

Chapter 3

GENERAL PRINCIPLES AFFECTING THE SCOPE OF CORRUPTION OFFENCES: JURISDICTION, CORPORATE LIABILITY, ACCOMPLICES AND INCHOATE OFFENCES

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1. JURISDICTION: TO WHAT EXTENT CAN A STATE PROSECUTE BRIBERY OFFENCES COMMITTED OUTSIDE ITS BORDERS?

1.1 Overview

In today's globalized world, bribery and other forms of corruption are often transnational. Instances of bribery may involve a number of individuals or legal entities and encompass actions in multiple states. Large corporations are often multi-national, carrying on business in numerous states. Acts of bribery by one corporation may disadvantage other foreign firms who lose business as a result. Since anti-corruption laws and their enforcement are not consistent across states, the way in which states determine jurisdiction, i.e. to whom their anti-corruption laws apply and who can be prosecuted by their courts or tribunals, has important implications for determining how effective anti-corruption laws will be in detecting, investigating, prosecuting and punishing corruption.

There are three general forms of jurisdiction: prescriptive, enforcement and adjudicative. These were briefly described by the Supreme Court of Canada in *R v Hape*:¹

Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation. Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. ... Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force [citations omitted].

As the Supreme Court noted, these forms of jurisdiction overlap in certain cases. Even if there is prescriptive jurisdiction, there may be no enforcement jurisdiction (i.e. the power to compel extradition by reason of an extradition treaty or agreement).

The rules governing extra-territorial jurisdiction must be balanced with the concept of state sovereignty. The principles of state sovereignty, including equality and territorial integrity, are reaffirmed in Article 4 of UNCAC. A state is under an international obligation to not enforce its legislative powers within the territorial limits of another state without that state's consent. However, under international law, the limits of a state's prescriptive or legislative jurisdiction (in other words the limits of how a state may determine to whom its laws apply) are less clear. See generally the International Bar Association's *Report of the Task Force on Extraterritorial Jurisdiction*.²

When engaged in international business transactions, it is essential for the company and its legal advisors to be aware which countries' laws apply to its activities. In that sense, jurisdiction is the most important issue in international business transactions. H. Lowell Brown describes six theories that states may rely upon to assert prescriptive jurisdiction (i.e. determine to whom their law applies).³ The two most accepted of these are **territoriality**, whereby jurisdiction is determined on the basis of where the criminal acts occurred, and **nationality** (sometimes termed the active personality principle), whereby a state's jurisdiction extends to the actions of its nationals no matter where the acts constituting the offence occur.

¹ *R v Hape*, [2007] 2 SCR 292 at para 58.

² The International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (2009) online: <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E>>.

³ H Lowell Brown, "The Extraterritorial Reach of the US Government's Campaign against International Bribery" (1998-1999) 22 *Hastings Intl & Comp L Rev* 407 at 419.

Historically, common law countries have been much more reluctant to assert jurisdiction based on nationality while civil law and socialist law countries were more likely to have embraced this theory. The third theory is **universality**; on this basis a state may charge any person present in its territory under its own domestic laws no matter where the acts constituting the offence occurred. This principle was traditionally reserved for piracy and has been extended more recently to crimes universally regarded as heinous, such as war crimes. The fourth theory is the **protective** principle, which determines jurisdiction with reference to which state's national interests were harmed by the offending act, and the fifth theory is the **passive personality** principle, which determines jurisdiction based on the nationality of the crime's victim or victims. Finally, there is also the "**flag**" principle, which is sometimes classified under the principle of territoriality and extends a state's domestic laws to acts occurring at sea on a ship flying its flag.

With bribery of a foreign public official, it is common for the actual act of bribery to take place within the foreign official's home country while some preparation, or perhaps just the authorization to offer a bribe, may take place in the briber's home state. Therefore, in respect to statutes that operate based on the territoriality principle alone, a home state's jurisdiction over a briber will depend on the connection required by the home state's law between the briber's conduct and the home state. A law that requires the *whole or majority* of the act of bribery to take place within the home state will have significantly less jurisdictional reach than a law like the US FCPA, which applies (among other ways) when *any or virtually any* act or communication in furtherance of a corrupt payment occurs within the US.

Territoriality may be asserted under the principles of either subjective territoriality or objective territoriality. Zerk reviews the different ways in which states may assert jurisdiction based on territoriality.⁴

The principle of subjective territoriality gives State X the right to take jurisdiction over a course of conduct that commenced in State X and was completed in another state. A terrorist plot that was hatched in State X and executed in State Y could fall into this category. The principle of objective territoriality gives State X the right to take jurisdiction over a course of conduct that began in another state and [was] completed in State X. A conspiracy in State Y to defraud investors in State X could give rise to jurisdiction based on this principle. A further refinement of the principle of objective territoriality appears to be gaining acceptance, in the antitrust field at least. This doctrine, known as the *effects doctrine*, argues that states have jurisdiction over foreign actors and conduct on the basis of "effects" (usually economic effects) produced within their own territorial boundaries, provided those effects are substantial, and a direct result of that foreign conduct. Jurisdiction taken on the basis of the effects doctrine is often classed as "extraterritorial jurisdiction" on the grounds that jurisdiction is asserted over foreign conduct. It is important, though, not to lose sight of the territorial connections that do exist (i.e. in terms of "effects") over which the regulating state arguably does have territorial jurisdiction. Nevertheless, while this doctrine has become increasingly accepted in principle as more states adopt it, its scope remains controversial, especially in relation to purely economic (as opposed to physical) effects.

1.2 UNCAC

Article 42(1) of UNCAC requires State Parties to assert jurisdiction when an offence is committed within their territory or on board a vessel flying their flag. Article 42(3) of the Convention also requires State

⁴ Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (2010) Harvard Corporate Social Responsibility Initiative Working Paper No 59 at 19, online: <https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf>.

Parties to exercise jurisdiction when the offender is present in their territory and extradition is refused on the basis that the offender is a national. Some commentators have noted that unlike the OECD Convention, UNCAC does not appear to mandate that a state assert jurisdiction in instances where the act occurred only partially within its territory.⁵

Article 42(2) *permits* states to establish jurisdiction in the following circumstances:

2. Subject to Article 4 of this Convention [State Sovereignty], a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is one of those established in accordance with article 23, paragraph 1(b) (ii) [conspiracy or other forms of participation in a plan to commit money laundering offences], of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i) [money laundering offences], of this Convention within its territory; or

(d) The offence is committed against the State Party.

Article 42(2) is limited by Article 4, which is meant to protect state sovereignty by discouraging the exercise of extraterritorial jurisdiction within the territory of another state if the laws of that state mandate exclusive territorial jurisdiction. Some commentators, such as Evan Lestelle, have questioned whether UNCAC permits jurisdiction to be established on the basis of other theories of jurisdiction, such as the protective principle, which is notably absent from Article 42(2).⁶ Lestelle states,⁷

Despite the extensive list of extraterritorial circumstances contemplated by article 42, the limitation in article 4 denudes much of the potency from the grant. Furthermore, a final theory of extraterritorial jurisdiction, the "protective" principle, is notably absent from the list in article 42. The "protective" principle provides jurisdiction if the effect or possible effect of the offense is to occur in the forum state and for offenses that threaten the "specific national interests" of the forum state. As discussed in Part I, global efforts at combating foreign public bribery would be aided by an amendment to the UNCAC that removes the limitations of article 4 and adds the "protective" principle as a basis for jurisdiction [footnotes omitted].

It could be argued, however, that the list of permitted bases of jurisdiction provided in Article 42(2) is non-exhaustive. Article 42(6) provides that:

Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

In addition, the *Legislative Guide* for UNCAC, produced by UNODC, states that UNCAC does not aim to alter general international rules regarding jurisdiction and that the list of jurisdictional bases in 42(2) is

⁵ *Ibid.*

⁶ Evan Lestelle, "The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction" (2008-2009) 83 Tul L Rev 527.

⁷ *Ibid* at 541.

not meant to be exhaustive. Rather, the purpose of Article 42 of UNCAC is to permit the exercise of jurisdiction in such a way that ensures that corruption offences do not go unpunished because of jurisdictional gaps.⁸ As noted above, there are differing views concerning the degree of latitude afforded to states under international law when determining the bases of criminal jurisdiction.

Lestelle argues that UNCAC should be amended to expressly allow for further extraterritorial application of domestic laws, potentially based on the protective or passive personality principles. In his view, corruption is a humanitarian concern of sufficient gravity to merit the application of laws with significant extraterritorial jurisdiction. Lestelle compares corruption to piracy, the earliest crime for which states commonly asserted jurisdiction based on the universality principle. He argues that both are “crimes against the global market”, and therefore far-reaching state-level laws are necessary in order to avoid the possibility that perpetrators will be able to evade prosecution. Otherwise, Lestelle warns that some states motivated by self-interest will refrain from taking legal action against perpetrators, thus creating “safe harbour” refuges where those engaged in bribery or corruption will not be prosecuted.⁹

1.3 OECD Convention

Jurisdiction is addressed by the OECD Convention in Article 4. Article 4 requires that each State Party take steps to ensure it has jurisdiction over bribery offences that occur wholly or partially within its territory. This is a narrow conception of extra-territorial jurisdiction. The word “partial” is not defined. The Commentary accompanying the Convention text states that this provision should be interpreted broadly in a way that does not require “extensive physical connection to the *bribery act*”. In addition, a State Party with “jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles” (Article 4(2)). Article 4(4) also requires states to review whether their basis for jurisdiction is sufficient to effectively fight against the bribery of foreign public officials.

At the time the OECD Convention was negotiated (during the 1990s), many common law countries (including Canada) were opposed to including a requirement that signatory states assert jurisdiction based on nationality. Article 4(4) therefore represented a compromise.¹⁰ However, since that time most of the common law OECD states have incorporated the principle of jurisdiction based on nationality into their domestic anti-bribery legislation (Canada did so in 2013).

1.4 Other International Anti-Corruption Instruments

In addition to mandating that states assert jurisdiction based on the territorial principle, *The Council of Europe Criminal Law Convention*, the *European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States* and the *African Union Convention on Preventing and Combating Corruption* all require State Parties to exercise jurisdiction on the basis of nationality. Interestingly, the African Union Convention is the only multilateral anti-corruption convention to expressly provide for jurisdiction based on the protective principle (see Article 13(1)(d)).

⁸ United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed (New York: United Nations, 2012) at 134 online:

<https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

⁹ Evan Lestelle, “The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction” (2008-2009) 83 Tul L Rev 527 at 552.

¹⁰ For further information on the negotiation and development of Article 4, see Mark Pieth, “Article 4 - Jurisdiction” in Mark Pieth, Lucinda A Low & Peter J Cullen, eds, *The OECD Convention on Bribery: A Commentary* (Cambridge: Cambridge University Press, 2007).

1.5 Corporate Entities

A corporation or other collective legal entity can be subject to a state's corruption laws (1) based on territorial jurisdiction if the company commits the offence (in whole or in part) in that state or (2) based on nationality jurisdiction if the company is incorporated or otherwise legally created or registered in that state. A company from one state can commit an offence in a foreign state either as the primary offender or as a secondary party offender (i.e. aid, abet or counsel another person to commit the offence).

In countries that base corporate criminal liability on the identification (i.e. "directing minds") theory, the actions and state of mind of certain employees and officers becomes in law "the actions and state of mind" of the corporation. In those instances, the corporation is the principal offender. Alternatively, a company can be liable for a corruption offence committed in a foreign state by means of secondary party liability. If the parent company aids, abets or counsels a subsidiary company or a third party agent to commit a corruption offence, the parent company is guilty of that offence as a secondary party to that offence. For example, if SNC-Lavalin Group, the Canadian parent company, were prosecuted for corruption in the Padma Bridge case, its criminal liability would be based on the claim that it aided, abetted or encouraged its subsidiary company and its third party agent (not an employee of SNC-Lavalin) to commit the offence as principal offenders.

The requisite mental element for the parent company as an aider, abettor or counsellor can vary depending on the particular offence and the state's laws for establishing corporate criminal liability. Generally speaking, the parent company's required level of fault will be (1) subjective fault (intentionally aided), (2) strict liability (aided by failing to take reasonable steps to prevent the offence), or (3) absolute liability (no mental fault element to aid, abet or counsel the offence is required).

The ability of state parties to exercise jurisdiction over foreign corporate entities, as addressed in the UNCAC and the OECD Convention, is summarized by Zerk as follows:¹¹

While all of the treaties either authorise or require the use of nationality jurisdiction in relation to the extraterritorial activities of their corporate nationals, they do not impose specific requirements vis-à-vis the regulation of the foreign activities of foreign companies and no treaties require the regulation of such activities directly. This will be because of the acknowledged legal limitations in relation to the regulation of foreign nationals in foreign territory. However, a number of treaty provisions are potentially relevant to the situation where a foreign subsidiary or agent is primarily responsible for a bribe. For instance, the UN Convention contains provisions relating to "accessory" or "secondary liability", under which a parent company could be held responsible for a foreign bribe on the basis that it was the "instigator" of that bribe. The OECD Convention mandates liability for complicity in the bribery of a foreign public official, including "incitement, aiding and abetting, or authorization" of such an act. The "Good Practice Guideline" annexed to a recent OECD Recommendation on implementation of the OECD Convention asks state parties to ensure that "a legal person cannot avoid responsibility by using intermediaries, *including related legal persons*, to offer, promise or give a bribe to a foreign public official on its behalf."

There is little guidance in the treaty provisions themselves as to the extent to which accounting controls must cover the transactions of foreign subsidiaries. However, to the extent that the treaty covers foreign bribery, it would appear to be the intention that

¹¹ Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (2010) Harvard Corporate Social Responsibility Initiative Working Paper No 59 at 55-56, online: <https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf>.

consolidated reporting (covering the transactions of foreign subsidiaries as well as the parent company) is indeed required [footnotes omitted].

1.6 Overview of OECD Countries Jurisdiction

The 2016 OECD *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*¹² provides the following summary of the types of jurisdiction each OECD country has:

BEGINNING OF EXCERPT

Some of the key findings in relation to jurisdiction are:

- All the Parties to the Convention (except Argentina) establish some form of territorial jurisdiction over legal persons for the offence of foreign bribery. In some Parties, this jurisdiction is a collateral effect of having jurisdiction over the acts of a natural person who commits foreign bribery in its territory.
- At least 23 Parties (56%) are able, in at least some circumstances, to assert jurisdiction over foreign companies that commit foreign bribery in their territory. One country—Colombia—reported to the Secretariat that its Superintendency of Corporations cannot sanction foreign legal persons for acts committed on its territory. For the other Parties, it could not be determined from the WGB reports whether such jurisdiction exists over foreign legal persons.
- At least 23 Parties (56%) can hold a domestic legal person liable for foreign bribery committed entirely abroad. In line with the WGB’s 2006 Mid-Term Study of Phase 2 Reports, the Phase 3 evaluations have indicated that some Parties still cannot assert jurisdiction over a domestic legal person for an offence committed abroad unless the Party also has jurisdiction over the natural person who actually committed the offence. In several cases, the Party may not be able to assert jurisdiction over the legal person unless the natural person who committed the act was a national (e.g. Austria, Bulgaria, Chile, Estonia, Germany, Italy, Latvia, Japan and Sweden). For 16 Parties (39%), no determination was made in the WGB reports.
- At least 8 Parties (20%) seemingly can hold a foreign legal person liable for foreign bribery committed entirely abroad, provided that some condition links the foreign legal person to the country for purpose of applying its foreign bribery offence. Mailbox companies in the Netherlands are also identified as a source of concern. The Phase 3 report for the Netherlands describes varying views within the Netherlands’ legal profession about whether it has effective jurisdiction over mailbox companies. The report also states that the Netherlands’ approach to “mailbox companies appears to be a potentially significant loophole in the Dutch framework” and urges it “to take all necessary measures to ensure that such companies are considered legal entities under the Dutch Criminal Code, and can be effectively prosecuted and sanctioned.”

Finally, although the Convention does not create obligations for Parties to assert jurisdiction over acts of foreign legal persons for offences that take place entirely outside its territory, the WGB has identified some interesting arrangements among the Parties for asserting such jurisdiction. These include:

- **Universal jurisdiction.** According to Iceland authorities, Iceland asserts universal jurisdiction for foreign bribery offences falling under the Anti-Bribery Convention. Likewise, the Phase 3 report for

¹² OECD, *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (OECD, 2016) at 112-13, online: <<https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>>.

Norway states: “Norway has extremely broad jurisdiction over foreign bribery offences, and could, in theory, prosecute any person committing a foreign bribery offence, regardless whether the offence was committed in Norway, and regardless whether the person involved is a Norwegian national. In practice, Norway explained that the universal jurisdiction was in fact rarely relied on, and only used in exceptional cases (twice between 1975 and 2004, and never in corruption cases). At any rate, this broad jurisdiction allows Norway to exercise both territorial and nationality jurisdiction over foreign bribery offences.” Estonia reports that it might be able to exercise universal jurisdiction over bribery offenses punishable by a “binding international agreement”, but in the absence of case law supporting this theory, the WGB has not been able to reach a definitive conclusion.

- ***Foreign legal person conducts business in, or owns property, in the territory.*** The Czech Republic can assert jurisdiction over a foreign legal person for acts committed outside of its territory when that legal person “conducts . . . activities . . . or owns property” inside the Czech Republic. Similarly, the United Kingdom can apply its Section 7 offence under the Bribery Act to any “commercial organisation” that “carries on a business, or part of a business” inside the United Kingdom. In such a case, the foreign legal person would be liable for the acts of any “associated person” even if the associated person commits the offence outside of the United Kingdom.
- ***Foreign legal person committed offence for the benefit of a domestic legal person.*** The Czech Republic can assert jurisdiction over a foreign legal person for acts committed outside of its territory when the “criminal act was committed for the benefit of a Czech legal person”
- ***Foreign legal person is closely connected to a domestic legal person or natural person.*** Greek authorities maintain that Greek law would apply to a foreign subsidiary having a “sufficient connection” with a parent company located in Greece. Israeli authorities believed that they could likely assert jurisdiction over a foreign legal person, “if the crime was committed by an Israeli citizen or resident who was the controlling owner of the legal person” [footnotes omitted].

END OF EXCERPT

In regard to the nationality requirements for legal persons, the report states the following:¹³

Of the 41 Convention Parties, at least 16 countries (39%) will consider any legal person incorporated or formed in accordance with their laws to have their nationality. At least eight countries (20%) will look to the legal person’s headquarters or seat of operations to determine its nationality, and at least another three countries (7%) will look at either the place of incorporation or the seat. Only 1 country, Brazil, restricts the application of its nationality jurisdiction to legal persons that are both incorporated in and headquartered in the country’s territory.

Finally, at least 11 countries (27%) will assert nationality jurisdiction over legal entities based on “other” factors, primarily whether the company is “registered” under the country’s laws or has a “registered office” on its territory. Depending on the country, these other factors may be exclusive or operate alongside the place of incorporation or the seat of the company [footnotes omitted].

¹³ *Ibid* at 124.

1.7 US Law

1.7.1 The Expansive Extraterritorial Reach of the US FCPA

The US FCPA has significant extraterritorial reach. Not only does it apply in instances where any act in furtherance of the offense occurs within the territory of the US, but it also exercises jurisdiction based on nationality. As part of its territorial jurisdiction, foreign companies that are listed on a US stock exchange are subject to the FCPA. For a detailed description of jurisdiction under the FCPA, including a discussion of due process and relevant cases, see Tarun's *Foreign Corrupt Practices Handbook*.¹⁴ The following excerpt from the US DOJ and SEC's *Resource Guide to the Foreign Corrupt Practices Act (Resource Guide)* details how these two FCPA enforcement agencies interpret the FCPA's jurisdiction:¹⁵

BEGINNING OF EXCERPT

Who Is Covered by the Anti-Bribery Provisions?

The *FCPA*'s anti-bribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

Issuers—15 USC. § 78dd-1

Section 30A of the Securities Exchange Act of 1934 (the Exchange Act), which can be found at 15 USC. Section 78dd-1, contains the anti-bribery provision governing issuers. A company is an "issuer" under the *FCPA* if it has a class of securities registered under Section 12 of the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act. In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A company thus need not be a US company to be an issuer. Foreign companies with American Depositary Receipts that are listed on a US exchange are also issuers. As of December 31, 2011, 965 foreign companies were registered with SEC. Officers, directors, employees, agents, or stockholders acting on behalf of an issuer (whether US or foreign nationals), and any co-conspirators, also can be prosecuted under the *FCPA*.

Domestic Concerns—15 USC. § 78dd-2

The *FCPA* also applies to "domestic concerns." A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States. [Note that "domestic concern" includes non-profit organizations such as aid groups.] Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.

¹⁴ Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (Chicago: American Bar Association, 2013) at 57-63.

¹⁵ Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), online: <<http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>>.

Territorial Jurisdiction—15 USC. § 78dd-3

The *FCPA* also applies to certain foreign nationals or entities that are not issuers or domestic concerns. Since 1998, the *FCPA*'s anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States. Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the *FCPA*'s anti-bribery prohibitions.

[According to Deming, “[w]ith the critical role that facilities of the US play in international commerce, such as the internet, banking, and air travel, a broad interpretation of what constitutes ‘while in the territory of the US’ could have dramatic implications.”¹⁶]

What Jurisdictional Conduct Triggers the Anti-Bribery Provisions?

The *FCPA*'s anti-bribery provisions can apply to conduct both inside and outside the United States. Issuers and domestic concerns—as well as their officers, directors, employees, agents, or stockholders—may be prosecuted for using the US mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. The Act defines “interstate commerce” as “trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof...” The term also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality. Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a US bank or otherwise using the US banking system, or traveling across state borders or internationally to or from the United States.

Those who are not issuers or domestic concerns may be prosecuted under the *FCPA* if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the US mails or a means or instrumentality of interstate commerce. Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the *FCPA* if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.

In addition, under the “alternative jurisdiction” provision of the *FCPA* enacted in 1998, US companies or persons may be subject to the anti-bribery provisions even if they act outside the United States. The 1998 amendments to the *FCPA* expanded the jurisdictional coverage of the Act by establishing an alternative basis for jurisdiction, that is, jurisdiction based on the nationality principle. In particular, the 1998 amendments removed the requirement that there be a use of interstate commerce (e.g., wire, email, telephone call) for acts in furtherance of a corrupt payment to a foreign official by US companies and persons occurring wholly outside of the United States [footnotes omitted].

END OF EXCERPT

Jurisdiction of US courts under the *FCPA* can be limited by due process requirements. In civil cases, the defendant must have “minimum contacts” with the court’s jurisdiction, and the exercise of jurisdiction must be reasonable. If a defendant’s actions have no effect in the US and the defendant has negligible contact with the US, these requirements might not be met. For example, in *SEC v Steffen*, the defendant’s

¹⁶ Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at 181.

role in falsified records was too “tangential”, and the defendant had no geographic ties to the US. The US forum had little continuing interest in pursuing the particular defendant, who also spoke little English. As a result, the court found that exercising jurisdiction over the defendant would exceed the limits of due process.¹⁷

In criminal cases, personal jurisdiction arises from a defendant’s arrest in the US, voluntary appearance in court or lawful extradition to the US.¹⁸

Foreign individuals or legal entities that would otherwise be outside the jurisdictional reach of the FCPA may be held criminally liable pursuant to the FCPA if they aided, abetted, counselled or induced another person or entity to commit a FCPA offense or if they conspired to violate the FCPA. The following excerpt from the *Resource Guide* explains the SEC’s and DOJ’s interpretation of the scope of secondary liability provisions of the FCPA:¹⁹

BEGINNING OF EXCERPT

Additional Principles of Criminal Liability for Anti-Bribery Violations: Aiding and Abetting and Conspiracy

Under federal law, individuals or companies that aid or abet a crime, including an *FCPA* violation, are as guilty as if they had directly committed the offense themselves. The aiding and abetting statute provides that whoever “commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission,” or “willfully causes an act to be done which if directly performed by him or another would be an offense against the United States,” is punishable as a principal. Aiding and abetting is not an independent crime, and the government must prove that an underlying *FCPA* violation was committed.

Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the *FCPA*—i.e., for agreeing to commit an *FCPA* violation—even if they are not, or could not be, independently charged with a substantive *FCPA* violation. For instance, a foreign, non-issuer company could be convicted of conspiring with a domestic concern to violate the *FCPA*. Under certain circumstances, it could also be held liable for the domestic concern’s substantive *FCPA* violations under *Pinkerton v. United States*, which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined.

A foreign company or individual may be held liable for aiding and abetting an *FCPA* violation or for conspiring to violate the *FCPA*, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States. For example, if a foreign company or individual conspires to violate the *FCPA* with someone who commits an overt act within the United States, the United States can prosecute the foreign company or individual for the conspiracy. The same principle applies to aiding and abetting violations. For instance, even though they took no action in the United States, Japanese and European companies were charged with conspiring with and aiding and abetting a domestic concern’s *FCPA* violations [endnotes omitted].

¹⁷ Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (Chicago: American Bar Association, 2013) at 58–59.

¹⁸ *Ibid* at 63.

¹⁹ Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 34, online: <<http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>>.

[Note: While the US may claim jurisdiction over the offence, they may have difficulty prosecuting foreign persons or entities if they have no extradition treaty with the foreign state or if the foreign state rejects the US claim of jurisdiction.]

Additional Principles of Civil Liability for Anti-Bribery Violations: Aiding and Abetting and Causing

Both companies and individuals can be held civilly liable for aiding and abetting *FCPA* anti-bribery violations if they knowingly or recklessly provide substantial assistance to a violator. Similarly, in the administrative proceeding context, companies and individuals may be held liable for causing *FCPA* violations. This liability extends to the subsidiaries and agents of US issuers.

In one case, the US subsidiary of a Swiss freight forwarding company was held civilly liable for paying bribes on behalf of its customers in several countries. Although the US subsidiary was not an issuer for purposes of the *FCPA*, it was an “agent” of several US issuers. By paying bribes on behalf of its issuers’ customers, the subsidiary both directly violated and aided and abetted the issuers’ *FCPA* violations.

END OF EXCERPT

1.7.2 Questioning the DOJ and SEC’s Broad View of Territorial Jurisdiction under the FCPA

As noted in the above excerpts, the DOJ and the SEC take a very broad view of the territorial jurisdiction of the *FCPA*. Some commentators refer to US jurisdiction over bribery as “potentially quasi-universal”.²⁰ It is also possible to understand the *FCPA*’s jurisdiction over issuers as being based on the effects doctrine of territoriality, as the corrupt acts on behalf of foreign corporations listed on the US markets have the potential to negatively affect the American competitors of the offending corporations.

Sean Hecker and Margot Laporte address the implications of the DOJ and SEC’s broad interpretation of territorial jurisdiction.²¹ Hecker and Laporte state that “[a]lthough not explicitly set forth in the joint *FCPA* guidance, the DOJ, in particular, through its public statements and in settled cases, has taken the position that even fleeting contact with the US territory may constitute a sufficient US nexus to assert territorial jurisdiction over foreign entities and individuals for conduct that occurred outside the United States.”²² Laporte and Hecker note that companies are often under pressure to settle *FCPA* enforcement actions and are reluctant to risk challenging the DOJ and SEC’s broad interpretation of the *FCPA*. They cite as an example a settled action against JGC Corp., a Japanese firm charged with making corrupt payments to Nigerian public officials. In this case, the DOJ asserted that the *FCPA*’s territorial jurisdiction was established on the basis of wire transfers routed through US bank accounts.

The DOJ and SEC’s expansive interpretation of territorial jurisdiction in corruption cases is reflected by the recent assertion of jurisdiction over FIFA officials by the US, although the *FCPA* was not used. Since the *FCPA* only covers bribes to government officials, the DOJ used non-bribery charges under different legislation to reach the indicted officials, namely the *Racketeer Influenced and Corrupt Organizations Act (RICO)* and the *Travel Act*, which prohibits the use of interstate travel and commerce to further an illegal

²⁰ Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, “The International Legal Framework against Corruption: Achievements and Challenges” (2013) 14 *Melbourne Journal of International Law* 1 at 49, online:

<http://law.unimelb.edu.au/data/assets/pdf_file/0008/1687445/08Wouters,-Ryngaert-and-Cloots1.pdf>.

²¹ Sean Hecker & Margot Laporte, “Should *FCPA* ‘Territorial’ Jurisdiction Reach Extraterritorial Proportions?” (2013) 42 *Intl Law News* 7.

²² *Ibid* at 8.

activity. This assertion of jurisdiction has been criticized in relation to the officials who barely have tangential connections to the US. The DOJ claims jurisdiction because several of the FIFA officials and marketing executives were allegedly involved in palm-greasing-related activities on American soil and some of the involved marketing companies and associations have offices in the US.²³

Hecker and Laporte note that there is case law to suggest that the FCPA's territorial jurisdiction is not inexhaustible. Koehler also makes this observation and criticizes the DOJ guidance (quoted above) for basing its advice on settled enforcement actions lacking in judicial scrutiny rather than case law.²⁴ Hecker and LaPorte cite a district court decision, *US v Patel*,²⁵ in which the Court rejected the DOJ's argument that the act of mailing a corrupt purchase agreement from the UK to the US was sufficient to establish a territorial nexus with the US. The Court held that, in order for the FCPA to apply to foreign entities that are not considered "issuers" under the FCPA, the act in furtherance of a corrupt payment must have taken place within US territory. Hecker and Laporte add, however, that until more US courts consider the issue, the DOJ and SEC are unlikely to retreat from their expansive interpretation of the territorial jurisdiction of the FCPA.

Hecker and Laporte also go on to state that a number of enforcement challenges arise when attempting to prosecute foreign entities with little territorial nexus with the US under the FCPA. Although mutual legal assistance agreements and cooperation with foreign states are on the rise, there nonetheless may be prolonged delays or difficulties when attempting to extradite accused persons or to obtain evidence from abroad. As a result, the DOJ and SEC rely heavily on the cooperation of the entities under investigation. In instances where evidence must be sought in foreign countries, the five-year statute of limitations period for FCPA violations may be suspended in some circumstances for up to three years. Lengthy delays in bringing matters to court may present further challenges, as witnesses may become unavailable or their memories may grow stale and evidence may be lost or destroyed. Given the difficulties in investigation and enforcement, the authors question whether it is prudent for the US to pursue enforcement actions in cases where there is only a weak territorial link to the US.

Annalisa Leibold also criticizes the broad extraterritorial application of the FCPA as she argues that extension of the FCPA jurisdiction to foreign non-issuers may be contrary to principles of customary international law.²⁶ Leibold analyzes the discrepancy in the amount of fines paid by foreign businesses versus domestic businesses and suggests that these statistics may be explained either by the fact that foreign corporations are more corrupt than the US firms, foreign corporations do not cooperate with the US law enforcement authorities, or the SEC and DOJ are unfairly targeting foreign businesses with higher penalties for the FCPA violations.²⁷ Finally, given the ease with which the DOJ and the SEC can bring charges against a foreign company and the fact that most foreign corruption charges are settled rather than litigated, the FCPA may be closer to an international anti-corruption business tax than to a domestic criminal law with limited extraterritorial application.²⁸ Leibold suggests that, to minimize potential foreign policy concerns and violations of international law, the SEC and DOJ should focus the enforcement of the FCPA on cases of bribery that have a close connection or substantial effect on the United States.²⁹

²³ "The World's Lawyer: Why America, and Not Another Country, Is Going after FIFA", *The Economist* (6 June 2015).

²⁴ Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham, UK: Edward Elgar, 2014) at 114.

²⁵ *US v Patel*, No 1:09-cr-00335, Trial Tr 5:11-14, 7:17-8:2 (DDC June 6, 2011).

²⁶ Annalisa Leibold, "Extraterritorial Application of the FCPA under International Law" (2015) 51 *Willamette L Rev* 225 at 253-259, online: <<https://ssrn.com/abstract=2489675>>.

²⁷ *Ibid* at 238.

²⁸ *Ibid* at 227, 259-260.

²⁹ *Ibid* at 262.

Similarly, Mateo de la Torre poses the question whether vigorous enforcement of the FCPA in cases where there is only a tangential link to the United States is “a valid regulatory effort or, alternatively, an act of legal imperialism.”³⁰ He argues that courts should place limitations on the extraterritorial reach of the FCPA in the interest of foreign jurisdictions, businesses and foreign relations. He suggests that, in determining whether extraterritorial application of the FCPA would be unreasonable, courts may look at the list of factors enumerated in section 403 of the *Restatement (Third) of Foreign Relations Law*, the following six of which are of particular importance:³¹

- 1) the link of the activity to the territory of the regulating state;
- 2) the connections between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- 3) the existence of justified expectations that might be protected or hurt by the regulation;
- 4) the importance of the regulation to the international political, legal, or economic system;
- 5) the extent to which another state may have an interest in regulating the activity; and
- 6) the likelihood of conflict with regulation by another state.

Mateo de la Torre concludes that successful challenges to the extraterritorial application of the FCPA in courts would allow foreign jurisdictions to develop regulatory regimes that take into account their cultural, political and economic specifics while continuing to provide cross-border assistance when necessary. Simultaneously, it would free prosecutorial resources of the SEC and DOJ that would otherwise be used in prosecuting cases with only remote connections to the United States.³²

1.8 UK Law

For offences under sections 1, 2 and 6 (active and passive bribery and bribing a foreign public official), the *Bribery Act* asserts jurisdiction based on both the territoriality principle and the nationality principle:

12. Offences under this Act: territorial application

(1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.

(2) Subsection (3) applies if—

(a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,

(b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and

(c) that person has a close connection with the United Kingdom.

(3) In such a case—

³⁰ Mateo J de la Torre, “The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets” (2016) 49 *Cornell Intl LJ* 469 at 470.

³¹ *Ibid* at 481.

³² *Ibid* at 494-495.

(a) the acts or omissions form part of the offence referred to in subsection (2)(a),
and

(b) proceedings for the offence may be taken at any place in the United Kingdom.

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

(h) a body incorporated under the law of any part of the United Kingdom,

(i) a Scottish partnership.

(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

(6) Where no act or omission which forms part of an offence under section 7 takes place in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom.

(7) Subsection (8) applies if, by virtue of this section, proceedings for an offence are to be taken in Scotland against a person.

(8) Such proceedings may be taken—

(a) in any sheriff court district in which the person is apprehended or in custody, or

(b) in such sheriff court district as the Lord Advocate may determine.

(9) In subsection (8) “sheriff court district” is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

In summary, the *Bribery Act* will apply if “any act or omission which forms part of the offence” occurs within the UK (section 12(1)). In addition, the *Bribery Act* applies to conduct occurring wholly outside the UK by persons with a “close connection” to the UK. Section 12(4) lists those considered to have a close connection to the UK, including British citizens, British nationals living overseas and all individuals ordinarily resident in the UK. Companies incorporated under UK law are also deemed to have a close connection with the UK. Foreign subsidiaries of UK parent companies are not subject to UK jurisdiction, even if wholly owned by UK parent companies. But, if a foreign subsidiary acts as an agent for a UK company, the agent’s conduct can be attributed to the parent company. Pursuant to section 14, senior officers or directors of a UK corporation that has been convicted of a section 1, 2 or 6 offence are also guilty of the offence if they consented or connived in the commission of the offence.

The offence of failing to prevent bribery under section 7 of the *Bribery Act* has much broader extraterritorial application. As James D. Painter explains,³³

Section 7 stands in stark contrast to the much narrower jurisdictional provisions of Sections 1, 2, and 6 of the *Bribery Act*, and it is this provision that is so striking in its extraterritoriality and scope of potential criminal liability. Three separate provisions embedded within Section 7 lead to this expansive jurisdictional reach and scope. First, the Section applies to "relevant commercial organizations". This term is defined in Section 7(5) of the *Bribery Act* to include both entities organized under UK law as well as entities organized under the laws of any other jurisdiction if the entity "carries on a business, or part of a business, in any part of the United Kingdom". Second, unlike the Section 1, 2, and 6 offenses that require either an act or omission in the UK or at least a "close connection", a relevant commercial organization can be exposed under Section 7 of the Act for failing to prevent bribery "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere." Third, the predicate offenses for an organization to be criminally liable under Section 7 are triggered by the acts or omissions of a person "associated with" the relevant commercial organization. Under Section 8 of the Act, an "associated person" is a person who performs services for or on behalf of the organization. The term includes employees, agents and subsidiaries, and the capacity in which the associated person performs services does not matter. These three concepts work to create an extraordinarily broad statute.

As Jessica Lordi notes, it is likely that the words "carry on a business" are intended to capture all commercial organizations doing business in the UK, not just those with a physical office in the UK.³⁴ In effect, section 7 appears to extend its reach to "virtually all major multinational corporations."³⁵

The *Guidance* document to the UK *Bribery Act*, produced by the Ministry of Justice, attempts to assuage concerns about the extraterritorial scope of section 7 by anticipating that a "common sense approach" will be employed when determining whether an organization carries on a business in the UK.³⁶ According to the *Guidance*, the mere fact that a company is listed for trading on the London Stock Exchange would not be sufficient to bring it under the jurisdiction of section 7 of the *Bribery Act* without further evidence of a "demonstrable business presence" in the UK. The *Guidance* also states that "having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies."³⁷

Lordi is skeptical, however, as there is no existing UK case law that gives meaning to the "common sense approach." Other commentators question whether the *Guidance* document has capitulated to business interests that objected to the reach of the *Bribery Act*. According to Jacqueline Bonneau, the Ministry of Justice's *Guidance* "has created loopholes that simply do not exist on the face of the *Bribery Act* text, risking the resurrection of some of the most infamous problems of the old common law bribery regime."³⁸

³³ James D Painter, "The New UK *Bribery Act*—What US Lawyers Need to Know" (2011) 82 Pennsylvania Bar Association Quarterly 173 at 174.

³⁴ Jessica Lordi, "The UK *Bribery Act*: Endless Jurisdictional Liability on Corporate Violators" (2012) 44 Case W Res J Intl L 955 at 972.

³⁵ J Warin, C Falconer & M Diamant, "The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption" (2010-2011) 46 Tex Intl LJ 1 at 28.

³⁶ United Kingdom, Minister of Justice, *The Bribery Act 2010: Guidance*, online: <<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>.

³⁷ *Ibid* at 16.

³⁸ Jacqueline Bonneau, "Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement" (2010-2011) 49 Colum J Transnat'l L 365.

It remains to be seen how the Serious Fraud Office, the agency charged with investigating offences under the *Bribery Act*, and the courts will interpret the jurisdiction of the *Bribery Act*.

In any case, a "relevant commercial organization" is liable to be convicted of an offence if persons associated with that organization commit a bribery offence, even if the bribery is committed abroad and the persons and organization have no close connection with the UK. For example, suppose an agent of Sri Lankan nationality was working for the Sri Lankan-based branch of a company incorporated in India. The Sri Lankan agent offers a bribe to an official in Sri Lanka. Importantly, the Indian company has an active branch in the UK. Under the *Bribery Act*, the Indian company could be prosecuted for failure to prevent bribery. Note, however, that to be personally prosecuted, the person committing the offence requires a close connection to the UK.

1.9 Canadian Law

Until 2013, the *CFPOA* determined jurisdiction based exclusively on the principle of territoriality. Territoriality is the jurisdictional principle which governs most criminal offences under Canadian law (*Criminal Code*, section 6), including the secret commissions offence in section 426. However, Canada has asserted jurisdiction based on nationality for a few crimes, such as offences under the *CFPOA* (since 2013), offences involving child sex tourism and certain terrorism offences committed outside of Canada; see *Criminal Code*, sections 7 (3.73) (3.74) (3.75) (4.1) and (4.11).³⁹

Since the *Criminal Code* does not define "territorial jurisdiction", its meaning has been determined by case law. The leading case was decided 30 years ago by the Supreme Court of Canada, but its definition is now outdated in the context of bribery and other transnational offences. In *Libman v The Queen* (1985), the Supreme Court of Canada held that in order for a Canadian criminal statute to apply, "a significant portion of the activities constituting that offence" must take place in Canada.⁴⁰ If a significant portion of the criminal conduct occurs in Canada and other parts occur in a foreign state, then Canada and that foreign state have concurrent jurisdiction (or qualified territorial jurisdiction). In *Libman*, the Court went on to state that there must be a "real and substantial link" between the offence and Canada. In addition, the court must be satisfied that prosecution does not offend the principle of international comity. The term "comity" refers to the principle of legal reciprocity and consideration for the interests of other states. Under this principle, a state displays civility towards other nations by respecting the validity of their laws and other executive or judicial actions.

Libman sets a fairly high test for territorial jurisdiction. While Canada requires "significant portions" of the offence to occur within Canada, the US and UK assert territorial jurisdiction if "any act or omission" which constitutes an element of the offence occurs within their borders. Prior to the 2013 amendments adding nationality jurisdiction to the *CFPOA*, it appears that the *Libman* test would have excluded Canadian prosecution of bribery by Canadian individuals or companies engaged in foreign bribery if the conduct constituting bribery occurred largely in other countries without any significant conduct in or substantial link to Canada. As noted, such a demanding test for territorial jurisdiction is not well suited to the modern realities of global business, in which the transfer of information, contracts and money between countries can occur instantaneously.

The OECD Working Group expressed concerns that Canada's standard of a "real and substantial link" failed to comply with the OECD Convention, which mandates that even a minor territorial link should be sufficient. However, the *Libman* standard has been relaxed somewhat in practice. For example, in *R v*

³⁹ For a fuller list and a discussion of extraterritoriality, see S Penney, V Rondinelli and J Stribopolous, *Criminal Procedure in Canada* (LexisNexis Canada, 2011) at 601-605.

⁴⁰ *Libman v the Queen*, [1985] 2 SCR 178.

Karigar,⁴¹ the first conviction of an individual under the *CFPOA*, the accused was a Canadian acting on behalf of a Canadian company while in India. Even though the actual financial element of the offence (i.e. approval or funding of the bribe) did not occur in Canada, the court found there was still a real and substantial connection because the accused was acting on behalf of a Canadian company and the unfair advantage would have flowed to that Canadian company. The substantial link seems to be that the accused was a Canadian citizen working for a Canadian company (compare with *Chowdhury* noted below).

Canada's failure to expressly assert jurisdiction based on nationality was repeatedly criticized by commentators prior to the 2013 amendments. In the 2011 Phase 3 Report, the OECD Working Group called the *CFPOA*'s lack of extraterritorial jurisdiction based on nationality "a serious obstacle to enforcement" and urged Canada to rectify this as a "matter of urgency".⁴² Prior to the 2013 amendments, Canada responded to such criticisms by arguing that the establishment of nationality jurisdiction was not explicitly mandated under its treaty obligations.

In June 2013, the *CFPOA* was amended by Bill S-14 to extend the Act's prescriptive jurisdiction to Canadian citizens, permanent residents and any public body or entity formed under Canadian law. These individuals or legal persons will now be subject to Canadian criminal liability in respect of acts of bribing a foreign public official, irrespective of whether any part of the act constituting the offence takes place in Canada. With these amendments, a Canadian accused such as Mr. Karigar would clearly fall within Canada's jurisdiction.

However, the *CFPOA*'s reach is not without limits. In *Chowdhury v HMQ*,⁴³ the accused was a citizen and resident of Bangladesh acting as an agent for a Canadian corporation, SNC-Lavalin. The accused had never been to Canada. In his capacity as agent for SNC-Lavalin, he allegedly facilitated the offer of bribes to foreign officials in Bangladesh in an attempt to secure for SNC-Lavalin an engineering contract for the Padma Bridge proposal.

Chowdhury launched an application claiming Canada had no jurisdiction to prosecute him for an offence of bribery under section 3(1)(b) of the *CFPOA*. The application was successful, and the bribery charge against Chowdhury was stayed. The Court gave a very helpful analysis of the complexity of the various concepts of jurisdiction. As the Court noted,

[10] The different forms of jurisdiction often overlap in real world legal problems. In this case the interplay is between prescriptive jurisdiction and adjudicative jurisdiction. Specifically, whether Parliament's legislation concerning the bribery of foreign officials brings a foreign national, whose acts in respect of the alleged offence were undertaken wholly outside of Canada, within the jurisdiction of this court.

...

[17] The problem in this case, of course, is that the applicant is not now, nor has he ever been, within Canada. He is not a Canadian citizen. He is a citizen of Bangladesh and his actions in relation to this alleged offence were all undertaken within Bangladesh. The question is whether a charge under the *CFPOA* gives this court jurisdiction over the applicant.

⁴¹ *R v Karigar*, 2013 ONSC 2199.

⁴² OECD, "The OECD Anti-Bribery Convention and the Working Group on Bribery", online: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Anti-Bribery_Convention_and_Working_Group_Brief_ENG.pdf>.

⁴³ *Chowdhury v HMQ*, 2014 ONSC 2635.

In other words, did Parliament intend section 3(1)(b) of the *CFPOA* to apply to non-Canadians who had never been in Canada and whose acts of bribery (for the benefit of a Canadian company) occurred entirely in a foreign state? The Court held that Parliament did not, stating the following:

[20] In this regard, the general rule when interpreting a statute is that Parliament is presumed to have intended to pass legislation that will accord with the principles of international law. This point is made clear in *Hape* where LeBel J. said, at para. 53:

It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law.

It is, of course, open to Parliament to pass legislation that conflicts with international law but if it wishes that result, it must do so clearly and expressly.

[21] The decision in *Hape* dealt with the issue of the "extraterritorial application" of Canadian law. It noted the general prohibition in s. 6(2) of the *Criminal Code* that I have set out above. The court went on to find that Parliament has "clear constitutional authority" to pass legislation governing conduct by non-Canadians outside of Canada. However, in exercising that authority, the court noted certain parameters that will generally apply. LeBel J. said, at para. 68:

[Parliament's] ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law.

[22] A basic part of international law is the principle of sovereign equality. Countries generally respect each other's borders and will not attempt to adjudicate matters that occurred within the borders of another sovereign country. Similarly, countries will exercise jurisdiction over their own nationals but not over another country's nationals except, of course, where that country's nationals commit an offence within another country's borders.

[23] Nevertheless, there are situations where a country will reach beyond its borders to prosecute individuals who commit an offence in another country. This normally only occurs where the offence committed in the other country is committed by the first country's own nationals or where the harm arising from the criminal acts in the other country is visited upon the citizens of the first country. In the former case, the basis for jurisdiction is nationality. At common law, we recognize that Canada may have a legitimate interest in prosecuting an offence involving the actions of Canadians outside of our borders. In the latter case, the basis for jurisdiction is qualified territoriality, which extends the notion of territorial jurisdiction beyond our strict borders. Under the "objective territorial principle", Canada will have a legitimate interest in prosecuting non-Canadians for criminal actions that cause harm in Canada provided a real and substantial link between the offence and Canada is established and international comity is not offended.: *Libman; Hape* at para. 59; Robert J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2010) at pp. 63-65.

...

[35] There is a last point to be taken from *Hape* and that is with respect to the issue that arises here, namely, the assumption of jurisdiction over foreign nationals. The court in *Hape* held that it was open to Parliament to pass legislation that sought to govern conduct by non-Canadians outside of Canada. The court pointed out, however, that if Parliament

chose to do so, Parliament would likely be violating international law and would also likely offend the comity of nations. Again, LeBel J. said, at para. 68:

Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada. Its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations.

[36] As a consequence of that reality, courts will approach the interpretation of any legislation with the presumption that Parliament did not intend to violate international law and offend the comity of nations. Thus, absent clear language compelling such an interpretation, courts will adopt an interpretation that leads to the opposite outcome.

The Court also emphasized the importance of the distinction between jurisdiction over the offence and jurisdiction over the person:

[13] Where adjudicative jurisdiction is asserted over an alleged offence, a court must have jurisdiction over both the offence and the person accused of the offence. The two are separate and discrete issues. As Doherty J.A. succinctly said in *United States v. Kavatzis* (2006), 208 C.C.C. (3d) 139 (Ont. C.A.), at para. 18:

Jurisdiction over an accused is distinct from jurisdiction over an offence. This dimension of jurisdiction is less commented upon but it is crucial to the resolution of this application.

...

[37] At the risk of being repetitive, but so that it is clear, there is a distinction between Canada extending its jurisdiction over the offence, because the offence has some extraterritorial aspects, and Canada extending its jurisdiction over a person who is outside of Canada's territorial jurisdiction. Jurisdiction over the former is governed by the "real and substantial link" test set out in *Libman*. The latter is governed by the legislative language used in the offence creating statute. This point is made by Robert J. Currie in *International & Transnational Criminal Law* where the author observes, at p. 421:

When Parliament wishes the courts to take extraterritorial jurisdiction over persons or conduct completely outside Canadian borders, it must instruct the courts to this effect by making it explicit or necessarily implied in the legislation. Otherwise, territorial jurisdiction — as expanded by the *Libman* criteria — is the default.

The Court held that neither section 3(1)(b) nor other provisions of the *CFPOA* contained such clear language, rejecting the position that jurisdiction over the offence establishes jurisdiction over all parties to the offence and noting that jurisdiction over Chowdhury would depend on his physical presence in Canada:

[54] In the end result, the position of the Crown appears to be that once Canada has jurisdiction over the offence, it has jurisdiction over all of the parties to that offence. I do

not accept that proposition because it conflates the question of jurisdiction over the offence with the question of jurisdiction over the person. The existing authorities make it clear that these are two separate and distinct questions. Canada can achieve an affirmative answer to the first question but that does not lead inexorably to an affirmative answer to the second question. The mere fact that the applicant is a party to the offence is not sufficient, in my view, to give Canada jurisdiction over him unless and until the applicant either physically attends in Canada or Bangladesh offers to surrender him to Canada.

[55] This latter point is made out in some of the cases to which I have already referred. For example, in *Treacy*, Lord Diplock twice alludes to the fact that the English courts could gain jurisdiction over a foreign national if that person comes into the United Kingdom. Lord Diplock said, at p. 562:

Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England. [...] It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.
[emphasis added]

[56] The same point is made in *Liangsiriprasert* where Lord Griffiths said, at p. 250:

If the inchoate crime is aimed at England with the consequent injury to English society why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures?
[emphasis added]

[57] I accept, therefore, that if Canada was able to "lay hands" on the applicant, Canada would then have the jurisdiction to try the applicant for an offence under the *CFPOA* over which Canada also has jurisdiction. Until that should happen to occur, the *CFPOA* does not extend Canada's jurisdiction to the applicant for the purposes of prosecuting him under that statute.

Since Canada has no extradition treaty with Bangladesh, Canada cannot "lay hands" on Chowdhury. The Court also rejected the Crown's argument that Chowdhury would get away with impunity unless Canada claimed jurisdiction over him. The Court stated,

[49] It appears that it was the Minister's view that foreign nationals were not caught by the *CFPOA*, that Canada would not have jurisdiction over them and that it would be up to their host country to decide on any prosecution of them.

[50] The Crown submits that such an interpretation would allow the applicant to get away with his activities "with impunity". Indeed, that may well be the result but, if it is, it is because the authorities in Bangladesh will have decided not to prosecute the applicant for any involvement he had in these matters and not to surrender him to Canada for prosecution here. Those are both decisions that a sovereign country is entitled to make in respect of one of its citizens. I can think of few greater infringements on the sovereignty of a foreign state than for Canada to say that it will pre-empt or overrule those conclusions by

purporting to prosecute the applicant in this country where his own country has declined to do so.

[51] In addition to those considerations, the principle of international comity argues against an interpretation of s. 3 that would bring foreign nationals within its ambit. A state's sovereignty is at its peak when it is dealing with its own citizens and their actions within that state's own borders.

The 2013 amendments to the *CFPOA* (adding nationality jurisdiction) would not give Canada jurisdiction over a person like Chowdhury.

On June 4, 2014, the RCMP charged US nationals Robert Barra and Dario Berini (former CEOs of Cryptometrics) and UK national Shailesh Govindia (an agent for Cryptometrics) with an offence under section 3 of the *CFPOA*. Canada-wide warrants have been issued for all three (extradition proceedings in US and UK are an option). Based on *Chowdhury*, prosecutors will no doubt argue that Canada has a legitimate interest in prosecuting these foreign nationals in Canada because the bribery scheme had its genesis in Canada.

For more on Canada's jurisdiction over transnational criminal offences, see Robert J Currie & Dr. Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed (Toronto, ON: Irwin Law, 2013).

1.10 Concerns with Expanded Jurisdiction

Eileen Skinnider, in *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response*, reviews some of the major arguments as well as some of the concerns associated with expanding jurisdiction.⁴⁴

BEGINNING OF EXCERPT

The broadening of jurisdiction beyond the principle of [strict] territoriality will likely result in higher incidences of concurrent jurisdiction. This could give rise to conflicting assertions of civil or criminal jurisdiction, conflicts of laws and concerns of dual criminality and double jeopardy. Companies have raised concerns as to how they are to do business and respond to investigations and prosecutions in multiple jurisdictions that have different substantive laws, enforcement procedures, penalties and available resources.⁴⁵ Companies have also expressed concern regarding the “legalization of compliance codes” and the multiplicity of possible compliance codes found in different States.⁴⁶

Some commentators counter these concerns by pointing out that the reality is there is an appalling lack of enforcement, and not to waste time worrying about multiple jurisdictional issues.⁴⁷ However, the IBA Legal Practice Division Task Force on Extraterritorial Jurisdiction has studied this issue and calls for

⁴⁴ Eileen Skinnider, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 2012) at 12–13, online: <<http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Final%20Paper%20Corruption-09%20May%202012.pdf>>.

⁴⁵ [79] Working Group on Bribery Consultation with the Private Sector and Civil Society (OECD, October 2011), retrieved from <http://www.oecd.org/dataoecd/2/31/49040760.pdf>.

⁴⁶ [80] *Ibid.*

⁴⁷ [81] International Bar Association “Report of the Task Force on Extra-Territorial Jurisdiction” Chapter 4: Bribery and Corruption, February 6, 2009 at p. 202.

harmonizing guidelines to alleviate this potential challenge.⁴⁸ The Task Force also calls for States to consider adopting a “soft” form of double jeopardy or *ne bis in idem* that takes into account not just criminal liability, but “functional equivalent” civil liability for corporations and individuals.⁴⁹ The lack of harmonization of corruption statutes in terms of corporate and individual liability, penalties, major elements of offences and defences, needs to be considered in devising any double jeopardy rule.

Whether a corporation may be regarded as national differs amongst States. Some States regard a corporation as national if it has been founded according to the national law or if the corporation resides in the territory. Other States relate the question of jurisdiction to the nationality of the acting natural person, not to the nationality of the legal person. Thus, States would require that the person who has acted corruptly within the structure or in favor of the legal person is one of its citizens. However, this may cause “serious legal loopholes since in the crucial cases of corporate liability investigative agencies may not be able to identify the individual instigator or perpetrator”.⁵⁰

Moreover States “may consider that the principle of liability of legal persons links legal consequences to the legal entity itself, hence abstracting from individual persons and their nationality”.⁵¹ The application of nationality jurisdiction to legal persons remains untested. Whether the authorities in a parent company’s country can take action against the parent company where one of its foreign subsidiaries bribes a foreign public official is a priority issue for OECD.⁵²

END OF EXCERPT

For a discussion of risks of parallel proceedings, see Chapter 6, Section 7.2 of this book.

⁴⁸ [82] The Task Force recommends consideration of the development of a protocol to the OECD Convention that would spell out the relevant factors that countries should take into account in their consultations regarding the most efficient jurisdiction as well as putting forth the possibility of developing a concept of single jurisdiction: Report on the Task Force on Extra-territorial Jurisdiction. Others call for harmonization, such as Thomas Snider and Won Kidane “Combating Corruption through International Law in Africa: A Comparative Analysis” (2007) 40 Cornell Int’l L.J. 714.

⁴⁹ [83] International Bar Association “Report of the Task Force on Extra-Territorial Jurisdiction” Chapter 4: Bribery and Corruption, February 6, 2009 at p. 202.

⁵⁰ [84] UNODC, Technical Guide to the United Nations Convention Against Corruption (UN: 2009), retrieved from http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

⁵¹ [85] *Ibid.*

⁵² [86] 2 OECD Working Group on Bribery in International Business Transactions “Consultation Paper: Review of the OECD Instruments Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption” (OECD: Jan 2008), retrieved from <http://www.oecd.org/dataoecd/18/25/39882963.pdf>.

2. CRIMINAL LIABILITY OF CORPORATIONS AND OTHER COLLECTIVE ENTITIES

2.1 Introduction

It is well recognized among commentators that in order to effectively combat transnational corruption, mechanisms must be in place to hold corporations and other collective entities liable when they engage in bribery. For convenience, I will generally use the expression “corporate liability”, but when doing so I intend to include other legally recognized collective entities. In many cases, particularly when dealing with large, decentralized multinationals,⁵³ it may be impossible for an enforcement agency to determine who made the actual decision to offer a bribe. Often the decision to offer a bribe by a frontline employee is either supported or tolerated by the upper echelons of management.⁵⁴ In such a case, punishing only the frontline employee would not sufficiently punish the corporate culture that facilitated the wrongdoing, nor would it effectively deter other corporations from allowing this culture to persist. There is therefore a need to hold corporations liable in these instances.

For many years, both common law and civil law jurisdictions resisted the idea that a corporation could be found guilty of a “crime”. This reluctance was based on the traditional notion that “crimes” required proof of “personal mental fault” (also referred to as subjective fault), which usually took the form of acting intentionally or recklessly (i.e. the *accused foresees* that his/her conduct may cause a criminal harm, but engages in that conduct, thereby knowingly taking the risk that the criminal harm may occur). It was thought that corporations, as non-human legal fictions, could not form personal states of mind such as intention or subjective recklessness. As industrialization spread in the 18th and 19th centuries, many new offences were created to prevent or regulate industrial activities and industrialization’s harmful ancillary effects. These offences were generally considered to be regulatory or administrative offences, as opposed to criminal offences. Since they were not crimes, they did not require proof of “personal fault”. They were strict or absolute liability and, therefore, corporations could be and were convicted of these types of offences.

The pressure to also hold corporations liable for criminal offences began to build in the early 20th century. Common law countries slowly adopted corporate *criminal* liability in the first half of the 20th century. How? Generally speaking, courts in common law countries began to hold that the “personal fault” of the “directing minds” of a corporation was deemed to also be the corporation’s personal fault. The critical question then became “which officers of a corporation are that corporation’s ‘directing minds’?”.

Civil law countries were less willing to accept the fiction that a corporation can have a guilty intent or mind. However, since the mid-20th century, many, but not all, civil law countries began to embrace corporate criminal liability (an issue further discussed in Section 2.4 below).

There are currently three main legal mechanisms for imputing criminal liability to corporations. These mechanisms are significantly different. In addition, within each mechanism there can be variations in terms of broad or narrow attribution of criminal liability to corporations. The three mechanisms are:

1. strict liability (used in general for US federal laws);

⁵³ In a 2007 study of international business organizations, almost 70,000 multinational parent companies operated through nearly 700,000 foreign affiliates and the largest 100 companies had an average of 187 subsidiaries per group: PI Blumerg et al, *The Law of Corporate Groups: Jurisdiction, Practice and Procedure* (Aspen Publishers Online, 2007), cited in OECD, *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (OECD, 2016) at 11, n 4, online: <<https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>>.

⁵⁴ Mark Pieth, “Article 2. The Responsibility of Legal Persons” in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention: A Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 212-51.

2. directing mind or identification doctrine (used by countries such as England and Canada and by many states in the US and Australia); and
3. corporate culture (used in Australian federal laws).

Pieth and Ivory briefly summarize these three mechanisms:⁵⁵

- by imputing to the corporation offences committed by any corporate agent or employee – no matter what steps others in the corporation had taken to prevent and respond to the misconduct (strict vicarious liability), or if others had not done enough to prevent the wrongdoing (qualified vicarious liability);
- by identifying the corporation with its executive bodies and managers and holding the corporation liable for their acts, omissions, and states of mind of those executives (identification); and
- by treating the collective entity as capable of offending in its own right, either through the aggregated thoughts and deeds of its senior stakeholders (aggregation) or through inadequate organizational systems and cultures (corporate culture, corporate (dis)organization).

Countries such as France, Austria, Italy and Switzerland have all enacted statutes that impose corporate criminal liability. Some jurisdictions, such as Germany, still do not recognize corporate *criminal* liability but instead impose quasi-criminal regulatory sanctions on collective entities. Outside of Europe, countries such as Korea, Japan and China recognize at least some form of corporate criminal liability. There remain, however, some countries that do not recognize criminal or quasi-criminal sanctions for companies, such as Greece and Uruguay.⁵⁶ In these countries, it is only possible to convict the employees, agents or executives of a company, but not the company itself. For a recent overview of corporate liability in Europe see: Clifford Chance LLP, *Corporate Liability in Europe*.⁵⁷ A 2016 review by the OECD Working Group on Bribery of corporate liability of the 41 countries that are parties to the OECD Anti-Bribery Convention is also now available.⁵⁸

Among countries that do recognize corporate criminal liability, there are significant variations regarding the offences for which criminal liability may be imposed and the way in which that liability is triggered. Most common law jurisdictions now accept that a corporation may be found to have *mens rea* through its human actors. Among civil law countries, some countries accept this proposition and impose corporate criminal liability for all crimes. Other civil law countries only accept this proposition for certain listed offences. The countries that employ this “list-based” approach generally restrict corporate criminal liability to economic and other types of offences generally associated with corporations as well as offences established pursuant to international and regional conventions. A more detailed review of the ways in which various common law and civil law countries address corporate criminal liability can be found in Pieth and Ivory’s chapter “Emergence and Convergence: Corporate Criminal Liability Principles

⁵⁵ Mark Pieth & Radha Ivory “Emergence and Convergence: Corporate Criminal Liability Principles in Overview” in M Pieth & R Ivory, eds, *Corporate Criminal Liability Emergence, Convergence and Risk* (Springer Netherlands, 2011) at 21–22.

⁵⁶ *Ibid.*

⁵⁷ Clifford Chance LLP, *Corporate Liability in Europe* (London: Clifford Chance, 2012), online: http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf.

⁵⁸ OECD, *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (OECD, 2016), online: <https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>.

in Overview”⁵⁹ and in the 2016 OECD report *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*.⁶⁰

The attribution of criminal intent or fault to corporations also raises the possibility of a due diligence or compliance defence. The possible existence of that defence in the context of bribery and anti-corruption offences in the US, UK and Canada will be discussed in further detail below.

2.2 UNCAC

UNCAC does not mandate that State Parties establish *criminal* sanctions for corporations involved in corruption offences. However, Article 26 does require State Parties to ensure that legal entities are liable (criminally *or otherwise*) for their participation in offences established under UNCAC. Article 26 states:

Article 26. Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

The *Legislative Guide* to UNCAC addresses corporate liability under Article 26 as follows:⁶¹

Article 26, paragraph 1, requires that States parties adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for participation in the offences established in accordance with the Convention.

The obligation to provide for the liability of legal entities is mandatory, to the extent that this is consistent with each State’s legal principles. Subject to these legal principles, the liability of legal persons may be criminal, civil or administrative (art. 26, para. 2), which is consistent with other international initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems. Thus, there is no obligation to establish criminal liability, if that is inconsistent with a State’s legal principles. In those cases, a form of civil or administrative liability will be sufficient to meet the requirement.

Article 26, paragraph 3, provides that this liability of legal entities must be established without prejudice to the criminal liability of the natural persons who have committed the

⁵⁹ Mark Pieth & Radha Ivory “Emergence and Convergence: Corporate Criminal Liability Principles in Overview” in M Pieth & R Ivory, eds, *Corporate Criminal Liability Emergence, Convergence and Risk* (Springer Netherlands, 2011).

⁶⁰ OECD, *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (OECD, 2016), online: <<https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>>.

⁶¹ United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed (New York: United Nations, 2012) at paras 333-339, online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

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offences. The liability of natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not be affected in any way by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction them both

The Convention requires States to ensure that legal persons held liable in accordance with article 26 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (art. 26, para. 4).

This specific provision complements the more general requirement of article 30, paragraph 1, that sanctions must take into account the gravity of the offence. Given that the investigation and prosecution of crimes of corruption can be quite lengthy, States with a legal system providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention are comparatively long (see also art. 29).

The most frequently used sanction is a fine, which is sometimes characterized as criminal, sometimes as non-criminal and sometimes as a hybrid. Other sanctions include exclusion from contracting with the Government (for example public procurement, aid procurement and export credit financing), forfeiture, confiscation, restitution, debarment or closing down of legal entities. In addition, States may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgment, the appointment of a trustee, the requirement to establish an effective internal compliance programme and the direct regulation of corporate structures.

The obligation to ensure that legal persons are subject to appropriate sanctions requires that these be provided for by legislation and should not limit or infringe on existing judicial independence or discretion with respect to sentencing [footnotes omitted].

2.3 OECD Convention

Article 2 of the OECD Convention states:

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

The clause “in accordance with its legal principles” reflects the Convention’s goal of functional equivalency, meaning that State Parties are required to sanction the bribery of foreign public officials in the same manner that they would sanction other offences committed by corporations, without mandating changes in the fundamental principles of their respective legal systems.⁶² In this regard, the *Commentaries on the Convention* state that if the concept of *criminal* responsibility of legal persons is not recognized in a nation’s legal system, that nation is not required to establish it. Furthermore, Article 3(2) requires that if criminal liability for legal persons is not available, State Parties *shall ensure* that legal persons are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.” This wording is very similar to the requirements regarding the sanctioning of legal persons later adopted in UNCAC. Pursuant to Article 3(4), State Parties shall also consider the imposition of additional civil or administrative sanctions, such as exclusion from participation in public procurement processes, exclusion from entitlement to certain benefits or a judicial

⁶² Mark Pieth, “Article 2. The Responsibility of Legal Persons” in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention: A Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2014).

winding-up order (These and other civil remedies are discussed in Chapter 7, Sections 7 to 10 of this book).

In 2009, the OECD Council adopted the 2009 Recommendation for Further Combatting Bribery and Annex I, which stated that member parties to the convention should not treat prosecution of natural persons as a prerequisite to also prosecuting the corporation, and secondly it provided guidance on different methods for attributing liability to the company based on the actions or inactions of natural persons associated with the company.

Pieth notes that the OECD Working Group on Bribery has been reluctant to give directives on which sanctions it feels meet the standard of “effective, proportionate and dissuasive”.⁶³ Upon reviewing the Working Group on Bribery’s Phase One evaluation of Japan (where it considered the sanctions available in Japan to be insufficient), Pieth argues that two principles are discernible:⁶⁴

By virtue of this finding, the WGB [Working Group on Bribery] established two principles: first, that sanctions against corporations must be sufficiently ‘tough’ to have an impact on large multinational corporations, second, that according to the concept of functional equivalence a trade-off is possible between two theoretically quite different instruments, i.e. the corporate fine and the forfeiture/confiscation of illicit profits (Article 3(3) of the Convention).

Pieth goes on to address how the different concepts of corporate criminal liability compare to the standard of effective, proportionate and dissuasive sanctions:⁶⁵

With respect to those countries which have implemented corporate criminal liability, the application of a mere identification model, imputing only offences of the most senior management to corporations and also frequently refusing a concept of ‘aggregate knowledge’, would in our view fail to meet the requirements of ‘effective, proportionate and dissuasive sanctions’.

As will be noted below, the above comments are relevant to the UK. They were also applicable to Canada before the 2004 legislative changes which provided a broader definition of corporate liability. Pieth then adds,⁶⁶

On the other hand, the terms of Articles 2 and 3 of the Convention would be met by countries whose liability concept includes lack of due diligence by senior management, allowing junior agents to engage in bribery.

According to this view, the many State Parties that rely on the identification theory to trigger liability of corporate entities are failing to meet their full OECD Convention obligations.

2.4 Overview of Corporate Liability in the 41 State Parties to the OECD Anti-Bribery Convention

The OECD’s Working Group on Bribery (WGB) has conducted a comparative study on liability of legal persons in the 41 Parties to the OECD Anti-Bribery Convention. In December 2016, the WGB released its final stocktaking report.⁶⁷

⁶³ *Ibid* at 199.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at 202.

⁶⁶ *Ibid*.

The report notes the vast global expansion of liability for “legal persons” that has taken place since the Convention’s adoption in 1997:⁶⁸

- After the adoption of the Convention, many Parties initiated law-making events relevant for LP [legal person] liability and foreign bribery. These included:
 - ***Creation of LP liability frameworks for foreign bribery in the absence of prior legal traditions.*** Based on information provided in the WGB’s monitoring reports, it appears that 16 Parties (39%) took steps to create LP liability systems apparently without any previous experience before the adoption of the Convention: Austria, Belgium, Bulgaria, Chile, Colombia, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Luxembourg, Russian Federation, Slovenia, Spain, and Switzerland.
 - ***Adaptation or application of LP liability systems that existed in some form before the Convention to cover foreign bribery.*** In addition, 24 Parties (59%) adapted or applied pre-existing systems for LP liability to foreign bribery while implementing the Convention: Australia, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Ireland, Israel, Japan, Korea, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, South Africa, Sweden, Turkey, United Kingdom and the United States.
- ***A multi-stage process of refining legal approaches to LP liability.*** Twenty-one countries (51%) have two or more entries in the timeline after the 1997 adoption of the Convention: Australia, Brazil, Canada, Colombia, Estonia, France, Germany, Greece, Hungary, Latvia, Mexico, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey and the United States. These multiple entries suggest that the creation of an LP liability regime may be, for many countries, an ongoing search for an appropriate fit with the local legal system through experimentation and adaptation as they apply their laws [footnotes omitted].

In regard to each OECD country, the report examines nine distinct aspects of the legal test or standard for liability of legal persons as well as three aspects of sanctions for legal persons found liable. Some of these features of legal person liability from the report are summarized below. As might be expected, there is significant variance in these features of legal person liability.

2.4.1 Sources of Liability for Legal Persons

According to the report,⁶⁹

- 73% of Parties have liability for legal persons in statutes, while 27% have liability in case law (e.g. common law).
- 48% have legal liability in statutes other than their general penal law (whether or not there are also provisions in their general penal law).
- 24% have bribery-specific legislation dealing with liability for legal persons.

⁶⁷ OECD, *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (OECD, 2016), online: <<https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>>.

⁶⁸ *Ibid* at 14-15.

⁶⁹ *Ibid* at 27-28.

2.4.2 Three Standards for Imputing Legal Liability

The report states,

Based on WGB reports, it would appear that at least 38 countries (93%) can hold legal persons liable when a person with the highest level of managerial authority commits the offence. At least 31 countries (76%) can also hold them liable if a person with such authority directs or authorises the offence. Finally, at least 29 Parties (71%) can hold companies liable if an officer or other manager fails to prevent the offence “through a failure to supervise ... or ... a failure to implement adequate controls”.⁷⁰

2.4.3 Circumstances under Which a Natural Person’s Acts Will Be Attributed to a Legal Person

Some countries require multiple circumstances (i.e. a cumulative approach) while other countries only require one of several factors (an alternative approach). The report notes in part,⁷¹

A second complexity shown in Table 5 is that some countries impose different conditions as a function of the level of authority or role that the natural person offender has in relation to the legal person. At least ten Parties (24%) have conditions that depend on whether or not the natural person who engages in bribery has managerial authority within the legal person. In contrast, 29 Parties (71%) appear to apply the same conditions to attribute the acts of any relevant natural person to the legal person, without regard to the level of authority that the relevant person has

In footnotes 38 and 39, the report states,

“It should be noted, however, that this number may simply reflect the fact that it is not yet clear how a legal person would be held liable for an offence committed by a lower-level employee given the absence of case law in some jurisdictions. . . . As shown in Table 5 below, some of the countries that require that the offence has been committed with the intent to benefit the legal person include: Austria (offence committed “for the benefit of entity”); Canada (“with the intent ... to benefit” the LP); Chile (“for the benefit” of the LP); Germany (offence must have violated the “duties incumbent on the legal person” or either “enriched”—or have been “intended” to enrich—the LP); Mexico (the offence for the “benefit” of the LP); and the United States (“for the benefit” of the LP).”].

For the more detailed conditions (e.g. benefit or interest, within the scope of duties), the frequency is as follows:

- Twenty-seven Parties (66%) will consider whether the acts of a relevant natural person were committed for the legal person’s benefit or interest;
- Twenty-one Parties (51%) will consider whether the acts of a relevant natural person were committed as a result of a failure to supervise;
- Fourteen (34%) will consider whether the acts of a relevant natural person were committed in the legal person’s name or on its behalf; Twelve (29%) will consider whether the acts of a relevant natural person were committed within the scope of the natural person’s duties or authority; and

⁷⁰ *Ibid* at 46-47.

⁷¹ *Ibid* at 53-54.

- Twelve Parties (29%) will consider whether the acts of a relevant natural person were related to the legal person's activity [footnotes omitted].

2.4.4 Liability of Legal Persons for Acts of Intermediaries

Intermediaries can be “related” (i.e. subsidiaries or individual entities within a corporate group) or unrelated (i.e. third-party agents, consultants or contractors). The law on liability of legal persons for acts of intermediaries varies significantly depending on the existence of various circumstances. The report studies each country on the basis of various circumstances. In respect to related intermediaries, the report states,

Some of the more noteworthy models of liability for related entities are:

- ***In the spirit of the organisation.*** According to the WGB report, Dutch law enforcement officials indicated that the Netherlands can prosecute a parent company for an offence committed by its subsidiary if the parent entity “knew about the illegal acts of the subsidiary or if the act was carried out ‘in the spirit of the legal entity’”. According to Dutch authorities, an act performed “in the spirit of the entity” could include acts “useful for the legal person in the business conducted by the legal person” as well as acts resulting from behaviours that were either “accepted or used to be accepted ... by the legal person”.
- ***“On behalf of”.*** In some countries, a parent company can be liable for the acts of its subsidiary, if the subsidiary is an “agent” or otherwise acting on its behalf. According to Norwegian officials and other panellists at the WGB’s on-site visit, Norway can hold the parent liable whenever the subsidiary acts “on behalf of” the parent. In the United States, “a parent may be liable for its subsidiary’s conduct under traditional agency principles”, whenever it has sufficient “control”, whether formally or in fact, over the subsidiary’s operations or conduct. Whenever such an “agency relationship” arises, the “subsidiary’s actions and knowledge” can trigger criminal or other liability for the parent company.
- ***“For the benefit of”.*** According to Slovenia, a parent company can be held liable if it “benefited from the bribe given by subsidiary”. Such approaches potentially go beyond the “agency” model to encompass wrongdoing that objectively benefits a parent company, even though the subsidiary that committed the offence may not be controlled by, or otherwise acting for, the parent company at the time of the offence.
- ***Corporate Groups.*** Brazil’s corporate liability regime notably holds “parent, controlled or affiliated companies ... jointly liable for the perpetration of acts” covered by the law. Perhaps in recognition of the broad scope of this liability, Brazil limits such liability to “applicable fines” and the “full compensation” for damages caused [footnotes omitted].

In regard to unrelated intermediaries the report notes,⁷²

Table 9 explores whether and how the Parties can hold legal persons liable for the acts of unaffiliated business partners or other third parties. It shows that at least 31 countries (76%) have laws that would allow them to hold companies liable for the unlawful acts of unrelated intermediaries under certain conditions. . . .

The most common reason identified by the WGB for holding a legal person liable for an offence committed by an unrelated entity or thirdparty agent is that the legal person in fact

⁷² *Ibid* at 91-92.

participated in, or directed, the unlawful act.⁶⁷ Based on WGB findings and supplemental information provided by the Parties, this was true in 27 countries (66%). . . .

Agency principles provided the second most frequent ground for imposing liability on a legal person for the acts of its unrelated business partners. At least seven countries (17%) can hold a legal person liable for bribery committed by a third party authorised to act on the legal person's behalf. These are Denmark, Estonia, Iceland, Korea, Slovenia, Turkey and the United States. . . .

At least 10 countries (24%) can hold a legal person liable on a theory other than complicity or agency. For example, the WGB found that at least one country, Portugal, can impose liability on a legal person that ratifies or approves the unlawful conduct of an unrelated intermediary after the fact.⁶⁹ One other country, Canada, provided supplemental information indicating that it can also hold an LP liable on this basis. Examples of other techniques for holding legal persons liable for the unlawful acts of their business partners, include:

- **Associated persons.** The Section 7 of the United Kingdom's Bribery Act 2010 makes certain companies liable for the acts of any "associated" person who "performs services" for them. Section 8(2) of the UK Bribery Act specifies that "the capacity in which [the associated person] performs services for or on behalf of [the legal person] does not matter".
- **Consortium or Joint Venture Members.** Brazil's corporate liability regime holds companies that are members of a consortium liable for the unlawful acts committed by other consortium member "within the scope of their respective consortium agreement". As with its rules for attributing liability within corporate groups, Brazil limits liability for consortium members to "applicable fines" and the "full compensation" for damages caused. Poland has a similar provision holding a legal person liable for the acts of its joint venture partners, provided that the legal person had "knowledge" of the act or "consents" to it.
- **Negligence offence.** Parties have widely different approaches to determining whether the requisite "fault" or "intent" (often referred to as *dol* in civil law traditions or as the mens rea element in the common law world) has been established within the company-intermediary relationship.⁷³ Some countries have attempted to side-step the difficulty of proving intent by holding legal persons liable for negligence. For example, Sweden has enacted a "negligent financing" offence, whereby a legal person can be sanctioned for providing money in a "grossly negligent" manner to an intermediary who then uses it for bribery [footnotes omitted].

2.4.5 Successor Liability

The report explains the importance of robust successor liability principles to the effective enforcement and sanctioning of corruption offences:⁷³

In a corporate law context, when a legal person merges with or acquires another entity, the successor or acquiring legal person can, in certain circumstances, assume the predecessor entity's liabilities. Successor liability in the context of foreign bribery refers to whether and under what conditions LP liability for the offence is affected by changes in company identity and ownership. Without it, a legal person may avoid liability by reorganising or otherwise altering its corporate identity. In some legal systems, however,

⁷³ *Ibid* at 101.

successor liability is viewed as problematic in the criminal law context because it is viewed as conflicting with the fundamental notion that no one can be punished for the act of another [footnotes omitted].

Neither the OECD Anti-Bribery Convention, nor the 2009 Recommendation, specifically refer to successor liability. The report also notes,⁷⁴

Among the Parties, at least 18 countries (44%) have some form of successor liability for foreign bribery or other criminal offences.

Table 10 also reports the types of transactions or reorganizations that can trigger successor liability, including name change or reincorporation (at least 12 countries, or 29%), merger/acquisition (at least 16 countries, or 39%), division or divestiture (at least 11 countries, or 27%) and dissolution (7 countries, or 17%).

A striking feature of Table 10 is the large number of unknowns indicated by question marks. . . .

Although the issue has not been fully explored in the WGB reports, some of the Parties' legal frameworks and practices concerning successor liability deserve special attention:

- ***Comprehensive statutory frameworks.*** In some countries, the legislature has clearly adopted a set of provisions that comprehensively address successor liability. . . . Other countries, such as the United States rely on well-established jurisprudence or other legal principles to ensure successor liability.
- ***Limits on sanctions.*** Brazil limits the type sanctions that may be imposed on successor companies to the payment of fines and compensation for damage. . . . The WGB expressed concern that limiting the ability to confiscate the profits of foreign bribery from successor companies “deprives the administration of one of the most serious deterrents to foreign bribery”.
- ***Mechanisms to prevent the extinction of a legal person.*** . . . For instance, under Belgium's 1999 Act establishing LP liability, a judge may, after finding “serious indications of guilt on the part of a legal person”, impose a provisional measure to suspend “any proceedings to dissolve or wind up the legal entity” or block any transfers of assets that “could result in the legal entity becoming insolvent” [footnotes omitted].

2.4.6 Jurisdiction over Legal Persons and their Nationality

Both of these topics are analyzed in the report. That analysis is included in Chapter 3, Section 1 of this book.

2.5 US Law

Under the US common law doctrine of *respondeat superior*, a corporation will be vicariously liable for acts of its employees that violate the FCPA if the employee was acting within the scope of his or her authority and, at least in part, for the benefit of the company. Under this principle, even low-level employees acting in contravention of an express direction not to bribe a foreign official may still trigger

⁷⁴ *Ibid* at 102-103.

liability for the corporation.⁷⁵ The term “scope of authority” means within the course of the employee’s ordinary duties. Tarun explains:⁷⁶

For example, an international salesman agreeing to bribe a foreign official in order to obtain or retain business will be deemed to be acting within the scope of his authority. The focus is on the function delegated to the agent or employee and whether the conduct falls within that general function. So long as the agent or employee’s acts are consistent with his general employment function, his employer may be held liable for those acts, even if they were contrary to express corporate policy [footnotes omitted].

In addition, “the benefit of the corporation” need not be the sole motivating factor behind the employee’s decision to offer a bribe: “So long as the motive includes a direct or ancillary benefit to the corporation—either realized or unrealized—a corporation will be accountable for the agent or employee’s acts”.⁷⁷

2.5.1 Corporate Criminal Liability under the FCPA Arising from the Acts of Foreign Subsidiaries

According to Tarun, whether US corporations are directly liable for the acts of their foreign subsidiaries is somewhat uncertain.⁷⁸ He states:

While the legislative history and one case indicate that foreign subsidiaries of US companies acting on their own and not as agents of a US parent are not subject to the anti-bribery provisions ... the Resource Guide to the US FCPA states that there are two ways in which a parent company can be liable for bribes paid by a subsidiary:

First, a parent may have participated sufficiently in the activity to be directly liable for the conduct – as, for example when it directed its subsidiary’s misconduct or otherwise directly participated in the bribe scheme. Second, a parent may be held liable for its subsidiary’s conduct under traditional agency principles.

According to the *Resource Guide*, control over the subsidiary, both general and in terms of the specific transaction, is the key factor in determining whether an agency relationship exists. If the relationship exists, the subsidiary’s actions and knowledge are imputed to the parent.

Tarun states that although the FCPA does not specifically address liability arising from the behaviour of foreign subsidiaries, there are “at least five” bases in American law under which a parent corporation could be liable for acts of bribery undertaken by its foreign subsidiaries:⁷⁹

First, a US company may be liable for bribery under agency principles if it had knowledge of or was willfully blind to the misconduct of its subsidiary. Second, a US parent corporation that authorizes, directs, or controls the wayward acts of a foreign subsidiary may be liable. Third a US company may be held liable under principles of respondeat superior where its corporate veil can be pierced. Fourth, a US Company that takes actions abroad in furtherance of a bribery scheme may be found liable under the Act’s 1998 alternative theory of nationality jurisdiction. Fifth, foreign subsidiaries may be liable if any act in furtherance of an illegal bribe took place in the United States territory.

⁷⁵ Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (Chicago: American Bar Association, 2013) at 48.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 49.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

In addition, under the accounting provisions of the FCPA, if the records of the parent and the subsidiary are consolidated for the purposes of filing documents pursuant to the SEC's mandatory reporting requirements, a parent company may be liable for the accounting violations of a foreign subsidiary.

2.5.2 Successor Liability

After a merger or acquisition, the successor company assumes the predecessor company's liabilities, including those arising under the FCPA. No liability will be created where there was none before, however; for example, if the predecessor was outside FCPA jurisdiction, it will not be retroactively subject to the FCPA after acquisition. Generally, the DOJ will only pursue FCPA actions against successor companies in extreme, egregious scenarios, such as the continuation of violations by the successor company.⁸⁰

2.6 UK Law

Corporations, partnerships and unincorporated bodies may be held criminally liable for section 1, 2 and 6 *Bribery Act* offences according to the traditional principles of corporate criminal liability in the UK.⁸¹ Under UK law, a corporation is its own legal entity with its own legal personality. This means that the corporation, separately from the natural persons who perform the activities of the corporation, can be involved in a corrupt transaction. The corporation may be involved in corrupt transactions either as an offender or as a victim. A corporation can be convicted of common law and statutory offences, including offences which require *mens rea*.⁸²

There are a few ways in which a corporation may be held criminally liable in the UK. If the offence is strict liability and requires no *mens rea*, there is no problem attributing liability to a corporation. A corporation can also be held vicariously liable for the acts of its employees or agents in situations where a natural person would also be vicariously liable, for example, where a statute imposes vicarious liability. This means that the acts and state of mind of employees or agents are attributed to the corporate body.⁸³

For offences that require *mens rea* and do not allow vicarious liability, corporate liability depends on the identification principle. If the offence is committed by an officer who is senior enough to be part of the directing mind and will of the company, and if the offence was committed within the scope of the offender's authority as a corporate officer, the offender's acts and state of mind will be deemed those of the company itself. The corporation can be convicted of an offence without a natural person being prosecuted for that offence. The identification principle is used to determine corporate liability for offences under sections 1, 2 and 6 of the *Bribery Act* as well as the false accounting offences under the *Theft Act*.

Because of the need to find subjective fault (*mens rea*) in one of the company's directing minds, the identification doctrine is often ineffective in establishing corporate liability. Firstly, identifying the directing minds of a large multinational corporation can be a challenge. Even when the directing minds can be identified, attributing fault to senior officers presents difficulties. Ashworth explains that the doctrine "allows large companies to disassociate themselves from the conduct of their local managers,

⁸⁰ Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 28-29, online: <<http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>>.

⁸¹ For further detail concerning corporate criminal liability in the UK see: A Pinto and M Evans, *Corporate Criminal Liability*, 3rd ed (London: Sweet & Maxwell, 2013) and Celia Wells, "Corporate Criminal Liability in England and Wales: Past, Present, and Future" in Mark Pieth & Radha Ivory, eds, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer: Dordrecht, 2011) 91.

⁸² Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (New York: Oxford University Press, 2011) at 39.

⁸³ David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford: Oxford University Press, 2011) at 258-260.

and thus to avoid criminal liability. Moreover, where a large national or multi-national company is prosecuted, the identification principle requires the prosecution to establish that one of the directors or top managers had the required knowledge or culpability. Managers at such a high level tend to focus on broader policy issues, not working practices.”⁸⁴ As a result, in cases of bribery committed by a foreign agent in a foreign country to secure business for a company, it can be very difficult to prove that a senior officer of that company was the directing mind behind the bribery offence. The identification doctrine also fails to establish liability for corporate culture, which can develop independently from senior officers at the highest levels. Further, English law does not allow aggregation of the states of mind of more than one person in the corporation in order to satisfy *mens rea* requirements. Thus, historically it was very difficult for corporations to be convicted of bribery offences. Indeed, Maton says “there has never been a successful prosecution in England of a company for bribery.”⁸⁵

The difficulty of attributing liability to corporations, especially large multinational corporations, prompted criticism in Phase 1 and Phase 2 Evaluations of the UK by the OECD Working Group. The UK has addressed the difficulties of the identification doctrine by creating offences that impose a duty on companies, for example in the *Corporate Manslaughter and Corporate Homicide Act* of 2007. The imposition of a corporate duty bypasses the difficulty of establishing culpability on the part of a controlling mind in the company. Section 7 of the *Bribery Act* is another example of this form of corporate liability.

2.6.1 *Bribery Act* Section 7

Section 7 creates a new strict liability offence of failure of a commercial organization to prevent bribery. It is triggered when a person associated with a “relevant commercial organization” (bodies corporate or partnerships) bribes another person for the benefit of the commercial organization. A conviction under section 7 does not require a conviction for a section 1, 2 or 6 offence, but there must be sufficient evidence that the act of bribery did occur.

A codified defence to the charge exists. The organization is exonerated if it can prove, on a balance of probabilities, that notwithstanding the actions of the associated person, it had adequate procedures in place to prevent such persons from engaging in bribery.

Section 7 defines the scope of this new offence in the following words:

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
- (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.⁸⁶

Under section 7, a commercial organization may be found guilty of an offence if anyone associated with the company’s business participates in bribery, unless the organization has adequate procedures in place to prevent the bribery. The offence can be made out even if the controlling minds of the organization were completely unaware of the bribery. To be “associated” with the organization, person A must be a “person

⁸⁴ Andrew Ashworth, *Principles of Criminal Law*, 6th ed (Oxford: Oxford University Press, 2009) at 150.

⁸⁵ James Maton, “The UK *Bribery Act 2010*” (2010) 36:3 *Employee Rel LJ* 37 at 40. Furthermore, English case law has generally defined “directing mind” quite narrowly: See *Tesco Supermarkets Ltd v Natras*, [1972] AC 153 (HL); *Director General of Fair Trading v Pioneer Concrete (UK) Ltd*, [1995] 1 AC 456; and *Meridian Global Funds Management Asia Ltd v Securities Commission*, [1995] 2 AC 500. While M Jefferson, “Corporate Criminal Liability in the 1990s” (2000) 64 *J Crim L* 106 argues that there has been some expansion of the directing mind test, E Ferran, “Corporate Attribution and the Directing Mind and Will” (2011) 127 *Law Q Rev* 239 suggests the wider *Meridian* test is not always applied.

⁸⁶ Interestingly, there is no corresponding offence of failure to prevent the taking of a bribe.

who performs services for or on behalf of" the organization. The capacity in which he or she performs these services does not matter; for example, person A may be an employee, agent or subsidiary, and there need not be a formal contract or in fact any degree of control. Person A does not need to have a close connection with the UK and may be an individual, a body corporate or a partnership. If person A is a subsidiary, the parent company will only be liable if the subsidiary acts in the parent's interest. If the subsidiary bribes in its own interests, the parent will not be liable, even if the subsidiary is wholly owned by that parent.⁸⁷

The phrase "bribes another person" means that person A is or would be guilty of an offence under sections 1 or 6, whether prosecuted or not, or would be guilty of such an offence if section 12(2)(c) and (4) dealing with jurisdiction to prosecute were omitted.⁸⁸ Furthermore, the person will be deemed to have committed the offence if his or her conduct amounted to aiding, abetting, counselling or procuring the offence.⁸⁹

Section 7 applies to "relevant commercial organisations", that is, companies incorporated in the UK or partnerships formed in the UK, as well as to bodies corporate and partnerships incorporated or formed anywhere and carrying on a business or part of a business in the UK. As Stephen Gentle notes, the careful drafting of "carries on a business", rather than simply "carries on business", is reflective of the wide jurisdiction of the offence. The mere business presence of an overseas entity in the UK, irrespective of whether business is actually carried out in the UK, is enough to fulfill the jurisdictional requirements of the offence.⁹⁰ That being said, the Government intends a "common sense approach" and has suggested that organizations without a "demonstrable business presence in the United Kingdom" will not be caught by this section.⁹¹

It should be noted that the *Bribery Act* contains no provision specifically insulating person A from secondary liability in respect to the offence under section 7 (in contrast to, for example, the offence in the UK of corporate manslaughter).⁹² However, person A is already guilty of the intentional offence of bribery under sections 1 or 6, so it would be somewhat pointless to also charge or convict person A of the strict liability offence under section 7 where person A's conduct of aiding and abetting the section 7 offence is exactly the same conduct that constitutes the section 1 or section 6 offence.

Section 7(2) states that a full defence to the charge is available if the company can prove on a balance of probabilities that it had adequate procedures in place and followed those procedures at the time the bribery occurred in order to prevent associated persons from engaging in bribery. For more information on the adequate procedures defence, refer to Section 2.4.3(i) of Chapter 2.

⁸⁷ Bob Sullivan, "Reformulating Bribery: A Legal Critique of the Bribery Act 2010" in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law* (Cambridge: Cambridge University Press, 2013) 13 at 30.

⁸⁸ Section 12 deals with the territorial application of the *Bribery Act*. If the offence takes place outside the UK but would constitute an offence if committed within the UK, and the individual in question has a close connection with the UK, the person may still be charged under sections 1, 2 and 6. Sections 12(2)(c) and 12(4) deal with the "close connection to the UK"; therefore persons associated with commercial organisations can be found to be "bribing another person" for the purposes of the organisation failing to prevent bribery, even if the activity took place outside of the UK and the individual had no close connection with the UK, so long as the organisation fell within the definition of a commercial organisation.

⁸⁹ Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (New York: Oxford University Press, 2011) at para 4.110.

⁹⁰ Stephen Gentle, "The Bribery Act 2010: (2) The Corporate Offence" (2011) 2 Crim L Rev 101 at 105.

⁹¹ United Kingdom, Minister of Justice, *The Bribery Act 2010: Guidance* (2011) at para 36, online: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

⁹² GR Sullivan, "The Bribery Act 2010: (1) An Overview" (2011) 2 Crim L Rev 87 at 95.

According to Celia Wells, the significance of this new offence to UK law “cannot be over emphasized”.⁹³ The provision places important obligations on companies to proactively prevent corruption within their organization. Wells views the provision as key to ensuring corporate accountability for bribery. However, the OECD Working Group on Bribery’s *Phase 3 Report* (March 2012)⁹⁴ notes that the section 7 offence does not completely eliminate the limitations of the UK’s narrow identification doctrine. If the “associated person” is a subsidiary or another company, the identification doctrine is still necessary to determine whether the associated person committed bribery.

The provision has also received criticism for being overly broad. Jon Jordan, a Senior Investigations Counsel with the Foreign Corrupt Practices Unit of the US SEC, believes the “provision is both revolutionary and dangerous”.⁹⁵ Bruce Bean and Emma MacGuidwin refer to it as “by far the most outrageously overreaching aspect of the Act”.⁹⁶ Bean and MacGuidwin question the usefulness of the “adequate procedures” defence, since the occurrence of bribery indicates that the procedures in place were not sufficient to prevent the instance of bribery. In the Ministry of Justice’s *Guidance* document, the Ministry has listed six principles that should inform a corporate compliance program, but these principles are fairly general and are not binding on a court. These principles of good corporate compliance programs are discussed in Chapter 8 of this book.

In December 2016, Sweett Group PLC pleaded guilty to failing to prevent an act of bribery committed by its subsidiary, Cyril Sweett International Limited, in order to secure a contract with Al Ain Ahlia Insurance Company (AAAI) for the building of the Rotana Hotel in Abu Dhabi.⁹⁷ In February 2016, Sweett Group PLC was sentenced and ordered to pay £2.25 million,⁹⁸ thus becoming the first company to be fined under section 7 of the *Bribery Act*. The SFO’s successful prosecution of Sweett Group speaks to the importance of implementing an adequate anti-corruption compliance program.

Notably, the US also considered codifying this type of compliance defence but ultimately rejected this approach. Instead, the US FCPA places positive obligations on companies to make and keep accurate books and records and to maintain a system of internal accounting controls. In Eileen Skinnider’s paper, “Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response”, the compliance defence is described as follows:⁹⁹

3. The Affirmative Compliance Defences

The compliance defence provides that corporations will not be held vicariously liable for a violation of the foreign corruption act by its employees or agents if the company established procedures reasonably designed to prevent and detect such violations by

⁹³ Celia Wells, “Corporate Criminal Liability in England and Wales: Past, Present, and Future” in *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer Netherlands, 2011) at 107.

⁹⁴ OECD, *United Kingdom - OCCD Anti-Bribery Convention*, online: <<http://www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm>>.

⁹⁵ Jon Jordan, “Recent Developments in the *Foreign Corrupt Practices Act* and the New UK *Bribery Act*: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery” (2011) 7 *NYU Journal of Law & Business* 845 at 865.

⁹⁶ Bruce Bean & Emma MacGuidwin, “Expansive Reach, Useless Guidance: An Introduction to the UK *Bribery Act 2010*” (2012) 18 *ILSA J Intl & Comp L* 323 at 339.

⁹⁷ UK Serious Fraud Office, “Sweett Group PLC Pleads Guilty to Bribery Offence” (18 December 2015), online: <<https://www.sfo.gov.uk/2015/12/18/sweett-group-plc-pleads-guilty-to-bribery-offence/>>.

⁹⁸ UK Serious Fraud Office, “Sweett Group PLC Sentenced and Ordered to Pay £2.25 million after Bribery Act Conviction” (19 February 2016), online: <<https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>>.

⁹⁹ Eileen Skinnider, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 2012) at 15–17, online: <<http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Final%20Paper%20Corruption-09%20May%202012.pdf>>.

employees and agents. Generally this refers to employees and not officers or directors. Such a defence is an affirmative defence for corporations faced with possible criminal charges if the corporation can present “good faith efforts” to achieve compliance with the laws, usually demonstrated by corporate compliance programmes. This defence recognises that despite best efforts and with the utmost diligence, corporations can still find themselves the subject of criminal prosecutions. [footnotes omitted]

2.7 Canadian Law

Pursuant to section 2 of the *CFPOA*, the offence provisions in the *CFPOA* apply to “persons”, as defined in section 2 of the *Criminal Code*. Section 2 of the *Criminal Code* states that “person” includes an organization, which is defined as:

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons.

Therefore, companies and other organizations are considered “persons” under the *CFPOA* and the *Criminal Code* and may be prosecuted for *CFPOA* and *Criminal Code* offences. It should also be noted that by knowingly engaging in corruption offences on three or more occasions, companies meet the definition of “criminal organization” under section 467.1 and can also be prosecuted for the additional criminal organization offences in the *Criminal Code*. Notably, the broad definition of “organization” extends liability to types of organizations that do not have the status of legal persons in the same way that corporations do.

Prior to 2004, corporate criminal liability was based on the common law principle of the directing mind. In 2003, the Canadian Government amended the *Criminal Code* and replaced the common law “directing minds” doctrine with a statutory scheme for corporate criminal liability. This new statutory scheme uses a much broader and more flexible definition of which officials in a corporation are to be “identified” as the corporation in respect to their acts, omissions and states of mind. Via section 34(2) of the federal *Interpretation Act*, the new *Criminal Code* corporate liability scheme also applies to *CFPOA* offences. Section 22.1 of the *Criminal Code* widens the scope of corporate criminal liability in the context of criminal and penal negligence offences, and section 22.2 provides the test for other *mens rea*-based offences. Section 22.2 is the relevant section of the *Criminal Code* for determining corporate liability for offences under the *CFPOA* since those offences require the prosecutor to prove subjective fault. It reads as follows:

22.2 In respect of an offence that requires the prosecution to prove fault—other than negligence—an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

This statutory scheme for corporate liability for crimes which require subjective fault still relies on the identification theory. However, the common law concept of “directing minds” has been replaced with the broader concept of “senior officers”. “Senior officers” is defined in the *Criminal Code* as follows:

“senior officer” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer

“Representative” is defined to mean “a director, partner, employee, member, agent or contractor of the organization”.

The term “senior officer” is broader than the common law directing minds concept as it includes persons who are responsible for managing an important aspect of the company’s activities. Under the old test, in order for a person to be considered a directing mind, he or she had to be more than a manager of an important aspect of the company’s activities; he or she also had to have the authority to design or implement corporate policy. In practice, this made establishing corporate criminal liability very difficult.¹⁰⁰

In the new definition of “senior officer”, the terms “managing” and “an important aspect of the organization’s activities” require further definition. So far, there have been very few cases that have interpreted these key parts of the definition of “senior officer”.¹⁰¹ In *R v Metron Construction Corporation*,¹⁰² the Ontario Court of Appeal imposed a fine of \$750,000 on the accused corporation for criminal negligence causing death contrary to section 221 of the *Criminal Code*. The negligence charge arose out of a workplace accident caused primarily by serious negligence on the part of the site supervisor and the foreman. The foreman died in the accident along with three other workers. Metron Construction plead guilty to one count of criminal negligence causing death under section 221 of the *Criminal Code*. No doubt that the guilty plea was premised on the conclusion that if they disputed criminal liability at trial, they would be convicted on the basis of the new test for criminal liability under section 22.1 and the new duty in section 217.1 of the *Criminal Code*, which requires persons who have the authority to direct the work of others “to take all reasonable steps to prevent bodily harm” to those persons. In a subsequent trial, the site supervisor was found guilty of four counts of criminal negligence causing death.¹⁰³ As noted, had Metron plead not guilty, undoubtedly the court would have held that the site supervisor was a “senior officer” and therefore the senior officer’s criminal negligence was also Metron’s criminal negligence. Under the narrower “directing minds” test applied in Canada before the 2004 amendments, it is highly

¹⁰⁰ See Gerry Ferguson, “The Basis for Criminal Responsibility of Collective Entities in Canada” in A Eser, G Heine & B Huber, eds, *Criminal Responsibility of Legal and Collective Entities* (Freiburg, Germany: Max-Planck Institute, 1999) at 153-180. See also Kent Roach, *Criminal Law*, 4th ed (Toronto: Irwin Law, 2009) at 212. More recently, see Paul Blyschak, “Corporate Liability for Foreign Corrupt Practices under Canadian Law” (2014) 59:3 McGill LJ 655.

¹⁰¹ In *R v Ontario Power Generation*, [2006] OJ No 4659 (Ont CJ), *R v Tri-Tex Sales & Services Ltd*, [2006] NJ No 230 (NL Prov Ct), and *R v ACS Public Sector Solutions Inc*, [2007] AJ No 1310 (Alta Prov Ct), the courts did not apply sections 22.1 or 22.2 since the alleged offences occurred before Bill C-45 came into force on April 1, 2004. In *R v Watts and Hydro Kleen Services*, [2005] AJ No 568, *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (Alta QB), and *R v Griffiths Energy International*, 2013 AJ No 412 (QB), all three companies plead guilty. The acts of bribery in those three cases all came from the very top officers of the companies, and therefore the companies would have been convicted on the basis of section 22.1 of the *Criminal Code* had the companies not plead guilty.

¹⁰² *R v Metron Construction Corporation*, 2013 ONCA 541.

¹⁰³ *R v Kazenelson*, 2015 ONSC 3639.

unlikely that the site supervisor would have been held to be a directing mind of Metron since he had not been delegated “governing executive authority” over a part of the company business.¹⁰⁴ As Jeremy Warning, Cheryl Edwards and Shane D. Todd note, the case demonstrates how sections 22.1 and 22.2 of the *Criminal Code* expand the criminal liability of corporations in Canada to include criminal conduct by employees who are not in an executive management position but nevertheless hold a significant amount of “localized responsibility” within the corporation.¹⁰⁵ As a result, if a company delegates responsibility to a foreign agent to engage in an important aspect of the company’s business, the agent is likely to be deemed a senior officer and his or her bribery could be imputed to the company, even if no one else in the company knew the foreign agent was bribing officials.¹⁰⁶

In *R c Pétroles Global inc.*,¹⁰⁷ the accused company was convicted of price-fixing under the federal *Competition Act*.¹⁰⁸ The company operated 317 gas stations in Ontario, Quebec and New Brunswick. A regional manager (Payette) managed over 200 gas stations in Quebec and New Brunswick and six subordinate territory managers who were responsible for their portion of those 200 stations. The regional manager and two of the territorial managers were involved in the price fixing. At the preliminary inquiry, the judge held that all three were “senior officers” on the ground that each of them managed an “important aspect of the company’s activities.”¹⁰⁹ At trial, Justice Toth found that the regional manager was definitely a senior officer and therefore his actions and state of mind were the actions and state of mind of the company. Justice Toth held that it was therefore unnecessary to decide whether the two territorial managers were also “senior officers” and he expressly declined to rule on that issue. Justice Toth did note that the definition of senior officer involves a functional analysis that goes beyond the mere title “manager”. The management under consideration must involve an important aspect of the company’s activities.

Under section 22.2(a), quoted above, a corporation may be criminally liable if a senior officer acting within the scope of his or her authority is a party to a *CFPOA* offence (this would include situations where the senior officer is a party to an offence by virtue of aiding or abetting another in the commission of an offence). In addition, the acts of the senior officer must have been done with the intention, at least in part, of benefiting the corporation. Section 22.2(b), quoted above, does not appear to expand the liability of corporations beyond the combined effect of section 22.2(a) and the common law doctrine of innocent agents.¹¹⁰

¹⁰⁴ The directing mind test in *Canadian Dredge & Dock Co.*, [1985] 1 SCR 662, was narrowly interpreted in the subsequent cases of *The Rhône v The Peter AB Widener*, [1993] 1 SCR 497, and *R v Safety Kleen Canada Inc.*, (1997) 16 CR (5th) 90 (Ont CA), where the concept of “executive governing authority” was emphasized as an essential requirement for holding an employee, agent or manager to be a “directing mind” of the corporation.

¹⁰⁵ Jeremy Warning, Cheryl Edwards & Shane D Todd, “Canada: After Metron: The Corporate Criminal Liability Landscape in Canada”, *Mondaq* (20 August 2012).

¹⁰⁶ Todd L Archibald, Kenneth E Jull & Kent W Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Toronto, ON: Thomson Reuters Canada, 2014) at 17-35.

¹⁰⁷ *R c Pétroles Global inc.*, 2012 QCCQ 5749 (QC) (preliminary inquiry), 2013 QCCS 4262 (trial decision).

¹⁰⁸ SC 2009, c 2, s 45(1). It is a “true crime”, and therefore the presumption of full subjective *mens rea* applies to it (i.e. intent, recklessness or wilful blindness): *R v H (AD)*, 2013 SCC 28. See also Paul Blyschak, “Corporate Liability for Foreign Corrupt Practices under Canadian Law” (2014) 59:3 McGill LJ 655.

¹⁰⁹ The case is only reported in French. This summary is based on a summary of the case in Todd L Archibald, Kenneth E Jull & Kent W Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Toronto, ON: Thomson Reuters Canada, 2014) at 5:40:50.

¹¹⁰ This same point is made in Darcy Macpherson, “Extending Corporate Criminal Liability: Some Thoughts on Bill C-45” (2004) 30 Man LJ 253 at 262. He explains the redundant nature of section 22.2(b) as follows:

In the end, I believe that paragraph 22.2(b) is redundant. If the senior officer directs another representative to commit the *actus reus*, and the other representative does so with the requisite fault element, then the other representative commits the offence and the senior officer abets the other representative. Both are parties to the offence and are thus liable. As long as the senior officer acts within the scope of his or her authority, paragraph 22.2(a) is satisfied and there is no need to resort to paragraph

Section 22.2(c), however, does significantly expand the law. Under the common law directing minds doctrine, it was not clear to what extent, if any, a company could be held liable for its omission to take action to prevent bribery. However, this is no longer the case under section 22.2(c). A senior officer's failure to take reasonable steps to stop an employee's offence can now attach liability to the corporation for that offence. Under the Canadian criminal law, citizens are not guilty of an offence for failing to try to stop it or failing to report it, unless the law places a specific duty on specific people in specific circumstances to take reasonable steps to stop the commission of the crime. Section 22.2(c) places obligations on company managers and other senior officers to take all reasonable measures to stop others connected with the organization from being parties to an offence when they are aware that an offence is occurring or is about to occur. This requires a significant level of cooperation among senior officers and encourages timely reporting of any violations. As Macpherson notes, if a senior officer of one department became aware that a representative reporting to another department intended to offer a bribe to a foreign public official, the fact that the senior officer might have no managerial powers within that department is irrelevant; the corporation will be criminally liable unless the senior officer takes all reasonable measures to stop the bribery.¹¹¹ Macpherson suggests that reporting up the chain of command, rather than requiring outside reporting to police, should satisfy the "all reasonable measures" requirement; otherwise some senior officers may be placed in conflicts of interest. However, whether the law requires external reporting is not clear.¹¹² When determining whether a senior officer took all reasonable measures, courts will also likely consider factors relevant to the due diligence defence, such as industry standards and risk management techniques.¹¹³

Unlike section 7 of the UK *Bribery Act*, section 22.2(c) stops short of prescribing positive obligations to prevent wrongdoing on behalf of company representatives. Section 22.2(c) is only implicated when a senior officer "knows" the representative is or is about to become a party to an offence or when the senior officer is willfully blind to this. It does not include instances when a senior officer is recklessly or negligently unaware that bribery or false accounting is taking place within the corporation.

22.2(b). If, on the other hand, the senior officer directs another representative to commit the *actus reus* and the other representative does so *without* the requisite fault element, then the other representative is an "innocent agent". The innocent agent is ignored for the purposes of the *actus reus*, and the senior officer would commit the offence. In either case, subsection 21(1) of the *Code* would make the senior officer a party to the offence (by virtue of paragraph 21(1)(c) in the former case, or by virtue of paragraph 21(1)(a) in the latter). In my view, paragraph 22.2(b) does not expand the conditions for corporate criminal liability.

¹¹¹ *Ibid* at 263.

¹¹² *Ibid* at 264-265.

¹¹³ Todd L Archibald, Kenneth E Jull & Kent W Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Toronto, ON: Thomson Reuters Canada, 2014) at 17-25.

3. PARTY OR ACCOMPLICE LIABILITY

In most legal systems, the person who gives a bribe and the person who receives a bribe are referred to as the principal offenders. But most legal systems also criminalize the conduct of persons who aid (assist), abet (encourage) or counsel (solicit, incite or procure) the principal offender in the commission of the offence. These persons are referred to as parties, accomplices or secondary parties to an offence. In the US, the UK and Canada, these secondary parties are deemed guilty of the same offence as the principal offender. They are also liable for the same punishments as the principal offender. The actual sentence imposed will depend on the degree of involvement and the degree of responsibility of each offender. Some civil law countries treat secondary parties differently. German law, for instance, punishes a person who incites an offence (a solicitor) in the same way as it punishes a perpetrator of the offence if he or she intentionally induces the perpetrator to commit the offence. A person who intentionally assists the principal (a facilitator) in the commission of the offence is criminally liable, but his or her sentence will be less severe than that of a principal.¹¹⁴ While virtually all countries criminalize some form of accomplice liability, there are both significant and subtle differences between legal systems with respect to accomplice liability.

3.1 UNCAC

UNCAC requires State Parties to criminalize acts of secondary participation in the offences set out in UNCAC in accordance with the State Party's domestic criminal law. Party liability is addressed in Article 27(1), which states:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

Note that Article 27(1) is a mandatory requirement for state parties and that it requires criminalization of "participation in any capacity".

3.2 OECD Convention

Similarly, the OECD Convention mandates that those who are complicit in the act of bribing a foreign public official must be held liable. Article 1(2) requires that each State Party take necessary measures "to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence."

3.3 US Law

Under section 2 of US Federal Criminal Law (18 USC. § 2), an individual, corporation or other legal entity who "aids, abets, counsels, commands, induces or procures" the commission of an offense or "willfully causes an act to be done which if directly performed by him or another would be an offense" is guilty of that offence and "is punishable as a principal." In this sense, the liability of the aider, abettor, etc. is derivative—it is based on the offense committed by the principal offender. The aider, abettor, etc. is sometimes referred to as a secondary party to distinguish him or her from the principal offender; but, in law the principal offender and the secondary offender are guilty of the same offence. Section 2 of the US

¹¹⁴ For a comparison of the criminalization of secondary liability in the German and American legal systems, see Markus Dubber, *Criminalizing Complicity: a Comparative Analysis* (2007) 5 *Journal of International Criminal Justice* 977.

Code applies to all federal offenses including the bribery offences in the FCPA. For further discussion of corporations as principal offender or aider, abettor or counsellor, see Section 1.5 above.

While accomplice liability is usually based on *acts*, an *omission* to act may actually assist or encourage the commission of an offence. In the US, there is generally no accomplice liability for omissions to act (e.g. failure to report or stop an act of bribery) unless the law has placed a specific legal duty on that person to act. Accomplice liability in the US also extends in general to ancillary offenses which are a natural and probable consequence of committing the principal offense. If A agrees to assist P to commit bribery and as part of the bribery scheme P threatens V with violence, then A is also liable for the offense of making threats of violence, if such threats were a natural and probable consequence of carrying out the bribery scheme. For a detailed analysis of party liability in the US, see W. LaFave's book *Substantive Criminal Law*.¹¹⁵

3.4 UK Law

Section 8 of the *Accessories and Abettors Act 1861*, as amended by the *Criminal Law Act 1977*, provides that anyone “who aids, abets, counsels or procures” the commission of any indictable UK offence is liable and punishable for that offence as a principal offender. Therefore, anyone who, by an act or omission of a legal duty, assists or encourages the commission of an offence under the *Bribery Act* will be punished in the same way as the principal offender. The accessory must intend to assist the principal offender and must have knowledge of the essential elements of the principal offender's offence. Voluntary attendance at the scene of the crime and a failure to stop the crime are not necessarily sufficient to constitute an act of assistance.¹¹⁶

English criminal law also extends liability to all persons who belong to a common unlawful purpose (sometimes called a joint venture) for further offences that are committed by one member of that group in carrying out the common unlawful purpose, provided these further offences are a reasonably foreseeable consequence of carrying out the unlawful purpose. Thus if A, B and C have a common unlawful purpose to bribe a foreign minister in hopes of obtaining a government contract and A, in carrying out the common purpose, forges an official document, then B and C are guilty of forgery if that forgery was a reasonably foreseeable consequence of carrying out the bribery scheme. This form of liability is sometimes referred to as joint enterprise liability or parasitic liability.¹¹⁷

A secondary party can be convicted even if the principal is acquitted, provided there is admissible evidence at the secondary party's trial to establish that the offence was committed and that the accused assisted or encouraged the commission of the offence. However, if the secondary party withdraws unequivocally from the common purpose and communicates this in time, he or she will have a defence (in contrast to conspiracy, which offers no defence for withdrawal from an agreement).¹¹⁸

Pursuant to section 14, the *Bribery Act* also establishes liability for senior company officers, such as directors, managers, company secretaries or those purporting to act in such a capacity, who “consent or connive” in the commission of a *Bribery Act* offence under sections 1, 2 or 6 by a legal entity (see Chapter 2, Section 2.4.2(iv)). It has been suggested that the concept of “consent and connivance” is wider and more flexible than accomplice liability.¹¹⁹ The concept does not necessarily require that aid be given

¹¹⁵ Wayne R LaFave, *Substantive Criminal Law*, vol 2, 2nd ed (Thomson/West, 2003) at 325-413.

¹¹⁶ Andrew Ashworth, *Principles of Criminal Law*, 6th ed (Oxford: Oxford University Press, 2009) at 409.

¹¹⁷ David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford: Oxford University Press, 2011) at 213-218.

¹¹⁸ *Ibid* at 231.

¹¹⁹ Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (Chicago: American Bar Association, 2013) at 562-564, quoting from M Raphael, *Blackstone's Guide to the Bribery Act*, 2010 (Oxford, Oxford University Press, 2010).

intentionally; it could also criminalize reckless behaviour. It likely also captures instances where a senior officer knows the bribery offence is occurring but does nothing to stop it, even if the senior officer did not actually aid or encourage the offence's commission. Senior officers can also face party liability if they consent or connive in the commission of false accounting provisions under the *Theft Act*.

3.5 Canadian Law

The *CFPOA* does not explicitly mention secondary parties to the indictable offence of bribery of foreign public officials. However, via section 34(2) of the federal *Interpretation Act*,¹²⁰ all the provisions of the *Criminal Code* that relate to indictable offences also apply to bribery of foreign public officials.¹²¹ Sections 21 and 22 of the *Criminal Code* address secondary party liability. Section 21(1) of the *Criminal Code* criminalizes the actions (or omissions of legal duties) of anyone who aids in the commission of an offence or abets any person in committing an offence. Pursuant to section 21(1), aiders, abettors and principal offenders who actually commit the offence are all guilty of the same offence and subject to the same penalties set out for that offence. As well, pursuant to section 21(2), when two or more people form a common unlawful purpose to commit an offence and during the course of that unlawful purpose one of them commits an ancillary offence, they are all parties to that offence if they knew or ought to have known that the commission of the ancillary offence was a probable consequence of carrying out the common unlawful purpose. A corporation or other organization can also be a member of a conspiracy if the requirements of sections 22.1 or 22.2 of the *Criminal Code* are met (further discussed in Section 2.7 above).

Section 22(1) of the *Criminal Code* makes those who counsel an offence liable for that offence if that offence is committed. If the offence is counselled but not committed, the counsellor is liable for a separate inchoate offence of incitement under section 464 of the *Criminal Code*; that offence is subject to the same punishment as an attempt to commit the offence that was counselled. Section 22(2) creates party liability for the counsellor for all reasonably foreseeable ancillary offences committed by the person counselled. For a more detailed analysis of party liability, see a standard Canadian criminal law textbook.¹²²

¹²⁰ *Interpretation Act*, RSC 1985, c I-21.

¹²¹ Despite some contrary views, this includes the *Criminal Code* provisions that criminalize complicity in the committal of an indictable offence. In *Naglingam v Canada (Minister of Citizenship & Immigration)*, 2008 FCA 153, the Court reasoned that pursuant to section 34(2) of the federal *Interpretation Act*, a refugee can be removed from Canada if he or she was a secondary party to one of the serious offences set out in the *Immigration and Refugee Protection Act* (see Fanny Lafontaine, "Parties to Offences under the Canadian *Crimes against Humanity and War Crimes Act*: An Analysis of Principal Liability and Complicity" (2009) C de D 967 at 982).

¹²² Don Stuart, *Canadian Criminal Law, Student Edition*, 7th ed (Toronto: Carswell, 2014) at 751-765; E Colvin & S Anand, *Principles of Criminal Law*, 3rd ed (Toronto: Carswell, 2007) at 553-584; and M Manning & P Sankoff, *Criminal Law*, 4th ed (LexisNexis) at 246-270.

4. INCHOATE OFFENCES

Certain offences are described as inchoate (or uncompleted) crimes, as opposed to “full or complete crimes”. The major inchoate crimes are attempt and conspiracy. Many common law legal systems (including the UK and Canada) also criminalize the inchoate offence of counselling an offence which is not committed (sometimes termed incitement). Although referred to as inchoate or incomplete, these offences are nonetheless distinct crimes on their own. Generally, common law states are more willing to punish inchoate crimes than civil law countries. Sweden, for example only punishes attempts for certain crimes, attempted bribery not being one of them.¹²³ In this section, the UNCAC and the OECD provisions on each of these three forms of inchoate offences will be examined, followed by a description of how the law in the US, UK and Canada deals with each offence.

4.1 Attempts

Countries around the world treat attempts to commit an offence in different ways. Some countries, such as Japan and Korea, do not criminalize attempts at all. In countries that do punish attempts, there is general agreement that the criminal law should not punish criminal thoughts alone; attempts are not committed until the offender engages in *some acts* for the purpose of committing the crime. But do *all* acts engaged in for the purpose of committing the offence in question constitute the offence of an attempt? In some countries, certain preliminary acts are classified as mere acts of preparation rather than an attempt, but at a certain point, acts will cross the line from preparation to attempt. Most common and civil law countries do not punish preparatory acts until they have reached the threshold of an “attempt”. However, there are some European states that do consider preparatory acts in respect to at least some criminal offences to be a crime. These countries include the Czech Republic (section 8 of the *Criminal Code*), Poland (Article 16 of the *Criminal Code*) and Russia (section 66 of the *Criminal Code*).

In practice, the distinction between mere preparatory acts and actual attempts is often difficult to draw, and the line between them is unclear in many states. Germany, France and a number of other European countries consider the point at which preparation becomes an attempt to be “with the act which immediately precedes the execution of the full offence”.¹²⁴ In other words, attempted offences are not committed until the offender is very close to executing or completing the full offence. On the other hand, in many common law countries, including the UK, the US and Canada, the threshold of an attempt is reached earlier, before the perpetrator has reached the “last act” stage. Stephen Matis characterizes the English criminal law approach as a “midway course” between the point of mere preparation and the last act stage.¹²⁵ In the US, the Model Penal Code suggests that an attempt begins when the offender has taken “a substantial step” towards the commission of the substantive offence. The point at which countries draw the line between an act of preparation and an attempt is often influenced by the rationale which that country relies upon in criminalizing an attempt. There are three possible rationales:

- a) *Prevention*: If there is no offence until the crime is committed (therefore removing police power to intervene before the crime is committed), crime prevention would be thwarted and harm would unnecessarily be caused to victims.
- b) *Moral fault*: People who attempt to commit crimes demonstrate a criminal disposition and deserve to be punished. Their state of mind is as morally blameworthy as persons who are successful in completing the crime.

¹²³ Ingeborg Zerbes, “Article 1 – The Offence of Bribery of Foreign Public Officials” in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention: A Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2014) 59 at 205.

¹²⁴ *Ibid* at 167.

¹²⁵ Stephen Matis, “Criminal Attempts and the Subjectivism/Objectivism Debate” (2004) 17 *Ratio Juris* 328 at 333.

- c) *Deterrence*: Punishing attempts may be necessary to deter others who may be contemplating the commission of a similar crime.

The law of attempts also raises the issue of whether voluntary withdrawal from an attempt forms a defence. Withdrawal, or voluntary desistance, refers to instances where the perpetrator has reached the stage of attempt but has a change of heart before the full offence is completed. France, Germany and Norway accept a defence of voluntary withdrawal while other countries like Australia have rejected this notion.¹²⁶

4.1.1 UNCAC

In consideration of the different approaches to the criminalization of attempts among the international community, UNCAC does not impose mandatory obligations on states to criminalize attempts or other types of preparatory actions in regard to most corruption-related offences. Article 27(2) provides a State Party “may” create an offence of attempted bribery. Article 27(3) provides that a State Party “may” create an offence for engaging in preparatory acts to commit bribery. Articles 27(2) and (3) state,

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

It is interesting to note that UNCAC is more prescriptive with regard to money laundering. Article 23(1) provides that State Parties “shall, subject to the basic concepts of its legal system, ...establish criminal offences” in respect to “attempts to commit” any of the money laundering offences listed in Article 23.

4.1.2 OECD Convention

The OECD Convention also respects the fact that countries take different approaches to the criminalization of inchoate offences. Article 1(2) states that an “[a]ttempt . . . to bribe a foreign public official shall be a criminal offence to the same extent as an attempt . . . to bribe a public official is an offence” in one’s own country. The *Commentaries on the OECD Convention* accompanying the Convention clarify that:

The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party’s legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.¹²⁷

Consequently, the OECD Working Group on Bribery does not look unfavourably on the legal systems of states that do not punish attempted bribery, such as Sweden, Japan and Korea.¹²⁸ It is also worth noting that the offence of attempted bribery of a foreign official would likely only cover a narrow ambit of behaviour, since offering or promising a bribe to a foreign public official is treated as part of the offence of bribery under the OECD Convention. Zerbes notes that in some countries the offer to bribe is

¹²⁶ Don Stuart, *Canadian Criminal Law, Student Edition*, 7th ed (Toronto: Carswell, 2014) at 712–713.

¹²⁷ *Commentaries on the OECD Convention* (1997), appended to the Convention at 15, para 11.

¹²⁸ Ingeborg Zerbes, “Article 1 – The Offence of Bribery of Foreign Public Officials” in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention: A Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2014) 59 at 205.

considered complete before the offer reaches the foreign public official: “A mere attempt to commit bribery is not envisaged by the FCPA, nor by Belgian, Finnish, French, Hungarian, or Spanish law, given the fact that they all regard the full offence as having been committed when someone seeks to induce a public servant”.¹²⁹

The Convention also does not address other points of difference among states, such as how severely attempts are punished or whether attempts to commit offences that are factually impossible are criminalized.¹³⁰

4.1.3 US Law

Most state penal codes and the US Model Penal Code have a provision in their general part which makes it an offense to attempt any offense. Some state penal codes and the US Code only penalize attempts within the context of specific offenses.¹³¹ In US law, a key point is whether the conduct of the accused has gone beyond mere acts of preparation and entered the realm of attempts. The details of the US law of attempts can be found in any standard American textbook of criminal law.¹³² Voluntary abandonment of an attempt (i.e. the plan to commit an offense) is recognized as a defense under the Model Penal Code and under many state penal codes.¹³³ Because the offense of bribery is broadly stated in section 78dd-1, it is not generally necessary to resort to attempted bribery. In section 78dd-1, bribery includes not only the completed offense “of paying the bribe and receiving the benefit” but also the “uncompleted” offenses of “offering, authorizing or promising” to pay a bribe, even if nothing further happens in regard to the actual payment of the bribe. Thus, attempts to bribe a foreign official will be caught in the full offense of bribery as defined in section 78dd-1.

4.1.4 UK Law

Under section 1 of the *Criminal Attempts Act 1981*, it is an offence to attempt to commit any offences that are indictable in England and Wales. Section 1(4) stipulates that it is not an offence to attempt to commit conspiracy or to attempt to aid, abet or counsel a substantive offence. Under section 1(1), a person is guilty of attempting to commit an offence if, with the intention of committing an applicable offence, “a person does an act which is more than merely preparatory to the commission of the offence”. Once a person’s actions have reached the stage of attempting an offence, the attempt is complete. It is not a defence if the perpetrator voluntarily withdraws from the attempt, although voluntary desistance may be evidence that the accused never really had the requisite intent to commit the substantive offence to begin with.¹³⁴ Historically, UK courts applied the “last step” test (i.e. to be classified as an attempt the accused’s conduct must have reached the last step before completion of the full offence). More recent case law suggests that the offender does not need to have commenced the last act before the completion of the substantive offence, but the precise line between merely preparatory acts and actual attempts is still unclear. As with US law, the law of attempts is not frequently resorted to for *Bribery Act* offences since the offences of bribery in that *Act* involve not only giving or receiving a bribe but also offering to give or promising to give, or requesting or agreeing to receive, a bribe.

¹²⁹ *Ibid.* While the US Code, which includes offences of bribery, does not have a general provision on attempts, the Code does penalize attempts of some offences, as discussed below, including attempts to commit bribery through the mails.

¹³⁰ *Ibid* at 170.

¹³¹ See e.g. the offences of attempts and conspiracy to commit bribery through the use of the mail, § 1349, 18 USC.

¹³² See, eg. Wayne R. LaFave, *Substantive Criminal Law*, 2nd ed (Thomson/West, 2003) vol 2 at 204-252.

¹³³ Wayne R LaFave, *Substantive Criminal Law*, vol 2, 2nd ed (Thomson/West, 2003) at 242-249.

¹³⁴ D Baker and G Williams, *Textbook on Criminal Law*, 3 ed (London: Sweet & Maxwell, 2012) at 547.

4.1.5 Canadian Law

Section 34(2) of the federal *Interpretation Act*¹³⁵ states that all the provisions of the *Criminal Code* that relate to indictable offences also apply to the offence provisions of other federal statutes. Therefore, although not explicitly noted in the *CFPOA*, the three major inchoate offences in Canada (counselling a crime not committed, attempt and conspiracy) apply to the *CFPOA* offences of bribing a foreign public official and falsifying books and records. These inchoate offences also apply to domestic corruption offences, which are found in the *Criminal Code*.

Pursuant to section 24(1) of the Canadian *Criminal Code*, anyone who, with the intention to commit an offence, “does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.” However, section 24(2) clarifies that mere preparation to commit an offence is not considered an attempt.

Like other legal systems, Canadian courts have struggled with the distinction between preparatory acts and attempts. The leading case is the 1986 Supreme Court of Canada decision in *R v Deutsch*.¹³⁶ The Court held that there is no general rule for distinguishing between preparation and an attempt and that the distinction should be left to the common sense of the trial judge. Writing for the majority, Justice Le Dain went on to state,¹³⁷

In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.

The Court’s failure to express a clear test to determine whether particular acts fulfill the *actus reus* requirement of an attempt offence remains troubling to some commentators, who argue that criminal law principles demand that a more clear formulation of the *actus reus* of attempt offences be available to the public.¹³⁸ The issue of whether voluntary withdrawal is a defence to an attempt charge has not been fully considered in Canada.¹³⁹

The maximum penalty under section 463 of the *Criminal Code* for attempts to commit indictable offences other than those punishable by life in prison is half the maximum penalty that would have been available had the attempt succeeded.

4.2 Conspiracy

The offence of conspiracy involves at its core an agreement between two or more persons to commit an offence. Many civil law countries only criminalize conspiracy to commit a limited number of very serious crimes, which generally do not include bribery. Most common law countries criminalize conspiracy to commit a broader range of offences, including the offence of bribery.¹⁴⁰ Unlike the law of attempts, conspirators may be convicted when no concrete steps beyond reaching the agreement have been taken. The criminalization of conspiracy is more controversial than the criminalization of attempts. Conspiracy

¹³⁵ RSC, 1985 c I-21.

¹³⁶ *R v Deutsch*, [1986] 2 SCR 2.

¹³⁷ *Ibid* at para 30.

¹³⁸ Don Stuart, *Canadian Criminal Law, Student Edition*, 7th ed (Toronto: Carswell, 2014) at 707.

¹³⁹ *Ibid* at 706.

¹⁴⁰ Ingeborg Zerbes, “Article 1 – The Offence of Bribery of Foreign Public Officials” in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention: A Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2014) 59 at 208.

occurs well before an attempt to commit an offence, and its criminalization can lead to a form of collective guilt that may unfairly punish individuals for the wrongdoing of others. In the past, the criminalization of conspiracy has also been used to suppress political dissent. However, the availability of an offence of conspiracy to commit corruption offences allows enforcement agencies to arrest perpetrators before harm has occurred and can be an effective weapon against organized crime.¹⁴¹

4.2.1 UNCAC

While Article 27 of UNCAC specifically references the adoption of provisions criminalizing parties to bribery and attempts to commit bribery, UNCAC is silent on conspiracy to commit bribery. However, Article 23 states that “subject to the basic concepts of its legal system, State Parties shall establish a criminal offence for conspiracy to commit” any of the money laundering offences in Article 23.

4.2.2 OECD Convention

As with attempts, rather than mandating a globally consistent approach, Article 1(2) focuses on consistency within the domestic context when dealing with criminalization of conspiracy. A conspiracy or an attempt to bribe a *foreign* official must be penalized in the same way (if any) as conspiracies or attempts to bribe *domestic* public officials.

4.2.3 US Law

The US criminalizes conspiracies to bribe foreign public officials. Charges under the *FCPA* will often be accompanied by a charge under the federal general conspiracy statute (18 USC § 371), which makes it a crime to conspire to commit an offense against the US or to conspire to defraud the US. The applicable punishment is either a fine or a prison term of up to five years (unless the object of the conspiracy is a misdemeanor offense, in which case the punishment shall not exceed the maximum punishment for that offense). The elements of the offense of conspiracy to commit bribery can be found in Tarun’s book *The Foreign Corrupt Practices Act Handbook*.¹⁴² He lists the four elements of a federal conspiracy as follows:

- a. An agreement by two or more persons,
- b. To commit the unlawful object of the conspiracy,
- c. With knowledge of the conspiracy and with actual participation in the conspiracy,
and
- d. The commission of an overt act in furtherance of the conspiracy by at least one co-conspirator.

It is important to note that the conspiracy offense is not complete until one of the co-conspirators commits an overt act in furtherance of the conspiracy. This does not have to be a criminal act in its own right but can be a non-criminal preparatory act, such as opening a bank account that is to be used as a part of the bribery scheme. By contrast, the offense of conspiracy in the UK and Canada does not require any overt acts in furtherance of the conspiracy. The law of conspiracy in the US is set out in detail in LaFave’s book *Substantive Criminal Law*.¹⁴³

¹⁴¹ For a discussion of the arguments for and against the criminalization of conspiracy see Aaron Fichtelberg, “Conspiracy and International Criminal Justice” (2006) 17 *Crim LF* 149.

¹⁴² Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (Chicago: American Bar Association, 2013) at 26-27.

¹⁴³ Wayne R LaFave, *Substantive Criminal Law*, vol 2, 2nd ed (Thomson/West, 2003) at 253-324. For more details concerning the law of conspiracy in the United States, see Neal Kumar Katyal, “Conspiracy Theory” (2003) 112 *Yale LJ* 1307, online:

Tarun notes that charging individuals or corporations with both a general conspiracy offense and a substantive *FCPA* offense offers several advantages to the prosecution. In this regard, he states,

First, the ongoing nature of conspiracy lends itself to expansive drafting, particularly in temporal terms. Conspiracies frequently are alleged to have continued for years and occasionally decades. Second, the breadth and vagueness of a conspiracy count allow the admission of much proof that might otherwise be inadmissible. Third, a conspiracy count enables the government to broadly join persons and allegations. A conspiracy can allege an agreement to defraud multiple entities, individuals, and companies or both the government (e.g., the Securities and Exchange Commission) and private entities and individuals. Fourth evidentiary rules with respect to co-conspirator declarations enlarge the admissibility of often-damaging statements in conspiracy trials [Under the US Federal Rules of Evidence, out of court statements made by a co-conspirator in furtherance of the conspiracy may be admitted against the accused]. Fifth, because the conspiracy is a continuing crime, its five-year statute of limitations does not begin to run until either the conspiracy's objectives are met, the conspiracy is abandoned, its members affirmatively withdraw, or the last overt act committed in furtherance of the conspiracy occurs [footnotes omitted].¹⁴⁴

4.2.4 UK Law

For the purposes of most corruption-related offences,¹⁴⁵ the old common law offence of conspiracy has been replaced with the *Criminal Law Act 1977*. Section 1(1) of the Act provides that a person is liable for conspiring to commit an offence if that person agrees with at least one other person to pursue a course of conduct that, if carried out according to plan, would necessarily involve the commission of any offence. The key element is the agreement. Evidence of negotiations without proof of an agreement is insufficient.¹⁴⁶ To be convicted, the defendant must have intended to enter the agreement, intended that the purpose of the agreement be carried out, and had knowledge of the relevant circumstances.¹⁴⁷ Recklessness rather than actual knowledge of these circumstances is insufficient.¹⁴⁸ If a defendant withdraws from a conspiracy immediately after entering the agreement, this does not provide a defence, but may be used to mitigate the sentence.¹⁴⁹ A company may be a party to a conspiracy if an officer forming part of its directing mind enters the agreement on the company's behalf.¹⁵⁰

The courts discourage the charging of both conspiracy and the substantive crime that the parties conspired to commit due to the length and complexity of resulting trials and the unfairness of convicting accused persons for two separate crimes for what constitutes one continuous transaction. However, charging both offences can provide the prosecution with evidentiary advantages.¹⁵¹

<<http://www.yalelawjournal.org/article/conspiracy-theory>>, and Paul Marcus, "The Crime of Conspiracy Thrives in Decisions of the United States Supreme Court" (2015) 64 U Kan L Rev 373, online: <<http://scholarship.law.wm.edu/facpubs/1797/>>.

¹⁴⁴ Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (Chicago: American Bar Association, 2013) at 26.

¹⁴⁵ Note that the common law offence of conspiracy to defraud remains in force: Dennis Baker and Glanville Williams, *Textbook of Criminal Law*, 3rd ed (London: Sweet & Maxwell, 2012) at 568. For more on common law conspiracy, see David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 447–456.

¹⁴⁶ Dennis Baker and Glanville Williams, *Textbook of Criminal Law*, 3rd ed (London: Sweet & Maxwell, 2012) at 570.

¹⁴⁷ *Ibid* at 580.

¹⁴⁸ *Ibid* at 586.

¹⁴⁹ David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 424.

¹⁵⁰ AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed (Oxford: Hart, 2010) at 324.

¹⁵¹ David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 445.

English courts will have jurisdiction over a conspiracy offence if the agreement is made in England or Wales to commit an offence abroad or if an agreement was made abroad to commit an offence in England or Wales, regardless of an absence of acts done in furtherance of the agreement in England or Wales.¹⁵²

4.2.5 Canadian Law

In *R v Karigar*, the court noted that section 3 of the *CPFOA* incorporates the idea of conspiracy. As stated by the court, “a conspiracy or agreement to bribe foreign public officials is a violation of the *Act*. . . the use of the term ‘agrees’ imports the concept of conspiracy”.¹⁵³ The court further elaborated that the agreement need not be between the giver and receiver of the bribe. Even if the word “agrees” in section 3 of the *CFPOA* does not import the concept of conspiracy, the *Criminal Code* provisions on conspiracy also apply to the bribery offences in the *CFPOA*.¹⁵⁴ Conspiracy to commit an indictable offence is set out under section 465(1)(c) of the *Criminal Code* as follows:

every one who conspires with any one to commit an indictable offence . . . is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable

The essence of the offence consists of an agreement between two or more persons to commit an indictable offence. There must be a common agreement between the parties to work together to commit the offence(s). Unlike the US conspiracy offence, there is no requirement that one of the co-conspirators take any action in furtherance of the conspiracy. The offence is complete the moment the agreement is reached. Like in the US, hearsay evidence spoken by a co-conspirator is admissible against the other conspirators, although there must be independent evidence of a conspiracy before this information may be used in court. Because of this permissive evidence rule, the conspiracy charge is sometimes referred to as “the prosecutor’s darling”.¹⁵⁵ The criminalization of conspiracy is generally justified by the principle that two people with a plan to commit an offence are more dangerous than one person plotting alone. This justification has been questioned, and numerous commentators and organizations have called on the Canadian government to narrow the offence of conspiracy.¹⁵⁶

Canadian courts have territorial jurisdiction over defendants who conspire in Canada to commit an act abroad that constitutes an offence both in Canada and the foreign country. Further, Canada will have jurisdiction if the defendant conspires elsewhere to commit any act in Canada that is an offence in Canada.¹⁵⁷

4.3 Incitement (or Solicitation)

Inciting or counselling an offence that is later committed by the person who was counselled makes the incitor or counsellor a party to, and therefore guilty of, the offence committed. But suppose a person incites or counsels another person to commit an offence, but that other person does not commit it. The incitor or counsellor cannot be a party to the offence counselled because that offence was never committed and his or her acts of counselling or inciting are too preliminary to convict the person of an attempt to commit the offence. Some countries have created a separate inchoate offence for counselling an offence that is not committed, which is called incitement in the UK and Canada and solicitation in the US.

¹⁵² *Ibid* at 446–447.

¹⁵³ *R v Karigar*, 2013 ONSC 5199 at para 28.

¹⁵⁴ Section 32(4) of the *Interpretation Act*, RSC 1985, C I-21.

¹⁵⁵ Don Stuart, *Canadian Criminal Law, Student Edition*, 7th ed (Toronto: Carswell, 2014) at 724.

¹⁵⁶ *Ibid* at 733-734.

¹⁵⁷ Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford University Press, 2014) at 51.

4.3.1 UNCAC and the OECD Convention

The inchoate offence of incitement is not specifically mentioned in either UNCAC or the OECD Convention. But there is no pressing need for this type of separate inchoate offence, since the definition of bribery under both conventions includes conduct such as “requesting a bribe”, regardless of whether the bribe is paid, or “offering a bribe”, regardless of whether the bribe is accepted or not.

4.3.2 US Law

The inchoate offense of incitement (which includes counselling, encouraging, instigating or soliciting) is referred to as the offense of solicitation in the US. The elements of this inchoate offense can be found in a standard American textbook on criminal law.¹⁵⁸ However, because of the expanded definition of the offense of bribery in section 78 dd-1, there is little or no need to use the offense of solicitation in respect to bribery offenses.

4.3.3 UK Law

In the UK, the common law offence of incitement was recognized by at least 1769.¹⁵⁹ It has now been replaced by section 44 of the *Serious Crimes Act 2007*. Under this section, those that intentionally commit acts that are capable of encouraging or assisting in the commission of an offence are themselves committing an offence, regardless of whether the substantive offence is carried out and regardless of whether their acts actually encourage or assist the principal offender. In order for the offence to be made out, the person doing the encouraging or assisting (D1) must intend to assist or encourage the substantive offence, or must believe that the substantive offence will be committed and that their acts will encourage or assist its commission. Section 65 clarifies that acts reducing the risk of criminal proceedings for the principal offender are considered to be capable of assisting or encouraging the commission of an offence.¹⁶⁰

English courts have jurisdiction if the defendant knew or believed that the substantive offence would be committed in England or Wales, regardless of where the acts of encouragement or assistance took place. English courts also have jurisdiction if the encouragement or assistance took place in England or Wales, but the defendant knew or believed the substantive offence would take place abroad so long as the defendant knew the offence was illegal both in the UK and in the country of the substantive offence.¹⁶¹

4.3.4 Canadian Law

A person who counsels another person to commit an offence that is later committed is considered a party to that offence (section 22 of the *Criminal Code*). However, a person who counsels another to commit an offence that is not committed is guilty of a different offence that is sometimes referred to as the offence of incitement. Section 464 of the *Criminal Code* states,

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

- (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

¹⁵⁸ Wayne R LaFave, *Substantive Criminal Law*, vol 2, 2nd ed (Thomson/West, 2003) at 188-204.

¹⁵⁹ *R v Vaughan*, 98 ER 308 (1769). See also *R v Higgins*, 102 E.R. 269 (1801).

¹⁶⁰ David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 465.

¹⁶¹ AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed (Oxford: Hart, 2010) at 357.

(b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

The term “counselling” is wide and, pursuant to section 22(3) of the *Criminal Code*, “includes procuring, soliciting or inciting.” The *mens rea* of the offence requires an intention that the counselled offence be committed or recklessness in the sense of a conscious disregard for a substantial and unjustified risk that the offence counselled was likely to be committed.¹⁶² The offence of incitement under section 464 has not been used in Canada so far to prosecute a person who counsels bribery that was not actually committed. It could have been used in the prosecution of Wallace and three other Canadians in respect to the alleged bribe offer in the Padma River Bridge project in Bangladesh (see Section 1.1 of Chapter 1).

¹⁶² *R v Hamilton*, [2005] 2 SCR 432.