeyer International GmbH ("Lahmeyer") (Germany), Impregilo SpA (Italy), and Spie Batignolles (France), was found guilty by the High Court of Lesotho for acts of corruption that occurred in the 1990s in relation to the Lesotho Highlands Project.¹⁰¹ The court convicted Acres for bribing the chief executive in charge of the eight billion USD Lesotho Highlands Water Project through an intermediary.

98. As part of a Negotiated Resolution Agreement between the World Bank and SNC-Lavalin, the World Bank debarred SNC-Lavalin and over one hundred of its affiliates for a period of ten years. Under this agreement, SNC-Lavalin and its affiliates committed to cooperate with the World Bank's Integrity Vice-President and continue to improve their internal compliance program. SNC-Lavalin was investigated for misconduct involving a conspiracy to pay bribes and misrepresentations when bidding for World Bank-financed projects, in violation of the World Bank's procurement guidelines. World Bank, Press Release, "World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years" (17 April 2013), online: <www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years> ["World Bank Debars SNC-Lavalin"].

99. See e.g. Transparency International, *Exporting Corruption? Country enforcement of the OECD anti-bribery convention, progress report 2012* (Berlin: Transparency International, 2012) at 16-17, online: <http://www.transparency.org/whatwedo/publication/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_convention>.

100. *Corruption of Foreign Public Officials Act*, SC 1998, c 34, s 3(1).

101. *R v Du Plooy*, [2003] LSHC 122 (Lesotho), Monopathi J.

Masupha Ephraim Sole, the executive who had accepted bribes from Acres and several other major international infrastructure companies, was sentenced to fifteen years in prison on evidence obtained through a Swiss court order to disclose Sole's secret bank accounts. The conviction was upheld by Lesotho's Court of Appeal in 2003. The Lesotho courts efficiently took action and ordered the parties to pay substantial fines.¹⁰²

In 2004, the World Bank followed suit and promptly debarred Acres for three years.¹⁰³ The World Bank declared Acres ineligible to receive any new World Bank-financed contracts for a period of three years. Following the Acres trial, the World Bank also found Lahmeyer guilty of bribery. The World Bank's Sanctions Board¹⁰⁴ found that Lahmeyer had used the same intermediary as Acres.¹⁰⁵ However, despite actions taken by Lesotho and the World Bank, no prosecution was initiated in Canada. While it appears that Canadian law enforcement authorities opened an investigation into the activities of Acres, the civil engineering firm was never charged or prosecuted.¹⁰⁶

Since the enactment of the *CFPOA*, Canadian law enforcement and judicial authorities have pursued several notable cases. What is noteworthy about this trend is that, much like Canada's adoption of the *CFPOA*, its move towards greater national enforcement of this Act appears to be the result of external pressure from both the OECD and Transparency International. In March 2011, the OECD issued a report on Canada's implementation of the *OECD Convention*.¹⁰⁷ The report, which came twelve years after the enactment of the *CFPOA*, was quite scathing. Among other observations, the OECD Committee found that Canada had only completed one prosecution since the enactment of

102. StAR – Stolen Asset Recovery Initiative, “Lesotho Highlands Water Project / Jacobus Michiel Du Plooy,” online: <star.worldbank.org/corruption-cases/node/20073>.

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

104. At the time it was called “Sanctions Committee.”

105. Vinay Bhargava, “Curing the Cancer of Corruption” in Vinay Bhargava, ed, *Global Issues for Global Citizens: An Introduction to Key Development Challenges* (Washington: World Bank, 2006) 341 at 345.

106. Fritz Heimann & Gillian Dell, *Progress Report 2009: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (23 June 2009) at 22, online: Transparency International <www.financialtransparency.org/wp-content/uploads/2015/04/3rdEditionOECDProgressReport2009-2.pdf>.

107. OECD Working Group on Bribery, *Phase Three Report on Implementing the OECD Anti-Bribery Convention in Canada* (March 2011), online: <www.oecd.org/canada/Canadaphase3reportEN.pdf>.

the *CFPOA*. The Committee noted that there were twenty open investigations and that credit for opening these cases should be largely given to the RCMP International Anti-Corruption Unit, which had been established in 2008.¹⁰⁸ In 2012, Transparency International issued its eighth annual progress report on country implementation of the *OECD Convention* and once again criticized Canada for lack of enforcement.¹⁰⁹ It is interesting to note that after these reports, in particular the OECD Report, the number of foreign bribery investigations in Canada increased from twenty-three in 2010 to thirty-five in 2013. What is equally important is the change in Canadian judicial attitudes towards the punishment of foreign corrupt acts.

Prior to the case of SNC-Lavalin, three cases marked a shift in Canada's implementation of the *CFPOA*. The three cases that have received serious media attention in Canada after the enactment of the *CFPOA* and the OECD Report are *Niko Resources*,¹¹⁰ *Griffiths*,¹¹¹ and *Karigar*.¹¹² These cases show a distinct trend towards a culture of national investigations, prosecutions, and punishment of companies that engage in corrupt practices with foreign public officials.

In brief, in the summer of 2011, Niko Resources ("Niko"), an Alberta-based oil and gas company, pled guilty to bribing a foreign senior public official in Bangladesh, contrary to the *CFPOA*. Niko's sentence was a 9.5 million CAD fine and a three-year probation order, pending implementation of a compliance program. Niko had paid the Energy Minister of Bangladesh 190 thousand CAD to cover the cost of a vehicle for his personal use and trips to Calgary and New York following an explosion at one of Niko's natural gas fields in Bangladesh. At the time of the payment, the Energy Minister had been in the process of determining how much compensation was owed to Bangladeshi villagers for water contamination and other environmental problems caused by the explosion. The Canadian media hailed the decision as a "wake up call" to Canadian companies

108. *Ibid* at 5.

109. Fritz Heimann & Gillian Dell, *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012* (2012), online: <issuu.com/transparencyinternational/docs/2012_exportingcorruption_oecdprogress_en?e=2496456/2042485>.

110. *Supra* note 8.

111. *Supra* note 9.

112. *Supra* note 10.

after Canada had been criticized for lax enforcement of the *CFPOA*.¹¹³ Media sources also called the case “the most significant development in Canada’s efforts to fight foreign bribery since the 1999 implementation of the *CFPOA*.”¹¹⁴

On 22 January 2013, another Alberta oil and gas company was in the spotlight, when the Alberta Court of Queen’s Bench ordered Griffiths Energy International (“Griffiths”) to pay a 10.35 million CAD penalty after finding it guilty of bribing a diplomat’s wife with two million CAD in order to secure lucrative opportunities in Africa.¹¹⁵ Both *Griffiths* and *Niko Resources* involved large companies whose primary business was oil and gas development. This is not surprising given that Canada’s number one overseas industry over the past five years has been oil and gas extraction.¹¹⁶

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

The third and most recent Canadian conviction was that of Nazir Karigar in August 2013. Ontario’s Superior Court of Justice convicted Karigar for conspiring to bribe Indian government officials with 450 thousand USD following a failed attempt to secure an airline security contract valued at 100

113. Daniel L Kiselbach & Richard Truman, “Canada’s *Corruption of Foreign Public Officials Act*: Niko Resources Ltd. Receives a \$9.5 Million Fine for Bribery” (October 2011), *Miller Thompson Newsletter* (blog), online: <millerthomson.com/en/publications/newsletters/criminal-law-regulation-enforcement/2011-archives/october-2011/canadas-corruption-of-foreign-public>.

114. John W Boscariol, “A Deeper Dive into Canada’s First Significant Foreign Bribery Case: *Niko Resources Ltd.*” (21 November 2011), *McCarthy Tetrault Publications* (blog), online: <www.mccarthy.ca/article_detail.aspx?id=5640>.

115. *Griffiths*, *supra* note 9.

116. Statistics Canada, “Exports of goods on a balance-of-payments basis, by product” (Ottawa: Statistics Canada, 2015), online: <www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/gblec04-eng.htm>.

million CAD. Under this contract, Karigar would have supplied a security system created by Cryptometrics Canada, an Ottawa-based technology company.¹¹⁷ Karigar was sentenced to three years in prison for conspiracy to bribe public officials in India.¹¹⁸ The *Karigar* decision marks the first conviction against an individual. Justice Hackland of the Ontario Superior Court of Justice, relying on section 3(1) of the *CFPOA*, stated that a serious sentence was necessary in that:

Canada's Treaty Obligations as well as the domestic case law from our Court of Appeal requires, in my view, that a sentence be pronounced that reflects the principals of deterrence and denunciation of your conduct. Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.¹¹⁹

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

[T]he corruption of foreign public officials, particularly in developing countries, is enormously harmful and is likely to undermine the rule of law. The idea that bribery is simply a cost of doing business in many countries, and should be treated as such by Canadian firms competing for business in those countries, must be disavowed.¹²⁰

This connection to the effects of foreign bribery in developing countries became more relevant in the SNC-Lavalin case. In September 2011, the RCMP raided the offices of Montreal-based SNC-Lavalin in connection with bribe payments made during its bid to supervise the contractor responsible for the construction of a multi-billion dollar bridge in Bangladesh.¹²¹ SNC-Lavalin is one of the ten largest engineering and construction firms in the world, with significant presence in developing countries and a long history of contracts with international development agencies and MDBs.

117. *Karigar*, *supra* note 10.

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

119. *Karigar*, *supra* note 10 at para 36.

120. *Ibid* at para 8.

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

The Canadian authorities took action rapidly and in 2012 charged former engineer Mohammad Ismail and former Executive Vice-President Ramesh Shah with bribing officials in Bangladesh. They are awaiting trial in Toronto. The former head of construction of the company was also arrested on charges of corruption, fraud, and money laundering in connection with dealings in North Africa.¹²²

On 17 April 2013, after a long investigation, the World Bank announced the debarment of SNC-Lavalin and one hundred of its affiliates for ten years following the company's misconduct in relation to the Padma Multipurpose Bridge Project in Bangladesh. This debarment was part of a negotiated resolution agreement between the World Bank and the corporation.¹²³ Under the agreement, SNC-Lavalin and its affiliates committed to cooperate with the World Bank's Integrity Vice Presidency ("INT") and to continue to improve their internal compliance programs. The debarment of SNC-Lavalin qualified for cross debarment by other MDBs under the *Agreement for Mutual Enforcement of Debarment Decisions*¹²⁴ ("*Cross Debarment Agreement*"), which was signed on 9 April 2010. SNC-Lavalin's debarment was consequently accepted by other MDBs, including the IDB.

It is evident from the discussions regarding *Niko Resources*, *Griffiths*, and *Karigar* that the case of SNC-Lavalin is not new. It is likely that due to its size and international influence, SNC-Lavalin has received more attention than its smaller Canadian counterparts. However, when looked at in context, this case marks an evolution in Canadian investigations and judicial decisions towards enforcement and punishment of individuals and companies under the *CFPOA*. What is different about the SNC-Lavalin case is that it represents the first

122. Critiques of Canada's enforcement measures should not be too severe. On 27 October 2014, a Dhaka court acquitted all seven defendants accused of taking bribes from SNC-Lavalin in connection with the Padma Bridge Project. See Richard L Cassin, "Bangladesh court clears all Padma Bridge defendants," (30 October 2014), *The FCPA Blog* (blog), online: <www.fcpcablog.com/blog/2014/10/30/bangladesh-court-clears-all-padma-bridge-defendants.html>.

123. "World Bank Debars SNC Lavalin," *supra* note 97.

124. 9 April 2010, online: <crossdebarment.org/oai001p.nsf/0/F77A326B818A19C548257853000C2B10/\$FILE/cross-debarment-agreement.pdf> [*Cross Debarment Agreement*]. The participating institutions to the International Financial Institution's ("IFI's") *Cross Debarment Agreement* are the World Bank, the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the IDB Group. The *Cross Debarment Agreement* provides that, subject to the prerequisite conditions set forth in the *Cross Debarment Agreement*, unless a participating IFI (1) believes that any of the prerequisite conditions set forth in the IFI's Cross-debarment Agreement have not been met or (2) decides to exercise its rights under the "opt out" clause set forth in the IFI's *Cross Debarment Agreement*, each participating IFI will promptly enforce the debarment decisions of the other participating IFIs.

time that Canadian authorities have cooperated so closely with an MDB in an investigation. In fact, the RCMP reportedly initiated its investigation at the request of the World Bank Group (“WBG”), which had lent 1.2 billion USD to the government of Bangladesh for the construction of the bridge and had subsequently investigated and debarred the corporation in relation to this matter.

III. CORRUPTION IN DEVELOPMENT PROJECTS: THE INTERSECTION OF THE INVESTIGATIONS AND SANCTIONS IMPOSED BY MDBS AND THE ACTIONS TAKEN BY NATIONAL AUTHORITIES

The SNC-Lavalin case is perhaps one of the most salient cases in which the collaboration between MDBs and national authorities materializes. However, there are fundamental differences between MDBs’ enforcement efforts and those of national authorities. At the national level, US authorities carry out criminal and civil investigations in relation to foreign corrupt practices, while Canadian authorities seem to carry out only criminal actions against *CFPOA* offenders. Both systems conform to the mandates emanating from the *OECD Convention*. In the case of MDBs, investigations and sanctions procedures are clearly administrative in nature and rooted within the principles of global administrative law.¹²⁵

To understand the differences between national systems and MDB systems, it is important to track the origins of the fight against corruption in MDBs back to 1996, when the World Bank President, James D. Wolfensohn, in a speech at the annual meetings of the WBG and International Monetary Fund, provided

125. Pascale Hélène Dubois & Aileen Elizabeth Nowlan, “Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law,” online: (2010) 36 Yale J Intl L, online: <www.yjil.org/docs/pub/o-36-dubois-nowlan-global-administrative-law-sanctions.pdf>.

the first international acknowledgement that corruption was pervasive in international development.¹²⁶

The first investigative unit and administrative adjudicative system were created at the World Bank in 1998 and were modified in 2002 after two reviews conducted by Richard Thornburgh, former Under-Secretary-General of the United Nations and former Attorney General of the United States.¹²⁷ These reviews were later complemented by the work conducted by an independent panel (chaired by former US Federal Reserve Chair, Paul Volcker), which created the World Bank's current debarment and suspension system. In 2001, the IDB adopted a system similar to that of the WBG. Thornburgh reviewed the IDB system in his 2008 report.¹²⁸ He recommended making the IDB's system more like the World Bank's, and the IDB adopted his recommendations in 2010.¹²⁹

Both the IDB and the World Bank's systems were heavily influenced by the suspension and debarment system of the US *Federal Acquisition Regulations*

126. James D Wolfensohn, Address (Remarks delivered at the Global Forum on Fighting Corruption, Washington, 24 February 1999), online: <www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/11/06/090224b08319907a/Rendered/PDF/Remarks0at0a0g0lfensohn00President.pdf>. Wolfensohn said:

It is true that when I came to the World Bank, I was given an admonition by our General Counsel that I should read the Articles of the Bretton Woods agreements. In there it says I am to deal with economic matters and that as an international civil servant, I should not, if I want to keep my job, talk about political matters. I was then told that there was one word I could not use, which was the "C" word, the "C" word being "corruption". Corruption, you see, was identified with politics, and if I got into that, I would have a terrible time with my Board.

Wolfensohn's worry was later corroborated by a 2004 World Bank study that estimated the amount of bribes paid worldwide to be "more than \$1 trillion, or the equivalent of 3 per cent of gross world product" See Vinay Bhargava, "Introduction to Global Issues" in Bhargava, *supra* note 105, 1 at 16.

127. For the first review, see Dick Thornburgh, Ronald L Gainer & Cuyler H Walker, *Report to Shengman Zhang, Managing Director and Chairman of the Oversight Committee on Fraud and Corruption, The World Bank: Concerning Mechanisms to Address Problems of Fraud and Corruption* (21 January 2000), online: <www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/08/05/000160016_20040805171318/Rendered/PDF/29755.pdf>. For the second report, see Dick Thornburgh, Ronald L Gainer & Cuyler H Walker, *Report Concerning the Debarment Processes of the World Bank* (14 August 2002), online: <siteresources.worldbank.org/INTDOII/Resources/thornburghreport.pdf>.
128. Dick Thornburgh et al, *Report Concerning the Anti-Corruption Framework of The Inter-American Development Bank* (21 November 2008), online: <idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1824265>.
129. Inter-American Development Bank, News Release, "IDB moves to strengthen anti-corruption framework" (8 December 2009), online: <www.iadb.org/en/news/news-releases/2009-12-08/idb-moves-to-strengthen-anti-corruption-framework,6079.html>.

*System*¹³⁰ (“*FAR*”). The *FAR* regulates the way in which US federal agencies exercise their discretion in deciding which contractors to exclude from public procurement on the basis they are not being presently responsible. The concept of present responsibility provides the US government with the necessary tools to avoid doing business with those contractors or providers that have not been responsible in fulfilling “their legal or contractual obligations.”¹³¹ US federal agencies can suspend and debar contractors deemed to be not presently responsible in order to avoid future harm to the US federal acquisition system. Fraud and corruption are two of the rationales for excluding contractors from participating in US federal procurement. The purpose of the suspension and debarment system is to reduce the “overall risk of harm to the procurement system.”¹³² In addition, suspensions and debarments under the *FAR* apply across all federal agencies irrespective of which agency declares a contractor ineligible.

MDBs adopted this concept of cross-agency ineligibility in 2010, when they signed the *Cross-Debarment Agreement*, which allowed the signatories to recognize one another’s debarment decisions. Under this agreement, all MDBs adopted the same definitions of sanctionable practices (corrupt practice, fraudulent practice, collusive practice, and coercive practice).¹³³ Similarly, the MDBs also agreed upon general principles and guidelines for imposing sanctions, and they harmonized the principles for the treatment of corporate groups. However, there has been no harmonization of the sanctions procedures utilized by the MDBs to impose debarments and suspensions.

A. MDBS’ MAIN CONCERN IN RELATION TO CORRUPTION IN DEVELOPMENT PROJECTS AND TOOLS TO ADDRESS IT

The World Bank and the IDB’s enforcement of the anti-corruption provisions included in Bank-financed activities has been growing since 2003. Today, the

130. 48 CFR (2005). The Foreword states that

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

131. Pascale Hélène Dubois, “Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System” [2012] U Chicago Legal F 195 at 198.

132. *Ibid* at 198-99.

133. Caldwell, *supra* note 5.

number of cross-debarred entities exceeds five hundred. This number does not include many other debarred entities that do not qualify for cross-debarment. However, most investigations undertaken by MDBs are of SMEs in the context of the development projects that MDBs finance. Fewer investigations are of large international corporations headquartered in developed nations, such as SNC-Lavalin.

A recent case in Latin America that exemplifies the type of SME that is debarred by MDBs and the impact of corruption on the poor can be found in El Salvador. In 2009, the IDB financed a housing project for a vulnerable community located near a river in San Salvador.¹³⁴ The community lacked roads, housing, water, and sanitation.¹³⁵ The executing agency opened a bidding process for the construction of the needed infrastructure and awarded the contract to a local SME.¹³⁶ During the construction process, the executing agency found that the SME had submitted an invoice for works that had not been performed in accordance with the contract. The executing agency also discovered that the certificate of execution issued by a project supervisor misrepresented the progress of the construction.¹³⁷ Construction was subsequently stopped for more than seven months, and ultimately the project was never finished. The families that were the beneficiaries of the project had to be moved from their shelters to the unfinished houses, where, according to news reports, they were exposed to adverse weather conditions, resulting in children getting sick.¹³⁸

The IDB investigated and sanctioned the SME, debarring the company and its legal representative for thirteen years and the project supervisor and the consultant to the executing agency for nine years. These sanctions were subject to cross-debarment, and the company and individuals were declared ineligible to participate in projects financed by the World Bank.

MDBs have also used other tools to address the adverse effects of corruption in development projects. In addition to traditional investigations, the World

134. Karla Argueta, "Proyecto Nuevos Mejicanos a juicio en Corte de Cuentas," *El Salvador* (7 March 2011), online: <archivo.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6329&cidArt=5638593>.

135. *Ibid.*

136. *Ibid.*

137. Karla Argueta, "Nuevos Mejicanos: abandonado y familias viviendo en riesgo," *El Salvador* (13 December 2010), online: <archivo.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6358&cidArt=5400582>.

138. Karla Argueta, "La espera es larga... y el trabajo es poco," *El Salvador* (7 March 2011), online: <archivo.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6358&cidArt=5638595>.

Bank, through the INT, has conducted wide portfolio reviews known variously as “proactive diagnostic tools” or Detailed Implementation Reviews (“DIRs”). These reviews have covered World Bank operations in India,¹³⁹ Vietnam, Cambodia, Indonesia, and Kenya. Perhaps the best-known review is the India DIR due to its political implications in that country. The Cambodia DIR was also important, having direct measurable effects on the way the Cambodian government conducts business. The Cambodia DIR also showed the commitment of an MDB to development as the primary goal in fighting corruption.

An important aspect of the Cambodia DIR is that it produced actionable information for the INT to start some investigations into certain SMEs. As an example, on 2 April 2010, the World Bank debarred a Cambodian construction SME, Royal Mekong Construction and Development Pte, and its director Heng Rathpiseth for engaging in fraudulent practices related to the projects that were under investigation in Cambodia. The two respondents were declared ineligible to bid on World Bank projects for two years.¹⁴⁰ Despite the relatively small size of the companies under investigation, the DIR had great ramifications.

In 2004, the World Bank’s regional staff in Cambodia raised some concerns about corruption in World Bank-financed projects.¹⁴¹ During the second half of that year, INT started to address these concerns together with the government of Cambodia by conducting a Fiduciary Review.¹⁴² As a result of this exercise, INT

139. World Bank Group, Department of Institutional Integrity, *Detailed Implementation Review: India Health Sector 2006-2007*, vol 1 (Washington: World Bank Group, 2007), online: <siteresources.worldbank.org/EXTDOII/Resources/WB250_Web_Vol1_012408.pdf>; World Bank Group, Department of Institutional Integrity, *Detailed Implementation Review India Health Sector 2006-2007*, vol 2 (Washington: World Bank Group, 2007), online: <siteresources.worldbank.org/EXTDOII/Resources/WB250_Web_Vol2_012408.pdf>. See also World Bank Group, Department of Institutional Integrity, *Annual Integrity Report 2005-2006* (Washington: World Bank Group, 2006) at 16, online: <siteresources.worldbank.org/INTDOII/Resources/complete.pdf>.
140. The World Bank, Press Release, “World Bank Debars Royal Mekong Construction” (2 April 2010), online: <siteresources.worldbank.org/INTDOII/Resources/Mekong_and_Rathpiseth_debar.pdf>.
141. James W Adams, “World Bank’s anti-corruption work in Cambodia,” Commentary, (15 October 2007), online: <go.worldbank.org/7JE5PD0PL0>.
142. The Fiduciary Review is part of the World Bank’s Country Assistance Strategy for Cambodia in order to promote transparency and accountability of (and, therefore, enhance) the governance environment. See The World Bank, Press Release, 2006/085/EAP, “The Royal Government Of Cambodia And The World Bank Release Summary Report And Action Plan Aimed At Reducing Fiduciary Risks” (16 September 2005), online: <go.worldbank.org/AI5WFBL6J0>; The World Bank, “Cambodia: Summary of Fiduciary Review” (2007) at 1, online: <siteresources.worldbank.org/INTCAMBODIA/Resources/FiduciarySummary.pdf> [“Fiduciary Review”].

assisted the government of Cambodia in identifying some weaknesses in a number of governmental offices and helped devise an action plan for the government to reduce the opportunities for future corruption. Within the scope of this joint exercise, several projects were scrutinized and sufficient evidence was found to substantiate allegations of fraud and corruption in seven of those projects.¹⁴³ The evidence showed that procurement procedures of the project agreements were not strictly obeyed, many contractors had bribed government officials, and the projects' financial management systems and audit requirements had control issues and therefore could not reveal important breakdowns or irregularities.¹⁴⁴ In light of these results, the World Bank and the government of Cambodia agreed on several actions, such as strengthening procurement mechanisms in project design and implementation, identifying specific anti-corruption measures as part of project preparation, and introducing Standard Operating Procedures in order to improve project management practices.¹⁴⁵

In June 2006, while conducting a further in-depth review of World Bank-financed projects, INT found that three of the ongoing projects mentioned above still had corruption-related problems.¹⁴⁶ As a consequence, the World Bank cancelled approximately 2.5 billion USD of funds for the three projects. The government of Cambodia had to agree to repay the amount of the cancelled project funds plus interest and to strengthen its efforts in fighting corruption. These efforts included the incorporation of legally binding anti-corruption plans, the establishment of an Anti-Corruption Working Group, and the enhancement of Cambodia's investigative capacity with the assistance of the World Bank.¹⁴⁷ Though the suspension of disbursements may have been perceived as a drastic action, the World Bank had no other recourse to address the significant impact

143. The investigated projects were: Biodiversity and Protected Areas Management Project (BPAMP), Flood Emergency and Rehabilitation (FERP), Agricultural Productivity Improvement Project (APIP), Forestry Concession Management and Control Pilot Project (FCMCPP), Land Management and Administration Project (LMAP), Provincial and Rural Infrastructure Project (PRIP), and Peri-Urban Water Supply and Sanitation Project (PPWSP). See The World Bank, Press Release, "Cambodia: World Bank Releases New Statement and Update" (6 June 2006), online: <go.worldbank.org/SMMHI1V940>.

144. "Fiduciary Review," *supra* note 140.

145. *Ibid.*

146. IMF, Asia and Pacific Department, *Cambodia: Staff Report for the 2007 Article IV Consultation*, Country Report No 07/290 (Washington: IMF, 2007), online: <www.imf.org/external/pubs/ft/scr/2007/cr07290.pdf>.

147. The World Bank, "World Bank Lifts Suspension of Projects" (7 February 2007), online: <go.worldbank.org/CDMB9JW7U0>.

of this corruption on development.¹⁴⁸ Moreover, the suspension of disbursements proved to be beneficial. During the ensuing period, the government undertook the required actions and, subsequently, the World Bank lifted the suspension for the three projects.

B. AREAS OF DIVERGENCE BETWEEN NATIONAL ENFORCEMENT EFFORTS AND MDBS' FIGHT AGAINST INTERNATIONAL CORRUPTION: SMES AND LARGE MULTATIONALS

The two cases described above demonstrate the type of corruption that concerns MDBs. That is, corruption that affects development projects, for the most part implemented by local government agencies. What is interesting to note in both cases is that the corporations involved were SMEs. In fact, between 2008 and 2012, SMEs and individuals added up to approximately 90 per cent of all entities debarred at the World Bank.¹⁴⁹ Most of these debarred enterprises were located in developing countries, which the World Bank refers to as Part II Countries.¹⁵⁰ The remaining, almost 10 per cent of debarred companies, were large multinationals.¹⁵¹ During the same period, 100 per cent of companies debarred by the IDB were

148. For example, by providing land titles to people in order to achieve a certain degree of income security, repairing and constructing more than four hundred kilometers of roads, and expanding the access to rural areas. Moreover, poor people are disproportionately affected by corruption because they are more reliant on public services, and they therefore suffer more because of corrupt officials and practices. See The World Bank, Press Release, "Cambodia: World Bank Releases New Statement and Update" (6 June 2006), online: <go.worldbank.org/SMMH11V940>.

149. In the World Bank's review process, there was concern for the fact that the majority of sanctioned firms at the first tier of review were SMEs that would not only fail to contest the charges but would also fail to engage in the process. The study conducted by the World Bank found that "the majority of cases resolved at the first tier (92%) have resulted not from an exchange of views at the first tier but by a 'default' by Respondents failing to engage the system in any way, either by providing an Explanation to OSD or to appeal the case to the SB. Most of these defaults involve small and medium-sized enterprises (SMEs) and form part of a larger pattern of non-engagement by SMEs in the system." See The World Bank Group, *Review of the World Bank Group Sanctions Regime 2011-2014: Phase 1 Review: Stock-Taking*, online: <consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/sanctionsreview_initiatingdiscussionbrief.pdf>.

150. The World Bank, *A guide to the World Bank*, 3rd ed (Washington: World Bank, 2011), online: <openknowledge.worldbank.org/bitstream/handle/10986/2342/638430PUB0Ext00Box0361527B0PUBLIC0.pdf?sequence=1&isAllowed=y>.

151. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Progress and Its Recent Reforms* (Washington: World Bank, 2012) at 38, online: <siteresources.worldbank.org/INTLAWJUSTICE/Resources/SanctionsProcess.pdf>.

SMEs.¹⁵² The above numbers exemplify the reality of fighting corruption by both MDBs while addressing the roots of the problem. In this respect, it is important to note that SMEs account for 90 per cent of businesses and more than 50 per cent of employment globally and more than 94 per cent of businesses in Latin America and the Caribbean.¹⁵³ Thus, SMEs are one of the main engines of growth in developing countries. In addition, 25 per cent of the MDB-sanctioned parties are individuals.¹⁵⁴ Still, the fact remains that within the 75 per cent of sanctioned corporations, the majority are SMEs.

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

In addition, the United Nations Office on Drugs and Crime ("UNODC") has established that the smaller an enterprise is, the more likely it will be subject to corruption and to perceive corruption as a major business obstacle.¹⁵⁵ According to the UNODC, the reasons for SMEs to engage in corrupt activities depend in part on the environment in which they operate. SMEs participating in markets

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

153. International Finance Corporation, Issue Brief, *IFC and Small and Medium Enterprises* (2012), online: <www.ifc.org/wps/wcm/connect/277d1680486a831abec2ff995bd23db/AM11IFC+IssueBrief_SME.pdf?MOD=AJPERES>. See also Inter-American Development Bank, News Release, "The IDB supports the internationalization of SMEs in the region through a business roundtable and best practices programs" (2012), online: <www.iadb.org/en/topics/trade/the-idb-supports-the-internationalization-of-smes-in-the-region-through-a-business-roundtable-and-best-practices-programs,7005.html>.

154. The World Bank, "World Bank Listing of Ineligible Firms & Individuals" (2015), online: <web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>.

155. United Nations Industrial Development Organization & United Nations Office on Drugs and Crime, *Corruption prevention to foster small and medium-sized enterprise development*, vol 2 (Vienna: UNIDO & UNODC, 2012) at 1, online: <www.unodc.org/documents/corruption/Publications/2012/Corruption_prevention_to_foster_small_and_medium_size_enterprise_development_Vol_2.pdf>.

where corruption is common have a slim chance of doing business successfully without engaging in illegal practices.¹⁵⁶ For this reason, it should come as no surprise that the sanctions systems of MDBs handle more cases related to SMEs than to large multinational corporations. The number of SMEs intricately related to development work in member countries is significantly higher than that of large multinational corporations. Although, as noted earlier, MDBs keep a keen eye on the actions of large multinationals in member countries, as in the case of SNC-Lavalin, and these cases make up a small portion of the MDBs' sanctioned entities.

The MDBs have established a menu of administrative sanctions to be imposed on respondents. Based on the sanctioning guidelines, the MDBs may choose from a number of sanctions, including reprimand, debarment, conditional non-debarment, and debarment with conditional release. These sanctions' objective is to deter wrongdoing on the part of corporations and individuals and to protect the projects financed by the MDBs in order to fulfill their development objectives. All this within the understanding that corruption undermines development projects and MDBs can protect project beneficiaries and stakeholders through preventive and sanctioning actions.¹⁵⁷

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

156. *Ibid* at 2.

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

In fact, the proceedings conducted by the SEC have resulted in severe punishments in the form of fines for corporations and sometimes imprisonment for their legal representatives, CEOs, or staff.¹⁵⁸ While the SEC has concentrated on charging corporations, the DOJ prosecutes both individuals and entities. On the one hand, all of the defendants charged and sanctioned by the SEC in 2013 were corporations. On the other hand, 63 per cent of DOJ enforcement actions during 2013 were against individuals and 37 per cent against corporations.¹⁵⁹

The fines imposed by the SEC are the outcome of either formal proceedings or settlement agreements, depending on the firm's willingness to cooperate with the SEC.¹⁶⁰ Companies like Alstom, Avon, Halliburton, and Pfizer have agreed to pay millions of USD to settle SEC charges.¹⁶¹ Settlements reached between the SEC and corporations usually have two components: a monetary penalty and a compliance program. Compliance programs typically include the imposition of extensive policies and procedures, training, vendor reviews, due diligence, expense control, and escalation of red flags, among other things.¹⁶² As a result of all SEC enforcement actions, corporations have not only paid several penalties but also have significantly increased the amount of money spent on compliance programs.¹⁶³ As mentioned earlier, these settlements have resulted in payment of large sums to the US government, but this money has not made its way to countries that were the beneficiaries of the contracts or agreements upon which bribes were paid.

-
158. Shearman & Sterling LLP, "Litigation: Recent Trends and Patterns in FCPA Enforcement" (March 2006), online: <www.shearman.com/-/media/Files/NewsInsights/Publications/2006/03/Recent-Trends-and-Patterns-in-FCPA-Enforcement/Files/View-Full-Text/FileAttachment/LIT_032706.pdf>.
159. Gibson Dunn, "2013 Year-End FCPA Update" (6 January 2014) at 9, online: <www.gibsondunn.com/publications/documents/2013-Year-End-FCPA-Update.pdf>.
160. Joseph W Yockey, "FCPA Settlement, Internal Strife, and the 'Culture of Compliance'" (2012) 2012:2 Wis L Rev 689 at 699.
161. Kenneth Winer & Manda Sertich, "Assessing the Power of the SEC to Impose Monetary Penalties In Administrative Proceedings Charging Violations of the FCPA" (13 June 2011), *FCPA Professor* (blog), online: <www.fcprofessor.com/assessing-the-power-of-the-sec-to-impose-monetary-penalties-in-administrative-proceedings-charging-violations-of-the-fcpa>.
162. Blank Rome Counselors at Law, "SEC FCPA Settlements Sends Wake-Up call to Small and Medium-Sized Businesses" (August 2014), online: <www.blankrome.com/pdfPage.cfm?contentID=37&itemID=3379>; Andrew Ceresney, Address (Remarks delivered at the 31st International Conference on the Foreign Corrupt Practices Act, 19 November 2014), online: <www.sec.gov/News/Speech/Detail/Speech/1370543493598#.VQs4EmjF_uQ>.
163. *Ibid.*

IV. CONCLUSION

This article highlights the great difference between national enforcement of foreign bribery laws by the United States and Canada, on the one hand, and international enforcement by MDBs, on the other. While national jurisdictions are keen on sanctioning individuals and corporations for their wrongdoing, there seems to be little evidence of restitution to the real victims of the corrupt practices in developing countries. So far, the evidence suggests that if bribes were paid by a corporation or individual subject to the US or Canadian jurisdictions, in relation to a contract or dealing in a developing country, the penalties imposed as a result of the proceedings or settlement agreement are not directed at restituting the harm done to the affected developing country or the specific communities. And this may be explained because the foreign bribery laws were created primarily to protect the markets of the countries that enacted such laws—primarily the United States. Under such a proposition, in the case of the United States, the affected parties in any foreign bribery scheme would be the US market, the US government, and its people.

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

Although this is an apparent point of divergence between national authorities such as the United States and Canada, on the one hand, and the MDBs, on the other, it could also prove to be an area of convergence. Both systems look at different aspects of the same problem. Foreign bribery involves actions in multiple jurisdictions and affects multiple parties. It affects and distorts the markets in which large multinationals operate and generates pervasive advantages to those companies that indulge in bribery. It has devastating effects on the communities

that need the assistance the most while challenging local governance structures. However, national systems and MDBs see different angles of the actions of wrongdoers and could benefit in continuing the pursuit of complementary enforcement actions, as in the case of SNC-Lavalin. In addition, the affected developing nations could benefit from the proceeds of the large fines imposed by national enforcement agencies in foreign bribery cases, money that could serve to strengthen local governance and, hence, level the international playing field.