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acceptability of the common business practice of bribing foreign officials. Nonetheless, the reality of such business dealings worldwide did not change until very recently,² when the consequences of ignoring the law became subject to enormous fines levied by the Department of Justice (DOJ).³ No doubt, the FCPA has inspired international efforts to eradicate corruption, national efforts to enshrine anti-bribery concepts in law, and serious efforts to enforce those laws. The Organization for Economic Cooperation and Development (OECD) Convention⁴ and the recent U.K. Anti-Bribery law⁵ reflect this trend, albeit with mixed success. Not surprisingly, many observers have remained cynical and doubt whether countries with an entrenched culture of corruption would ever change. This article examines Brazil's surprising decision to enact its Clean Companies Law,⁶ thereby ending the country's official tolerance of corruption and adding its name to the short list of countries that have taken major steps to change the business culture. It looks at this through the lens of the pharmaceutical industry, considering the preliminary groundwork for the law as established through industry and country codes. Finally this article concludes with some assessments of the efficacy of these efforts and recommendations for regulatory changes.

² Cf. SHEARMAN & STERLING LLP, *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, in THE FOREIGN CORRUPT PRACTICES ACT AND INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS 2013 (2013), available at http://www.shearman.com/~media/Files/Services/FCPA/2014/FCPA_DigestTPFCPA010614.pdf (showing the statistics and the dramatic increase in cases and fines).

³ *Id.*

⁴ OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2011), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

⁵ Bribery Act, 2010, c. 23 § 7 (Eng.).

⁶ Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.8.2013 (Braz.). An English translation of the law is available at http://www.cov.com/files/upload/E-Alert_Attachment_Brazilian_Clean_Companies_Act_English.pdf. In 2012, Mexico also passed its own anti-corruption law. See Alison Tanchyk et al., *Mexico Enacts Anti-Corruption Law for Federal Government Contracting*, MORGAN LEWIS, Oct. 12, 2012, <http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/ba98cb6e-5be8-42b0-b495-4255dd0f28f5> (discussing law which took effect June 12, 2012 and “. . . holds individuals and companies accountable for offering money or gifts to obtain or maintain a business advantage in the procurement of public contracts . . .”).

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II. FOREIGN CORRUPT PRACTICES ACT AND THE INTERNATIONAL RESPONSE

Passing the Foreign Corrupt Practices Act in the United States in 1977 was the bold act of a legislature not known for such activism for over a decade.⁷ In retrospect, it is interesting that neither gridlock nor partisan bickering obstructed this dramatic move. The statute criminalized the offering of something of value to a foreign official to obtain or retain business.⁸ It also required maintaining adequate books and records so failure to record a bribe could be actionable.⁹ No doubt, many expected other countries to follow suit and were disappointed: the community of nations not only failed to embrace this new view, many countries continued to condone the practice by allowing tax deductions for bribes.¹⁰

A. *Foreign Corrupt Practices Act*

The 1977 law required issuers of securities defined by the law¹¹ to “make and keep books, records, and accounts, accurately and fairly reflect the transactions . . .” as well as “. . . devise and maintain a system of internal accounting controls . . .”¹² The standard was “reasonable detail” and “reasonable assurances.”¹³ Furthermore, Section 5 imposed a knowing standard: “No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify . . .”¹⁴ This was an addition in 1988 and replaced the earlier “reason to know” standard.¹⁵ “Reason to know” was too vague and made business people uncomfortable with what might be imputed to them, whereas the knowing standard was more consistent with criminal standards.¹⁶

⁷ 15 U.S.C. § 78dd-1. Perhaps not since the Civil Rights Act of 1964 was there such an attempt to change the culture of business and society.

⁸ *Id.*

⁹ 15 U.S.C. § 78m(b)(2) (2012).

¹⁰ See generally Walter Perkel, *Foreign Corrupt Practices Act*, 40 AM. CRIM. L. REV. 683, 704 (2003) (discussing tax deductibility).

¹¹ 15 U.S.C. § 78m(b)(2).

¹² *Id.* at § 78m(b)(2)(A)–(B).

¹³ *Id.*; see also *id.* at § 78m(b)(7).

¹⁴ *Id.* § 78m(b)(5).

¹⁵ Foreign Corrupt Practices Act Amendments of 1988, 15 U.S.C. § 78m(b)(4)–(7) (1988) [hereinafter FCPAA 1988]. For discussion, see generally Beverley H. Earle, *Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Act's Focus on Improving Investment Opportunities*, 37 CLEV. ST. L. REV. 549 (1989) (discussing the impact of the 1988 amendments).

¹⁶ Statute requires both “corrupt” and willful intent for an individual. 15 U.S.C. § 78dd-1 states

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Another section of the law makes it unlawful for an issuer of securities or domestic concern or

any person . . . or officer, director, employee, or agent of such person . . . [to]. . . corruptly [] make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the payment . . . of anything of value to—

(1) any foreign official for purposes of—

(A)

(i) influencing any act or decision of such foreign official in his official capacity,

(ii) inducing such foreign official to do or omit to do any act . . . , or

(iii) securing any improper advantage; or

(B) Inducing such foreign official to use his influence . . . in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.¹⁷

The statute also restricts influencing foreign political parties or candidates.¹⁸

The original FCPA included an exemption for functions that were “ministerial or clerical.”¹⁹ However, the 1988 version dropped that exemption for the clearer exemption of “routine governmental action,” which it defined as what could be “ordinarily and commonly performed.”²⁰ A subsequent section clarifies that the law does not include specific actions connected to the decision making process “to award new business to or continue business with a particular party.”²¹

Any officer, director or employee or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-f of the title shall be fined not more than \$100,000 or imprisoned not more than 5 years or both.

For discussion, see generally Don Zarin, *The Foreign Payments Provisions*, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT* §§4–8, at 36 (2d ed. 2013).

¹⁷ FCPA, *supra* note 1, at §§ 78dd–3(a) (2012).

¹⁸ *Id.* at § 78dd–3(a)(2).

¹⁹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 30A, 91 Stat. 1494 (1977) (prior to 1988 amendments).

²⁰ FCPA, *supra* note 1, at §§ 78dd–1(b)&(f)(3)(A) (2012) (listing obtaining permits or official documents allowing a person to do business in a foreign country, processing visas and work orders, police protection, inspections, phone service, loading and unloading cargo, or protecting perishable commodities or actions of a similar nature, as examples of ordinarily and commonly performed work).

²¹ *Id.* at § 78dd–1(f)(3)(B).

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The Affirmative Defense sections allow a defense if the bribe was lawful in the country or it was a “reasonable and bona fide expenditure” including travel, promotion, or demonstration.²² A number of Department of Justice Opinions address the issue of whether underwriting travel for foreign officials and otherwise incurring expenses while promoting business relations constitute violations of the FCPA.²³

The statute has endured despite suggestions it hampered the United States’ business interests overseas.²⁴

B. *OECD*

Moral persuasion did not appear to be much of an incentive for countries to revise their laws in the years after 1977.²⁵ However, two decades later, economic arguments began to grab the attention of the world community.²⁶ The adverse impact of corruption on economic development became a topic of international conversation; outrage grew with respect to the common practice subverting economic assistance and development projects into mere camouflage for bribes. The OECD drafted a Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions in 1997, which became effective in 1999.²⁷ The Convention requires countries to have legislation that meets the standards in the Convention. The FCPA serves this purpose for the United States, and the U.S. ratified the Convention in 1998. The OECD has been instrumental in keeping interna-

²² *Id.* at § 78dd–1(c).

²³ Beverley Earle & Anita Cava, *When is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 *IND. INTL. & COMP. L. REV.* 111, 128–29 (analyzing Opinion Releases).

²⁴ *See, e.g., id.* at 146.

²⁵ *See* Beverley Earle, *The United States’ Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won’t Work, Try the Money Argument*, 14 *DICK. J. INT. L.* 207, 207–09 (1996) (discussing the “shift from a moral to an economic argument”). *See generally* Beverley Earle & Anita Cava, *Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and Their Impact on India and Multinational Corporations*, 31 *U. HAW. L. REV.* 59 (2008) (discussing history of multidisciplinary analysis of bribes); JOHN T. NOONAN, *BRIBES* (1984) (tracing the history of bribes throughout the centuries); and SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978) (discussing groundbreaking work on the study of corruption from economic viewpoint).

²⁶ *Bribonomics*, *ECONOMIST*, March 19, 1994, at 86, available at <http://search.proquest.com/printviewfile?accountid=14731> (citing Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 *Q. J. ECON.* 599 (1993)).

²⁷ OECD, *supra* note 4.

tional attention on this issue and monitoring signatory countries for compliance.

The OECD monitors compliance by countries, and the reporting maintains pressure.²⁸ However, one of the major pressures on countries to comply comes from the internet.²⁹ This has reshaped the way information is shared and can bring additional pressure outside of both the electoral or normal enforcement process.

C. *United Kingdom Bribery Act (UKBA)*

The UKBA was adopted with fanfare in 2010, implemented in 2011, and touted as the “FCPA on steroids” because of its broader reach in terms of covering “private bribery,” which encompasses bribes between private businessmen.³⁰ The UKBA covers any entity or person who does business in the U.K.—even if the acts took place outside the U.K.—and has a zero tolerance policy for facilitation payments, contrary to the FCPA.³¹ The statute includes an “adequate procedures defense,” which suggests that a good compliance program is going to allow a company to remain in good stead even if a rogue employee takes unauthorized action in violation of the law.³²

The Ministry of Justice issued *Guidance* to clarify some of the ambiguity.³³ However, there still is confusion about when promotional and entertainment expenses cross the line and become bribes. In December 2012, David Green, the head of the Serious Fraud Office, clari-

²⁸ See *What We Do and How*, OECD.ORG, <http://www.oecd.org/about/whatwedoandhow> (last visited Mar. 31, 2014).

²⁹ See Beverley Earle, *Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What is to Be Done?*, 33 CORNELL INT’L L.J. 483, 511 (2000) (suggesting technology will help expose corruption and thus deter it); Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 38 HARV. J. ON LEGIS. 67, 90 (2001) (discussing the power of technology and the internet to aid in exposing corruption).

³⁰ See Nathan Koppel, *Introducing the New “FCPA on Steroids,”* WALL ST. J. L. BLOG (Dec. 28, 2010, 2:12 PM), <http://blogs.wsj.com/law/2010/12/28/introducing-the-new-fcpa-on-steroids>.

³¹ Bribery Act, 2010, c. 23, § 3 (Eng.); see also Geoffrey Gauci & Jessica Fisher, *The UK Bribery Act and the US FCPA: The Key Differences*, ASS’N. CORP. COUNSEL (Mar. 15, 2011), <http://www.acc.com/legalresources/quickcounsel/ukbafcpa.cfm#BEFP>.

³² Bribery Act, *supra* note 5, at § 7(2).

³³ MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING (2011) (U.K.), <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> [hereinafter *Guidance*].

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fied the illegality of facilitation payments.³⁴ One group noted, “Where once enforcement of the U.K. Bribery Act seemed a paper tiger, we now see active prosecutions.”³⁵

D. Other

The philosophical shift in attitudes regarding bribing foreign officials — at least publically — is reflected in the drumbeat of organizations adopting anti-bribery agreements ten years after the FCPA. For example, the Organization of American States (OAS) enacted the Inter-American Convention Against Corruption in 1996.³⁶ This required nations to criminalize bribery.³⁷ It went into force in 1997, although the United States did not ratify until 2000.³⁸ Interestingly, the Convention has a section addressing and prohibiting the “illicit enrichment” of officials.³⁹ The section focuses on the personal profit that foreign officials routinely used their offices to secure. Public opinion is increasingly intolerant of such excess.⁴⁰

The United Nations Convention Against Corruption was enacted in 2003 and entered into force in 2005.⁴¹ A major aspect of the Convention is the requirement that countries have laws criminalizing many of the bribery offenses.⁴² As of November 29, 2013, 140 countries

³⁴ Barry & Richard, *An Open Letter from SFO David Green on Facilitation Payments You Don't Know About*, <http://thebriberyact.com/2013/08/22/an-open-letter-from-sfo-director-david-green-on-facilitation-payments-that-you-dont-kn> (reprinting David Green's Dec. 6, 2012 letter reiterating no tolerance for facilitation payments in contrast to previous head's assurance of reasonableness).

³⁵ Kevin T. Abikoff et al., *United States: FCPA/Anti-Bribery Alert Winter - 2013*, MONDAQ (Jan. 7, 2014), <http://www.mondaq.com/unitedstates/x/284740/White+Collar+Crime+Fraud/FCPAAntiBribery+Alert+Winter+2013> (Hughes Hubbard & Reed LLP commenting on global enforcement trends).

³⁶ Organization of American States, *Inter-American Convention against Corruption*, Mar. 29, 1996, O.A.S.T.S. No. B-58 [hereinafter IACAC].

³⁷ *Id.* at art. VII.

³⁸ *See* IACAC, *supra* note 36.

³⁹ IACAC, *supra* note 36, at art. IX.

⁴⁰ LINDY MUZILA ET AL., *ON THE TAKE: CRIMINALIZING ILLICIT ENRICHMENT TO FIGHT CORRUPTION*, 1, 7–9 (The World Bank 2012), *available at* https://www.unodc.org/documents/corruption/Publications/2012/On_the_Take_Criminalizing_Illicit_Enrichment_to_Fight_Corruption.pdf (discussing the development of the offense over time).

⁴¹ United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

⁴² *Id.* at arts. 15–28.

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signed on to the Convention.⁴³ The number of signatories only broadens the base of consensus that countries and their citizens will no longer tolerate unofficial pillaging by their elected officials.

The World Bank's efforts have also increased attention to the issue of bribery by the announcement in 2012 of *Strengthening Governance, Tackling Corruption: The World Bank Group's Updated Strategy and Implementation Plan*.⁴⁴ They have instituted Procurement Guidelines and have debarred firms for violations.⁴⁵

Other groups, including the International Monetary Fund (IMF), the African Development Bank, the Asian Development Bank, the Council of Europe, the African Union, and the Inter-American Development Bank, have also adopted rules and/or policies to penalize bribing officials while conducting business.⁴⁶ This unity in condemning bribery and in tightening the noose of prohibition serves to send notice to business people who previously scoffed at the new-found seriousness towards rooting out this ancient evil.⁴⁷

⁴³ U.N.D.O.C., *United Nations Convention against Corruption: Signature and Ratification Status as of 29 November 2013*, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Mar. 31, 2014).

⁴⁴ WORLD BANK, *Strengthening Governance, Tackling Corruption: The World Bank Group's Updated Strategy and Implementation Plan*, (Mar. 6, 2012), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/0,,contentMDK:23086675~pagePK:210058~piPK:210062~theSitePK:286305,00.html>.

⁴⁵ Don Zarin, *Multilateral Efforts Concerning Transnational Bribery of Foreign Officials*, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 13-11* (2d ed. 2013) (noting that "over 607 individuals and firms . . . have been debarred or cross-debarred").

⁴⁶ See INT'L MONETARY FUND, *THE IMF AND GOOD GOVERNANCE FACTSHEET*, (Mar. 18, 2014), <http://www.imf.org/external/np/exr/facts/pdf/gov.pdf>; *Integrity and Anti-Corruption*, AFRICAN DEV. BANK GRP., <http://www.afdb.org/en/about-us/structure/integrity-and-anti-corruption> (last visited Apr. 2, 2014); *Fighting Fraud and Corruption in ADB Projects*, Asian Dev. Bank, <http://www.adb.org/site/integrity/main> (last visited Apr. 2, 2014); *Action against Economic Crime*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/default_en.asp (last visited Apr. 2, 2014); African Union Convention on Preventing and Combating Corruption, July 11, 2003, available at http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf; *Institutional Integrity*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/institutional-integrity,1291.html> (last visited Apr. 2, 2014).

⁴⁷ See NOONAN, *supra* note 25 (tracing the history of bribes throughout the centuries).

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E. NGOs

Two NGOs are particularly important in the fight against corruption. First, Transparency International (“TI”), founded in 1993, states that its goal is “[a] world in which government, politics, business, civil society and the daily lives of people are free of corruption.”⁴⁸ Its logo is an eye with the globe as the eyeball, symbolic of the world watching and the idea that transparency will help end the entrenched practice of corruption and bribery.⁴⁹ TI uses surveys of Bribe Payers Index and Corruptions Perception Index to look at which countries are most likely to offer bribes and in which countries one may be most likely to be approached for bribes.⁵⁰ Such surveys capture the phenomenon that although a country may have a relatively low tolerance for bribery within its borders, its business people are apt to resort to bribery when outside its borders.⁵¹ TI engages in research and strategies to engage civil society and find ways to combat corruption.⁵²

Another NGO, TRACE International, founded in 2001, helps support corporate compliance.⁵³

TRACE International and TRACE Incorporated are distinct entities with a shared mission to increase commercial transparency for multinational companies and their commercial intermediaries by raising the standard of anti-bribery compliance. TRACE International is a non-profit membership organization that pools resources to provide members with anti-bribery compliance support, while TRACE Incorporated offers both members and non-members customizable risk-based due diligence, a comprehensive training package, and consulting ser-

⁴⁸ *Who We Are*, TRANSPARENCY INT’L, <http://www.transparency.org/whoweare> (last visited Mar. 31, 2014).

⁴⁹ *Id.* (referring to the graphic on the website).

⁵⁰ *Bribe Payers Index*, TRANSPARENCY INT’L, <http://www.transparency.org/research/bpi> (last visited Mar. 31, 2014); *Corruption Perceptions Index*, TRANSPARENCY INT’L, <http://www.transparency.org/research/cpi> (last visited Mar. 31, 2014).

⁵¹ *Bribe Payers Index*, *supra* note 50; *Corruption Perceptions Index*, *supra* note 50. The Bribe Payers Index and Corruption Perceptions Index demonstrate that this is a two-part problem viewed from the perspective of both the briber and the bribee.

⁵² See, e.g., Kareem Fahim, *Slap to a Man’s Pride Set off Tumult in Tunisia*, N.Y. TIMES, Jan. 21, 2011, <http://www.nytimes.com/2011/01/22/world/africa/22sidi.html?pagewanted=all&r=0>, (discussing the impact of the fruit vendor in Tunisia who set himself on fire Dec. 17, 2010 because of his harassment for bribes and how protests led to the end of the 23-year term of the dictator/president).

⁵³ *About TRACE*, TRACE, <http://www.traceinternational.org/Trace.html> (last visited Mar. 31, 2014).

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vices. Working together, TRACE International and TRACE Incorporated offer one complete, cost-effective, and practical solution for anti-bribery and third party compliance.⁵⁴

ABOUT TRACE INTERNATIONAL

TRACE International was founded in 2001 by in-house anti-bribery compliance experts to achieve economies of scale and to set a common standard for two shared elements of anti-bribery compliance programs: due diligence reviews of commercial intermediaries and anti-bribery training for the global supply chain. TRACE International is a 501c (6) non-profit business association that leverages a shared-cost model to provide practical and cost-effective anti-bribery compliance services for multinational companies and their commercial intermediaries through a membership program.⁵⁵

Although confusing because both have TI as acronyms, their functions are quite different., as the latter is an organization supporting compliance efforts and furthering industry education. While companies that compete do not collaborate in this arena, if competitors are united in complying with anti-bribery laws, all companies benefit. Companies pay dues to support the organization.⁵⁶

This brief explanation of developments that occurred post-1977 shows the remarkable expansion globally of a common understanding of the economic consequences of bribery and a collective will expressed through law to change this practice.⁵⁷

III. THE PHARMACEUTICAL INDUSTRY

As defined by the legal landscape outlined above, corruption in the pharmaceutical industry manifests itself in the manufacturing, promotion, and marketing of prescription drugs and medical devices writ large.⁵⁸ Focusing specifically on the role of physicians in this pro-

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Portable Due Diligence*, TRACE, <http://traceinternational.org/Diligence/portable-due-diligence.html>, (last visited Mar. 31, 2014).

⁵⁷ SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978).

⁵⁸ Mark A. Rodwin, Symposium, *Institutional Corruption and the Pharmaceutical Policy*, 41 *J.L. MED. & ETHICS* 544 (2013)

Today, the goals of pharmaceutical policy and medical practice are often undermined due to *institutional corruption* — that is, widespread or systemic practices, usually legal, that undermine an institution's objectives or integrity . . . [T]he pharmaceutical

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cess, a major issue is that in many countries around the world—and especially in Latin America—doctors are employed by the government in some capacity. Accordingly, they function as public officials and are subject to the reach of anti-bribery legislation when they prescribe or make recommendations for adoption of specific pharmaceutical goods and services.⁵⁹ As a result, the pharmaceutical industry has been under special scrutiny for influencing such decisions through gifts, hospitality, luxurious travel under the guise of educational opportunities or familiarization trips, and similar benefits offered to health care providers.⁶⁰ The legal enforcement environment has been buttressed by industry efforts to police itself at every level—global, regional, and national—by adopting codes of conduct or ethics.⁶¹ This is certainly true in Brazil.

industry's own purposes are often undermined. Moreover, certain practices have corrupted medical research, the production of medical knowledge, the practice of medicine, drug safety, and the Food and Drug Administration's oversight of pharmaceutical marketing.;

See Press Release, SEC, SEC Charges Stryker Corporation with FCPA Violations (Oct. 24, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262#.U0v9e8e7n1U> for a review of corruption in Latin America and the enforcement activity against pharmaceutical companies for improper development, promotion and sales reveals staggering sums assessed in fines. In 2013, Stryker was fined more than \$13.2 million for improper bribes in five countries, including Mexico and Argentina. In a review of FCPA enforcement actions in Latin America in 2012, three of the six major defendants were pharmaceutical companies that were fined a total of \$59.9 million (Biomet: \$22.8 million; Orthofix: \$7.7 million; Eli Lilly: \$29.4 million). See also Matt Ellis, *FCPA in Latin America: 2012 in Review*, LACCAnet (Feb. 15, 2013), available at <http://www.millerchevalier.com/portaresource/lookup/poid/Z1tOl9NPiOLTYnMQZ56TfzcRVPMQiLsSwapDm83!/document.name=/FCPA%20in%20Latin%20America.pdf>.

⁵⁹ See, e.g., *When is a Bribe Not a Bribe?*, *supra* note 23, at 134–35, n.102 (2013) (citing Lanny A. Breuer, *Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum* (2009), http://www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf).

⁶⁰ See Breuer, *supra* note 59, at 2 (“The depth of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, creates a significant risk that corrupt payments will infect the process. The Criminal Division stands ready to ferret out this illegal conduct and we are uniquely situated to do so.”).

⁶¹ Jeffrey Francer et al., *Ethical Pharmaceutical Promotion and Communications Worldwide: Codes and Regulations*, *PHIL. ETHICS & HUMAN. IN MED.* 7 (2014), available at <http://www.peh-med.com/content/pdf/1747-5341-9-7.pdf> (offering tables summarizing the many strands of industry self-regulatory organizations); see also GlaxoSmithKline's (GSK) helpful inventory of all pharmaceutical, vaccine, and consumer product trade associations in existence in 2013, organized by global, regional, and country status. *Main Pharmaceutical, Vaccine and Consumer Prod-*

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A. *Industry Codes*

Throughout Latin America, the medical establishment has long worked with the pharmaceutical industry to create robust codes of conduct. The Argentine Chamber of Medical Specialities (CAEMe) is credited with launching the first such effort in 1925,⁶² while the respected Latin American regional industry organization, the Federation of Pharmaceutical Industries (FIFARMA), organized itself in 1962.⁶³ Today, the pharmaceutical industries in many countries in the region have agreed to governance by the principles put forward by the European-based International Federation of Pharmaceutical Manufacturers and Associations (IFPMA), widely viewed to be the gold standard.⁶⁴ The IFPMA Code of Practice, which was adopted in 1981 and significantly updated in 2012,⁶⁵ has been explicitly embraced by the

uct Trade Associations – 2013, GLAXOSMITHKLINE (2014), <http://www.gsk.com/content/dam/gsk/globals/documents/pdf/corporateresponsibility/cr-report-2012/trade-association-memberships.pdf>.

⁶² ¿Qué es CAEMe?, CAEMe, <http://www.caeme.org.ar/nosotros.php> (last visited Apr. 1, 2014) (English translation available at <http://translate.google.com/translate?hl=en&sl=es&u=http://www.caeme.org.ar/&prev=/search%3Fq%3Dcaeme%2Bargentina%26client%3Dfirefox-a%26hs%3DNjC%26rls%3Dorg.mozilla:en-US:official%26channel%3Dsb%26biw%3D1366%26bih%3D640>); *Interview with Ernesto Felicio, Executive Director of CAEMe and Executive Vice President of FIFARMA, CAEMe*, PHARMABOARDROOM (Sept. 21, 2009), <http://www.pharmaboardroom.com/article/interview-with-ernesto-felicio-executive-director-of-caeme-and-executive-vice-president-of-fifarma-c>.

⁶³ FIFARMA, <http://www.fifarma.org> (last visited Mar. 31, 2014) (English translation available at <http://translate.google.com/translate?hl=en&sl=es&u=http://www.fifarma.org/&prev=/search%3Fq%3DFifarma%26client%3Dfirefox-a%26hs%3Dvu6%26rls%3Dorg.mozilla:enUS:official%26channel%3Dffb>).

⁶⁴ IFPMA members must abide by the standards set forth in the IFPMA Code. For a list of member organizations and their adoption of the IFPMA Code, see INT'L FED'N OF PHARM. MFRS. & ASS'NS, *IFPMA Code Compliance Network (CCN) Global Code Comparison* (2012), http://www.ifpma.org/fileadmin/content/Ethics/IFPMA_Code_of_Practice/ifpma_global_code_051113_final.pdf.

⁶⁵ Eduardo Pisani, *Foreword to INT'L FED'N OF PHARM. MFRS. & ASS'NS, IFPMA CODE OF PRACTICE* (2012), http://www.ifpma.org/fileadmin/content/Publication/2012/IFPMA_Code_of_Practice_2012_new_logo.pdf. This last iteration garnered much attention from the international compliance and corruption community, as it took a great leap forward in specifically addressing the gray areas noted above. In particular, the revision “clarif[ied] proper payments to healthcare professionals for speaking, meetings, and other services; defin[ed] gifts and promotions as distinct from ‘items of medical utility’ and require[ed] both to be modest in value; eliminate[ed] mention of cultural courtesy gifts; and require[ed] medical samples to be marked as such.” Earle & Cava, *supra* note 23, at 137. It is interesting to note that a dozen years after the creation of the IFPMA, its British counterpart, the Association of the British Pharmaceutical Industry (ABPI), established the Prescription

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industry associations of various Latin American countries, including: Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, and Peru.⁶⁶ Each of these trade associations is known by its own acronym and provides information about the Code of Practice on its individual website.⁶⁷

In Brazil, two trade associations represent the large sector in question: Abimed,⁶⁸ the umbrella for technology and medical device manufacturers, and Interfarma,⁶⁹ which includes pharmaceutical companies. Both have adopted codes to govern the competitive environment of their respective sector, which in many respects parallel each other.

A close review of Interfarma's Code of Practice reflects its aim to establish high standards for the industry and to offer innovative guidance for clean competition in a lucrative environment. The Preface provides:

Medicines Code of Practice Authority (PMCPA) "to operate the Code of Practice for the Pharmaceutical Industry independently of the [ABPI] itself." ASSOC. OF THE BRITISH PHARM. INDUS., *CODE OF PRACTICE FOR THE PHARMACEUTICAL INDUSTRY* 1, 2 (2012), http://www.breakthrough.org.uk/sites/default/files/media/About%20Us/Our%20Supporters/Corporate%20Partners/ABPI_Code_2012.pdf. In 2011, it, too, took action to address the potential for corruption in the marketing of pharmaceuticals and medical devices by specifying that gifts must be properly related to patient care and must be modest in nature. *See Earle & Cava, supra* note 23, at 135–37.

⁶⁶ INT'L FED'N OF PHARM. MFRS. & ASS'NS, *Members – Associations*, <http://www.ifpma.org/about-ifpma/members/associations.html> (last visited March 31, 2014).

⁶⁷ The respective associations of each nation are: Argentina – Federación Latinoamericana de la Industria Farmacéutica (FIFARMA) and Cámara Argentina de Especialidades Medicinales (CAEMe); Brazil – Associação da Indústria Farmacéutica de Pesquisa (Interfarma); Chile – Cámara de la Innovación Farmacéutica de Chile (CIF); Colombia – La Asociación de Laboratorios Farmacéuticos de Investigación (AFIDRO); Ecuador – Industria Farmacéutica de Investigación e Innovación (IFI); Guatemala – La Federación Centroamericana de Laboratorios Farmacéuticos (Fedefarma); Mexico – Asociación Mexicana de Industrias de Investigación Farmacéutica, A.C (AMIIF); and Peru – Asociación Nacional de Laboratorios Farmacéuticos (ALAFARPE). *Id.*

⁶⁸ *See* ABIMED, *Code of Ethics* (3d ed. 2010), available at http://www.abimed.org.br/adimed_v4_online_ingles.pdf. Abimed (Associação Brasileira da Indústria de Alta Tecnologia de Equipamentos, Produtos e Suprimentos Médico-Hospitalares) is the Brazilian Association of Industry and High Technology of Equipment. *See* Rebeca Duran, *Brazilian Medical Industry Overview*, *BRAZIL BUS.*, June 21, 2013, <http://thebrazilbusiness.com/article/brazilian-medical-industry-overview>.

⁶⁹ INTERFARMA, *CODE OF CONDUCT* (2012), http://www.ifpma.org/fileadmin/content/About%20us/2%20Members/Associations/Code-Brazil/Brazil_-_Interfarma_Code_of_Conduct_2012_-_English_version.pdf.

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. . . For us at Interfarma, the Code of Conduct is more than just a text. It is a document that governs our daily practice and our greater commitment with society and with the country: act ethically. Thus, only those companies that respect and follow the Code can become members of our entity. And, in the event of noncompliance with the rules, the Code itself establishes the mechanisms that lead to punishment.

With this initiative, we hope to help patients, doctors, authorities and professionals transform public health and the relations that exist therein in our Country in areas of clarity, transparency, respect for laws and ethics.⁷⁰

The document is divided into four sections, each of which addresses in detail the following concerns: general rules, prescription drugs, over-the-counter (OTC) drugs, and guidance for dispute resolution.⁷¹ Under its umbrella of general rules, Interfarma sets out ten guidelines that cover industry relationships with public officials and government agents and patient groups, specifically addressing long-standing areas of concern with respect to corruption in the industry: inappropriate support of physicians to attend or lecture at meetings and lavish gifts intended influence purchasing decisions.

Accordingly, Interfarma's Code limits a physician's ability to attend medical meetings at a pharmaceutical company's expense. Although support for both national and international travel expenses, meals, and hospitality is permitted, it "may not be conditional on the prescription, distribution, and/or advertisement or promotion of any kind of medicine."⁷² Further, any support must be disclosed for lectures or presentations, as well as any conflict of interest that might exist, and gifts other than items directly related to medical services and of minimal value are prohibited.⁷³

⁷⁰ Theo Van der Loo & Antônio Britto, *Preface to INTERFARMA, CODE OF CONDUCT*, *supra* note 69, at 3.

⁷¹ INTERFARMA, *supra* note 69, at 10.

⁷² Ester Flesch et al., *Brazil, PROMOTING MEDICAL PRODS. GLOBALLY: HANDBOOK OF PHARMA AND MEDTECH COMPLIANCE* 1, 7 (3d ed. 2012), available at <http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Pharmaceuticals/Brazil.pdf>.

⁷³ Section 10.1 of the Code regarding The Offer of Gifts specifically provides:

The Companies bound to this Code of Conduct may offer gifts to Healthcare Professionals, provided the all the following conditions are complied with:

i) the gifts shall be objects related to medical practice and/or strictly educational, such as, but not limited to publications,

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Similar restrictions apply to the marketing of drugs to physicians: incentives are forbidden, meals must be for educational purposes only, and neither companions nor health care professionals who are not licensed to prescribe may be offered hospitality.⁷⁴ The final chapter of the Code includes provisions for an independent Ethics Committee as well as a list of penalties for violation of the rules, which provide that fines shall be donated to selected non-profit entities.⁷⁵

Abimed's Code of Practice, an updated version of which was promulgated in 2012, sets forth "four basic principles [to] serve as a guide to . . . [the] Code of Ethics – Separation, Transparency, Equivalence, and Documentation. . ."⁷⁶ These specifically address the concerns that permeate the industry: the ability of health care professionals working in their official capacity to affect purchasing decisions; the need for all interactions with health care professionals to be clearly documented; the notion that any support be in proportion to the work done in exchange; and, finally, that all transactions be in writing.⁷⁷ Interestingly, in the very next paragraph following articulation of its basic principles, the document specifically incorporates by reference the requirements of the FCPA as it applies to its "associate companies."⁷⁸

As noted above, Interfarma and Abimed are but two of a number of industry organizations operating in Latin America, but they have earned a degree of respect for leadership in addressing the temptations presented to those involved in the sale and purchase of

stand-alone issues of scientific periodicals (except subscriptions), and anatomic models;

- ii) the gifts shall be objects of a merely symbolic value, i.e., objects whose individual value is not higher than one third (1/3) of the national minimum wage at the time of their acquisitions, and may or may not have the Company's logo; and
- iii) the offers of gifts are limited to three (3) events per year for each Healthcare Professional.

Section 10.2 provides:

Products used in the administrative routine of clinics, including, but not limited to pens, pencil holders, and notepads shall not be considered objects related to medical practice and, therefore, shall not be distributed as gifts. The prohibition set forth in this item does not include the offer of pens and notepads used as support material by participants in congresses, seminars or scientific lectures held outside the medical clinic environment.

Id. at 27–28 (footnotes omitted).

⁷⁴ *Id.* at 31–32.

⁷⁵ *Id.* at 41–42.

⁷⁶ See ABIMED, *supra* note 68, at 5–6.

⁷⁷ *Id.* at 6.

⁷⁸ *Id.*

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medicines and medical devices. Indeed, Interfarma in particular is seen to be working closely with the government in drafting legislation designed to promote its goals.⁷⁹

B. Country Code

Brazil has been the focus of regional scrutiny with respect to its evolving regulation of the pharmaceutical and medical device industry as a whole. The regulatory scheme for the pharmaceutical industry is complex. The federal government plays a role in establishing the right to advertise and fairly compete,⁸⁰ but with respect to the regulation and marketing of drugs and medical devices, the government's Ministry of Health is "responsible for public health in Brazil [and] oversees Brazil's national health system."⁸¹ The Ministry operates under a management contract with the National Health Surveillance Agency (ANVISA), which is essentially independent and financially autonomous⁸² and is referred to as "Brazil's FDA-equivalent."⁸³

ANVISA wields great power over the global pharmaceutical and medical device companies under its jurisdiction. In order to do business in Brazil, a pharmaceutical firm must register all products, which must also pass clinical tests within the country—even if the

⁷⁹ In a recent interview, Edvard Philipson, Vice President of Ferring Pharmaceuticals in Latin America, stated:

The industry association in Brazil, INTERFARMA, participates very actively in developing [pharma industry] regulations and ensuring their success. There are already very specific guidelines on what type of promotional materials can be given to physicians, the cost and size of samples provided, and so on. Brazil, followed by Chile, Mexico and Columbia are at the forefront – these are countries where the government is fundamentally the payer, and has more of a say in how things are done. However there are other countries where regulations there are not so strict or so well-enforced – countries such as Bolivia, Peru, Venezuela, even Argentina.

Ben Steele, *Global Ethics Codes and the Latin American Pharma Market*, EYE FOR PHARMA, June 6, 2013, <http://social.eyeforpharma.com/market-access/global-ethics-codes-and-latin-american-pharma-market>.

⁸⁰ See Flesch et al, *supra* note 72, at 3–6.

⁸¹ Jennifer Bragg et al., *Ensuring FCPA Compliance While Transacting Business in Brazil*, FDLI 8, 9 (May/June 2012), https://www.skadden.com/sites/default/files/publications/Loucks_Bragg_Ensuring%20FCPA_MayJune2012.pdf.

⁸² *Id.* at 10. ("Anvisa is responsible for regulating, controlling, and inspecting products and services that have the potential to pose risks to public health. Among other things, Anvisa monitors and regulates drugs, medical devices and controls, and smoking products, and provides technical support in the grant of patents.")

⁸³ *Id.*

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United States Food and Drug Administration (FDA) has approved it.⁸⁴ In addition, “a foreign company seeking to market a pharmaceutical product must have a domestic partner, given the Latin American business culture’s reliance on personal relationships.”⁸⁵

Further, since its creation in 1999, ANVISA “has increased the level of surveillance in the sector,”⁸⁶ issuing a number of regulations, known as rulings, that address concerns surrounding corruption and compliance in the pharmaceutical industry. For example, in June of 2009, ANVISA issued Resolution RDC 96/08, which imposed significantly more restrictions on advertisements for medicine and drugs than did its earlier standard.⁸⁷ Although these only apply to the promotion of pharmaceuticals to private practice physicians, they set a best practices standard for the entire healthcare industry.⁸⁸

Resolution 96/08 addresses gifts to physicians who can prescribe medications⁸⁹ as well as hospitality and entertainment for healthcare professionals to attend educational conferences,⁹⁰ “but does not provide the level of education and entertainment that is considered acceptable.”⁹¹ The resolution also addresses other areas of concern in

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Flesch et al, *supra* note 72, at 3.

⁸⁷ *Id.* at 5. Note that the General Attorney of the Brazilian Government has questioned the validity of these restrictions on jurisdictional grounds, which ANVISA has ignored. *Id.*

⁸⁸ *Id.* at 6. It is important to note that

the rules outlined below are applicable to private practice doctors only, as dealings with governmental officials involve another set of regulations. However, the issue of a physician’s possible public function is a broad concept which is not fully defined in Brazilian law. The main consideration is that a physician who works for a governmental or a public funded entity should not have any decision-making powers. This includes holding administrative/managerial functions within the institution or participating in the elaboration of technical specifications for public bids/tenders. *Id.*

⁸⁹ *Id.* at 7. ANVISA Resolution RDC 96/08, Article 5 provides that pharmaceutical companies cannot offer gifts, benefits or anything else of value to physicians who can prescribe medicines, whether or not the intent was *quid pro quo*. “However, low-value gifts (pens, notebooks, etc.) are still authorized. Prescription pads cannot contain the company logo or promote a drug. Materials containing scientific information such as magazines and medical journals can be freely distributed.” *Id.*

⁹⁰ *Id.* at 7–8. As seems to be the emerging custom, travel support to educational opportunities is permitted by Brazilian law, but it must be free of any conditions and any relationship between the healthcare provider and the company must be disclosed in all appropriate ways. Further, the conference must be genuinely educational in nature, not a subterfuge for luxury travel.

⁹¹ *Id.* at 8.

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the global enforcement environment, including off-label promotion of drugs, distribution of free samples, and comparison advertising.⁹²

Note that ANVISA has both civil and criminal sanctions at its disposal and it has increased its enforcement activity in the past five years, imposing four times the amount of money in fines between 2008 and 2010.⁹³ Obviously, it is difficult to explore the full dimensions of the legal landscape governing pharmaceutical and medical devices promotion and sales in Brazil,⁹⁴ but suffice it to say that the issue has been the topic of no less than eighteen educational conferences between January, 2012 and March, 2014.⁹⁵ No doubt this is in large measure due to the reality of the marketplace, which is rife with temptation.

C. Reality

Today, with its robust economy, Brazil is a very attractive place to do business. In 2012, it ranked as the top recipient of foreign direct investment in Latin America, receiving \$65.272 billion in foreign investment in 2012 alone.⁹⁶ It is the world's ninth largest market for pharmaceuticals and drugs, worth nearly \$15.5 billion.⁹⁷ Estimates for 2014 place that number at closer to \$25 billion annually.⁹⁸ A survey of managers in the pharmaceutical and healthcare sectors sug-

⁹² *Id.* at 8–9. These topics are interesting, but outside the corruption under consideration in this article.

⁹³ *Id.* at 11.

⁹⁴ Unofficial translations of ANVISA regulations are offered on the Brazil Pharma News website. Juliane Carvalho, *English Translated Regulations*, BRAZIL PHARMA NEWS (Jan. 11, 2014 3:42 PM), <http://www.brazilpharmanews.com/regulatory-updates/translated-regulations.html>.

⁹⁵ See, e.g., FDLI, *The Food and Drug Law Institute's U.S. & Brazil: Navigating New Frontiers in Pharmaceutical, Medical Device and Food Law and Regulation*, <http://www.fdpi.org/conferences/conference-pages/u-s-brazil-navigating-new-frontiers-in-pharmaceutical-medical-device-and-food-law-and-regulation> (conference held Sep. 10–11, 2012 in São Paulo, Brazil). For the complete list of such conferences in Brazil, see Juliane Carvalho, *Conferences*, BRAZIL PHARMA NEWS (Apr. 23, 2012 10:31 AM), <http://www.brazilpharmanews.com/conferences.html>.

⁹⁶ ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN, *Foreign Direct Investment in Latin America and the Caribbean*, 1, 26 (2013), <http://www.eclac.org/publicaciones/xml/4/49844/ForeignDirectInvestment2012.pdf>.

⁹⁷ Bragg et al, *supra* note 81, at 8–9.

⁹⁸ Keith M. Korenchuk et al., *Responding to Anti-Corruption Concerns in Brazil: Considerations for the Pharmaceutical and Medical Device Sectors*, PHARM. COMPLIANCE MONITOR (Jan. 2, 2014), <http://www.pharmacompliancemonitor.com/responding-to-anti-corruption-concerns-in-brazil-considerations-for-the-pharmaceutical-and-medical-device-sectors/6069>.

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gests that Brazil is the favored emerging market for 2012-2017 by a wide margin.⁹⁹

At the same time, the 2013 Transparency International Corruption Index ranked Brazil 72nd out of 177 countries and territories surveyed,¹⁰⁰ underlining an environment where the potential for abuse threads throughout the healthcare system. There is general agreement that with increased investments in emerging markets comes increased risk of corruption. According to Robert Barrington, TI's Director of External Affairs, "[t]here are a number of classic red flags for bribery that indicate the pharma sector is particularly vulnerable These include a tradition of gifts and hospitality, a lack of transparency in pricing and the need for regulatory approval in everything."¹⁰¹

One area of concern is the process in place for purchasing medical goods and services for the government's healthcare system. In Brazil, private entities submit bids in a public procurement mechanism that is not centralized in a single national entity, so federal, state, and municipal authorities organize tenders,¹⁰² or requests for proposals. The system involves multiple points of access to decision makers, which leads to serious corruption risk because would-be bribers can use multiple avenues to encourage or influence corrupt conduct of decision makers, including health authorities responsible for budgets or procurement decisions.¹⁰³ Another area of concern is, of course, any interaction with health care providers who might influence the choice of products and devices for the system.¹⁰⁴ These realities, coupled together with general perceptions of corruption in the country,¹⁰⁵ no doubt provided the basis for the decision of the Brazilian government to take dramatic action.

⁹⁹ *Pharmaceuticals and Healthcare Companies Face Tougher Times in Emerging Markets*, GLOBAL INTELLIGENCE AGENCY (Sept. 5, 2012), <http://www.globalintelligence.com/insights/all/pharmaceuticals-and-healthcare-companies-face-tougher-times-in-emerging-markets>.

¹⁰⁰ *Corruption Perception Index 2013*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2013/results> (last visited Mar. 31, 2014).

¹⁰¹ Aleksandar Vasovic & Ben Hirschler, *A Prescription for Corruption*, REUTERS, 4 (Feb. 28, 2012), <http://graphics.thomsonreuters.com/specials/Pharma.pdf>.

¹⁰² The tender process is a complex undertaking that requires its own analysis. See, e.g., MGMT. SCIS. FOR HEALTH, *MDS-3: MANAGING ACCESS TO MEDICINES AND HEALTH TECHNOLOGIES* (2014), CH. 21, AT 21.24, available at <http://www.msh.org/sites/msh.org/files/mds3-jan2014.pdf>.

¹⁰³ Korenchuk et al., *supra* note 98.

¹⁰⁴ *Id.*

¹⁰⁵ See generally Stuart Vincent Campbell, Note, *Perception is Not Reality: The FCPA, Brazil, and the Mismanagement of Corruption*, 22 MINN. J. INTL. LAW 247 (2013).

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IV. BRAZIL'S CLEAN COMPANIES ACT

A. *Analysis*

The sheer scale of preparing for both the soccer (known as football outside of the United States of America) World Cup in 2014 and the Summer Olympics in 2016 may have alerted the Brazilian legislators that “business as usual” would not be an appropriate way to showcase the country to the world audience.¹⁰⁶ No doubt this sentiment was highlighted by the events of the 2013 “Brazil Spring” when an increase in bus fares drove protesters to the streets, where they tapped into deep discontent about the country’s economy and its massive spending to prepare for both events.¹⁰⁷ Brazil’s history of corruption is legendary; recent examples include the Siemens case,¹⁰⁸ the incarceration of officials from the “Mensalao” prosecutions,¹⁰⁹ the Bridgestone

¹⁰⁶ Shasta Darlington & Sarah Holt, “No Stadium, No Match-FIFA Issues Threat to Brazil World Cup City, Jan. 22, 2014, <http://edition.cnn.com/2014/01/21/sport/football/football-world-cup-venue-threat/> (discussing problem of pace of construction).

¹⁰⁷ Girish Gupta, *Brazil’s Protests: Social Inequality and World Cup Spending Fuel Mass Unrest*, *TIME* (June 18, 2013), <http://world.time.com/2013/06/18/brazils-protests-social-inequality-and-world-cup-spending-fuel-mass-unrest/> (noting that “[protestors] decry a culture marked by corruption, a general lack of return on high taxes, and point to inadequate government upkeep and spending on infrastructure, education and healthcare.”); see also *Brazil’s New Anti-Bribery Act Goes into Effect in January 2014—Is Your Company Ready?* BLANK ROME LLP (Dec. 2013), <https://www.blankrome.com/index.cfm?contentID=37&itemID=3224> [hereinafter *Brazil’s New Anti Bribery Act*] (“Commentators have noted that the Brazilian Congress finally passed the Act in response to widespread protests against official corruption and government spending in connection with the 2014 FIFA World Cup and the 2016 Olympics, both of which will be held in Brazil.”). *But see*, Jones Day & Mattos Nuriel Kestener Advogados, *Brazil’s Clean Company Law: New Risks for Companies Doing Business in Brazil*, JONES DAY 1 (Aug. 2013), available at <http://www.jonesday.com/files/Publication/3c9b0192-a812-4849-b9fb-96fc1e520f70/Presentation/PublicationAttachment/ec9bf444-80c0-4892-af4a-9731b3d3c57c/Brazil%20Clean%20Company%20Law.pdf> (noting that “[t]he adoption of the Law caps a three-year process that mostly predates the recent public outcry against corruption” and likening it to the OECD compliance issue).

¹⁰⁸ Alex Webb & Christiana Sciaudone, *Siemens Banned From Bidding in Brazil on Suspected Bribery*, *BLOOMBERG* (Feb. 28, 2014), <http://www.bloomberg.com/news/2014-02-28/siemens-banned-from-bidding-in-brazil-on-suspected-bribery.html>.

¹⁰⁹ *Ex-Government Leaders Begin Prison Terms in Brazilian Corruption Case*, *UPI* (Nov. 16, 2013, 11:34 AM), http://www.upi.com/Top_News/World-News/2013/11/16/Ex-government-leaders-begin-prison-terms-in-Brazilian-corruption-case/ UPI-75421384619678 [hereinafter *Ex-Government Leaders*]; see also Jones Day & Mattos Nuriel Kestener Advogados, *supra* note 107, at 2.

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investigations and plea,¹¹⁰ and the Brazilian subsidiary of Eli Lilly pharmaceutical's problems with bribery involving the sale of drugs.¹¹¹ In November 2013, the first Brazilian officials convicted in the "Mensalao" or "big monthly allowance" scheme started serving their jail sentences.¹¹² This fact alone sends an alert to the business community – punishment for common corruption, once thought to be impossible, was in fact imposed. A several million dollar fine, which amounts to a mere slap on the wrist in many situations, may be considered an acceptable cost of doing business, but incarceration along with even larger fines will begin to deter criminal behavior.

The Brazilian Clean Companies Act was passed August 1, 2013 and became effective January 29, 2014.¹¹³ The law is divided into seven chapters. Initially, the law provides for "strict administrative and civil liability of a legal person for engaging in acts against the public administration, national or foreign."¹¹⁴ It applies to "companies . . . with personhood or not, regardless of the form."¹¹⁵ The law does not preclude individuals' liability as well. The definition of what is prohibited mirrors the FCPA by making it illegal "[t]o promote, offer, or give, directly or indirectly, an improper benefit to a public agent or to a third person related to him."¹¹⁶ Interestingly, the law also outlaws "sponsoring" the illegal acts of or "hid[ing] or cover[ing] up" the "real

¹¹⁰ In 2011, Bridgestone agreed to pay \$28 million to the DOJ for "violating the FCPA through bid rigging and corrupt payments to government officials in a number of countries, including Brazil." *Brazil's New Anti-Bribery Act*, *supra* note 107, n. 3; *see also* Press Release, Dep't of Justice, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), *available at* www.justice.gov/opa/pr/2011/September/11-crm-1193.html.

¹¹¹ *See* Press Release, SEC, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), *available at* www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116; *Brazil's New Anti-Bribery Act*, *supra* note 108, n. 3; *Foreign Corrupt Practices Act 2013 Mid-year Update*, BAKERHOSTETLER 27 (2013), <http://www.bakerlaw.com/files/Uploads/Documents/FCPA/2013FCPAMidYearUpdate.pdf> (discussing SEC settlement in December 2012 in "Russian, Polish, Chinese, and Brazilian operations for \$29.4 million, including \$14 million in disgorged profits."); Richard L. Cassin, *A Survey of FCPA Sentences*, FCPA BLOG (Feb. 28, 2012 5:28 AM), <http://www.fcpablog.com/blog/2012/2/28/a-survey-of-fcpa-sentences.html> (discussing the variance in sentences with 15 years the longest).

¹¹² *Ex-Government Leaders*, *supra* note 109 (discussing the Supreme Court ordering twelve men to begin serving sentences immediately, including former President Lula Da Silva's former chief of staff).

¹¹³ Law No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.8.2013 (Braz.).

¹¹⁴ *Id.*, ch. I, art. 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.*



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interests or the identities of the beneficiaries.”¹¹⁷ The Clean Companies Act specifies that engaging in fraud in the public bid process or hindering investigations would also violate the law.¹¹⁸ It also extends a very broad definition of “public agent” and can include someone who is not paid.¹¹⁹ What this means, however, has yet to be determined.

Rather than requiring criminal intent, the new Act states that “the legal persons shall be held strictly liable . . . for the injurious acts stipulated herein.”¹²⁰ This may be akin to the earlier version of the FCPA, which had the “reason to know” standard rather than the “knowing” standard.¹²¹ Note, however, that Brazil’s position seems to run counter to the trend reflected in the more recent UKBA, which allows an “adequate procedures defense.”¹²² Perhaps Brazil’s first step reflects an effort to enact tough legislation, but in reality what may be needed instead is an articulated bright line that has clear, consistent consequences once crossed.

Liability, set out in Chapter III, “shall include a fine of from .1% to 20% of gross billings of the fiscal year prior . . . which shall never be less than the benefit gained . . .”¹²³ If gross billings cannot be estimated, the fine should be from R\$6,000 to R\$60,000,000.¹²⁴ The factors considered include the seriousness of the offense, the benefit gained, negative effects, the position of the violator, cooperation, and the existence of an international compliance program.¹²⁵

Chapter IV highlights the “Administrative Proceeding for Liability,” which surprisingly allows many agencies to take control of these proceedings, noting, “[t]he institution and judgment of an administrative proceeding to ascertain the liability of a legal person appertains to the supreme authority of each body or entity of the Executive, Legislative and judicial branches . . .”¹²⁶ Each authority shall have a committee by “[two] or more permanent civil servants.”¹²⁷ This is the most serious defect in the law: a system of myriad committees with many different quasi-judges reduces accountability while increasing the potential to use accusations in and of themselves as a

¹¹⁷ *Id.*, ch. II, art. 5.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*, ch. I, art. 2.

¹²¹ See Shearman & Sterling, *supra* note 3; OECD, *supra* note 4.

¹²² See Law No. 12,846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.8.2013 (Braz.).

¹²³ *Id.*, ch. III, art. 6.

¹²⁴ *Id.*

¹²⁵ *Id.* at ch. III, art. 7.

¹²⁶ *Id.* at ch. IV, art. 8.

¹²⁷ *Id.* at ch. IV, art. 10.

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means of shakedown. The Comptroller General handles matters dealing with a “foreign public administration.”¹²⁸

Chapter V, “Leniency Agreement,” officially recognizes the benefits of cooperating with the investigation.¹²⁹ This is akin to non-prosecution agreements that have been used so effectively in the United States.¹³⁰

Chapter VI, “Judicial Liability,” notes that even if the entity is found liable, it could face additional penalties, including “suspension or partial prohibition of its operations” or “compulsory dissolution of the legal person.”¹³¹ Further, there may be “freezing of assets,”¹³² although nothing explains what this means or how it will apply. Unlike the possibility of using the British Serious Fraud Office’s budget as an indicator of enforcement intent,¹³³ Brazil’s decentralized investigation and prosecution process makes it impossible to view funds allocated for these procedures as a proxy for the seriousness of Brazil’s plans for enforcement.

Chapter VII, “Final Provisions,” announces the National Registry of Punished Companies, which will publish penalties imposed by all branches of government.¹³⁴ The Registry will also publish Leniency Agreements. This measure demonstrates cognizance of the problem of decentralized enforcement and offers a way to centralize reporting, thereby partially curing the defect; however, the Registry’s effectiveness remains to be seen.

There are interesting comparisons to be made with the FCPA, U.K. Bribery Act, and the Brazilian Clean Companies Act. Many law firms have issued advisories to their clients on how to comply with this

¹²⁸ *Id.* at ch. IV, art. 9.

¹²⁹ *Id.* at ch. V, art. 16.

¹³⁰ See GIBSON DUNN, *2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)* 1, 1(2013), <http://www.gibsondunn.com/publications/Documents/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.pdf> (comparing the use of deferred prosecution agreements and non-prosecutions agreements in the US with recent developments in the UK regarding their approach to such agreements).

¹³¹ Law No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.8.2013 (Braz.), at ch. VI, art. 19.

¹³² *Id.*

¹³³ Matt Kelly, *The Delicate State of Anti-Bribery Enforcement at the SFO*, COMPLIANCE WEEK (Mar. 17, 2014), <http://www.complianceweek.com/the-delicate-state-of-anti-bribery-enforcement-at-the-sfo/article/338487/>, (discussing the problem of underfunding).

¹³⁴ Law No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.8.2013 (Braz.), at ch. VII, art. 22.

new regulatory effort.¹³⁵ One cannot overstate the importance of Brazil's first step, particularly in the context of the significant financial outlays for the World Cup and the Olympics. This is an important and laudable initial attempt to level the playing fields for the countries' whose companies do not fall within the reach of the FCPA or the U.K. Bribery Act. For example, Chinese companies that do not have a presence in the U.K. or U.S. will begin to feel the potential consequence of this law. This is significant because companies from countries that could ignore external constraints up to now may become ensnared in embarrassing prosecutions.

There is no criminal liability for entities, which is an important distinction. Yet, theoretically, the company could be barred or could also be dissolved, which—if used—is a powerful incentive to adopt appropriate business practices.

Similar to the U.K. Bribery Act, Brazil's law does not permit the facilitation exception that exists in the FCPA, however, it is not clear how this will be enforced. If everything is a violation of the law, then companies may find it easier to ignore. The experience of the United States is perhaps instructive: Congress amended the FCPA to allow facilitation payments for "routine government action."¹³⁶ In so doing, it addressed the realities of business by drawing a clearer line between what was *de minimis* and necessary to accomplish things in certain environments and what was corrupt and unlawful. Perhaps Brazil will see a revision is eventually necessary.

B. Commentary

The passage of the Clean Companies Act ushers in a new era of possible change in the Brazilian business climate. As one commentator highlighted, between 2001 and 2013, at which time Brazil ratified the OECD Anti-Bribery Convention, there was only one prosecution for bribery of foreign public officials.¹³⁷ However, during this time, the police "conducted 289 domestic bribery investigations . . . resulting in

¹³⁵ See, e.g., JONES DAY, *supra* note 107; *Brazil's New Anti-Bribery Act*, *supra* note 107; *Brazil's Anti-corruption "Clean Company Law" Goes into Effect 1/24/14 - Get Ready to Comply*, DLA PIPER (Aug. 12, 2013), http://www.dlapiper.com/en/us/insights/publications/2013/08/brazils-anticorruption-clean-company-law-goes-in_/.

¹³⁶ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, Nov. 10, 1998, 112 Stat 3302 (amending Foreign Corrupt Practices Act).

¹³⁷ COVINGTON AND BURLING, *Advisory - Anti-Corruption: New Brazilian Anti-Bribery Statute* 1, 3 (2013), http://www.cov.com/files/Publication/83260639-b097-4908-843c-1434efafca9e/Presentation/PublicationAttachment/8c7a9c35-5f0c-4e2f-9e12-168b79085722/New_Brazilian_Anti-Bribery_Statute.pdf (analyzing the statute and suggesting that companies need to develop policies and procedures to deal with both domestic and foreign bribery).

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1,600 arrests – including the arrest of more than 100 public officials.”¹³⁸

Regulations are expected to be promulgated, but have not as of this writing.

What is not in the law is interesting as well. One commentator has focused not on the law's provisions, but rather on the three sections of the law vetoed by President Rousseff.¹³⁹ One removed a lower ceiling on company fines, and another addressed factoring conduct of public official and the last required proof of willful misconduct.¹⁴⁰ The impact of these vetoes made the law more stringent,¹⁴¹ yet one of the parts that weakened the law—the diffused enforcement—was not addressed.

The risk of multijurisdictional action is highlighted.¹⁴² For example, commentator Gwendolyn Hassan notes four trends that are changing the playing field: 1) more stringent (compared to the FCPA) new national laws; 2) updates and strengthening of existing laws; 3) new enforcement efforts (citing Canada, Korea, Switzerland, and Algeria); and 4) increasing cross border dual prosecutions thereby increasing potential penalties.¹⁴³ This is in the international context of the G-20 adopting “The Guiding Principles on Enforcement of the Foreign Bribery Offense” and “Guiding Principles to Combat Solicitation” in the fall of 2013¹⁴⁴ and also issuing a related Declaration.¹⁴⁵ Heather Lowe, legal counsel of Global Financial Integrity, noted:

¹³⁸ *Id.* at 3, n. 9.

¹³⁹ JONES DAY, *supra* note 107, at 4.

¹⁴⁰ *Id.*

¹⁴¹ *Accord.* SCHUMPETER, *Brazil's New Anti-Corruption Law: Hard to Read*, *ECONOMIST* (Jan. 29, 2014, 9:40 PM), <http://www.economist.com/blogs/schumpeter/2014/01/brazil-s-new-anti-corruption-law> (but noting that how the regulations are implemented will make a great difference and highlighting the problem of decentralized enforcement).

¹⁴² Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, 42 *INT'L L. NEWS*, no. 1, Winter 2013, available at http://www.americanbar.org/publications/international_law_news/2013/winter/the_increasing_risk_multijurisdictional_bribery_prosecution_why_having_fcpa_compliance_program_no_longer_enough.html (noting that although enforcement actions have slowed in the US, there is a “marked increase” in enforcement actions in other jurisdiction).

¹⁴³ *Id.*

¹⁴⁴ G20 ANTI-CORRUPTION WORKING GROUP, *Progress Report 2013*, (2013), <http://www.mofa.go.jp/files/000014208.pdf> (report from meeting in Russia).

¹⁴⁵ *G20 Leaders' Declaration*, (2013), <http://www.mofa.go.jp/files/000013493.pdf> (agreeing to share tax information by the end of 2015 and help deny corrupt individuals a place to hide); see also Samuel Rubinfeld, *G-20 Adopts Foreign Bribery Enforcement Principles*, *WALL ST. J.* (Sept. 9, 2013, 4:41 PM), <http://blogs.wsj.com/>

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Four or five years ago, the idea of automatically exchanging tax information wasn't even on the table. . . . Now the 20 largest economies in the world have announced that they will begin sharing information automatically within two to three years. This is really a sea change.¹⁴⁶

While this is a significant change, the implementation will have to be watched. Ironically, although Russia exerted significant leadership in the 2013 G-20 process in anticipation of the 2014 Winter Olympics in Sochi in 2014, it exerted brute force in annexing Crimea in March of 2014 and has been shunned by the community of nations. Accordingly, it is certain that Russia will not be leading this effort and may not even participate in it.¹⁴⁷ Obviously, it will be an ongoing problem if Russian companies continue to bribe with impunity in their home country, and Russia is a safe haven for corrupt officials and their booty. Indeed, Russia has offered a safe haven to the ousted leader of the Ukraine, Victor Yanukovich, whose extensive corruption is evident from his opulent home and galleon-shaped banquet hall—collectively referred to as “the museum of corruption.”¹⁴⁸ These developments are deeply troubling and will no doubt set back Russia's efforts to address corruption, however minimal those measures have been.

As Transparency International has made clear with its Bribe Payers Index, if offering the bribe continues, the corruption cycle keeps moving. If countries simultaneously crack down on corruption, it will dry up both the offers and the offerees. So, if Chinese companies become concerned, then that could be significant change. If Russia is no longer an active member of the G-7 or G-20, and there is a European-Russian split brought on by the tension in Ukraine and the annexation of Crimea, there will be a ripple effect all over the world, including Brazil, in terms of progress on international and national anti-corruption measures.

riskandcompliance/2013/09/09/g-20-adopts-foreign-bribery-enforcement-principles (summarizing impact of G-20 meetings).

¹⁴⁶ Rubinfeld, *supra* note 145.

¹⁴⁷ Cf. EUROPEAN PARLIAMENTARY RESEARCH SERV., CORRUPTION IN RUSSIA 1 (2014), http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140742/LDM_BRI%282014%29140742_REV1_EN.pdf (discussing the extent of corruption in Russia as compared to other G-20 nations).

¹⁴⁸ Roland Oliphant, *Viktor Yanukovych Leaves Behind Palace Monument to Greed and Corruption*, TELEGRAPH (Feb. 23, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10657109/Viktor-Yanukovych-leaves-behind-palace-monument-to-greed-and-corruption.html> (describing the lavish mansion deposed Ukraine leader left when he fled to Russia).

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C. *Impact*

Companies will have to be prepared for enforcement efforts in Brazil. Whether they materialize is another question. Companies will need a compliance program that is thought out beyond just compliance with the FCPA, because as the earlier sections illustrated, that will not be sufficient. One Brazilian compliance consultant commented, “[G]iven the lack of enforcement to date, coupled with the high levels of bureaucracy, Brazil presents a high level of compliance risk for most companies.”¹⁴⁹

The replacement enforcer for Lanny Breuer in the United States Department of Justice, Associate Attorney General, Mythili Raman, noted the SEC was using Nonprosecution Agreements in an FCPA case.¹⁵⁰ Furthermore, parallel prosecution will have a dramatic impact:

[A]nother major trend in FCPA enforcement is the use of parallel or “carbon copy” prosecutions. With many countries passing their own anti-bribery statutes or choosing to aggressively enforce statutes already on the books, multi-national corporations are increasingly required to navigate and interact with multiple regulatory regimes while conducting business abroad. When companies violate these laws they face prosecution by multiple countries for the same set of alleged bad acts. Moreover, where one country begins an investigation into alleged bribery, this investigation may in and of itself catalyze other countries’ investigations or the commencement of their legal proceedings against the company.¹⁵¹

How this will translate into numbers of investigations and convictions for corruption and bribery in Brazil or in other countries for activities in Brazil will have to be watched carefully in 2014 and 2015.

V. SUGGESTIONS FOR CHANGE AND IMPLICATIONS FOR THE PHARMACEUTICAL INDUSTRY

Pharmaceutical companies no doubt have their collective eye on Brazil, welcoming this new Clean Companies Act with a mixture of anxiety and relief. On the one hand, the multinational entities have long participated in local, regional, and global efforts to self-regulate, thereby meeting and even exceeding the long-standing requirements of the FCPA. More recently, compliance officers have devoted serious

¹⁴⁹ Gabriela Roitburd, *Brazil’s Clean Companies Act – Executing*, ASS’N. CORP. COUNSEL (2013), <http://www.acc.com/accdocket/onlineexclusives/brazil-cca-03.cfm>.

¹⁵⁰ BAKERHOSTETLER, *supra* note 111, at 1.

¹⁵¹ *Id.* at 2.

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attention to the stricter UKBA, particularly with its reach to purely private business entities and its zero-tolerance for facilitation payments.

Always mindful of these rules, multinational pharmaceutical companies have had to compete with local and international firms not necessarily willing to be subject to them. Accordingly, despite Brazil's having embraced the standards of the IFPMA,¹⁵² which promotes best practices in the pharmaceutical industry globally, their efforts to do business in Brazil have been hampered. No doubt this national effort to level the business playing field is welcome.

Nonetheless, the threat of large fines and imprisonment certainly is a harbinger of a more difficult business environment on the ground in Brazil. Just as the pace of anti-bribery enforcement in the United States has quickened and has seemingly targeted the pharmaceutical sector,¹⁵³ the same might well prove to be true for the industry in Brazil. A sea change is evident by the mere signing of this Act into law. It is not surprising that a cottage industry of another sort has arisen to assist in navigating this unexpectedly new and potentially turbulent environment: the plethora of conferences addressing doing business in Brazil, especially geared to pharmaceutical compliance, is remarkable.¹⁵⁴

It is early for suggestions for modification of the Clean Companies Act, yet it is important to begin the discussion. To wait eleven years, as was the case in modifying the FCPA, would be too long in this internet-connected global world of the twenty-first century.¹⁵⁵

The first obvious priority necessary to improve the new anti-corruption law in Brazil would be to empower a central enforcement agency comparable to the Department of Justice or the Serious Fraud Office with both authority and necessary funding. There can be no serious enforcement otherwise. It goes without saying that to have a "strict liability" statute with no central enforcement makes little

¹⁵² See *supra*, notes 63–65 and accompanying text.

¹⁵³ Mike Scarcella, *DOJ Targets Pharmaceutical Industry for FCPA Enforcement*, THE BLT: BLOG OF LEGALTIMES (Nov. 12, 2009 2:01 PM), <http://legaltimes.typepad.com/blt/2009/11/doj-targets-pharmaceutical-industry-for-fcpa-enforcement.html> (noting "focus more criminal enforcement" on pharma Assistant Attorney General Breuer stated).

¹⁵⁴ See *supra*, note 94 and accompanying text.

¹⁵⁵ The FCPA was enacted in 1977 and substantially amended in 1988. If the Clean Companies Law were to follow a similar timeline, revisions would not occur until 2024. For a discussion on how globalization and the advent of the "network society" in the modern era drive social change at an accelerated pace, see Brian M. Stewart, *Chronolawgy: A Study of Law and Temporal Perception*, 67 U. MIAMI L. REV. 303, 309–15 (2012).

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sense.¹⁵⁶ Just as the ramped up enforcement in the United States has put the FCPA in a new light, so would a robust focus by enforcement authorities in Brazil accomplish much in a short time.

Second, Brazil must build upon the self-regulatory standards of the IFPMA, Interfarma, and Abimed and enhance the regulatory framework of ANVISA with respect to the embedded culture of establishing business relationships through meals and hospitality, travel, and promotional gifts. Although the multinationals subject to the FCPA and UKBA regulatory requirements have embraced the best practices outlined above, it is most doubtful that international businesses not so constrained have paid much attention to them. Needless to say, the same is likely true of local companies. Accordingly, the Clean Companies Act must more clearly define the proper amount and type of meals, hospitality, travel, and gifts. The pharmaceutical industry is mindful of the power of such incentives to affect business decision-making, and amplification of the proper limits would go a long way to establishing a strong foundation for acceptance of the new Act in the country. Obvious examples to consider in offering guidance include: What kind of meals may be offered for physicians? May there be entertainment? How far may physicians, who are often state employees, travel for such education? Is a trip to Buenos Aires appropriate? Miami? California?

Third, focusing on the pharmaceutical industry but keeping in mind that it serves as a template for other government purchasing arrangements, Brazil's decentralized approach to the tender system is problematic.¹⁵⁷ Although this may reflect deeply ingrained local sentiments—and, as outsiders, our recommendations will no doubt be discounted—this presents serious opportunities for graft. Economies of scale will never occur without a more comprehensive analysis and overhaul of the bidding process in the medical and pharmaceutical sectors as a precursor to truly imposing a Clean Companies presence in Brazil.

Finally, modifying the “strict liability” approach to enforcement by adopting a measure similar to the UKBA’s “adequate procedures” approach, *de facto* mirrored in enforcement of the FCPA, seems to reduce the invitation to “cooperate” with Brazilian authorities in an improper way. Although such cooperation, together with having “effective internal compliance procedures” and being willing to self-disclose, is recognized as a possible way to mitigate the large fines,¹⁵⁸ one

¹⁵⁶ Law No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.8.2013 (Braz.) ch. I, arts. 1st, 2d (providing for strict liability).

¹⁵⁷ See *supra*, note 101 and accompanying text.

¹⁵⁸ Kevin M. LaCroix, *The Brazilian Clean Companies Act*, LEXISNEXIS LEGAL NEWSROOM (Dec. 11, 2013 3:20 PM), <http://www.lexisnexis.com/legalnewsroom/>

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must be wary of any invitation to cooperate with authorities in Brazil. A more flexible hand is likely to wield a less open invitation to find unauthorized ways to cooperate.

VI. CONCLUSION

Change is possible. One need only examine the startling figures of the enforcement of the FCPA in the last ten years to see the extraordinary growth in the fines and punishment of corporations and individuals.¹⁵⁹ While it may seem that the enforcement structure in Brazil will never change, we have seen that it too is possible. The pharmaceutical industry's voluntary efforts will never be effective, however, unless there is the accompanying pressure of serious enforcement with respect to all who do business in Brazil. The U.K. and the United States' enforcement of their respective national laws will never rein in the behavior of Russian, Chinese, or other nations' firms if they do not face legal accountability in their home nation. Having said that, the fact remains that Brazil's action in 2014—with its showcase of the upcoming World Cup and Olympics—will help move the anti-bribery agenda forward in a global context.

corporate/b/fcpa-compliance/archive/2013/12/11/the-brazilian-clean-companies-act.aspx.

¹⁵⁹ SHEARMAN & STERLING LLP, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977*, 1–671 (2014), http://www.shearman.com/~media/Files/Services/FCPA/2014/January_2014_FCPA_DigestFCPA010614.pdf (displaying one of the most comprehensive up-to-date analyses, edited by former DOJ official Philip Urofsky).

UNIVERSAL ANTI-BRIBERY LEGISLATION CAN SAVE INTERNATIONAL BUSINESS: A COMPARISON OF THE FCPA AND THE UKBA IN AN ATTEMPT TO CREATE UNIVERSAL LEGISLATION TO COMBAT BRIBERY AROUND THE GLOBE

*By: Lindsey Hills*¹*

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I. INTRODUCTION

We are facing an epidemic where bribery is infiltrating the international business realm in a way that demands immediate action. The United States has attempted to combat this via the Foreign Corrupt Practices Act (“FCPA”) in conjunction with the Organization for Economic Co-Operation and Development (“OECD”). In addition, the OECD’s peer-pressure influence resulted in the United Kingdom enacting the U.K. Bribery Act (“UKBA”) in 2011.

Taken together, these varying acts may have one believing that corruption is facing a solid wall of enforcement legislation. On the contrary, the UKBA and the FCPA contain a multitude of different standards, which require companies to create two separate compliance programs while spending millions of dollars to deal with these discrepancies. The unfair disadvantage to companies trying to comply, as well as the argued competitive disadvantage to companies from the U.K. and U.S. respectively, has led to the need for universal anti-bribery legislation.

These two acts set up a solid foundation, however, there needs to be universal alignment in order to successfully combat corruption in the global realm, and achieve international anti-bribery success. In this Article, Part I will compare and contrast the similarities and differences in both acts based on their language, enforcement, and practices. Part II will then discuss the effects these differences in enforcement provisions have had on the international business arena. Lastly, Part III will demonstrate why there is such a vital need for universal legislation regarding anti-bribery, and will propose sample legislation combining the most effective provisions from both acts in an attempt to cohesively universalize the anti-bribery international business realm. This will detail how universal legislation not only improves international business, but incentivizes the world to aid in combating worldwide corruption.

II. A COMPARTIVE ANALYSIS OF THE UKBA AND THE FCPA IN THE INTERNATIONAL REALM

While the FCPA and the UKBA have a common goal, their differences have lead to a multitude of problems for multi-national corporations. Complying with different textual definitions, as well as differing enforcement practices and defenses, such as facilitating payments and adequate procedures, creates a dichotomy that cripples international companies actively trying to comply with both the UKBA and the FCPA. These differences demand further legislative action so as to aid, not hinder, international business.

While the differences between the FCPA and the UKBA highlight the need of universal legislation, the goals and motives surrounding their enactment and continued enforcement remain the same. This

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combined end game drives the fight against international bribery in a relatively cohesive manner.

1. *The Foreign Corrupt Practices Act*

The FCPA was enacted in 1977 under President Jimmy Carter as a response to widespread bribery discoveries by the Securities and Exchange Commission (“SEC”),² as part of the investigation into the Watergate scandal.³ The major catalyst was the investigation into Lockheed, which uncovered a series of bribes made by officials to negotiate sales of Lockheed aircrafts.⁴ The FCPA’s principal goal was to effectively halt corrupt practices, and create a level playing field for international businesses, in addition to restoring public confidence.⁵ While it was enacted in 1977, the Act remained relatively un-litigated until the late 1990s.⁶

The Foreign Corrupt Practices Act specifically prohibits paying, offering to pay, promising to pay, or authorizing someone to pay forward anything of value to a foreign official to obtain or retain business.⁷ This applies to issuers, domestic concerns, and anyone within the limits of territorial jurisdiction.⁸ An issuer is someone listed on a national securities exchange in the United States, or on an American Depository Receipt, or a company who trades stocks “over-the-counter” in the United States.⁹ A domestic concern is any United States citizen or national, or any resident in the United States, or company organized under U.S. law, or one that has their principal place of business in the United States.¹⁰ Put simply, there are five elements that must be met for an FCPA violation: (1) the briber must be a U.S. citizen, busi-

² U.S. DEP’T OF JUSTICE & U.S. SEC. AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 1, 3 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

³ Jordan Weissmann, *The Corruption Law That Scares the Bejesus Out of Corporate America*, *The Atlantic* (Apr. 25, 2012, 5:08 PM), <http://www.theatlantic.com/business/archive/2012/04/the-corruption-law-that-scars-the-bejesus-out-of-corporate-america/256314/>.

⁴ James F. Peltz, *Lockheed Agrees to Pay Record Fine: Aerospace: Calabasas Firm Pleads Guilty in Connection with Bribing an Egyptian Politician*, *L.A. Times* (Jan 28, 1995), http://articles.latimes.com/1995-01-28/business/fi-25231_1_egyptian-politician.

⁵ See U.S. DEP’T OF JUSTICE & U.S. SEC. AND EXCH. COMM’N, *supra* note 2, at 2.

⁶ Blank and Rome LLP, *GLOBALISM AND IT’S ATTENDANT CONSEQUENCES ON FCPA ENFORCEMENT*, (Apr. 9, 2012), available at <http://www.blankrome.com/index.cfm?contentID=37&itemID=2777>.

⁷ The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (1977).

⁸ *Id.*

⁹ *Id.*

¹⁰ 15 U.S.C. §§ 78dd-2(h)(1)

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ness entity or employee of a U.S. business entity or any company listed on a U.S. stock exchange; (2) the bribe must be made with corrupt intent; (3) payment or offer of payment must be anything of value; (4) the recipient must be a foreign government official; and (5) the bribe must have been offered or paid to obtain or retain business.¹¹ It is noteworthy that domestic concern is defined broadly, as described above. In addition, foreign activity of private United States companies falls within the FCPA's scope;¹² yet the FCPA does not prohibit bribes paid to officers or employees of private, non-governmental entities.¹³ While this sets up a solid foundation for any potential universal legislation, there are loopholes that should be amended in order to make these provisions more effective as a bribery combatant. The limit on which types of bribes are offered is problematic and needs to be addressed with any future legislation; however, the broad definition of domestic concern is a good start to encompassing as many international business actors as possible.

2. *The United Kingdom Bribery Act*

In the simplest of terms, the United Kingdom implemented the Bribery Act due to the OECD bullying the United Kingdom. The OECD did this by essentially exposing them for having a lackluster, non-impactful, and passive anti-bribery implementation system. It was said that the UK's "inadequate anti-bribery laws were the subject of constant criticism by the OECD,"¹⁴ magnified in a 2008 report published by the OECD, which "extensively criticized the UK's persistent failure to address its deficient anti-corruption and anti-bribery laws."¹⁵ The response was an Act, implemented in 2011, which creates new offenses and has further international reach than the scope of the United States' FCPA.¹⁶

A brief summation of the relevant sections of the UKBA is critical at this point. Sections 1 and 2 refer to general offenses, which prohibit the giving and taking of bribes in both the public and private sector; it also bans commercial bribery,¹⁷ which includes bribes offered

¹¹ Sharifa G. Hunter, *A Comparative Analysis of the FCPA and the U.K. Bribery Act and the Practical Implications of Both on International Business*, 18 *ILSA J. Int'l & Comp. L.* 89, 94–95 (2011).

¹² *Id.* at 94.

¹³ *Id.* at 96–97.

¹⁴ *See id.* at 91–92.

¹⁵ *Id.* at 92.

¹⁶ *Id.*

¹⁷ Michael Fine, *Coordinating U.K. Bribery Act and FCPA Compliance*, LRN 2, 11 (2011), http://www.lrn.com/sites/default/files/Coordinating%20UK%20Bribery%20Act%20and%20FCPA%20Compliance_0.pdf.

or paid in connection with purely commercial activities.¹⁸ Provisionally, this is very broad and extends to any activity “connected with business, performed in the course of a person’s employment or performed on behalf of a company.”¹⁹ Section 7 establishes a new corporate offense for failing to prevent bribery with the exception of proof of adequate reporting procedures in place.²⁰ This Section applies to any company which “carries on a business or part of a business” in the U.K. regardless of where the offense takes place.²¹ The UKBA’s general offenses prohibit bribery of *any* person; this includes non-public officials, with the intent to induce improper performance of a relevant duty.²²

There are four separate offenses under the UKBA: bribing, being bribed, bribing a foreign public official, and failing as a commercial organization to prevent bribery.²³ These are governed by a “close connection” test, with no corrupt intent required, and primarily deal with inducements to improperly perform a relevant duty, agreeing to receive a bribe, and the strict liability corporate offense of failing to prevent bribery.²⁴ This added offense of failing to prevent bribery is a huge step forward in combating international corruption. It builds off the provisions of the FCPA and holds an even larger group of people and entities accountable for any act of bribery, or feigned ignorance, in regards to bribery’s impact on international business deals. This provision greatly expands who is subjected to accountability under anti-bribery legislation. However, the implementation of this provision under the UKBA, with a complete absence of any similar provision in the FCPA creates an international regulation divide, which leads to numerous problems for complying companies.

The most important similarities between the FCPA and the UKBA are in the plain text. Most notable, are their similar definitions of public official, as well as the fact that their actual practice in most areas may not substantially differ.²⁵ In addition, they are both vague on payments. The FCPA does not define “anything of value,” while the UKBA simply says “any other financial or other advantage.”²⁶ This ambiguity can lead to differing enforcement practices. Their extraterritorial provisions, as will be discussed in further detail later, are similar in reach, with the UKBA being slightly broader. Most importantly however, both acts’ ideals and goals mirror one another.

¹⁸ *Id.* at 11.

¹⁹ *Id.*

²⁰ *Id.* at 2–3.

²¹ *Id.* at 3.

²² *Id.* at 6.

²³ See Hunter, *supra* note 11, at 93–95.

²⁴ *Id.* at 95–96.

²⁵ See Fine, *supra* note 17, at 3.

²⁶ *Id.* at 7.

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3. *Differences Between the FCPA and the UKBA Lead to Inconsistencies, Leading to a Call for Universal Legislation*

The differences between the Acts lead to potentially duplicative enforcement and undefined ambiguity, leaving multi-national corporations in the dark as to how best to decipher the inconsistencies in determining how to effectively frame their internal compliance provisions. The differences range from language discrepancies, to exceptions, to affirmative defenses, to penalties, and to compliance. All of which are vital in the enforcement of these acts and create a dichotomy which businesses are left to define.

The FCPA deals with bribery of foreign officials, while the UKBA deals with bribes to *any* person.²⁷ This discrepancy creates ambiguity with regard to whom companies can conduct different aspects of their business. In addition, the FPCA deals with payment to obtain or retain business, while the UKBA deals with intention to induce improper performance.²⁸ Not only are these both imprecise in regards to what meets their requirements, but they also show that at the very foundation of both acts, bribery is defined differently. This discrepancy is not an effective international bribery combatant.

While the definitions of bribery remain dissimilar, there is also the concern of intent. The FCPA requires corrupt intent, while the UKBA requires intent to induce, not necessarily in a corrupt manner.²⁹ The differences in intent requirements can lead to abstruseness and, effectively, a gray area for companies trying to conduct business within the provisions of these acts. In addition, the FCPA limits their corporate strict liability to accounting provisions, under a "Books and Records Provision" while the UKBA established a new offense of failure by a commercial organization to prevent bribery.³⁰ One Act requires your books and records to be on display, while the other holds you accountable for not stopping bribery. This creates a level of ambiguity that makes it incredibly difficult, if not impossible, for international companies to effectively and efficiently regulate against bribery. There are also significant differences in their senior official liability. To be liable, the FCPA requires that the senior official simply fail to adequately supervise the conduct of those that work for him,³¹ while the UKBA requires the senior official to "consent or connive" in the act of bribery.³² These differences could be significant in the event of liti-

²⁷ See generally 15 U.S.C. § 78dd-1 (1977); U.K. Bribery Act, 2011, c. 23 (Eng.) [hereafter U.K. Bribery Act].

²⁸ See generally 15 U.S.C. § 78dd-1 (1977); U.K. Bribery Act, *supra* note 27.

²⁹ See generally 15 U.S.C. § 78dd-1 (1977); U.K. Bribery Act, *supra* note 27.

³⁰ 15 U.S.C. § 78dd-2; U.K. Bribery Act, *supra* note 27.

³¹ See generally 15 U.S.C. § 78dd-1 (1977).

³² U.K. Bribery Act, *supra* note 27, at § 14.

gation. If under one act, a senior official is liable due to his position, but under the other act, he is liable only if there is consent, then this clearly creates a problem for any and all international corporations.

One of the most significant linguistic differences between the Acts is how they define their extraterritorial jurisdictional limits. The FCPA includes anything listed on the U.S. stock exchange, as well as U.S. companies, or companies with their principal place of business in the U.S.³³ The UKBA does not have the stock exchange provision, however, the UKBA follows a “conducting business” requirement where even part of their business activities being conducted in the U.K. will satisfy to afford jurisdiction under the Bribery Act.³⁴ This “conducting business” provision has the potential to reach numerous international companies that have very little connection with the U.K. This creates the potential for corporate susceptibility at a “significantly greater” level than what is provided under the FCPA.³⁵ In addition, the UKBA prohibits both public and commercial bribery, another provision not accounted for under the FCPA.³⁶ By expanding their jurisdiction in this way, the UKBA inevitably holds more people accountable to bribery violations, while the FCPA does not. Lastly, the FCPA provides for successor liability, where the parent company can be held liable for past anti-bribery violations of a company, even if it happened before the acquisition,³⁷ alternatively, the Bribery Act leaves open whether there is successor liability over acquired companies or not.³⁸ With the ever-expanding international business realm, the issue of successor liability has become a provision that affects most multi-national corporations during their day-to-day operations. With this high standard for successor liability, and with no remedy for ‘good behavior’ or adequate provisions, the FCPA holds corporations accountable at a new level, potentially stalling the progressive expansion of international business.

These examples of differences are merely based on the plain text of the Acts. As we look toward the application side of both Acts, it will reaffirm that there is a significant enforcement problem due to these discrepancies for international companies: a problem that needs to be resolved sooner rather than later. This multitude of discrepancies requires multi-national corporations to expense numerous hours and immeasurable finances on complying with small differences between

³³ See generally 15 U.S.C. § 78dd-1 (1977); U.K. Bribery Act, *supra* note 27.

³⁴ See generally U.K. Bribery Act, 2011, c. 23 (Eng.).

³⁵ Fine, *supra* note 17, at 11.

³⁶ Hunter, *supra* note 11, at 97.

³⁷ *U.K. Bribery Act and Its Effect on U.S. Companies*, Murphy & King, (May 2011), http://www.murphyking.com/newsevents/uUK_Bribery_Act_and_its_Effect_on_US_Companies/.

³⁸ *Id.*

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each act in an attempt to combat bribery. This seems excessive and taxing on corporations simply trying to comply.

A. Facilitating Payments

Facilitating payments is an area where the discrepancies greatly hurt international business and lead to the above-mentioned duplicative enforcement. For example, the FCPA allows facilitating or grease payments, which are made to expedite or secure the performance of routine governmental actions.³⁹ On the other hand, the UKBA will offer no exception for facilitating payments, unless it is a payment allowed by local law;⁴⁰ the UKBA holds a zero tolerance policy for any type of facilitating payments.⁴¹ The FCPA exception allows payments that “merely move a particular matter toward an eventual end.”⁴² This would most likely include gratuities to customs officials in order to expedite customs documents. The lack of exception under the UKBA causes U.K. companies to be placed at a competitive disadvantage.⁴³ Another disadvantage to U.K. companies is the ambiguity regarding prosecution of these facilitating payments. While the Serious Fraud Office (“SFO”), the chief enforcement agency of the UKBA, has continuously stated that they do not anticipate many prosecutions regarding facilitating payments,⁴⁴ the government has discussed their seriousness in eliminating facilitating payments worldwide and has expressed interest in doing so via aggressive prosecutions.⁴⁵ This disastrously large discrepancy between the two Acts causes a multitude of practical business problems. It fosters different everyday business practices depending on which Act’s jurisdiction a corporation is complying with in an operational sense. For example, one company dealing with shipping to different areas could potentially have to deal with using facilitating payments for one shipment, while they are prohibited from using facilitating payments for the other shipment. This causes companies to have to comply with different regulations for the same business practices. This hardly seems practical or efficient. This very notion exemplifies the call for uniformity among anti-bribery acts.

B. Affirmative Defenses

The differences between the FCPA and the UKBA regarding affirmative defenses might be one of the most difficult discrepancies

³⁹ See Hunter, *supra* note 11, at 99.

⁴⁰ *Id.* at 100.

⁴¹ See Fine, *supra* note 17, at 18.

⁴² Hunter, *supra* note 11, at 99-100.

⁴³ *Id.* at 100.

⁴⁴ *Id.*

⁴⁵ Fine, *supra* note 17, at 19.

for companies to overcome. In short, the FCPA allows for reasonable and *bona fide* expenditures as long as it complies with local laws.⁴⁶ These reasonable *bona fide* expenditures can include payments of gifts or anything of value, if lawful under the written laws of the region or if it was directly related to the promotion, demonstration, or execution of performance of the contract with a foreign government or agency.⁴⁷ For example, this includes travel and lodging expenses, meals, etc. This however excludes any payments made with corrupt intent, which would effectively void any *bona fide* expenditures defense.

The UKBA has no similar defense. That being said, guidance from the U.K.'s Ministry of Justice has strongly implied that reasonable and proportionate promotional expenditures will be allowed as long as they remain small and do not constitute a pattern.⁴⁸ But what does this mean in practice? An interesting development under the UKBA has been the application of a national security defense. If something conflicts with national security issues, then it can preclude any prosecutorial action for UKBA violations.⁴⁹ This was evidenced in the BAE Systems case where Tony Blair was concerned about a terrorist attack if prosecutorial actions were commenced any further, and so the investigation was essentially halted on national security grounds.⁵⁰ The FCPA has no such provision. However, this begs the question, what is a national security ground? How broad does that exception reach? This uncertainty in prosecutorial conduct once again leaves companies in an undefined gray area.

C. Compliance Defense

One of the biggest critiques of the FCPA is its lack of a compliance defense, especially in light of the UKBA's prominent stance on compliance defenses. In continued efforts of ambiguousness all-around, the U.S. enforcement authorities have said they will take compliance into consideration during prosecutions.⁵¹ However, in action, companies are generally credited for good practice, but the effects of the "good deeds" usually only affect the sentencing areas of prosecution.⁵² It affords little-to-no aid anywhere else in the prosecutorial system. There has been large critique over the FCPA's lack of compliance program; many have pushed toward a compliance program's positive

⁴⁶ Hunter, *supra* note 11, at 101.

⁴⁷ *Id.* at 101-02.

⁴⁸ *Id.* at 102.

⁴⁹ Fine, *supra* note 17, at 20.

⁵⁰ Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L. L. 1, 23 (2012).

⁵¹ Hunter, *supra* note 11, at 104.

⁵² Fine, *supra* note 17, at 21.

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effects, given the UKBA's provision. Critics argue it would be invaluable to protect U.S. companies operating overseas.⁵³

The Adequate Procedures Provision, a compliance defense to corporate liability under the UKBA, affords companies certain levels of complete deniability if they can demonstrate adequate procedures were in place and geared towards preventing bribery.⁵⁴ This defense to liability for each provision of the UKBA greatly aids corporations in conducting their businesses efficiently. These procedures aided in preventing those associated with the company from engaging in conduct that would result in violations of the Act.⁵⁵ Some examples of the adequate procedures are laid out in Section 7 of the Act: overall program design, tone at the top, risk assessment, due diligence, communication (including training), and monitoring and review.⁵⁶ If companies fail to demonstrate adequate procedures, there is a strict liability offense. However, if there are adequate procedures in place, the company is "off the hook" for violations. This discrepancy is too wide. One Act allows and the other does not, which leaves companies unsure of whether their actions amount to a violation.

D. These Inconsistencies Lead to Varying Enforcement Patterns for Multi-National Corporations, Creating Difficulty for Adequate Compliance

Due to linguistic differences in both Acts, enforcement and remedial measures have greatly differed, as have each enforcement agencies' practices. The FCPA has led the way in various additional enforcement actions to hold multi-national corporations accountable, while the UKBA's stringent enforcement policies could potentially fail under the realities of the business world.

i. FCPA Enforcement

While the United States' Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") both have jurisdiction over certain issuers and domestic concerns, most cases never actually get to trial. Almost all FCPA issues are resolved via non-prosecution agreements and deferred prosecution agreements.⁵⁷ A non-prosecution agreement, or NPA, is a privately negotiated agreement between the DOJ and the violating company, where the DOJ agrees not to prosecute under the condition that the company admits fault and agrees to

⁵³ Hunter, *supra* note 11, at 106.

⁵⁴ *Id.* at 103.

⁵⁵ *Id.* at 106.

⁵⁶ See Hunter, *supra* note 17, at 21.

⁵⁷ *FCPA 101*, FCPA PROFESSOR (2011), <http://www.fcpaprofessor.com/fcpa-101>.

compliance undertakings.⁵⁸ NPAs are not filed with a court.⁵⁹ A deferred prosecution agreement, or DPA, is technically filed with a court and has the same appearance as a criminal indictment, however, here the DOJ agrees to defer prosecution of the company if it acknowledges responsibility and again agrees to host compliance undertakings.⁶⁰ Under these agreements, the companies have to acknowledge fault or responsibility, but they do not have to plead guilty to any charges, and they are never found in violation of the FCPA; consequently, they are not debarred.⁶¹ Under the FCPA provisions, if one is charged and found guilty, debarment is a potential consequence, which is a huge catalyst behind the increasing use of NPAs and DPAs within the U.S.⁶²

While it may be perceived in the press that companies are continuously convicted of anti-bribery violations, it is not in fact the case. For example, Siemens, who had to pay approximately \$800 million to U.S. authorities as an FCPA settlement, was never convicted of FCPA violations.⁶³ As stated above, if they had been convicted, they may have been debarred from doing business in the United States. Instead, Siemens simply settled under an agreement with the U.S. government. The same is true for BAE Systems, a well-known case in 2010 regarding bribes to Saudi public officials.⁶⁴ BAE was also never convicted of FCPA violations.⁶⁵ Both companies settled under various NPAs and DPAs. The DOJ has said that the issue of debarment was a significant factor in why they did not charge Siemens or BAE with FCPA anti-bribery violations.⁶⁶ If there were different end results, one that either afforded companies a compliance defense under the FCPA, such as the UKBA's adequate procedures defense, or offered solutions other than debarment, then maybe the DOJ would not have to rely so heavily on the NPAs and DPAs. That being said, NPAs and DPAs are a couple of the best available solutions for anti-corruption, creating a level of accountability without completely crippling an international corporation.

In addition, FCPA actions have increased rapidly over the last few years for both the DOJ and the SEC. The SEC claims it gets about

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

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eight tips a day.⁶⁷ That being said, the fines are rarely as high as one might expect.⁶⁸ FCPA violations have spread vastly around the world, with the most prevalent area for bribery being China, followed by Iraq, and Nigeria.⁶⁹ Due to the world's increased manufacturing presence in China, it is no surprise that bribery in China is magnified. In addition, it is common knowledge that bribery is rampant in the course of business in India. This leads to a 'cost of doing business' argument, which will be discussed below. Investigations in the United States totaled 106 investigations in 2010 and 113 in 2011, whereas the total number of cases in those years respectively was 227 and 275.⁷⁰ In addition, the SEC had thirteen actions brought in 2011, eight of which were resolved through consent judgments, four were resolved through administrative cease and desist orders, and one was resolved through a DPA.⁷¹ In contrast, the DOJ brought only one contested action in 2011, and ten other criminal cases, most of which were resolved either through a NPA or a DPA.⁷² FCPA enforcement has increased over the years because of these alternatives: "wha[t has] really changed is not so much the legislation, but the enforcement and approach to enforcement by U.S. authorities."⁷³ These numbers show that bribery remains a major thorn in the realm of international business. It has not lessened, and in fact has become more prevalent in countries that are expanding further into the global business world. The FCPA's NPAs and DPAs afford an additional type of enforcement, which punishes the appropriate violators without creating an international debarment issue. This increase in FCPA cases further shows the demand for a new level of enforcement action to combat the growing bribery problems.

⁶⁷ Press Release, Sec. Exch. Comm'n, SEC Issues First Whistleblower Program Award (Aug. 21, 2012), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483972#.U1feZFewVRI>.

⁶⁸ *See generally* FCPA Digest: Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977, Shearman & Sterling LLP, Jan. 2012, http://www.shearman.com/~/_media/Files/NewsInsights/Publications/2012/01/Shearman%20%20Sterlings%20Recent%20Trends%20and%20Patterns%20i_/Files/View%20full%20January%202012%20iFCPA%20Digesti/FileAttachment/FCPADigestJan2012.pdf.

⁶⁹ *Id.* at xi. (Asia (excluding China) 20%, China 9%, Middle East (excluding Iraq) 10%, Iraq 9%, Central Asia and Russia 8%, Europe 12%, Africa (excluding Nigeria) 9%, Nigeria 9%, and the Americas 14%).

⁷⁰ FCPA and U.K. Bribery Act Enforcement and Compliance in 2012, Navigant (Sept. 28, 2012), *available at* <http://www.securitiesdocket.com/wp-content/uploads/2012/09/Sept-28-2012-Consolidated.pdf>.

⁷¹ *See* Shearman & Sterling LLP, *supra* note 68, at xii.

⁷² *Id.* at xi.

⁷³ FCPA 101, *supra* note 57.

This lack of actual enforcement and heavy reliance on NPAs and DPAs urges us to ask the question: should the FCPA enforcement action procedures be restructured to better reflect the actual goings-on? Should there be explicit language discussing the NPAs and DPAs in more depth? If almost all of the prosecution is going to be through these agreements, shouldn't the UKBA also have these procedures? What will the UKBA do when it comes time to prosecute without this alternative? More enforcement leads to further compliance in a country hesitant to change due to lackluster rulings. DPAs and NPAs bring that raised level of enforcement.

ii. UKBA Enforcement

The UKBA does not have a remedy equivalent to the FCPA's NPAs and DPAs, which could greatly cripple their enforcement capabilities. The SFO recently revised its enforcement policies in October 2012 to restate the SFO's primary role as investigator, to ensure consistency, and to meet certain OECD requirements.⁷⁴ The newfound provisions provide for a "Full Code Test," which requires sufficient evidence to provide a realistic prospect of conviction as well as evidence that the prosecution is in the public's interest.⁷⁵ The SFO goes on to clarify that they will not waiver in regard to facilitating payments – small amounts will be unacceptable in the course of doing business – and that facilitating payments are illegal in the U.K. irrespective of their size or frequency.⁷⁶ Lastly, the SFO declared a focus on investigating business expenditures⁷⁷ without truly defining what these business expenditures entailed.⁷⁸ These new provisions hardly seem revolutionary. In fact, they seem to attempt to provide clarity without clearly defining what facilitating payments or business expenditures really are.

In addition, the lingering question of what the UKBA enforcement will actually look like in light of these revisions is something we must look into, in anticipation of creating a structure for universal legislation. These revisions to the UKBA came about due to the continued critique that the prosecutorial appetite of the SFO was minimal. The U.K. investigated a total of seventeen cases in 2010 and twenty-three in 2011.⁷⁹ That being said, there have been only a few prosecutions

⁷⁴ *U.K. Bribery Act: SFO Revises Enforcement Policies*, Curtis, Mallet-Prevost, Colt & Mosle LLP, Nov. 2012, <http://www.curtis.com/siteFiles/Publications/SFO%20Revised%20Policies.pdf>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See* Navigant, *supra* note 70.

⁷⁹ *Id.*

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under the Bribery Act to date, and most have involved individuals rather than corporations.⁸⁰ However, while the critics comment that the SFO's prosecutorial appetite is small, and while it may very well be minimal, one major reason for the lack of cases is because the Bribery Act does not act retrospectively.⁸¹ The SFO is limited in their enforcement of any new provisions to bribes occurring after the enactment of the UKBA in July 2011, and one must also factor in time to conduct an investigation.⁸² While enforcement will most likely remain limited for the foreseeable future, when it does occur, the U.K. is going to have to revise the Bribery Act. It will have to come up with some sort of solution to the lack of clarity and ambiguous provisions, which do not mirror the FCPA. Universal legislation could solve all of these problems at once. As soon as the SFO begins to increasingly and proactively regulate on an international scale, these companies will have a more escalated problem in dealing with issues such as, eliminating loopholes, defining the gray area, and avoiding duplicative enforcement by spending millions of dollars on varying degrees of compliance to each country's individual Act(s).

III. DIFFERENCES WITHIN THE FCPA AND THE UKBA CREATE DUPLICATIVE ENFORCEMENT AS WELL AS A COMPETITIVE DISADVANTAGE

Whether one is looking at the potential harm of duplicative enforcement for multi-national corporations, or analyzing the lack of enforcement power of the OECD, it is clear that there is a desperate need for a solution. These differing provisions have so far been unsuccessful in solving the infectious bribery epidemic; in fact, the discrepancies are facilitating it. An act with universal enforcement jurisdiction needs to be implemented to properly fight for the fundamental goals established under the FCPA and the UKBA.

1. *Universal Legislation Is Necessary to Remedy Duplicative Enforcement*

The potential for duplicative enforcement causes a vast logistical problem within the international business realm, and must be remedied via universal legislation. Universal anti-bribery enforcement is necessary to combat the growing encroachment of duplicative enforce-

⁸⁰ See, e.g., *Court Clerk Munir Patel Jailed for Taking Bribes*, BBC NEWS, Nov. 18, 2011, <http://www.bbc.co.uk/news/uk-england-london-15689869>.

⁸¹ See *Bribery and Corruption*, ASHURST LLP 5, Feb. 2014, https://www.google.com/url?q=http://www.ashurst.com/doc.aspx%3Fid_Resource%3D4649&sa=U&ei=w51RU9CpEPSosQTUsIHIBg&ved=0CBsQFjAA&usg=AFQjCNG7T4f5fSI5djEIm30MDvj2zgJ0DA.

⁸² See *id.*

ment. Whether through extended extraterritorial reach, or enactment of a compliance defense in the FCPA, there needs to be a solution to the continuing trend of duplicative enforcement problems for multinational corporations.

The most practical way to solve the potential for increased duplicative enforcement issues is to create a universal anti-bribery enforcement system to combat corruption in the international business world. Duplicative enforcement is not a hypothetical; there have already been cases where companies have been brought to justice under more than one Act.

The first case is Siemens. Siemens was under investigation by the DOJ and the SEC, as well as the Munich Public Prosecutor's Office.⁸³ Siemens successfully cooperated with both countries, but nonetheless ended up having to pay significant fines in both jurisdictions for the same offense.⁸⁴ BAE, as discussed previously, was due for trial in the United Kingdom, and then under the umbrella of national security concerns, Tony Blair called off the investigation.⁸⁵ Soon after, the United States' DOJ initiated its own investigation into BAE Systems, leading to the establishment of a cooperative prosecution by the two countries.⁸⁶

In addition, Halliburton/TSKJ has recently come into some anti-bribery concerns. Their troubles spanned over twelve different jurisdictions.⁸⁷ Currently, the DOJ has spearheaded the investigation encouraging the SFO to take a back seat. If there is cooperation, this twelve-jurisdiction claim could result in Halliburton/TSKJ being prosecuted in one area alone. However, if international agency cooperation is unsuccessful, Halliburton/TSKJ could end up with duplicative investigations in multiple regions around the world. Lastly, there is Innospec. This situation deals with the U.K.'s SFO taking over a case after enforcement competition with the United States.⁸⁸ After the agencies decided that the SFO would lead the investigation, there was cooperation from three U.S. agencies, which helped lead the SFO to one of their first global settlements.⁸⁹

This idea of cooperative efforts works well in theory, and so far has not caused many international problems. However, what happens

⁸³ See Spahn, *supra* note 50, at 26–27.

⁸⁴ *Id.* at 26 n.133, 27.

⁸⁵ See David Leigh & Rob Evans, *Blair Called for BAE Inquiry to be Halted*, *Guardian*, Dec. 22, 2007, <http://www.guardian.co.uk/baefiles/story/0,,2231496,00.html>.

⁸⁶ See Spahn, *supra* note 50, at 25.

⁸⁷ *Id.* at 27.

⁸⁸ *Id.* at 31.

⁸⁹ *Id.*

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when both countries want to prosecute? Does the company then have to deal with investigations in numerous arenas under different Acts with various criteria? Under the current laws, yes.

There is potential for all of this to change. There are currently two international investigations pending which could set the stage for the next wave of anti-bribery enforcement. The DOJ is investigating Wal-Mart, while the SFO is investigating Rolls Royce. Both cases have the ability to set major precedent in which direction each Act's enforcement will trend. In both cases, the companies are helping with the investigation by providing the DOJ and SFO, respectively, with information regarding their company's practices in various countries around the globe.

Wal-Mart has reacted by taking a defensive, yet active stance: it has fired most of the executives that were involved in the bribery allegations,⁹⁰ and as the investigation expanded into India, the Bharti Wal-Mart suspended its CFO and its legal team for the entire country.⁹¹ It has also publicly stated its cooperation numerous times⁹² in addition to conducting a "worldwide review of its compliance controls," it is also already making substantial changes to its infrastructure, such as updating compliance procedures, which has cost around \$30 million.⁹³ Furthermore, Wal-Mart hired a new head of international legal compliance in an effort to centralize its compliance in international operations (totaling 26 countries).⁹⁴ They claim this hiring is "consistent with their ongoing efforts," such as strengthening their compliance programs through concrete actions.⁹⁵

On the other side, the SFO has begun an investigation into Rolls Royce, which makes aircraft engines. This investigation is based on whistleblower information regarding the company's violations of anti-bribery law in China and Indonesia.⁹⁶ Due to the company con-

⁹⁰ Susana G. Baumann, *Expansion of Wal-Mart Stores In Mexico Comes With A High Price: Bribery And Corruption*, HUFFINGTON POST (Jan. 8, 2013, 10:13 AM), http://www.huffingtonpost.com/2013/01/08/expansion-walmart-mexico_n_2431694.html.

⁹¹ Rasul Bailay & Chaitali Chakravarty, *Bharti Wal-Mart Suspends CFO, Legal Team in Bribery Probe*, THE TIMES OF INDIA (Nov. 23, 2012, 7:35 AM), <http://timesofindia.indiatimes.com/business/india-business/Bharti-Wal-Mart-suspends-CFO-legal-team-in-bribery-probe/articleshow/17331568.cms>.

⁹² Christopher M. Matthews, *Wal-Mart FCPA Probe Grows*, WALL ST. J. (Nov. 15, 2012, 5:51 PM), <http://blogs.wsj.com/corruption-currents/2012/11/15/wal-mart-fcpa-probe-grows/>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Michael Volkov, *A Status Check on the U.K. Bribery Act*, JDSUPRA, Feb. 4, 2013, <http://www.jdsupra.com/legalnews/a-status-check-on-the-uk-bribery-act-67032/>.

ducting some of its business in the U.K., Rolls Royce availed itself of the Bribery Act's jurisdiction. The debate in this case is whether or not the SFO will prosecute. There has been much speculation that the SFO may prosecute this case because of the public perception that they prefer civil settlements to criminal prosecutions.⁹⁷

These cases have the potential to shape foreign bribery laws. Wal-Mart could potentially be tried for bribery violations in the U.S., India, China, and Brazil, among other nations, while Rolls Royce could potentially be tried for bribery violations in the U.K., China, and Indonesia. Both of these companies could be liable in different countries under differing Acts, for the same exact bribes. How is this fair? Each company should definitely be held accountable for their actions, however this form of duplicative enforcement, which borders on double jeopardy, is not the way to accomplish it. What if there was one act with the same jurisdiction, penalties, and enforcement? Would this stop a potential duplicative prosecution?

2. *Because the OECD Lacks Enforcement Power, Establishment of an Act with Universal Enforcement Jurisdiction Is Imperative*

The OECD Working Group has previously attempted to address concerns raised due to these multijurisdictional bribery prosecutions. The Working Group discussed the possibility of establishing certain criteria for a single jurisdiction prosecution, however, nothing was agreed upon.⁹⁸ The OECD's apparent lack of enforcement power distances it from being promising legislation, and closer to simply being effective monitoring and policing.

It has been argued that there is no need for universality because the OECD Convention on Combating Bribery has been in effect since 1997.⁹⁹ However, ironically enough, the OECD developed this branch to combat bribery due to pressure from the United States,¹⁰⁰ stemming from corruption concerns and unfair competitive disadvantages to U.S. companies due to the United States' FCPA provisions. The OECD's main goals are to encourage various sanctions against bribery, encourage countries to make bribery illegal, and to level the international business playing field.¹⁰¹ The OECD operates under a

⁹⁷ *Id.*

⁹⁸ See Spahn, *supra* note 50, at 23.

⁹⁹ Andrew Tyler, *Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective?*, 43 GEO. WASH. INT'L. L. REV. 137, 138 (2011).

¹⁰⁰ *Id.*

¹⁰¹ See generally *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention*, Progress Report 2012, Sept. 6, 2012, available at http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_convention.

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“horizontal enforcement model in which each signatory state enforces against foreign bribery through its own distinct domestic legal system.”¹⁰² However, this horizontal enforcement model has little to no enforcement power.

The OECD includes a provision requiring signatories to make it a crime to bribe foreign officials during international business transactions.¹⁰³ However, despite this provision’s enactment fifteen years ago, there is still not full compliance. The OECD does however boast that there has been significant success in implementation through its peer-review process (similar to the way it pushed the U.K. to enact the Bribery Act).¹⁰⁴ The OECD historically chastised countries in an attempt to drive them to fix their enforcement actions and make peer-review processes more actionable.¹⁰⁵ In short, the OECD has past success in its peer-pressure format, but lacks the jurisdiction to actively implement any universal enforcement mechanisms. The Convention also lacked the ability to change worldwide levels in corruption according to recent studies, which reveal shortcomings in the Convention itself.¹⁰⁶ The study shows public perception of limited enforcement possibilities, and a call for facilitation payments, further international cooperation, greater whistleblower protection, and broader preventative measures, yet the problems inevitably circle back to the OECD’s lack of enforcement power.¹⁰⁷

There are only four countries that actively enforce anti-bribery measures as a result of the OECD’s push, and there are fifteen countries that enforce a moderate level of anti-bribery legislation.¹⁰⁸ Its future is in serious jeopardy because there are a limited number of parties who adequately enforce the Convention.¹⁰⁹ The most influential signatories to the OECD are the United States, the United Kingdom, Italy, Norway, Switzerland, Denmark, and Germany.¹¹⁰ The entire success of the OECD hinges upon the signatory countries imple-

¹⁰² Spahn, *supra* note 50, at 49.

¹⁰³ Tyler, *supra* note 99, at 137.

¹⁰⁴ *Id.* at 139.

¹⁰⁵ *OECD Anti-Bribery Convention: Time to Take Real Steps*, OECD Insights, (May 25, 2011), <http://oecdinsights.org/2011/05/25/oecd-anti-bribery-convention-time-to-take-real-steps/>.

¹⁰⁶ Tyler, *supra* note 99, at 166.

¹⁰⁷ *Id.* at 163.

¹⁰⁸ *Id.* at 168.

¹⁰⁹ *Report Cards*, FCPA PROFESSOR, June 30, 2011, <http://www.fcprofessor.com/report-cards-3>.

¹¹⁰ Exporting Corruption, *supra* note 101, at 8.

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menting the OECD's suggestions.¹¹¹ How does the OECD combat that implementation problem without the power to do so, and without becoming a universal enforcement act?

IV. THE DESPERATE NEED FOR A SOLUTION

The inconsistencies' effect on enforcement causes bribery to slip through gaps in enforcement power and remain prominent in the international business realm. Bribery has an enormously damaging effect on international business. "Bribery. . .inhibits free trade and economic development in many countries by undermining competition in these international markets."¹¹² Setting up a system of international business soaked in bribery creates unfair advantages to more developed countries, which can afford to pay the bribes and do not have anti-bribery legislation. It also gives an advantage to bigger and more affluent companies. The World Bank echoed this sentiment by saying, "corruption has a negative relationship with per capita GDP. . .lowers the quality of public infrastructure. . .lowers public satisfaction. . .undermines the official economy, and reduces the effectiveness of development aid and increases inequality and poverty."¹¹³ The inconsistencies within the two Acts exacerbate these problems on a global scale. They lead to unfair advantages, a multitude of expenses, and duplicative enforcement, all while deterring business due to unfair competitive disadvantages. This problem can be fixed.

The FCPA and UKBA's immense impact has been an ideal first step in combating bribery, but the Acts can only take it so far. Ten years ago, bribes were a culturally acceptable business practice. They led to long-standing relationships, and were even tax deductible in Europe.¹¹⁴ Now everything has changed. The OECD has pushed for further regulation and the countries have complied. The FCPA has "become a major legal issue for all multinational companies across various industry sectors" as it has surged to the forefront of these corporations' concerns.¹¹⁵ The UKBA is likely to quickly follow in its footsteps. How do we smooth this transition so we remain active in the fight against bribery and corruption while maintaining international business's fervor?

¹¹¹ Luke Balleny, *Enforcement of Danish Foreign Bribery Laws*, TRUSTLAW, (Mar. 22, 2013, 12:39 PM), <http://www.trust.org/trustlaw/news/enforcement-of-danish-foreign-bribery-laws-weak-oecd-report/>.

¹¹² See Hunter, *supra* note 10, at 90.

¹¹³ *Id.*

¹¹⁴ Patrick Hughes, *How the Foreign Corrupt Practices Act is Changing International Business Practices*, ALBANY-COLONIE REGIONAL CHAMBER, <http://acchamber.org/MediaCenter/businesslibrary/ForeignCorruptPracticesAct.aspx>.

¹¹⁵ *Id.*

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First of all, there needs to be a way to eliminate the ambiguity in the Acts. For example, the concept of both “bribe” and “foreign official” are so vaguely defined in both the FCPA and the UKBA that it is better to simply not give money to anyone, however, that has proven to be impractical. Another problem is the indistinctness in definitions of bona fide expenditures. While these are not present in the UKBA, the FCPA’s guidelines on “wining and dining” leave too much room for interpretation. Companies need to know where the line is between simply taking someone out to dinner and an anti-bribery violation. There needs to be a line drawn that allows for more clarity. Further clarifications would allow companies to operate knowing exactly what can and cannot be done, while helping to minimize the competitive disadvantage companies subject to FCPA and UKBA jurisdiction have in the international business world. As shown above, the vagueness in which each act defines certain key terms leads to a large disadvantage to all multi-national corporations. It comes down to this: companies cannot actively or effectively combat bribery while maintaining business and complying with these separate Acts if the rules, regulations, and provisions are not laid out coherently across all continents. A universal act, or a form of universal legislation, would accomplish these desperately needed goals. While both the FCPA and the UKBA have had a great impact on fighting bribery, the impact needs to expand into a universal blanket act, which clearly defines what companies are expected to do.

The impact of the FCPA alone has been astronomical. However, being the first major act with direct enforcement action has caused the United States to feel like they are fighting this battle alone, which greatly harms U.S. based companies in a competitive international realm. The costs, both competitively and financially, are substantial.

Besides immediate financial concerns, when a company subject to the FCPA is competing with another company to acquire a third company, the U.S. company has to factor in numerous additional costs for compliance, giving them a competitive disadvantage in the market; the same initial disadvantage applies to companies under the arm of the UKBA. This creates a huge logistical problem for companies trying to comply with the proper anti-bribery provisions of the UKBA and FCPA. In addition, the UKBA has been deemed the “strictest anti-corruption legislation to date.”¹¹⁶ The FCPA has been the world leader in enforcing anti-corruption legislation; however, this could all change if the prosecutorial appetite of the SFO grows. Without further instruction, the strictness of these Acts could lead to further international business problems due to ambiguous enforcement standards.

¹¹⁶ *Id.* at 109.

It is incredibly costly to keep companies' anti-bribery provisions up to date due to the differing Acts. In order to maintain a level playing field, there should be one system. This would allow companies to establish an effective internal system to combat bribery on an international level, while being able to continue to conduct business successfully. These discrepancies are crippling companies. Not only are those companies who are complying forced to deal with an uneven playing field in comparison to those companies not under the jurisdiction of either Act, but these companies are also expected to spend an unreasonable amount of time and money complying with two relatively different lists of provisions. To effectively meet the requirements of each Act, due to their multitude of differences, companies are spending countless hours trying to come up with a proper internal system, which takes away from international business progress. There should be a system, with global enforcement power, so companies can reasonably focus on one internal compliance system and still be able to effectively compete in the international realm, while combating bribery.

The crux of the problem is that FCPA compliance does not equate to Bribery Act compliance. There needs to be universality. There needs to be a "meaningful international alignment of the world's leading economic powers" to combat bribery.¹¹⁷ There is concern that the British Government's rigid implementation of Bribery Act provisions could cause companies to terminate various foreign relationships in an effort to avoid prosecution.¹¹⁸ For example, because the Bribery Act does not impose a facilitating payments exception, it could cause companies associated with the U.K. to impose a higher cost when doing business, and in return, cause a competitive disadvantage, as shown above with the FCPA. This has been the worry of companies from the beginning, setting up this unfair disadvantage concern due to their home country. A universal act would change that. Bribery greatly increases the cost of doing business worldwide, but now with differing legislative requirements, compliance to combat bribery is becoming an additional exorbitant cost as well. These increasing costs can act as a disincentive that impedes further international business expansion: a consequence that businesses cannot afford.

¹¹⁷ Comm. on Int'l Bus. Transactions, *The FCPA and Its Impact on International Business Transactions – Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?* N.Y.C. BAR Ass'n, 25 (Dec. 2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf>.

¹¹⁸ Hunter, *supra* note 11, at 110.



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1. *How to Accomplish Universal Legislation*

The extraterritorial reach of both acts pushes towards universal jurisdiction. The FCPA has prosecuted companies all across the world, and the UKBA's extraterritorial reach is even broader with its "close connection" test and offense for failure to prevent bribes. These trends are causing multinational corporations with connections to both countries to become nervous,¹¹⁹ and rightly so. On the other hand, it is forcing them to become more familiar with the acts and look at their own compliance standards, which is the goal. Global companies now have to be aware that both the FCPA and the UKBA can directly impact their operations, even if they only have limited activity within the U.S. and the U.K., ultimately forcing them to create more effective anti-corruption internal programs.¹²⁰ While this extraterritorial reach is impressive, it creates gaps in enforcement, which will lead to loopholes for multi-national corporations.

2. *Proposed Provisions*

The greater the international business realm gets, the greater the need for universal anti-bribery legislation becomes. Therefore, there should be one universal act, one with actual enforcement power. While the OECD has the right idea, it simply urges countries along; it has little power to actively enforce legislation. The ideal legislation proposed by this Article would have the following key elements:

- Adequate Provisions – from the UKBA, to allow a company to instill procedures to combat bribery, and be rewarded for maintaining that level of accountability.
- Alternative Enforcement – such as NPAs and DPAs from the FCPA. This will encourage enforcement and provides a penalty without complete debarment, which is more appropriate and effective under practical business circumstances.
- Compliance Defense and Voluntary Disclosures – from the UKBA. A compliance defense has a similar rationale to the adequate provisions. This provides that if a company notices problems and actively alters its programs to stop them right away and then works with the government to remedy its mistakes, it should be given some leniency during its investigation and prosecution.

¹¹⁹ *The Extraterritorial Reach of the FCPA and the U.K. Bribery Act: Implications for International Business*, Arnold & Porter LLP 1-3 (2012), http://www.arnoldporter.com/resources/documents/Advisory%20Extraterritorial_Reach_FCPA_and_UK_Bribery%20Act_Implications_International_Business.pdf.

¹²⁰ *Id.* at 4–5.

- Whistleblower Provisions – the FCPA has these incorporated via the Dodd Frank Act.¹²¹ This is something that should be universal. Whistleblower provisions hold companies accountable on a whole new level, and would greatly lead to a reduction in anti-bribery violations.
- Facilitating Payments – in an ideal world, the international standard would align with the UKBA and have a zero tolerance policy for facilitating payments. In reality, some facilitating payments, if minimal, not patterned, and not qualified as bribes, are simply the cost of doing business in most countries. That being said, the move would be to universalize what is acceptable with the goal of eventually eliminating facilitating payments completely.
- Bona Fide and Hospitality Expenditures – these issues are even more important than facilitating payments and are not bribery. If costs extend past a clear definition of bona fide expenditures then there should be repercussions; however, if costs are simply normal business costs that do not exceed to a level of bribery or inducement to commit improper acts, then a company should not risk debarment for something as trivial as flying an official out to a board meeting.
- Passive Offenses – the UKBA's offense of failing to prevent a commercial bribe is a great step in the right direction. It not only penalizes those who commit bribery, but also punishes those that willfully allow it. This is a great way to combat bribery on an international scale.
- Criminal and Civil Enforcement – the FCPA's system of equal levels of criminal and civil enforcement is important and the most effective way to attempt to combat bribery, as there are so many different bribery violation types. This way all areas are covered and no bribery act violations slip through the cracks simply because they are not quite to the level of a criminal violation.

These provisions are simply a suggestion for a universal act that would potentially embody each important and effective provision necessary to create a fully functioning universal legislation to combat bribery. It would afford companies a realistic way to deal with their internal compliance programs while maintaining an even broader set of jurisdictional capabilities. This would place all multi-national corporations on a level playing field with a uniform act to combat corruption in the international realm.

Individuals are tried for the crimes they commit once. Countries have to choose where to prosecute, and there is such a thing as

¹²¹ Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011, 9:20AM), <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>.

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double jeopardy. But who has jurisdiction over these international companies so they are protected from double jeopardy? One entity should have jurisdiction over all international business. A universal system to combat bribery in the international realm is imperative, and should be implemented as soon as possible. The ideal would be to create a piece of universal legislation with the above provisions that could somehow maintain jurisdiction over each area of the international business realm. The enforcement issue is one of the biggest critiques regarding the inconsistencies with these two acts, and in order to effectively solve the problem, there needs to be an act that can actively hold each country and company accountable to maintaining its provisions. Whether this can be done through the WTO or the UN remains an entirely different, but crucial argument. Clearly, the enforcement power of the OECD is inadequate, so there needs to be a different entity to harness this enforcement power, one that would have the power to reach beyond its signatories and create an unprecedented expansive extraterritorial reach. If that can be figured out and enacted using the above provisions, international business can be saved.

V. CONCLUSION

While every company should be held liable for the bribes it commits, it should not be penalized for failing to provide different internal procedures in each separate jurisdiction. The current system is simply not practical in the ever-expanding international business arena. If companies are continuously expected to comply with multiple acts and their individual provisions and discrepancies, then there will be no time left to conduct actual business in the global business world and it will all be spent organizing compliance provisions for each individual anti-bribery act. In order to conduct international business efficiently and combat anti-bribery productively, there needs to be universal enforcement. One with the exact provisions proposed above might not be necessary, but action in this area is. The OECD has mentioned the idea, but their lack of available enforcement power creates a serious problem. Universal alignment of anti-bribery legislation is imperative for international business to more effectively, and fairly, combat corruption for all parties involved. What is needed is a remedy for the OECD's lack of enforcement capabilities. This can be done by incorporating the detailed and effective provisions of the FCPA and UKBA (as listed above) into construction of a universal act with universal enforcement power, outlining each provision in black and white. We need universality to combat worldwide corruption, and this needs to happen quickly. If such an act can be implemented, either under the purview of the WTO or the UN while maintaining a level of universal enforcement power, it would inevitably save international business from this growing bribery epidemic.

**WILL WHAT HAPPENED IN ECUADOR STAY IN
ECUADOR? HOW THE EXISTING INTERNATIONAL
DUE PROCESS ANALYSIS MAY BE INEFFECTIVE IN
KEEPING FRAUDULENT FOREIGN JUDGMENTS
OUT OF U.S. COURTS***

*By: Christopher Lento***

ABSTRACT:

Recent evidence in the decades-old *Chevron/Ecuador* litigation suggests that the \$18 billion judgment rendered against Chevron by an Ecuadorian court may have been a product of conspiracy and fraud on an almost unprecedented scale. However, these allegations overshadow fundamental problems in the method by which U.S. courts determine whether judgments ren-

* Judge Lewis Kaplan, in his March 2014 ruling in the Racketeering and Corrupt Influenced Organizations case brought by Chevron against the plaintiff's attorney Steven Donziger, used the phrase "What Happens in Ecuador Stays in Ecuador" to refer to Donziger's supposed assumption that evidence of potential fraud in the case to enforce Ecuador's judgment against Chevron would not be subject to subpoena in the United States. See *Chevron v. Donziger*, 1:11-cv-00691 LAK-JCF, 126, (S.D.N.Y. 2014) available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=379>.

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dered in foreign jurisdictions may be enforced against defendants in the United States.

Under the current jurisprudential regime, courts that are faced with the question of whether a foreign judgment is enforceable in the United States follow what is termed the “international due process analysis.” In this analysis, the court must render a value judgment on the overall judicial process of the country handing down the original decree, and decide whether the country *generally* affords due process in judicial proceedings. If so, and if the U.S. court determines that the judicial system in the country of origin is fundamentally fair, the judgment will be upheld by U.S. courts. However, this analysis raises a potentially troublesome issue because under the guise of judicial efficiency, courts are free to focus only on the foreign court system as a whole and disregard the particular proceedings under which the judgment was rendered. In essence, this means that courts may completely ignore claims by defendants that they did not receive due process in foreign proceedings. Further, courts are afforded unbridled discretion to validate foreign judgments without considering credible extrinsic evidence regarding the political system of the country where the judgment originated. Perhaps even more troublesome is the fact that because U.S. courts are not required to examine particular proceedings, this analysis has the potential to increase fraudulent practices by foreign litigants in “fair judicial systems,” who anticipate that unscrupulous tactics will not affect enforceability of their judgments in the U.S.

The *Chevron/Ecuador* case concerns claims that Texaco, which Chevron acquired in 2001, polluted the Lago Agrio oilfield region of Ecuador by improperly dumping billions of gallons of contaminants in the area. After a court appointed expert reported widespread pollution in the region, an Ecuadorian Court ordered Chevron to pay \$18 billion dollars in damages. When the plaintiffs sought to collect the judgment in the U.S., Chevron challenged the ruling by the Ecuadorian Court, eventually uncovering evidence that suggested the judgment was a product of a widespread pattern of fraud and conspiracy, including admissions of bribery by one of the presiding Ecuadorian judges.

Paradoxically, the existing international due process analysis suggests that a U.S. court determining

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whether to enforce the judgment should examine Ecuador’s court system as a whole, rather than looking into the particular proceedings under which the original judgment was rendered. This article examines the background and application of the international due process analysis, and suggests that rather than promoting judicial efficiency, the existing analysis actually *increases* the burden on U.S. courts determining the validity of a foreign judgment, and also may lead to judicial incursions foreign affairs, a territory normally reserved for the Executive and Legislative Branches.

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I. INTRODUCTION

A recent ruling in the *Chevron/Ecuador* case has revived a contentious debate by a number of widely disparate groups, from oil companies and environmentalists, to foreign affairs experts and judicial commentators.¹ The litigation, now over 20 years old, brings a host of legal, ethical and political questions into the spotlight, but in an increasingly global society, perhaps one of the most important questions relates to how the United States will enforce judgments rendered in foreign courts. Surprisingly, the scheme by which the enforceability of these judgments is determined by U.S. courts is sadly lacking. Because of the unclear nature of the legal standards used to examine the validity of judgments rendered abroad, judges may validate foreign judgments rendered in proceedings that potentially contravene our notions of fairness and judicial impartiality, but more importantly, may

¹ See *Chevron v. Donziger*, 1:11-cv-00691 LAK-JCF, 126, (S.D.N.Y. 2014) available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=379>.



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violate constitutional requirements and guarantees. The *Chevron/Ecuador* case provides an illustration of some of the difficult issues that arise when the validity of a foreign judgment is suspect. Although it has recently come to light that the multi-billion dollar judgment rendered against Chevron was most likely a product of a widespread pattern of fraud and bribery, the question remains as to whether litigants, who may have been denied any semblance of a fair and impartial trial in a foreign court, should be denied relief simply because the lens through which we examine a foreign judgment is often colored by our relationship with the country where it was rendered.

II. RECOGNITION OF JUDGMENTS RENDERED IN FOREIGN NATIONS

Both federal and state courts have recently wrestled with the question of the extent to which U.S. courts should consider international law when applying domestic law.² Similarly, U.S. courts have increasingly had to contend with issues raised by recognizing judgments rendered in foreign courts, particularly in civil matters. Specifically, in the absence of an existing international legal regime, such as the International Criminal Court or an applicable treaty, what is the extent to which the U.S. judiciary's deference to the courts of other nations obviates due process in proceedings rendered abroad? Judgments rendered domestically normally pose little, if any, problems because the rights guaranteed by the Constitution are widely understood to require uniform practices that, when followed by the conscientious plaintiff, lead to the recognition of judgments by all other states via the Full Faith and Credit Clause, found at Article IV §1 of the Constitution.³ Taken together, the Full Faith and Credit Clause, and its corollary, the Due Process Clause, suggest that when the parties to a legal controversy have an opportunity for a full and fair hearing by a court of competent jurisdiction, the re-litigation of issues already decided is not only wasteful of judicial resources, but would also impose an unfair burden on the victor in the earlier proceeding.⁴ Generally, Article IV §1 of the Constitution addresses the duties that the various states have to honor the "public acts, records, and judicial proceedings of every other state."⁵ However, the Supreme Court has noted that there is a difference between the credit owed to a state's legislative

² Jacob Gershman, *Oklahoma Ban on Sharia Law Unconstitutional, US Judge Rules*, LAW BLOG, WALL ST. J., (August 16, 2013) available at <http://blogs.wsj.com/law/2013/08/16/oklahoma-ban-on-sharia-law-unconstitutional-us-judge-rules/>.

³ U.S. CONST. art. IV, § 1.

⁴ Robert Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution* 45 COLUM. L. REV. 1 (1945).

⁵ U.S. CONST. art. IV, § 1.

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measures or common law, and the credit owed to judgments, which are generally entitled to greater respect than the laws or statutes of other states.⁶ Therefore, once a judgment is rendered, under the doctrine of *res judicata*, the court sitting in the state where the judgment is sought to be enforced can no longer review whether the original court observed procedural due process requirements, as this kind of review is precluded by the mandatory recognition of the original judgment. Presumably, any procedural defects in the suit would have been reviewed and resolved by the court in the original proceedings, and litigation of these issues would be barred in a subsequent trial. Further, for judgments rendered in domestic courts, a subsequent court's determination of whether a litigant has already had the opportunity for a full and fair hearing is a fairly straightforward matter. Generally, a comprehensive and shared legal scheme assures that the fairness analysis is for the most part uniform, notwithstanding that proceedings may occur in states thousands of miles apart. Therefore, upon minimal inquiry into the adequacy of the judicial process of the state where a judgment originated, the state where judgment is sought to be enforced is constitutionally bound to give the same effect to judgments as those proceedings would have in the state of their origin.⁷

International recognition of judgments between countries is obviously much more problematic. The absence of any internationally recognized analogue of the Full Faith and Credit Clause (other than that provided by international treaty) means that each nation is free to recognize and enforce foreign judgments according to its own law, or to refuse to consider recognition and enforcement altogether. In the United States, the closest approximation of an international version of the Full Faith and Credit Clause is the Act of State Doctrine, which dictates that the propriety of the decisions of other countries relating to their internal affairs will not be questioned in the courts of the United States.⁸ In its traditional formulation, the doctrine precludes courts of this country from inquiring into the validity of public acts that a recognized foreign sovereign power commits within its own territory.⁹ While application of the doctrine is not required by statute, it is a principle generally recognized and adhered to by federal courts when examining the decisions of the agencies of foreign sovereigns.¹⁰ It is important to note that the underlying aim of the Act of State Doctrine is not based in comity, the principle that one nation will extend certain courtesies to other nations through the recognition of the valid-

⁶ Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003).

⁷ 28 U.S.C. § 1738 (2006).

⁸ Underhill v. Hernandez, 168 U.S. 250, 254 (1897).

⁹ Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408 (1964).

¹⁰ *Id.*

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ity and effect of their executive, legislative, and judicial acts.¹¹ Rather the aim of the Act of State Doctrine is to preserve the separation of powers between the Judicial and Executive branches.¹² That is, the purpose of the doctrine is not to protect other nations' sovereignty from interference by the United States, but rather to prevent the Executive Branch's prerogative of dictating foreign affairs from being frustrated by a decision issued by the Judicial Branch.¹³

The Act of State doctrine gives rise to an additional complication, which is the fact that conflict of laws is generally regarded as a matter of *state*, rather than federal law, with the consequence that each state is free to make its own decision regarding recognition of a foreign country's judgments.¹⁴ However, although the recognition of judgments generally has state-specific applicability, the complication primarily arises when the controversy at hand may implicate foreign relations. As the Supreme Court noted in *Sabbatino*, a 1964 case that established that the policy of federal courts would be to honor the Act of State Doctrine, the Court was "not without other precedent for a determination that federal law governs; there are enclaves of federal judge-made law which bind the States". . . [t]he rules of international law should not be left to divergent and perhaps parochial state interpretations."¹⁵ Under the holding of *Sabbatino*, even though recognition of foreign judgments in this country is generally governed by state law, the Separation of Powers, Act of State and Political Question Doctrines (and their underlying principles) would seemingly restrict state court judges and also curtail the discretion of federal judges, when the foreign relations of the United States could be impaired by the application of state judgment recognition law.

III. THE INTERNATIONAL DUE PROCESS ANALYSIS

The *Chevron/Ecuador* case brings these issues screaming into the spotlight, demanding particular attention to potential domestic enforcement of judgments rendered in the courts of other countries. As the case continues to wind its way through the appeals process, it has the potential to either reinforce or redefine the existing limits of comity between the United States and Ecuador, as well as raise serious questions about the extent to which the Judicial Branch can render decisions that touch upon political relationships before it encroaches

¹¹ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

¹² *See* 376 U.S. at 423.

¹³ *Id.*

¹⁴ *Nicor Int'l Corp. v. El Paso Corp.*, 318 F. Supp. 2d 1160 (S.D. Fla. 2004).

¹⁵ 376 U.S. at 939.

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on the powers of the other branches.¹⁶ Under the current jurisprudential regime, courts that are faced with the question of whether a foreign judgment is enforceable in the United States follow what is termed the “international due process” analysis.¹⁷ In this analysis, rather than re-examining foreign proceedings in which the judgment was obtained, a U.S. court may render a value judgment on the overall judicial system of the country handing down the original decree, and decide whether the country *generally* affords due process in judicial proceedings. If so, and the court determines that the court system in the country of origin is fundamentally fair, the judgment will be upheld by U.S. courts.¹⁸

This analysis raises a potentially troublesome issue because under the guise of judicial efficiency, courts are free to focus only on the foreign court system as a whole and disregard procedural issues in the particular proceedings under which the judgment was rendered. In essence, this means that courts may completely ignore claims by defendants that they did not receive due process in foreign proceedings. Professor Montre Carodine, in an in-depth examination of the international due process analysis, has noted that rather than examining individual proceedings, courts are free to rely on “political evidence and the judges’ own personal perceptions of the foreign countries.”¹⁹ Under this analysis, an anomaly may occur wherein courts might enforce judgments from foreign nations that generally provide due process, even if the particular proceedings were void of the due process requirements that would be guaranteed under the Constitution in domestic proceedings. However, judges are free to refuse to enforce judgments from countries that may be considered “unfriendly” to U.S. interests even if these countries afforded the defendants protections that exceed constitutional due process requirements.

In addition, courts are afforded unbridled discretion with respect to the extrinsic evidence they will consider concerning the fairness of the judicial system of the judgment’s country of origin.²⁰ It has been contended that because the international due process analysis rests solely with the judiciary, and may be subject to the personal bias and determinations of the judge, it violates the Separation of Powers Doctrine because it in effect allows courts to “set” foreign policy in holdings that will bind subsequent courts considering similar issues.²¹

¹⁶ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 534, 545 (S.D.N.Y. 2001), *aff’d*, 303 F.3d 470 (2d Cir. 2002).

¹⁷ *Soc’y of Lloyds v. Ashenden*, 233 F.3d 473, (7th Cir. 2000).

¹⁸ *See id.* at 481.

¹⁹ *See* Montre Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1164 (2007).

²⁰ *See id.* at 1207.

²¹ *See id.* at 1206–07.

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However, perhaps the most troublesome aspect of the international due process analysis arises because U.S. courts are not required to examine particular proceedings, which means this analysis has the potential to increase fraudulent practices by foreign litigants in “fair judicial systems,” who anticipate that unscrupulous tactics will not affect the enforceability of their judgments in the U.S. For example, American attorneys representing plaintiffs in foreign courts that generally afford fair proceedings have an incentive to exploit this weakness through fraud or bribery, particularly if they believe that their individual proceedings will receive minimal scrutiny. As counterintuitive as it may seem, the existing international due process analysis may afford unscrupulous plaintiffs who choose their forums carefully increased opportunities to tamper with individual proceedings, and then have potentially fraudulent judgments enforced in the U.S. Although this outcome seems implausible, both the *Dole* and *Chevron* cases discussed below provide examples in which choosing to file in a “fundamentally fair” country that only *generally* afforded due process rights might have made a significant difference in the outcome of the case.

IV. THE TRADITIONAL ROLE OF THE JUDICIARY IN FOREIGN AFFAIRS

With all due respect to the memory of the late Reagan-era Speaker of the House Tip O’ Neill, “politics” has rapidly become a global concern.²² With the advent of the internet and communications technology that allows instantaneous dissemination of information, political developments in nearly every country are scrutinized and evaluated on a global scale in real-time as they occur. As business and commerce becomes increasingly globalized, developments in countries the world over have both a concrete and abstract effect on the day-to-day activities of the citizens of the United States.²³ Similar to the so-called “butterfly effect,” where a small change in one system has drastic consequences in a seemingly unrelated system at a later date, political developments in nearly every country are instantly noted,

²² Former Speaker of the U.S. House Tip O’Neill (b. December 12, 1912, d. January 5, 1994) coined the popular phrase “All Politics is Local,” which stands for the principle that politicians must appeal to the concerns of their local constituents in order to garner success. According to this theory, local issues and mundane concerns drive political success, rather than broad theoretical or global issues or concerns which may only have intangible effects on voters.

²³ See generally Kristen Chick, *Egypt’s Liberals Walk Out, Leaving Islamists to Write a Constitution*, CHRISTIAN SCIENCE MONITOR, March 28, 2012, available at <http://www.csmonitor.com/World/Middle-East/2012/0328/Egypt-s-liberals-walk-out-leaving-Islamists-to-write-a-constitution>.

transmitted instantaneously via mass communication channels, and the resultant potential global ramifications are calculated, outcomes and effects are anticipated, and measures are put in place to either foster or minimize the impact of these changes.²⁴ While the “political” branches of the federal government (the Legislative and Executive Branches), have the staff and resources to make determinations of how global events will shape U.S. foreign policy, the Judiciary should theoretically be insulated from the requirement of making or formulating these foreign policy determinations based on constitutional and legal norms. Under the Separation of Powers doctrine, the foreign affairs power is, at least in theory, the exclusive domain of the Executive and Legislative branches.²⁵ However, it is often the Court itself that sets the limits on the extent to which it may consider questions of foreign affairs, and it does so through purely jurisprudential checks such as the Political Question Doctrine.²⁶ As in any self-policing system, notwithstanding the appeals system, the judiciary is almost unrestricted in its ability to step outside the bounds of its own self-imposed restrictions in the name of judicial interpretation. As corporations continue to expand and conduct business on a global scale, it is virtually certain that the judiciary will be called upon more and more to determine the validity of judgments rendered in foreign courts. In this specific circumstance, under the existing international due process analysis, courts are able to determine foreign policy, rather than interpret it, to the extent that they may evaluate and render a value judgment on the legal systems of foreign nations.

As noted above, the primary restraint on judicial incursions into the sphere of other branches is the Separation of Powers Doctrine, which is further encapsulated in the judicially created Political Question Doctrine. The doctrine was first suggested in the landmark *Marbury v. Madison* case, in which Chief Justice John Marshall described a distinct type of Executive action, the political action, wherein an official may exercise discretion.²⁷ The Court built on this in *Mitchell vs. Maurer*, noting that a federal court has a special obligation to “satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.”²⁸ Although the opinion seemed to suggest that the court always has the final say in interpreting the constitution-

²⁴ See generally Tim Mullaney, *Gas Could Hit \$8 on Iran Showdown, Experts Say*, USA TODAY, March 22, 2012, available at <http://www.usatoday.com/money/industries/energy/story/2012-03-21/gas-prices-iran-strait-of-hormuz/53704546/1>.

²⁵ See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“[T]he conduct of . . . foreign relations . . . is committed by the Constitution to the Executive and Legislative [branches] . . .”).

²⁶ Carodine, *supra* note 20, at 1196.

²⁷ *Marbury v. Madison*, 5 U.S. 137, 164 (1803).

²⁸ *Mitchell v. Maurer*, 293 U. S. 237, 244 (1934).

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ally conferred powers of the branches, it might refuse to do so in certain situations where the questions were simply not within the courts' expertise. Marshall suggested that these questions, although falling squarely within the Court's power to adjudicate, were better determined by the Executive branch, which is uniquely positioned to make policy decisions. This notion was later refined and expanded in *Baker v. Carr*, where Justice Brennan outlined the factors to be used by the court in determining whether a question is more appropriate for resolution by the political branches.²⁹ Considerations such as a "textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable and manageable standards for resolving it," and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" are several of the factors that play into the political question determination.³⁰ These factors would all seemingly come into play in the foreign affairs arena, which is unquestionably the province of the Executive and Legislative branches.³¹ However, realizing the potential to completely sideline the judiciary in questions regarding foreign affairs, the *Baker* Court indicated that invocation of the Political Question Doctrine was at the discretion of the Court. Although all questions involving foreign affairs are potentially political questions, the Court stated that it would be a mistake to "suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."³² Clearly however, there are situations dealing with foreign relations where the question falls into an area "textually . . . commit[ed] . . . to a coordinate political department," where the court's involvement might demonstrate "a lack of the respect due coordinate branches of government."³³ In foreign affairs, the Executive is often in the best position to determine the state of relations between the United States and other nations, and depending on the political and economic changes that occur within those nations, foreign relations may necessitate adjustment on a moment's notice notwithstanding any country's given political or economic stability. The Judiciary, therefore, often lacks both the expertise and legitimate authority to determine foreign policy, as recognized by the Court itself through application of the Political Question Doctrine, which analysis should also be applicable to the international due process analysis.

²⁹ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

³⁰ *See id.*

³¹ *See generally* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

³² *See* 369 U.S. at 211.

³³ *See id.* at 217.

V. UNDERPINNINGS OF RECOGNITION OF FOREIGN MONEY JUDGMENTS

However, courts have arrived at, and seemingly wholeheartedly embraced, the current iteration of the international due process analysis through a series of notable cases. As it stands, the analysis has evolved over time to the extent that it would be almost unrecognizable to its original proponents. The analysis has its roots in the principle of comity, which is the principle that one jurisdiction will extend certain courtesies to other nations through the recognition of the validity and effect of their executive, legislative, and judicial acts.³⁴ However, the basic hope underlying comity is that other jurisdictions will reciprocate the courtesy shown to them.³⁵ Many statutes relating to the enforcement of foreign judgments require that the judgments of a particular jurisdiction will be recognized and enforced by a country only to the extent that the originating country would recognize and enforce the judgments rendered by the enforcing country. This concept was perhaps most clearly outlined by the Supreme Court in the 1895 case of *Hilton v. Guyot*, which involved a French liquidator's attempt to collect on a judgment obtained in France against an American citizen.³⁶ In its landmark decision, the Supreme Court ruled in favor of the defendant-debtor, and refused to recognize the French judgment, beginning with a discussion of the doctrine of comity. Comity, the court noted, is neither a matter of absolute obligation on one hand, nor a matter of mere courtesy and good will on the other, but is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."³⁷ The court went on to review the treatment of foreign judgments in other countries, and then announced its rule regarding the conclusiveness of foreign judgments:

[W]e are satisfied that, where there has been opportunity for a full and fair trial abroad before a [foreign] court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show ei-

³⁴ See John Kuhn Bleimaier, *The Doctrine of Comity in Private International Law*, 24 CATH. LAW 327 (1979).

³⁵ See *id.* at 330.

³⁶ See *Hilton v. Guyot*, 159 U.S. 113 (1895).

³⁷ See *id.* at 163–64.

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ther prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.³⁸

Though the French judgment appeared to meet these requirements, the Court nevertheless refused to recognize the judgment based on a lack of reciprocity, because France did not at that time recognize American judgments.³⁹ Among western nations, France was one of the last major countries that refused to recognize and enforce foreign judgments in the absence of a complete reexamination of the merits, and only began doing so approximately 70 years after *Hilton* was decided.⁴⁰

Hilton's comity-based analysis for the recognition and enforcement of foreign judgments survives today, albeit in a drastically altered form. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign Money-Judgments Recognition Act in 1962, and the American Bar Association approved it the same year, and a majority of states have adopted the Uniform Act.⁴¹ States that have not adopted the Uniform Act usually rely on common law principles, and the Restatement of Foreign Relations Law (Restatement), which is also based on *Hilton*.⁴² Under both the Restatement and the Uniform Act, if a party obtains a judgment outside the United States but wishes to collect on it in the United States, that party must have the judgment "recognized" in order for the judgment to be enforceable.⁴³ Courts will typically enforce a judgment that the creditor seeks to have recognized, unless the judgment debtor establishes the applicability of one of the statutory grounds for non-recognition. These grounds are comprised of both mandatory grounds, which absolutely prohibit judicial recognition, and discretionary grounds,

³⁸ See *id.* at 202–03.

³⁹ See *id.* at 227.

⁴⁰ Kurt H. Nadelmann, *French Courts Recognize Foreign Money Judgments: One Down and More to Go*, 13 AM J. COMP. L. 72 (1964).

⁴¹ Carodine, *Political Judging*, *supra* note 20, at 1166.

⁴² See *In re Breau*, 565 A.2d 1044, 1049 (N.H. 1989) (referencing the common law principles of *Hilton v. Guyot*, as well as section 481 of the Third Restatement of Foreign Relations Law, adopted in 1987).

⁴³ Steven M. Richman & Justin B. Richman, *An Overview of Enforcement of Foreign Orders and Judgments in American Courts*, NEW JERSEY LAWYER, 13, February 2010.

which allow the judge some amount of leeway.⁴⁴ However, grounds that the Act considers “discretionary” include situations such as when the judgment was obtained by fraud or there is substantial doubt about the integrity of the rendering court.⁴⁵ The final discretionary ground in the 2005 iteration of the Act include situations when the specific proceedings are not compatible with the requirements of due process of law.⁴⁶ Remarkably, based on the plain wording of the Act, this suggests that the judge has the discretion to recognize a potentially *fraudulent* judgment and make it judicially enforceable, or to recognize a judgment in spite of evidence that it was rendered in proceedings devoid of due process. Likewise, in spite of evidence suggesting that the integrity of the rendering court has been compromised, the judge has discretion on whether or not to enforce the judgment, rather than the duty to dismiss the suit for enforcement.

Perhaps most troubling, however, are the “mandatory grounds” for non-recognition which have given rise to the analysis which the courts use today. These grounds suggest that a foreign judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law, the foreign court did not have personal jurisdiction over the defendant, or the foreign court did not have jurisdiction over the subject matter.⁴⁷ As it evolved, however, the exception has become the rule: the “mandatory grounds” for *non-recognition* of a judgment have become the test by which to determine whether a judgment *will* be recognized. The *Hilton* Court’s requirements of the opportunity for a full and fair trial before a foreign court of competent jurisdiction conducted upon regular proceedings, the citation or voluntary appearance of the defendant, an impartial system of jurisprudence treating all parties alike, and the lack of prejudice or fraud in the court or the system of laws under which it sits are no longer the primary aspects considered by the court in recognizing foreign judgments. Rather than those considerations, which appear likely to accurately measure the fairness and validity of a foreign judgment, the international due process analysis has been reduced to a single determination by the court as to whether the judgment was rendered “under a system which fails to provide impartial tribunals or procedures compatible with the requirements of due process of law.”⁴⁸ Under this loose standard, a foreign judgment need only be rendered under a system that generally provides impartial tribunals and proce-

⁴⁴ 2005 Uniform Foreign Money-Judgments Recognition Act, § 4(c).

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ 2005 Uniform Foreign-Country Money Judgments Recognition Act § 4(b).

⁴⁸ *See id.* at §§ 4(a)–(b).

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dures compatible with due process of law, as noted above. Significantly, the system does not need to provide due process commensurate with constitutionally guaranteed rights, but rather, the foreign procedures simply have to reflect some vague approximation of due-process. Courts have not required that the system in which the foreign proceedings took place comply with constitutional benchmarks of due-process, but rather, require only that the system generally affords proceedings that are fundamentally fair.⁴⁹ If the overall judicial system of the nation rendering the judgment is considered “fair,” then fairness in an individual case is not examined, allowing for potential recognition of foreign judgments rendered in proceedings that would clearly violate due process protections if they took place in a U.S. court.

VI. APPLICATION OF THE INTERNATIONAL DUE PROCESS ANALYSIS

The international due process analysis has been most clearly defined by Judge Posner in the case *Society of Lloyd's v. Ashenden*, when he noted that foreign judgments from the United Kingdom need not comport with American notions of due process to be enforceable in the United States.⁵⁰ Instead, Judge Posner held that foreign judgments from the United Kingdom and other “civilized” countries need only comply with a much looser standard, noting that the “international concept of due process” is distinct from the notion of due process that has emerged from American case law.⁵¹ Under this analysis, the fact that a foreign court denied an individual judgment debtor due process is inconsequential if the court feels that the country has a fair judicial system, and it may, in the name of comity, enforce the judgment against the judgment debtor. On the other hand, had the judgment creditor obtained the judgment in a country that the court feels has an unjust judicial systems, the court will completely disregard the judgment.⁵² The *Ashenden* court emphasized that the entire “system” must be unfair to preclude recognition, and expressed doubt as to the viability of the “retail approach” which focuses on the particular proceedings.⁵³ Also troubling is the suggestion that the analysis should only require that the foreign procedures be “compatible” with due process, rather than mirror the fundamental rights that would be constitutionally guaranteed in domestic courts.⁵⁴

⁴⁹ *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002).

⁵⁰ *Soc'y of Lloyds v. Ashenden* 233 F.3d 473, 480–81 (7th Cir. 2000).

⁵¹ *See id.*

⁵² *See id.* at 481.

⁵³ *See id.* at 477.

⁵⁴ *See id.*

The anomalies that arose under *Ashenden* and other related *Lloyd's* cases are ironic, because in 1977, the United States and the United Kingdom did attempt to establish a bilateral treaty to govern the recognition of judgments, and the proposal received preliminary approval.⁵⁵ However, despite numerous revisions and attempted compromises, the final adoption of this document never occurred, despite the many similarities of the judicial process and a shared legal history. It is almost unthinkable that a country that spawned so many of our legal traditions would give rise to questions regarding the recognition of judgments in which U.S. citizens were deprived of fundamental due process rights, but the *Lloyd's* cases were just such a situation.

The *Lloyd's* cases concern Lloyd's of London, established approximately 325 years ago and later incorporated in 1871. Lloyd's is not an insurance company as we would recognize one in the United States, but rather, is actually a marketplace itself, established as a corporate body under the Act 1871 of the British Parliament.⁵⁶ Lloyd's has historically been made up of individual financial backers, underwriters, and members, which have been traditionally known as "Names." Names may be either individuals, partnerships of individuals or corporate investors, all of which come together under the aegis of Lloyd's to pool and spread risk.⁵⁷ Lloyd's generally raises capital through soliciting investments, but in order to invest in Lloyd's underwriting activities, an individual or corporation must first become a Name by entering into an agency relationship with a Lloyd's employee, known as "Member's Agents." Further, to become a Name, investors must demonstrate a particular level of financial worth, and then must deposit their investment amount in the form of a letter of credit issued in favor of Lloyd's. The Members Agent then invests this money in one or more "syndicates," which is the general term for the risk-relationship between the entities that are performing the actions which are sought to be insured, and the group of investors who insure that risk.⁵⁸ Syndicates typically write business and insure risks for only one year, at the end of which the syndicate ceases to exist as an ongoing trading entity. However, after the year lapses, there is a lag time of two more years allowed for claims to come in and be settled, and at the end of

⁵⁵ Hay & Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 TEX. INT'L L.J. 421 (1976).

⁵⁶ Lloyd's Act of 1871, available at http://www.lloyds.com/The-Market/Operating-at-Lloyds/Regulation/Acts-and-Byelaws/~/_media/Files/The%20Market/Operating%20at%20Lloyds/Regulation/Acts%20and%20byelaws/Acts/Mar07LloydsAct1871.pdf.

⁵⁷ *Introduction to Lloyd's: Background*, HM REVENUE AND CUSTOMS, available at <http://www.hmrc.gov.uk/manuals/lmanual/LLM1010.htm>.

⁵⁸ "What Lloyd's Insures", About Lloyd's, LLOYD'S.COM, available at <http://www.lloyds.com/lloyds/about-us>.

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the third year, each syndicate closes its accounts, and the Names receive their share of the profits, or pay their share of the losses, and their liability comes to an end. Most importantly, until all claims are received and paid, a syndicate cannot close its accounts and distribute profits, and pending that closure, *Names are liable without limit* for their shares in the syndicates in which they invest. Each Name pledges his entire personal wealth to back up his share in the syndicate's insurance policies.⁵⁹ Historically, this potential inability of a syndicate to close its accounts in a timely fashion and then distribute profits had drastically reduced the appeal of investing in syndicates. In order to counter this, and generate interest by investors, Lloyd's instituted the practice of having reserves calculated to cover any outstanding claims that might come in against the syndicates, which allowed Lloyd's to maintain the schedule of closing accounts and declaring profits (or losses) at the end of the third year. At the time of closing actuaries calculate and set aside estimated reserves to cover the costs of both claims that have been notified but not yet paid, and potential claims which may have been incurred but not reported, and the costs of the reserves are then deducted from the syndicate's profits, and the syndicate is allowed to close at the end of the third year.⁶⁰

Lloyd's motto, *Uberrimae fidei*, is Latin for "of the utmost good faith," which is ironic in the eyes of many after a series of states and individual investors alleged fraud by Lloyd's on a massive scale, which led to multiple lawsuits and tested the outer limits of both comity and international judgment recognition. Over time, it was discovered that Lloyd's three-year business model was completely ineffective in dealing with risks that could be categorized as "long tail" risks, where the liabilities related to an occurrence may not become known for years, or perhaps even decades later. These types of risks often led to an insuring syndicate's reserves being vastly inadequate to cover later claims, which also led to resistance to doing business with Lloyd's from the perspective of the insured. To maintain the appeal of investing in Lloyd's on both the Name and insured sides, Lloyd's developed a scheme called "*Reinsurance to Close*" that allowed a syndicate to close in any event after three years and declare a result based only on the claims that had been made within the three year time limit. However, it would then package the entire portfolio of policies from that closed syndicate with a set amount of reserves to cover potential future claims against these policies, and pass them on to new syndicates that

⁵⁹ See *How is Risk Placed at Lloyd's*, LLOYD'S.COM (last visited May 7, 2014), <http://www.lloyds.com/lloyds/about-us/what-we-do/placing-risk>.

⁶⁰ LLM2020, *Syndicate Accounts: Accounting Rules until 2004: Three-Year Accounting*, HMRC.GOV.UK (last visited April 14, 2012), available at <http://www.hmrc.gov.uk/manuals/lmanual/LLM2020.htm>.

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were still active. These active syndicates, now saddled with potential future claims from “inherited” policies, used the calculated reserves to buy reinsurance policies to cover any losses that might arise from any future claims, which effectively shifted the risk from the syndicates to the reinsurer. However, Lloyd’s quickly discovered several problems with this structure. First, calculating the amount of reserves necessary to cover hypothetical future claims is a difficult and often inaccurate process, and so the amount of reinsurance purchased to cover future liability was often grossly inadequate once the claims manifested. Second, because the Names were personally liable without limit if the reinsurance amount was inadequate, the structure was similar to a “Ponzi” scheme, in the sense that early investors were able to take profits while passing risks along to subsequent investors.⁶¹ That is, as the portfolios were transferred forward year after year, the investors in the most recent syndicate became personally liable for all of the latent liabilities of its predecessor syndicates, and unless the reserves (in the form of reinsurance) passed on were adequate to pay potential future claims, the result of using this system was to create a “time bomb” of liability.⁶² The system was a perfect breeding ground for fraud, because profits taken as a syndicate closed were directly reduced by the reserves calculated, which in turn influenced the amount of reinsurance purchased. This encouraged intentionally underestimating reserves, which would then require a lower amount of reinsurance to be purchased, and maximize present profits. Further, many of the Names solicited during this time period claim that they were led to believe that the very existence of Reinsurance to Close ended their liability at the end of the three year syndicate period, and that they were completely unaware of the potential liability from inadequate reinsurance.⁶³

In the 1980s, when Lloyd’s governing committee learned of the potential future liability posed by the hazards of asbestos and other

⁶¹ See Richard Thomson, *Two Men Who Lost a Billion: Names in the Lloyd’s Syndicates Run by Anthony Gooda and Derek Walker are Facing Ruin*. Richard Thomson Relates a Tale of Two Incompetents, THE INDEPENDENT (June 27, 1993), available at <http://www.independent.co.uk/news/business/profile-two-men-who-lost-a-billion-names-in-the-lloyds-syndicates-run-by-anthony-gooda-and-derek-walker-are-facing-ruin-richard-thomson-relates-a-tale-of-two-incompetents-1494224.html>.

⁶² Courtland H. Peterson, *Choice Of Law And Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd’s of London Cases*, 60 LA. L. REV. 1259, 1262 (2000).

⁶³ Jamie Dunkley, *Lloyds Names Face Bankruptcy as Court Battle Ends*, THE TELEGRAPH, June 4, 2009, <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/insurance/5446813/Lloyds-Names-face-bankruptcy-as-court-battle-ends.html>.

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pollutants, they realized that many of the most profitable syndicates, which many members of the governing committee had personally invested in, faced losses on a scale that would literally destroy Lloyd's as a functioning entity.⁶⁴ A report was generated that recommended that new Names be actively recruited so that additional assets would be available to meet impending losses, and that recruitment be facilitated by reducing the assets which each Name had to prove in order to establish membership. This would serve to bring in thousands of new Names, which would dilute impending losses by actively passing costs on to the new Names. In 1972 Lloyd's had begun soliciting Americans to be Names, and continued to do so during the late 1970s and 1980s, but although the governing committee knew of the pending disaster from long-tail asbestos claims, the new Names were not informed of the probable liability they faced.⁶⁵ More importantly, they were not told that their liability was both several and unlimited. In essence, expanding the numbers of Names functioned to provide more assets to absorb the impending losses, while allowing insiders to avoid future liability by surreptitiously leaving the at-risk syndicates. In fact, during this period, some of the Names were repeatedly assured of the safety of their investment, and were actually urged to increase their investment in the syndicates.⁶⁶

In the early 1980s, Lloyd's sought to take measures to protect itself from litigation, and succeeded in obtaining a new 'private act' of the British Parliament, entitled the Lloyd's Act of 1982, which provided Lloyd's with immunity from legal liability, and further, stripped the ability of the Names to regulate themselves by establishing a governing committee known as the Council of Lloyd's.⁶⁷ Lloyd's began requiring all Names to sign contracts in which they agreed to comply with the Lloyd's Act, and which included choice-of-forum and choice-of-law clauses under which they agreed that all legal disputes would be brought in English courts and decided under English law.⁶⁸ The Names were not informed of the extent and implications of these changes until much later when losses in the billions of dollars became known. The choice-of-law and choice-of-forum clauses proved to be critical in the litigation in American courts during the 1990s, when the Names became individually liable for the massive losses from the reinsurance scheme.⁶⁹ The Lloyd's Act authorized the Council to appoint

⁶⁴ *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 478 (7th Cir. 2000).

⁶⁵ *Soc'y of Lloyd's v. Ashenden*, 98 C 5335, 1999 WL 284775 1, 4 (N.D. Ill. Apr. 23, 1999) *aff'd sub nom. Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) [hereinafter *Ashenden*].

⁶⁶ *See id.*

⁶⁷ *See id.* at 2.

⁶⁸ *See id.*

⁶⁹ *Ashenden v. Lloyd's of London*, 96 C 852, 1996 WL 717464 1,1 (1996).

“substitute agents,” who would have the power “to act on behalf of members for the proper regulation of the business of insurance at Lloyd’s.”⁷⁰ When Lloyd’s experienced over \$12 billion in losses during the 1980s and early 1990s, and the Names were unable to meet their contribution requirements, Lloyd’s entered into a series of settlement agreements with the Names, under which Lloyd’s and the Names who agreed to settle exchanged mutual releases of liability and waivers of claims.⁷¹ The majority of the Names accepted the settlement plan in 1996, although a substantial number of the Names refused to do so. In accordance with the settlement plan, all of the Names, including those who rejected the settlement, were offered the opportunity to purchase reinsurance. Significantly, even those Names that did not participate in the settlement agreements were covered by the reinsurance, but the Names who refused to settle were not included in the “mutual waiver of claims.”⁷² Further, there were provisions in the settlement plan that shielded Lloyd’s from being tangled in extended litigation. Specifically, Names could not claim any offset against Lloyd’s and could not dispute the amount of their reinsurance premiums in any lawsuits brought by Lloyd’s to collect the reinsurance premiums. To ensure that these provisions were enforceable against the non-settling Names, the Council appointed a “substitute agent” to sign the reinsurance contract on their behalf pursuant to the Lloyd’s Act.⁷³ Non-settling Names sought to challenge Lloyd’s ability to enact the settlement plan, as well as specific provisions of the reinsurance contract in court in the United Kingdom. However, the British courts affirmed Lloyd’s power to enact the settlement plan, and upheld the validity of the clause which prevented the Names from claiming any set-offs from the reinsurance premium, including damages for fraud.⁷⁴ Additionally, the British courts also upheld what was termed a “conclusive evidence” clause of the reinsurance contract, which stated that whatever Lloyd’s determined the premium amount to be was automatically conclusive evidence between the Names and the reinsurer, and the Names would simply be liable for whatever amount Lloyd’s set.⁷⁵

When Lloyd’s sought to enforce provisions in the contracts against American Names by billing them for mounting losses, the subsequent cases highlighted the fraudulent misrepresentations that Lloyd’s had used in order to generate capital in order to dilute its losses. The defendants in *Ashenden* were a husband and wife who re-

⁷⁰ *Ashenden*, 98 C 5335 at 2.

⁷¹ *See id.*

⁷² *See id.* at 2–3.

⁷³ *See id.* at 3.

⁷⁴ *See id.*

⁷⁵ *See id.*

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sided in Illinois, James and Mary Jane Ashenden. The Ashendens were separately recruited to become Names in 1977 and in 1984 by a Managing Agent, and they initially invested \$70,000 after being assured that Lloyd's was an esteemed and time-honored institution that only invested in "conservative risks."⁷⁶ The Managing Agent continued to reassure the Ashendens regarding the security of their investment in Lloyd's, and they invested even more in Lloyd's, never having been informed that they faced tremendous impending losses because of asbestos claims. In 1991, Lloyd's called on the Ashendens to help cover increasing losses sustained by the syndicates, who insured policies that had been successively reinsured without adequate reserves, sometimes dating as far back as the 1930s.⁷⁷ Lloyd's made demand upon the Ashenden's letters of credit to cover the losses, and the Ashendens, in addition to over forty other Illinois Names, ultimately sued Lloyd's and several of its agents in state court, arguing that Lloyd's had violated Illinois securities and consumer protection laws.⁷⁸ Lloyd's removed the case to federal district court, and the district court dismissed the case, ruling that the Names were subject to the choice of law and forum clauses as outlined in the settlement plan.⁷⁹ Subsequently, Lloyd's sent the Ashendens copies of the settlement plan, which included "finality statements" that set forth demands from each of them for the balance that they owed from their underwriting liabilities, and from their shares of the reinsurance premium. Lloyd's demanded \$179,430 from James Ashenden and \$222,668 from Mary Jane Ashenden, but stated that their individual liabilities would be reduced to \$100,000 each if they executed the mutual releases.⁸⁰ The Ashendens refused the settlement offer, and they instructed their agent not to sign the reinsurance agreements for them. But as noted, Lloyd's had made the reinsurance payments for all of the Names, including payment on behalf of the non-settling Names, like the Ashendens, who had also refused to sign the reinsurance contract. Lloyd's then sued those Names, including the Ashendens, in the United Kingdom, and was able to get default judgments because of the waiver and "conclusive evidence" clauses.⁸¹ The British court denied the Names leave to appeal, and so the British judgment was final, valid, and enforceable.

Lloyd's then sought to have the judgments recognized in the United States. Writing for the Seventh Circuit, Judge Posner began

⁷⁶ See *id.* at 4.

⁷⁷ See *id.*

⁷⁸ Ashenden v. Lloyd's of London, 934 F. Supp. 992, 994 (N.D. Ill. 1996).

⁷⁹ See *id.*

⁸⁰ See Ashenden, 98 C 5335 at 4.

⁸¹ See *id.*

his analysis by outlining Illinois's version of the Uniform Foreign Country Money-Judgments Recognition Act, which allows that a foreign judgment is unenforceable if rendered by a court outside the United States and the judgment was "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."⁸² The court found the word "system" fatal to the Ashendens' position.⁸³ Judge Posner noted that the judgments against the defendants were obtained in Great Britain's High Court, "which corresponds to our federal district courts; they were affirmed by the Court of Appeal, which corresponds to the Federal Courts of Appeals; and the Appellate Committee of the House of Lords, which corresponds to the U.S. Supreme Court, denied the defendants' petition for review."⁸⁴ Posner unequivocally declared that "[t]he courts of England are fair and neutral forums,"⁸⁵ and asserted that "[a]ny suggestion that this system of courts does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible."⁸⁶ He further asserted that British courts "are highly regarded for impartiality, professionalism, and scrupulous regard for procedural rights."⁸⁷ The Seventh Circuit concluded that the Illinois Judgment Recognition Act provided that only the system under which a foreign judgment was entered be "compatible with" American notions of due process, not identical.⁸⁸ According to Judge Posner, there was no "serious question" that the United Kingdom's judicial system comports with the international concept of due process.⁸⁹

The Court rejected the Ashenden's argument that it should examine the particular proceedings in which Lloyd's obtained the judgments against them, rather than looking only at the British judicial system generally.⁹⁰ However, because of the Illinois Act's focus on the "system", Posner concluded that the Act did not call for "a retail approach", which he stated would be inconsistent with providing a streamlined, expeditious method for collecting judgments rendered by courts in other jurisdictions, and which would, in effect give the judgment creditor a further appeal on the merits.⁹¹ However, Judge Posner went on to state that had the judgment at issue "been rendered by

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ Carodine, *supra* note 20, at 1183.

⁹⁰ *See Ashenden*, 223 F. 3d at 476.

⁹¹ *See id.*

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Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question,” the Court may have considered the type of evidence needed to show a denial of international due process.⁹²

This statement highlights the major flaw in the international due process analysis, that whether an individual’s claim that due process rights were violated are measured against applicable sets of standards that are wholly at the discretion of the presiding judge, and their personal perception of the country that the judgment was rendered in. It is generally believed that Lloyd’s engaged in fraud on a massive scale, but more disturbing is the fact that because of this fraud, the Ashendens were deprived of rights that, if this situation had occurred in the United States, would have been guaranteed under the Constitution, and the actions of Lloyd’s would have subjected it to criminal prosecution. However, under this analysis, Lloyd’s not only perpetrated fraud, but was then allowed to sue, as judgment creditors, the very people they had defrauded. In the United States, one of the most fundamental requirements of procedural due process is “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”⁹³ However, the U.S. court ignored the fact that the British Court entered a judgment against the Ashendens for the reinsurance premiums even though the Ashendens never had any real opportunity to contest these figures. The figures were calculated solely at Lloyd’s discretion, with no other proof of their validity other than the fact that Lloyd’s chose the amount of the assessment, and under the “conclusive evidence” provision, the Court unquestioningly accepted that as the amount of the debt owed. By focusing solely on the Ashenden’s contract with Lloyd’s, the Seventh Circuit enforced a judgment entered by British court without affording the Ashendens any meaningful opportunity to be heard or challenge the claims brought against them. In essence, the Court’s decision meant that the standardized contracts the Ashendens signed when they became Names granted Lloyd’s the power to appoint substitute agents, chosen for the sole purpose of unilaterally waiving the Names’ rights to challenge the very fraud that led them to become Names initially.⁹⁴ The Ashendens were left with no ability to challenge a settlement agreement entered on their behalf, and specifically against their wishes, and moreover, were left with no meaningful opportunity to raise claims of fraud nor any other defenses against Lloyd’s.

The *Ashenden* case is significant for its clear application of the international due process analysis, which, as it stands, seems to be

⁹² *See id.*

⁹³ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

⁹⁴ *Carodine*, *supra* note 20, at 1184.

fundamentally flawed. It allows for a potential deprivation of due process that when challenged, will look only to whether the entire judicial system is, in the court's view, fundamentally fair, and courts may pass judgment on other judicial systems with little or no evidentiary bases for their assessments. Judge Posner himself presumed the fairness of the British system without any significant, in-depth procedural analysis.⁹⁵ However, he also suggested that courts might label other countries as fundamentally "uncivilized," and following this holding, might similarly pass judgment on those countries without meaningful analysis.⁹⁶ Some authors have suggested that this scheme not only encourages, but indeed requires, courts to look the other way when presented with questionable and possibly fraudulent judgments from favored countries, and this favored status need not reflect the opinion of the Executive branch in any fashion, but rather, the opinion of the court itself.⁹⁷

VII. THE *CHEVRON/ECUADOR* LITIGATION

The *Ashenden* case was decided in 2000, but the international due process analysis has been also been playing out to some extent in litigation that dates back into the 1990s. It involves a situation that is reminiscent of the *Lloyd's* case, but in this case, rather than misrepresentation and failure to disclose by the plaintiff, the behaviors of the plaintiffs involve widespread fraud and bribery on an almost unprecedented level.⁹⁸ The case involves political corruption, fabricated evidence, manipulation and threats against the Ecuadorian judiciary, and other conduct so egregious that the U.S. judge hearing the case to enforce a judgment handed down by the Ecuadorian court found the plaintiff's attorney, Steven Donziger, liable for coercion, bribery and other violations of the Racketeering Influenced and Corrupt Organizations Act.⁹⁹ It is still unknown whether the recent ruling in the federal

⁹⁵ *Ashenden*, 233 F.3d at 476–78.

⁹⁶ *See id.*

⁹⁷ Carodine, *supra* note 20, at 1188.

⁹⁸ References to fraud, bribery, racketeering and other wrongdoing by plaintiffs' attorneys in the *Chevron/Ecuador* litigation are based on Judge Kaplan's ruling in *Chevron v. Donziger*, No. 11 Civ. 0691, 17–20, (S.D.N.Y. Mar. 4, 2014), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=379>. It is important to note that this ruling is subject to appeal and plaintiffs' attorneys may be cleared of any wrongdoing. However, this would not change the fundamental premise of this paper regarding the shortcomings of the existing international due process analysis.

⁹⁹ Michael Goldhaber, *Judge Kaplan Lays Into Plaintiffs in Ecuador Suit Against Chevron*, THE AMERICAN LAWYER, Nov. 8, 2010, available at http://www.law.com/jsp/law/article.jsp?id=1202474516910&Judge_Kaplan_Lays_Into_Plaintiffs_in_Ecuador_Suit_Against_Chevron.

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district court could result in proceedings seeking the plaintiff's attorney's disbarment, but the District Court, in examining statements by the plaintiff's attorney, stated, "it is relevant to note that Donziger is a member of the New York Bar. His conduct, whether in the United States or in Ecuador, was subject in every respect to the New York rules governing the conduct of lawyers."¹⁰⁰ Although this ruling is recent as of March 2014, even in the face of early evidence that the original suit and the resulting judgment were potentially based on fabricated evidence and fraud, the suit to enforce the judgment has laboriously wound its ways through U.S. courts for years. The *Chevron/Ecuador* litigation is significant because it raises questions about the admissibility of expert testimony and evidence that is rendered or gathered abroad, particularly when used to support damage awards in countries that are subject to frequent regime change, and political or economic instability, leading to unstable governments. These countries are typically governed by regimes that are semi-dictatorial, and often subject to allegations ranging from bureaucratic ineptitude to widespread corruption.¹⁰¹ Ecuador, where the judgment was rendered in this case, is currently governed by a regime that is considered both politically and economically unstable. The country is marked by having had eight presidents in the last twelve years; 40% of its population living in poverty and another 13% live in extreme poverty; and its current President is a socialist with strong ties to Venezuela's late president Hugo Chavez.¹⁰² However, under any theory of natural law or social justice, the fact that the government of a country might be corrupt should not serve to deprive its citizens of remedies in court against U.S. companies who have intentionally and validly wronged them. Likewise, the fact that a country has a beneficent government should not diminish the need to protect the due process rights of U.S. citizens or companies who may be innocent of wrongdoing. As the world moves towards a more global economy, the resulting rise in transnational litigation such as *Chevron/Ecuador* suggests that the international due process analysis' focus on judging the entire judicial system of a country may require closer examination.

The original *Chevron/Ecuador* lawsuit concerns accusations by approximately 30,000 plaintiffs that Texaco, which Chevron acquired in 2001, dumped billions of gallons of contaminated water in and

¹⁰⁰ See *Chevron*, No. 11 Civ. 0691 at 20.

¹⁰¹ Sophie Brown, *Report: Political Instability on the Rise*, CNN, Dec. 12, 2013, available at <http://edition.cnn.com/2013/12/11/business/maplecroft-political-risk/>.

¹⁰² CLARE SEELKE, CONG. RESEARCH SERV., RS21687, ECUADOR: POLITICAL AND ECONOMIC SITUATION AND U.S. RELATIONS (2008).

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around the Ecuadorian region of Lago Agrio.¹⁰³ During the period that the lawsuit has been in the court system, six separate Ecuadorian judges have been involved in the case, and “one federal judge in New York died before he could make a ruling.”¹⁰⁴ The case, perhaps the largest environmental lawsuit in history, aside from the 2010 Deepwater Horizon spill, has once again brought the question of the recognition of international judgments to the foreground. After an Ecuadorian judge rendered an \$18 billion damage award against Chevron (later reduced to \$9.5 billion), the company vowed to continue fighting the lawsuit, claiming that the plaintiffs’ case had no merit and was based on fabricated evidence and testimony.¹⁰⁵ Chevron continuously maintained the lawsuit was a scheme by the plaintiff’s attorney, Steven Donziger, to whip up a frenzy of support among the media and environmental groups so that Chevron would eventually settle just to end the case.¹⁰⁶ Significantly, Donziger was successful in eliciting substantial financial support, and eventually it was discovered that the plaintiff’s case had been underwritten by a number of investors including a large plaintiff’s firm based in Philadelphia that was not involved in the suit, but which sought to collect a portion of the judgment.¹⁰⁷

The plaintiffs’ claims stem from Texaco’s participation in an exploration and production venture with Petroecuador, Ecuador’s state-owned oil company, in the 1970s. Texaco was a minority partner, and representatives from Chevron claimed that “the production operation took place primarily on government lands and was conducted in compliance with Ecuadorian laws and regulations.”¹⁰⁸ Chevron produced approximately 1.7 billion barrels of crude oil, and it alleged that the Government of Ecuador received 95% of the financial proceeds.¹⁰⁹ The resulting oil production and exports were so profitable that Ecuador’s per-capita GDP doubled within a single decade, and even today, oil exports still provide the bulk of public revenues.¹¹⁰ Attorneys initiated the original litigation in August 1993 in Texas state court. The case

¹⁰³ Bryan Walsh, *An Oily Case: Chevron’s Never-Ending, Record-Breaking Lawsuit in Ecuador*, TIME, Jan. 2012, available at <http://science.time.com/2012/01/09/an-oily-case-chevrons-never-ending-record-breaking-lawsuit-in-ecuador/>.

¹⁰⁴ *Id.*

¹⁰⁵ Dominic Rushe and Rory Carroll, *Chevron Fined over \$8 Billion over Amazon “Contaminations”*, THE GUARDIAN, Mar. 26, 2014, available at <http://www.theguardian.com/business/2011/feb/14/chevron-contaminate-ecuador>.

¹⁰⁶ Jessica M. Karmasek, *Pressure Placed on Chevron to Settle Ecuador Lawsuit*, LEGAL NEWSLINE, May 25, 2011, available at <http://legalnewsline.com/issues/class-action/232868-pressure-placed-on-chevron-to-settle-ecuador-lawsuit>.

¹⁰⁷ Daniel Fisher, *Chevron’s \$27 Billion Problem*, FORBES, July 13, 2009.

¹⁰⁸ CHEVRON IN ECUADOR, <http://www.texaco.com/sitelets/ecuador/en/history/>.

¹⁰⁹ *Id.*

¹¹⁰ Walsh, *supra* note 104.

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was subsequently removed to the U.S. District Court for the Southern District of Texas in *Sequihua v. Texaco*.¹¹¹ The plaintiffs alleged that, rather than safely disposing of the byproducts of oil exploration and production, Texaco simply dumped the byproducts into large open pits, and left hundreds of these pools behind when the company's contract ended and it left the country.¹¹² The attorneys for the plaintiffs brought claims based on property damage, personal injuries, and "increased risk of disease due to negligent or otherwise improper oil piping and waste disposal practices."¹¹³ In addition to monetary relief, the plaintiffs sought an injunction requiring Texaco to "return the land to its former condition" and the imposition of a "trust fund" to be administered by the Court.¹¹⁴ Attorneys for Texaco denied these charges, and offered evidence that Texaco's operations were in line with the law, as well producing evidence that Texaco had completed a \$40 million remediation and public works program supervised, inspected and approved by the Government of Ecuador.¹¹⁵ Texaco claimed that after it ceased operations, the Government of Ecuador had granted Texaco a full and complete release of all further claims, liabilities and obligations.¹¹⁶ The plaintiffs also attempted to tie birth defects and cancer to the waste, while Texaco claimed that there had been no proven health effects from the pollution, and that in any event, they had remediated their share of any pollution and were shielded from liability by the releases from Government of Ecuador.¹¹⁷

The *Sequihua* court subsequently dismissed the suit fewer than five months later on grounds of international comity and *forum non conveniens*.¹¹⁸ However, in November of 1993, the plaintiff's filed a concurrent suit in Southern District of New York (the judicial district encompassing Texaco's corporate headquarters), in which the judge allowed the plaintiffs the opportunity, through discovery and otherwise, to attempt to ascertain the scope of Texaco's alleged involvement in the pollution, and to prove that the litigation belonged in

¹¹¹ *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

¹¹² Patrick Radden Keefe, *Reversal of Fortune*, *NEW YORKER*, Jan. 9, 2012, available at http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe?currentPage=all.

¹¹³ Christina Weston, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability For Conduct Abroad*, 25 *EMORY INT'L L. REV.* 731, 732 (2011) (internal citations omitted).

¹¹⁴ *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 62 (S.D. Tex. 1994).

¹¹⁵ *Chevron in Ecuador*, *supra* note 111; Walsh, *supra* note 104.

¹¹⁶ *Chevron in Ecuador*, *supra* note 111.

¹¹⁷ Walsh, *supra* note 104.

¹¹⁸ *Sequihua* 847 F. Supp. 61, 62.

U.S. courts.¹¹⁹ This suit, *Aguinda v. Texaco*, was also subsequently dismissed on the grounds of international comity and *forum non conveniens*, as well as the failure to join indispensable parties - namely, the Republic of Ecuador, and Petroecuador, the state-run oil company which conducted all operations since Texaco left the country in 1992.¹²⁰ However, on appeal in *Jota v. Texaco, Inc.* (which consolidated the Ecuadorian case with a case filed by Peruvian plaintiffs who lived downstream from the affected area), the Second Circuit Court of Appeals held that the district court's dismissal on grounds of *forum non conveniens* and comity was erroneous in the absence of any condition requiring the oil company to submit to jurisdiction in Ecuador, and that the district court's reasoning regarding the plaintiffs' failure to join the Republic of Ecuador as an indispensable party was only applicable to the part of the complaint that "sought to enjoin activities currently under Republic's control."¹²¹ The Second Circuit, possibly seeking to relieve district courts of complex examinations of jurisdictional issues when transferring to foreign courts, had noted in earlier cases that a conditional dismissal obviated the need for an extensive inquiry into foreign jurisdictional law, reasoning that if the foreign court refused to take jurisdiction, the plaintiff would "still [be] protected by the conditional nature of the dismissal."¹²² Accordingly, the Court of Appeals remanded the case to the Southern District of New York for proceedings in line with its decision.¹²³

At this point it may be appropriate to discuss a discrepancy initially noted by the Second Circuit Court of Appeals in *Jota*. The court noted that the litigation had taken a curious turn at this point: the litigation was proceeding under the unusual context of a foreign country, the Republic of Ecuador, initially expressing vigorous opposition to the maintenance of this litigation in a United States court and then, after a change in the government, just as vigorously urging that the litigation proceed here.¹²⁴ Remarkably, the court noted that although the Republic of Ecuador had originally considered the suit an affront to their sovereignty, after the regime change the Ecuadorian government had urged that "*only the adjudication of jurisdiction in the claim filed by Ecuadorians . . . in a federal court of N.Y.* against the Texaco Company, [would] bring to those affected the possibility of finding just treatment and a solution to the serious situation that they are

¹¹⁹ *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996) *vacated sub nom.* *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

¹²⁰ See *Aguinda*, 945 F. Supp. at 627.

¹²¹ *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

¹²² *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 968 (2d Cir. 1980).

¹²³ *Id.*

¹²⁴ *Jota*, 157 F.3d at 155.

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going through.”¹²⁵ This point underscores the fact that the *Chevron / Ecuador* litigation may stand for one of the great “ironies” in the field of law to date. The attorneys for the Ecuadorian plaintiffs brought suit in the U.S. because of expanded remedies such as punitive damages, expanded procedural opportunities such as broad discovery tools, and the right to a jury trial on issues of fact.¹²⁶ The plaintiffs, and eventually the Republic of Ecuador, fought to keep the litigation in the United States, quite possibly because of the potential for a huge monetary award from a sympathetic U.S. jury. Texaco, wanting to avoid the suit all together, in what may have possibly been one of the largest miscalculations in the history of corporate law, repeatedly brought motions to dismiss under *forum non conveniens* grounds, seeking to have the case transferred to Ecuador.¹²⁷ The practical effect of a *forum non conveniens* dismissal is significant – in the overwhelming majority of cases, a *forum non conveniens* dismissal is a clear victory for a defendant because it forces plaintiffs to either settle for insignificant amounts or abandon their efforts, particularly if the courts in the country to which the suit would be transferred do not historically award huge tort judgments.¹²⁸

Texaco was well within reason to assume that, once it established that Ecuador provided a more appropriate forum, the suit would fall by the wayside. Because Ecuador was traditionally pro-defendant, large companies such as Texaco would naturally anticipate that they would be able to take advantage of a better bargaining position and settle the case quickly, or have the case dismissed entirely.¹²⁹ The *Sequihua* court undertook a detailed analysis to determine whether Ecuador was an adequate alternative forum, eventually granting the motion to dismiss on *forum non conveniens* grounds.¹³⁰ The *Aguinda* Court following the reasoning of the *Sequihua* court, found the obstacles to maintaining U.S. jurisdiction even more persuasive, and also dismissed on *forum non conveniens* grounds.¹³¹ As noted above, on appeal, the Second District Court of Appeals reversed and remanded, finding that the failure of the District Court to require Texaco to submit to *in personam* jurisdiction in Ecuador to be reversible error.¹³² During all of the initial U.S. proceedings, the plaintiffs continuously

¹²⁵ *Id.* (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Sequihua*, 847 F. Supp. at 62.

¹²⁸ Weston, *supra* note 114, at 741.

¹²⁹ Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 100 COL. L. REV. 1444 (2011).

¹³⁰ *Sequihua*, 847 F. Supp. at 65.

¹³¹ *Aguinda*, 945 F. Supp. at 628 (S.D.N.Y. 1996) *vacated, sub nom. Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

¹³² *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).

protested the transfer of the litigation to Ecuador.¹³³ In perhaps the most prescient arguments of the entire litigation, the plaintiffs, who would eventually triumph in Ecuador, introduced evidence showing that “the Ecuadorian courts were subject to corrupting influences and outside pressures, especially from the military, that rendered them inadequate to dispense independent, impartial justice in these cases.”¹³⁴

It was only on remand to the Southern District of New York, that anyone in the judiciary began expressing misgivings about the ability of the Ecuadorian Court system to render a fair decision in this case.¹³⁵ Noting that the plaintiffs themselves initially raised issues of lingering corruption in the Ecuadorian court system in their *forum non conveniens* argument, the District Court stated that the events surrounding the regime change in Ecuador had revived lingering questions about the ability of the Ecuadorian (and Peruvian) courts to “dispense independent, impartial justice in these cases.”¹³⁶

It is interesting to note that the reason the “fairness” of the Ecuadorian court system was at issue during these proceedings is because, like the international due process analysis, the *forum non conveniens* analysis also requires judges to assess the appropriateness of the alternative forum.¹³⁷ The Second Circuit Court of Appeals has clarified the type of finding that district courts are required to make in order to determine the adequacy of alternative foreign forums when foreign law or practice is an issue, and, as in the *Chevron/Ecuador* litigation, when dismissal is conditional on the alternate forum gaining jurisdiction over the defendant.¹³⁸ In those circumstances, the Second Circuit stated that a district court must undertake a full analysis of the foreign laws or practices relevant to its decision to dismiss on *forum non conveniens* grounds, and closely review all submissions that are related to the adequacy of the forum.¹³⁹ The requirement that the dismissal be conditional serves to protect the non-moving party, and allows a court to dismiss on *forum non conveniens* grounds even if the court is unable to make a definitive determination as to the adequacy of the foreign forum.¹⁴⁰ Further, in making the determination, the court’s justifiable belief in the adequacy of the alternative forum has been held to be a sufficient basis for granting a conditional dismissal

¹³³ See generally, *Sequihua*, 847 F. Supp. at 61; *Aguinda*, 945 F. Supp. at 625; *Jota*, 157 F.3d at 53.

¹³⁴ *Weston*, *supra* note 116, at 733.

¹³⁵ *Aguinda v. Texaco, Inc.*, 142 F. Supp 2d 534, 543-44 (S.D.N.Y. 2001).

¹³⁶ *Id.* at 743.

¹³⁷ See *Bank of Credit & Commerce Int’l Ltd. v. State Bank of Pak.*, 273 F.3d 241, 246 (2d Cir. 2001).

¹³⁸ See *id.* at 247.

¹³⁹ *Id.* at 248.

¹⁴⁰ See *Calavo Growers of California*, 632 F.2d at 968.

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in favor of a foreign forum.¹⁴¹ However, the Second Circuit held that even if the court asserts a justifiable belief in the adequacy of the alternative forum, it is required to cite to the evidence in the record that supports this belief, bearing in mind that it is at all times the movant's burden to persuade the court of the adequacy of any alternative forums.¹⁴² In essence, the movant must prove that the forum is adequate to such an extent that it gives rise to a justifiable belief on the part of the court, and in cases when the court has concerns regarding the accuracy of its justifiable belief, the conditional dismissal serves to protect the non-moving party.¹⁴³

The district court, applying the analysis outlined by the Second Circuit, consulted the U.S. Department of State, Ecuador Country Report on Human Rights Practices for 2000, noting that a primary conclusion of the report was that "[t]he most fundamental human rights abuse in Ecuador stems from shortcomings in its politicized, inefficient, and corrupt legal and judicial system."¹⁴⁴ Acknowledging the caution and deference that a U.S. court must exercise in approaching the question of the independence and impartiality of a foreign court, the district court reopened the record to receive additional submissions regarding the adequacy of the court system of Ecuador for adjudicating the dispute.¹⁴⁵

At this point, with the plaintiffs essentially stipulating in district court that they were unable to produce material evidence of Texaco's involvement in the pollution, Texaco, with almost self-destructive determination, continued to press for transfer of the case to Ecuador, consenting to *in personam* jurisdiction in Ecuador, waiving statute of limitations and accepting service of process in Ecuador.¹⁴⁶ This fulfilled the Second Circuit's requirement that dismissal be conditional on Texaco's submission to *in personam* jurisdiction. The district court then outlined its "justifiable belief" in the adequacy of Ecuador as an alternative forum. While noting that "no one claims the Ecuadorian judiciary is wholly immune to corruption, inefficiency, or outside pressure," the district court ultimately decided that Texaco had carried its burden in proving that Ecuador was an adequate forum, theorizing that "the courts of Ecuador can exercise, with respect to the parties and claims here presented, that modicum of independence and impar-

¹⁴¹ See *id.* at 968 n.6.

¹⁴² See *Bank of Credit & Commerce Int'l Ltd.*, 273 F.3d at 248.

¹⁴³ See *id.*

¹⁴⁴ Aguinda, 142 F.Supp 2d at 544 (citing Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices: Ecuador*, U.S. DEP'T OF STATE (2001), <http://www.state.gov/j/drl/rls/hrrpt/2000/wha/766.html>).

¹⁴⁵ See Aguinda, 142 F. Supp. 2d at 538 (S.D.N.Y. 2001).

¹⁴⁶ *Id.* at 539.

tiality necessary to an adequate alternative forum.”¹⁴⁷ In what was, in hindsight, an ill-fated proclamation, the district court stated that “even the possibility that corruption or undue influence might be brought to bear if this litigation were pursued in Ecuador seems exceedingly remote.”¹⁴⁸ The Ecuadorian plaintiffs appealed this decision, but in 2002 the Second Circuit affirmed the District Court’s dismissal under *forum non conveniens*, ruling that the lower court’s decision was not an abuse of discretion, *notwithstanding repeated arguments by the plaintiff’s attorneys that Ecuadorian courts were subject to corruption and incapable of impartiality*.¹⁴⁹

In 2003, the Ecuadorian plaintiffs re-filed their suit in Ecuador against Chevron Corporation, which was at that point the successor of Texaco.¹⁵⁰ Despite continuing attempts by the plaintiffs to try the suit in the media and in the court of public opinion by suggesting that the suit was about a greedy U.S. corporation taking advantage of the powerless citizens of a smaller country, more facts began to emerge. As noted above, Texaco was not in fact running rampant and polluting the land at will; it was simply the minority partner in the oil consortium run by Petroecuador, which was the actual operator. In fact, Texaco’s involvement in the project was governed by a concession agreement, in which all activities were conducted with the oversight and approval of the Government of Ecuador. Evidence was produced showing that at the end of the concession agreement, Texaco had conducted the remediation program as it had been asserting all along, in which producing wells and pits formerly utilized by Texaco were closed, produced water systems were modified, cleared lands were replanted, and contaminated soil remediated.¹⁵¹ The \$40 million remediation program began in 1995 and was completed in late summer 1998, and during the process, all remediation activities were inspected and certified by the Ecuadorian government on a site-by-site basis.¹⁵² On September 30, 1998, Ecuador’s Minister of Energy and Mines, the President of Petroecuador and the General Manager of Petroproducción, the operating division of Petroecuador, signed the “Final Release of Claims and Delivery of Equipment.”¹⁵³ This 1998 agreement finalized the govern-

¹⁴⁷ *Id.* at 544–46.

¹⁴⁸ *Id.* at 546.

¹⁴⁹ Aguinda., 303 F.3d at 478.

¹⁵⁰ Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER (Jan. 9, 2012), available at http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe?currentPage=all.

¹⁵¹ *Id.*

¹⁵² *Who Signed-Off On Texaco’s Remediation?*, AMAZON POST (July 1, 2009), <http://www.theamazonpost.com/news/who-signed-off-on-texaco’s-remediation>.

¹⁵³ *Texaco in Ecuador: Remediation*, TEXACO, <http://www.texaco.com/sitelets/ecua dor/en/remediation/> (last visited May 16, 2014).

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ment of Ecuador's approval and certification of Texaco's environmental remediation work and stated that Texaco had fully complied with all obligations established in the remediation agreement signed in 1995. In addition, the municipalities in the area of the drilling operations signed a negotiated settlement with Texaco that released the company from any future claims and obligations.¹⁵⁴ At the end of the concession agreement, two independent audits were also conducted to address the impact of the consortium operations on the soil, water and air, and assess compliance with environmental laws, regulations and generally accepted operating practices. Two internationally recognized consulting firms conducted the audits and each independently concluded that Texaco acted responsibly and that there was no lasting or significant environmental impact from the former consortium operations.¹⁵⁵ Based on these audits and the remediation efforts, the government of Ecuador subsequently granted Texaco a full release from any and all environmental liability arising from its operations.¹⁵⁶

Under almost any situation, an agreement between a government-run company and a corporation would be valid. However, Ecuador, as noted above, has been subject to political and economic turmoil, and although the country had traditionally been pro-defendant, the current President of Ecuador has seemingly demonstrated little respect for the country's legal obligations, whether to private companies or other nations. Elected in 2006, he began a series of machinations to consolidate power, and shortly after he took office, proposed a series of changes to Ecuador's constitution in order to extend his term in office.¹⁵⁷ Further, when Ecuador defaulted on its payment of global debt it owed to the World Bank and other international banks, he simply declared that Ecuador's national debt was "immoral and illegitimate," based on the argument that it had been contracted by prior regimes, and pledged to fight creditors in international courts, in order to negotiate a reduction in the debt amount.¹⁵⁸ Based on the political climate in Ecuador when the suit was brought, it was seemingly no surprise that the regime allowed the suit against Chevron to proceed, despite both the release and the fact that Texaco was a minority consortium

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ CHEVRON CORP., DELIVERING ENERGY NOW DEVELOPING ENERGY FOR THE FUTURE: 2008 ANNUAL REPORT 47 (2008), available at https://web.archive.org/web/20130407190605/http://www.chevron.com/documents/pdf/annualreport/Chevron2008AnnualReport_full.pdf.

¹⁵⁷ Joshua Partlow & Stephan Kuffner, *Voters in Ecuador Approve Constitution*, WASH. POST, (Sept. 29, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/28/AR2008092802644.html>.

¹⁵⁸ *Ecuador Defaults on Foreign Debt*, BBC (Dec. 13, 2008), <http://news.bbc.co.uk/2/hi/7780984.stm>.

partner, with the government receiving 95% of the profits from production.¹⁵⁹ However, the suit proceeded against Texaco alone, with the state-run Petroecuador notably absent from the proceedings, and with the President of Ecuador consistently calling for Chevron to be subject to punishment, despite the fact that the current regime still enjoys the profits from the operations of from Petroecuador, which has continuously drilled in the disputed area even after claims of vast pollution arose.¹⁶⁰

Further, it later came to light that while the *forum non conveniens* suit was proceeding through the U.S. courts, the plaintiff's attorneys had been "working with" Ecuadorian legislators to draft legislation in preparation for any possible transfer of the case from the U.S. courts to Ecuador.¹⁶¹ The resulting legislation, Ecuador's Environmental Management Act of 1999, created a private right of action for the cost of remediation for general environmental harm, laying the groundwork for the eventual action against Chevron in Ecuador.¹⁶² After suit was filed in Ecuador, the Ecuadorian court received damage reports, estimates of the extent of pollution, expert opinions, and eventually appointed an "independent global expert," who provided a massive report that purportedly assessed the existence and extent of damages. The report, called the Cabrera Report, accused Texaco employees of not only widespread pollution, but deforestation and cultural destruction as well, and recommended damages of up to \$16 billion.¹⁶³ Ultimately, on February 15, 2011, after years of litigation in Ecuador, the court in Ecuador fined Chevron \$9.5 billion over the alleged pollution, which included a 10 percent legally mandated reparations fee.¹⁶⁴

In the midst of the litigation, Chevron attorneys began discovering proof of discrepancies and misrepresentations by the plaintiff's attorneys and the court appointed "independent expert" that would eventually lead Chevron to file fraud, extortion and racketeering

¹⁵⁹ *History of Texaco and Chevron in Ecuador: Chevron in Ecuador*, TEXACO, <http://www.texaco.com/sitelets/ecuador/en/history/> (last visited May 16, 2014).

¹⁶⁰ See generally Mercedes Alvaro, *Companies Look to Boost Production at Mature Oil Fields in Ecuador*, WALL ST. J. (Feb. 1, 2012), <http://online.wsj.com/article/BT-CO-20120201-713643.html>.

¹⁶¹ *Chevron Corp. v. Donziger*, 1:11-cv-00691-LAK-JCF at 15.

¹⁶² *Id.*

¹⁶³ Reuters, *Report Says Chevron Owes Billions for Ecuadorean Pollution*, N.Y. TIMES (Apr. 3, 2008), http://www.nytimes.com/2008/04/03/business/worldbusiness/03chevron.html?fta=y&_r=0.

¹⁶⁴ *Chevron Fined for Amazon Pollution by Ecuador Court*, BBC (Feb. 15, 2011, 12:58 AM), <http://www.bbc.co.uk/news/world-latin-america-12460333>.

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charges against the plaintiff's American attorney, Steven Donziger.¹⁶⁵ Discovery also led to allegations of manipulating the Ecuadorian judiciary and misrepresentations of the testimony of expert witnesses who testified as to the extent of environmental damages.¹⁶⁶ In one of the earliest discoveries, a typographical error led to the realization that Donziger's team fabricated early expert witness reports. In 2004, Donziger hired Charles Calmbacher, a Georgia-based biologist and environmental scientist, to help oversee soil and water tests in Ecuador. Reports signed by Calmbacher, which were submitted to an Ecuadorian court in 2005, showed high levels of toxins at two sites and estimated the contamination would cost more than \$40 million to clean up at these sites alone.¹⁶⁷ However, Chevron attorneys noticed a typographical error in some of these reports: *the spelling of Calmbacher's own name*. Chevron attorneys also noticed misspellings of Calmbacher's name in letters to the Ecuadorian court asking for an extension in filing his reports.¹⁶⁸ During Calmbacher's subsequent deposition, he stated that he had flown back to the U.S. early due to illness, and had therefore sent pre-signed pages back to Ecuador with the understanding his findings would be printed over his signature. However, he stated that the reports that were actually filed with the Ecuadorian court did not reflect his actual conclusions, maintaining that he had not seen the final version of the submitted reports until they were produced during a deposition by Chevron attorneys.¹⁶⁹ He noted while he did find some evidence of contamination, he did not determine that additional remediation was necessary, and did not calculate clean-up costs, concluding that he did not see significant contamination that posed immediate threat to the environment or to humans or wildlife.¹⁷⁰ His deposition testimony included the statement "I did not reach these conclusions, and I did not write this report."¹⁷¹ Despite amounting to possible fraud by Donziger, Donziger made no denial that falsified reports were submitted and offered no

¹⁶⁵ See Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER (Jan. 9, 2012), http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe?currentPage=all.

¹⁶⁶ Chris Dolmetsch & Christie Smythe, *Chevron Claims Trial Showed Proof of Fraud in Ecuador*, BLOOMBERG (Nov. 26, 2013, 3:35PM), <http://www.bloomberg.com/news/2013-11-26/chevron-claims-trial-showed-proof-of-fraud-in-ecuador.html>.

¹⁶⁷ Ben Casselman & Angel Gonzalez, *Chevron Suit Data Questioned*, WALL ST. J. (Apr. 5, 2010), <http://online.wsj.com/article/SB10001424052702303912104575164210793874400.html>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

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explanation for the falsified reports, other than to state that Calmbacher's reports were only a small part of the overall case, and that other tests have shown contamination at dozens of sites.¹⁷²

Shortly after these falsified reports were discovered, Chevron attorneys uncovered evidence suggesting that portions of the Cabrera Report, which was most likely the justification for the Ecuadorian court's judgment against Chevron, may have been actually provided by the plaintiffs' attorneys themselves.¹⁷³ In eleven civil actions across the United States, Chevron presented this evidence to federal district judges; judges sitting in Newark, San Diego, Asheville, and Albuquerque ruled that the evidence presented appeared to demonstrate fraud by Donziger, who denied wrongdoing, saying that his "actions were permissible in Ecuador."¹⁷⁴ Although Cabrera, the purported author of the report, assured the Ecuadorian court that he was independent and that the plaintiffs attorneys had nothing to do with the environmental assessment or damage recommendations, Chevron had seemingly uncovered evidence to the contrary. These eleven federal civil actions were filed in cities in which the Ecuadorian plaintiffs' litigation consultants were based, and materials subpoenaed by Chevron from these litigation consultants suggest that much of the material from the Cabrera Report was generated by these litigation consultants.¹⁷⁵ A forensic linguist retained by Chevron filed a report concluding that most of the Cabrera report was originally written in English, a language that Cabrera does not speak, and only later translated into Spanish.¹⁷⁶ Cabrera, a mining engineer, allegedly recommended damages for "cancer deaths," and "unjust enrichment," which Chevron claimed would be unlikely areas of expertise to be evaluated by a mining engineer.¹⁷⁷ Eventually plaintiffs lawyers acknowledged that they indeed provided significant information to Cabrera, including "proposed findings of fact and economic valuations for the environmental and other damages caused by Texaco's practices and pollution," and that Cabrera, evi-

¹⁷² *Id.*

¹⁷³ Roger Parloff, *Ecuador Plaintiffs Suffer Setback in Chevron Case*, CNN MONEY, (Oct. 31, 2013), <http://features.blogs.fortune.cnn.com/2013/10/31/ecuador-plaintiffs-suffer-setback-in-chevron-case/> (referring to the ghostwritten responses to its own comments).

¹⁷⁴ Roger Parloff, *Evidence of Fraud Mounts in Ecuadorian Suit against Chevron*, CNN MONEY, (Sept. 13, 2010), http://money.cnn.com/2010/09/13/news/international/chevron_ecuador_litigation.fortune/.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ Daniel Fisher, *Chevron's \$27 Billion Problem*, FORBES, (July 13, 2009), http://www.forbes.com/part_forbes/2009/0713/texaco-ecuador-pollution-chevrons-27-billion-problem.html.

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dently persuaded by these submissions, had “adopted the proposals, analyses, and conclusions of the Plaintiffs.”¹⁷⁸

Subsequently, Chevron attorneys unearthed a second set of revelations, possibly even more damning for the plaintiff's case. Donziger, attempting to generate public sympathy in the U.S., had a documentary filmed that would allegedly garner support for the plaintiffs and put pressure on Chevron to settle the case. The documentary, *Crude*, released in 2009, detailed the legal struggle of the plaintiffs, and showed interviews from Ecuadorian “experts” and the victims of Texaco's alleged pollution. *Crude* garnered enormous support for the plaintiffs' cause, but when Chevron attorneys subpoenaed the outtakes from the movie, the over 600 hours of edited material once again provided evidence that Donziger was engaged in a massive fraud.¹⁷⁹ It became clear that the entire movie was orchestrated by Donziger, who was featured prominently in the film as fighting to protect innocent Ecuadorian victims against the greed and corruption of a massive mega-corporation. However, in the outtakes, Donziger was caught on tape repeatedly expressing disgust for the “utter weakness, corruption, and lack of integrity” of the Ecuadorian courts.¹⁸⁰ In transcripts of the outtakes, Donziger, speaking with his American litigation consultants, after they suggested that there was little evidence of widespread pollution, states “[h]old on a second. . . [T]his is Ecuador. . . . You can say whatever you want and at the end of the day, there's a thousand people around the courthouse, you're going to get what you want. Sorry, but it's true.” Later he adds, “Because, at the end of the day, this is all for the court, just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win.”¹⁸¹ In film footage, Donziger at one point barges into a judge's chambers and intimidates him into reversing a ruling the judge had made in Chevron's favor. The associated outtake shows Donziger later claiming that this “would never happen in any judicial system that had integrity.”¹⁸²

Possibly most damaging to the plaintiffs' case are outtakes from the movie showing Donziger and Pablo Fajardo, an Ecuadorian attorney also representing the plaintiffs, and three litigation consultants, meeting with Cabrera in May of 2007, two weeks before Cabrera was even officially appointed as “global expert” by the Ecuadorian court. Attorney Fajardo is shown in the footage presenting a

¹⁷⁸ See *id.* Parloff, *supra* note 174.

¹⁷⁹ Carter Wood, *Crude Outtakes Reveal Lies in Trial Lawyers Suit Against Chevron*, (Aug. 13, 2010), <http://www.pointoflaw.com/archives/2010/08/crude-outtakes.php> (referring to the documentary-style film).

¹⁸⁰ Parloff, *supra* note 174.

¹⁸¹ See *id.*

¹⁸² See *id.*

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PowerPoint presentation entitled “Plan for the Global Expert Assessment,” and according to transcripts filed in court, states “[a]nd here is where we do want the support of our entire technical team, of experts, scientists, attorneys, political scientists, so that all will contribute to that report, in other words, you see . . . the work isn’t going to be the expert’s. All of us bear the burden.”¹⁸³

In the face of clear and widespread fraud by Donziger, including possible fabrication of evidence, and suggestions of the Ecuadorian judiciary bowing to pressure entirely generated by a campaign by the plaintiff’s attorneys to manipulate the Ecuadorian court system, it would seem that attempts to enforce the Ecuadorian judgment in the U.S. would have been dismissed immediately. Indeed, in an initial ruling in one of the civil actions noted above, the U.S. Magistrate Judge in Asheville, North Carolina, stated

While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. . . If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.”¹⁸⁴

Other courts subsequently sanctioned attorneys associated with the case: the attorney who had initially filed on behalf of the plaintiffs in New York, Cristobal Bonifaz, after leaving his role in the original litigation, filed a claim for a separate set of plaintiffs against Chevron in federal court in San Francisco. The U.S. District Judge subsequently ordered Bonifaz to pay \$45,000 in costs and fees when it was discovered that his plaintiffs did not actually have cancer like the suit claimed.¹⁸⁵ In the face of so much potential evidence of fraud, Manhattan District Court Judge Lewis Kaplan granted Chevron’s motion to depose Donziger in October 2010, and also compelled Donziger to produce attorney-client communications.¹⁸⁶ Those documents led Chevron to file a civil suit under the Racketeering Influenced and Corrupt Organizations Act (RICO) in February 2011, accusing the Ecuadorian

¹⁸³ See *id.*

¹⁸⁴ *Chevron Corp. v. Camp*, No. 1:10MC27, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010).

¹⁸⁵ Bret Stephens, *Amazonian Swindle*, WALL ST. J., (Oct. 30, 2007, 12:01 AM), <http://online.wsj.com/news/articles/SB119370013621475588>.

¹⁸⁶ Daniel Fisher, *Kaplan Orders Deposition of Attorney Donziger in Chevron Ecuador Case*, FORBES, (Oct. 21, 2010), <http://www.forbes.com/sites/danielfisher/2010/10/21/kaplan-orders-deposition-of-attorney-donziger-in-chevron-ecuador-case/>; see also, Fisher, *supra* note 181.

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plaintiffs and their lawyers of a conspiracy to extort a multibillion-dollar settlement from Chevron.¹⁸⁷

However, the suit against Chevron in Ecuador continued to progress through the appeals process there, and the Ecuadorian Court of Appeals eventually affirmed the multi-billion dollar judgment against Chevron, in part because Chevron had failed to “make a public apology.”¹⁸⁸ Despite the evidence of widespread fraud in Ecuador, Chevron found it difficult to get resolution in U.S. courts regarding the disposition of the Ecuadorian judgment. However, once the judgment was affirmed in Ecuador, Chevron immediately sought a declaratory judgment that the Ecuadorian judgment was unenforceable, and sought protection under the New York Civil Practice Law and Rules Article 53, which governs the recognition of money judgments imposed in foreign countries.¹⁸⁹ In March 2011, in response to the evidence presented by Chevron, Judge Kaplan issued an injunction to block enforcement of the judgment on a worldwide basis.¹⁹⁰ However, this injunction was voided by the Second Circuit Court of Appeals in January of 2012, in a unanimous decision by the three-judge panel, who noted that Chevron could only challenge the judgment’s validity defensively, in response to attempted enforcement, and that the Ecuadorian plaintiffs had not yet undertaken enforcement anywhere, and might never undertake in enforcement in New York.¹⁹¹ However, the Court of Appeals stated that granting the type of “speculative” relief sought by Chevron would “unquestionably provoke extensive friction between legal systems” by encouraging challenges in New York to the legitimacy of courts in foreign countries.¹⁹² Furthermore, the Court noted that Article 53 and the common-law principles that it encapsulated were motivated by an interest to provide for the enforcement of foreign judgments, not to prevent them, and to rule in Chevron’s favor would “turn that framework on its head.”¹⁹³

More recently, these questions regarding the enforcement of Ecuador’s judgment in the United States and the effect on interna-

¹⁸⁷ Amy Kolz, *The Complete Game*, AM. LAWYER, at ¶ 7-10 (Jan. 2012).

¹⁸⁸ Braden Reddall & Eduardo Garcia, *Chevron Appeals \$18 Billion Ruling in Ecuador Lawsuit*, REUTERS, (Jan. 20, 2012,), <http://www.reuters.com/article/2012/01/20/us-chevron-idUSTRE80J1ZJ20120120>.

¹⁸⁹ N.Y. C.P.L.R. § 5302 (Consol. 2014).

¹⁹⁰ *Chevron Corp. v. Donziger*, 768 F. Supp.2d 581, 660 (S.D.N.Y. 2011) *vacated sub nom. Chevron Corp. v. Naranjo*, 11-1150-CV L, 2011 WL4375022 (2d Cir. Sept. 19, 2011) *rev’d and remanded sub nom. Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

¹⁹¹ *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 423, 184 L. Ed.2d 288 (U.S. 2012).

¹⁹² *See id.*

¹⁹³ *See id.* at 241.

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tional comity have taken a back seat to rulings in Chevron's 2011 RICO suit filed against Donziger in the same Manhattan court. Originally, the RICO suit focused on allegations that Donziger and the consultants retained by the plaintiffs authored portions of the Cabrera Report, the report that was provided to the Ecuadorian Court in assessing the existence and extent of pollution in the disputed area and on which the judgment against was based.¹⁹⁴ However, it was soon revealed that the *entire* Cabrera Report had been written and provided by the Stratus Company, a Boulder, Colorado consulting firm Donziger hired.¹⁹⁵ Over the years, Donziger had represented to both Ecuadorian and U.S. courts, the media, and the public that Cabrera, the Ecuadorian court-appointed global expert, had been the author of the report.¹⁹⁶ Stratus, a co-defendant in the RICO suit, settled the lawsuit with Chevron and disavowed its work in the Chevron suit, stating that its work had been "fatally tainted" by Donziger, and that the Cabrera Report was "not reliable."¹⁹⁷ These revelations soon paled in the face of testimony by one of the presiding Ecuadorian judges that he had been bribed in order to rule against Chevron based on the ghostwritten Cabrera Report.¹⁹⁸ The former judge, Alberto Guerra, testified that he was paid thousands of dollars by attorneys for the plaintiffs to rule against Chevron, and that two of the presiding Ecuadorian judges were each promised \$500,000 from the proceeds of the Chevron judgment.¹⁹⁹ In the face of the evidence advanced in the RICO trial against Donziger, Judge Kaplan recently issued a ruling that can only be considered a major setback for the plaintiff's case, holding that the monetary judgment against Chevron was a product of bribery, fraud and racketeering perpetrated by Donziger.²⁰⁰ In a 485-page opinion, Judge Kaplan did not rule on whether pollution occurred in the disputed area as a result of Texaco's operations, but did find that the plaintiff's legal team, led by Donziger, engaged in widespread bribery, conspiracy, and

¹⁹⁴ Chevron Corp. v. Donziger, 886 F. Supp. 2d 235, 258 (S.D.N.Y. 2012).

¹⁹⁵ Roger Parloff, *Judge: \$9.5 Billion Ecuadorean Judgment against Chevron was Product of Bribery* (March 15, 2014), <http://features.blogs.fortune.cnn.com/2014/03/05/judge-9-5-billion-ecuadorian-verdict-against-chevron-was-product-of-bribery/>.

¹⁹⁶ *See id.*

¹⁹⁷ Daniel Fisher, *Plaintiffs' Expert Disavows Evidence in Chevron Ecuador Case, Says Process 'Fatally Tainted'*, FORBES (Apr. 11, 2013) <http://www.forbes.com/sites/danielfisher/2013/04/11/plaintiffs-expert-disavows-evidence-in-chevron-ecuador-case-says-process-fatally-tainted/>.

¹⁹⁸ Christie Smythe, *Ecuador Judge Testifies That He Was Bribed to Rule Against Chevron*, BUSINESSWEEK (Oct. 24, 2013), <http://www.businessweek.com/news/2013-10-23/ecuador-judge-testifies-he-was-bribed-to-rule-in-chevron-case>.

¹⁹⁹ *See id.*

²⁰⁰ Parloff, *supra* note 196.

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obstruction of justice, and barring Donziger and his associated from profiting from the “egregious fraud that occurred.”²⁰¹

After a twenty-year legal battle and possibly hundreds of millions of dollars in legal fees, the ruling by Judge has seemingly galvanized Chevron, which is pursuing Donziger and his associates with all of its legal might, and is now suing him for \$32 million in legal fees resulting from the successful RICO case against him.²⁰² Once viewed as a tenacious maverick who was something akin to a hero for going up against a gigantic multinational corporation, Donziger is now on the defensive, challenging the legitimacy of the most recent district court ruling, calling the court proceedings it “deeply flawed,” and claiming to be the victim of a “well-funded corporate retaliation campaign.”²⁰³ However, Chevron claims it is trying to hold Donziger accountable for bringing a fraudulent lawsuit against the company.²⁰⁴ Aside from seeking legal fees from Donziger, Chevron is seeking to bring suits against others involved in facilitating the Ecuador litigation as well.²⁰⁵ On March 14, 2014, a Judge sitting in Gibraltar held that Chevron can proceed in a tort suit against Russ DeLeon, Harvard Law classmate of Donziger, and online-poker tycoon.²⁰⁶ Chevron alleges that DeLeon helped pay for the documentary *Crude*, and invested millions in the litigation in Ecuador, which Chevron claim eventually became a racketeering conspiracy. According to evidence, DeLeon was entitled to collect \$600 million if Chevron paid the judgment, and the Gibraltar Court found at least a prima facie case that DeLeon and his funding vehicle were “fully involved in the conspiracy, continuing to fund it well after they were aware of fraudulent activities.”²⁰⁷ Further, on March 31, 2014, Chevron brought fraud charges against Patton Boggs,

²⁰¹ See *Chevron v. Donziger*, 1:11-cv-00691 LAK-JCF 126, at 478.

²⁰² Paul M. Barrett, *In Pollution Case, Chevron Seeks \$32 Million from Plaintiffs' Lawyer Donziger*, *BUSINESSWEEK* (Mar. 20, 2014), <http://www.businessweek.com/articles/2014-03-20/in-pollution-case-chevron-seeks-32-million-from-plaintiffs-lawyer-donziger>.

²⁰³ Clifford Krauss, *Big Victory for Chevron Over Claims in Ecuador*, *N.Y. TIMES* (Mar. 4, 2014), <http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html>.

²⁰⁴ Nate Raymond, *Chevron Seeks \$32 Million in Legal Fees in Ecuador Case*, *REUTERS* (Mar. 19, 2014), <http://www.reuters.com/article/2014/03/19/us-chevron-ecuador-idUSBREA2I1PS20140319>.

²⁰⁵ See *id.*

²⁰⁶ *Chevron v. DeLeon*, Supreme Court of Gibraltar, 2012-C-232 1-2, 4 (2014), available at <https://www.documentcloud.org/documents/1088097-2014-03-14-gibraltar-judgment.html>.

²⁰⁷ Michael D. Goldhaber, *The Global Lawyer: The Noose Tightens on Chevron Litigation Backers*, *AM. LAWYER* (Mar. 24, 2014), available at <http://www.americanlawyer.com/id=1202648169924/The-Global-Lawyer:-The-Noose-Tightens-on-Chevron-Litigation-Backers?slreturn=20140323141053>.

a Washington D.C. law firm, that the plaintiffs hired in an attempt to collect the judgment from Chevron.²⁰⁸ Chevron claims that attorneys at Patton Boggs had knowledge that the Cabrera Report was written by Donziger's consultants at Stratus, and misled both the court and public about the report's origin; in essence claiming that Patton Boggs not only had knowledge of, but furthered the racketeering conspiracy against Chevron.²⁰⁹ On May 7, 2014 Patton Boggs agreed to pay Chevron \$15 million to settle the fraud allegations, and agreed to cooperate with Chevron in discovery related to the case, while expressing regret over its involvement in the matter.²¹⁰

VIII. CHEVRON/ECUADOR UNDER THE INTERNATIONAL DUE PROCESS ANALYSIS

The high-profile nature of the case, and the subsequent Ecuadorian judgment seemingly squarely implicates application the international due process analysis. Because the March 2014 ruling did not consider the actual question of the existence of, or Chevron's responsibility for, pollution in the Lago Agrio oilfield region, the litigation will most likely continue to wind its way the Ecuadorian and U.S. court systems. Although the allegations of fraud and bribery overshadow the entire litigation, the case it has the potential to clarify the international due process doctrine and judges' roles in affecting foreign policy in the foreign judgment recognition and enforcement context. As stated earlier, the international due process analysis, as applied in these cases, may violate separation of powers principles because it requires courts to pass judgments on other countries, and so allows courts to actively engage in international politics, and their holdings must then be followed by lower courts considering similar claims.²¹¹ As noted, Judge Posner held that the court may divide countries into two categories, "civilized countries" and "uncivilized countries."²¹² Where countries were effectively considered "uncivilized" by the courts, meaning that they did not provide for impartial tribunals or

²⁰⁸ Casey Sullivan, *N.Y. Judge Lets Chevron Bring Fraud Claims against Patton Boggs*, REUTERS (Mar. 31, 2014), <http://www.reuters.com/article/2014/03/31/chevron-lawsuit-idUSL1N0MS14420140331>.

²⁰⁹ Daniel Fisher, *Chevron's Next Target: Patton Boggs*, FORBES (Mar. 31, 2014), <http://www.forbes.com/sites/danielfisher/2014/03/31/chevrons-next-target-washington-law-firm-patton-boggs/>.

²¹⁰ Steven Mufson, *Chevron, Patton Boggs Settle their Epic Legal Battle over Jungle Oil Pits in Ecuador*, WASH. POST, May 7, 2014, http://www.washingtonpost.com/business/economy/chevron-and-patton-boggs-settle-their-epic-legal-battle-over-jungle-oil-pits-in-ecuador/2014/05/07/8fa73ad4-d5ef-11e3-aae8-c2d44bd79778_story.html.

²¹¹ Carodine, *supra* note 20, at 1206.

²¹² *Soc'y of Lloyds v. Ashenden*, 233 F.3d at 481 (7th Cir. 2000).

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procedures compatible with due process of law, the courts are comfortable passing judgment on those countries and finding that the judgments at issue were unenforceable. In the “uncivilized country” cases, the courts essentially ignored the individual proceedings that resulted in the foreign judgment and instead looked to “evidence” regarding the quality of the foreign judicial system and the U.S. judges’, sometimes personal, perceptions of those countries. Notably, one of these “uncivilized country” cases was recently decided by the Southern District of Florida. In *Osorio v. Dole Food Co.*, the court refused to recognize and enforce a \$97 million Nicaraguan judgment for several reasons, one of which was that the Nicaraguan judicial system did not comport with the concept of international due process.²¹³ The plaintiffs in the *Dole* case were represented by Los Angeles-based attorney Juan Dominguez. Examining the Nicaraguan court system that handled the original suits by the plaintiffs, the California Court refused to recognize the Nicaraguan judgment, “[i]n view of the persuasive evidence that direct political interference and judicial corruption in Nicaragua is widespread.”²¹⁴ The court was careful to note that its decision was based on the overall Nicaraguan judicial system, “not the particulars of this case.”²¹⁵

The *Chevron/Ecuador* litigation could ultimately assist in further developing the parameters of the international due process analysis. In the 2000 remand to the District Court of the Southern District of New York, Judge Rakoff examined the appropriateness of Ecuadorian court system in the *forum non conveniens* analysis, noting that the events in Ecuador had “revived lingering questions about the ability of the Ecuadorian courts to dispense independent, impartial justice in these cases.”²¹⁶ Significantly, Judge Rakoff consulted an annual report produced by the U.S. State Department that undertakes to assess “whether the judicial institutions of various nations provide at least a modicum of fundamental fairness to litigants.”²¹⁷ One of the primary conclusions of the report, entitled *The Country Report for Ecuador, U.S. Department of State, Ecuador Country Report on Human Rights Practices for 1998, dated February 26, 1999*, found that “[t]he most fundamental human rights abuse [in Ecuador] stems from shortcomings in [its] politicized, inefficient, and corrupt legal and judicial system.”²¹⁸ However, as noted above, the Second Circuit had held that it

²¹³ *Osorio v. Dole Food Co.*, 665 F.Supp.2d 1307, 1351 (S.D. Fla. 2009), *affd. sub nom.* *Osorio v. Dow Chem. Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011).

²¹⁴ *Id.* at 1351.

²¹⁵ *See id.*

²¹⁶ *Aguinda v. Texaco, Inc.*, 93 CIV. 7527 (TSR), 2000 WL 122143 1 (S.D.N.Y. Jan. 31, 2000).

²¹⁷ *See id.* at 2.

²¹⁸ *See id.*

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remains the burden of the movants to demonstrate the adequacy of the proposed forum in a *forum non conveniens* analysis, and so Judge Rakoff invited the Chevron litigants themselves to submit briefs on the fairness of the Ecuadorian courts in order to assess whether a fair trial might be obtained there.²¹⁹

During subsequent proceedings to determine the enforceability of the Ecuadorian judgment, Judge Kaplan noted that the case was “extraordinary,” not only because of the staggering amount of money at stake but also because Chevron had raised serious arguments about “the fairness and integrity of the judicial system of Ecuador,” thus implicating “considerations of international comity.”²²⁰ An important point at issue in the 2011 district court proceedings was whether Chevron was likely to have been successful on the merits with respect to its claim that the Ecuadorian judicial system does not comport with the international concept of due process.²²¹ In his ruling, Judge Kaplan noted, “there is abundant evidence before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here and especially in cases such as this.”²²² The District Court considered evidence of Ecuador’s deficiencies of judicial process as reported in the “Alvarez Report” prepared by Vladimiro Alvarez Grau.²²³ Alvarez, according to the Court, was a highly credentialed and experienced attorney from Ecuador who had practiced law in Ecuador for over 40 years and had held various prominent posts there, including as an elected official and legal academic.²²⁴ In an overview of the Ecuadoran political and judicial systems, Alvarez focused in particular on the relevant time period for the *Chevron* litigation, which was between 2003 when the lawsuit in Ecuador began and 2011 when the monetary judgment was entered by the Ecuadorian provincial court.²²⁵ Based on the report the Court noted that the judicial system in Ecuador was already “troubled” when socialist President Rafael Correa, who publicly supported the Ecuadorian plaintiffs’ claims, rose to power. The judiciary had been in a “state of severe institutional crisis” for a long time and had recently “deteriorated.”²²⁶ Judge Kaplan found that President Correa had heavily influenced the judicial system in this case, and that he “interfered in matters that were pending before the judiciary

²¹⁹ See *id.* at 3.

²²⁰ *Chevron Corp. v. Donziger*, 768 F.Supp.2d at 595.

²²¹ See *id.* at 584.

²²² See *id.* at 633.

²²³ See *id.* at 633–34.

²²⁴ *Id.* at 616 n.163.

²²⁵ *Id.* at 635, n.305.

²²⁶ *Id.* at 616.

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and that were of particular interest Ecuadorian government.”²²⁷ According to Judge Kaplan, in “a number of recent cases, judges have been threatened with violence, removed, and/or prosecuted when they ruled against the government’s interests.”²²⁸ Also relevant to Judge Kaplan’s determination was the fact that a number of independent commentators lamented the state of affairs in Ecuador, and concluded that there was no respect for the rule of law, and that there was no independent judiciary.²²⁹ However, Judge Kaplan also looked to sources such as World Bank and U.S. State Department documents, which supported these findings.²³⁰ In 2009, the World Bank gave Ecuador a low ranking for respect for the rule of law; and the U.S. State Department recognized that there were times when the judges in Ecuador decided cases on the basis of outside influences, particularly when dealing with matters of interest to the government.²³¹ Taken in the aggregate, the judicial system in Ecuador seemed scarcely more than a political tool used to accomplish the goals of the government without regard to an evenhanded or just application of the law, when the judge rendered the Chevron judgment.

Immediately after Judge Kaplan’s 2011 decision, the Ecuadorian ambassador to Washington launched a defense of his country’s judicial system, taking issue with Judge Kaplan’s conclusions and expressed “consternation that a U.S. court has elected to pass judgment on Ecuador’s courts.”²³² In response to Judge Kaplan’s assertion that “here is abundant evidence before the court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law,” the Ambassador claimed that the Judge’s opinion “does not accurately reflect upon or credit the independence of the Ecuadorian judiciary.”²³³ However, Judge Kaplan seems to have given some weight to external guidance such as the Country Report from the U.S. Department of State, and so may have a strong justification for his evaluation of the foreign court system. A systematic approach in evaluating the court system of another country, which is based on guidance from the Executive Branch, seems more likely to withstand scrutiny than an approach that is based on the determination based solely on the judge’s perceptions. While the Second Circuit Court of Appeals ultimately overturned Judge Kaplan’s decision because of the far reaching

²²⁷ *Id.* at 618.

²²⁸ *Id.*

²²⁹ *Id.* at 619.

²³⁰ *Id.* at 620.

²³¹ *Id.*

²³² Lawrence Hurley, *Ecuador’s U.S. Ambassador Speaks out on Chevron Case*, *N.Y. TIMES* (Mar. 10, 2011), available at <http://www.nytimes.com/gwire/2011/03/10/10greenwire-ecuadors-us-ambassador-speaks-out-on-chevron-c-86771.html>.

²³³ *Id.*

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nature of his global injunction on the enforcement of the Ecuadorian court's judgment, the Second Circuit's affirmation of the purpose of the Recognition Act seems to serve as a clear reminder of the restraint and delicacy that comity principles would warrant in politically charged transnational cases such as this.²³⁴ Unlike the *forum non conveniens* analysis, in which the judge may rely on arguments from the litigants themselves to determine the adequacy of a foreign forum, it would seem that judges performing the international due process analysis should seek external guidance from other branches, and rely solely on that guidance when determining the adequacy of a foreign court system. Limiting the analysis to external guidance from the other branches may serve as the most appropriate method to make these determinations, and allow judges to avoid the implication that their determination might be colored by personal perceptions. This method has allowed courts to sidestep concerns regarding comity in the past.²³⁵

Judge Kaplan applied the international due process analysis in his March 2014 opinion in the RICO case against Donziger. Basing his analysis in part on the language of the Restatement (Third) of the Foreign Relations Law of the United States, Judge Kaplan noted that "United States courts may not give comity to or recognize the judgment of a foreign state if 'the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law.'"²³⁶ Noting that "Courts essentially are tasked with one question: whether the foreign procedures are 'fundamentally fair' and 'do not offend against basic fairness,'" Judge Kaplan remarked on the delicate nature of this determination, stating that "the Court is far from eager to pass judgment as to the fairness of the judicial system of another country, but it of course is obliged to do so."²³⁷ For a second time in a ruling, Judge Kaplan examined the writings of Grau regarding the state of the Ecuadorian courts, and based his opinion partly on that evidence, as well as Donziger's statements that the Ecuadorian judiciary lacked integrity, and the U.S. State Department's Human Rights Reports, Judge Kaplan held that "the judicial system was not fair or impartial and did not comport with the requirements of due process. The Ecuadorian decisions therefore are not entitled to recognition here."²³⁸

²³⁴ *Chevron Corp. v. Naranjo*, 667 F.3d 232, 242–43 (2d Cir. 2012), *cert. denied* 133 S. Ct. 423, 184 L. Ed. 2d 288 (2012).

²³⁵ *See Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142 (2d Cir. 2000).

²³⁶ *See Chevron v. Donziger*, 1:11-cv-00691 LAK-JCF 126, at 417.

²³⁷ *Id.* at 418 & n.1585.

²³⁸ *Id.* at 419.

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After the *Chevron/Ecuador* litigation, the question that remains is whether the international due process analysis gives rise to more problems than it solves. Going forward, it seems counterproductive to insist that the judiciary be required to examine the entire judicial system of a foreign country, when it should perhaps more properly examine claims that individual proceedings violate due process. It may be argued that the international due process analysis required that Judge Kaplan reach beyond his constitutionally delineated role and engage in a foreign affairs-based analysis that is beyond the competence of state and federal judges.²³⁹ As noted above, it is quite possible that the analysis requires action that is unsuitable for judges, who are responsible for settling disputes between individual parties, but not for formulating international policies or engaging in a type of decision making in which the Executive Branch should engage.²⁴⁰ As evidenced by the fact that the Ambassador for a foreign sovereign was compelled to defend his country's judiciary based on the ruling of a U.S. judge, this analysis may give rise to foreign affairs complications outside the purview of the judiciary. The international due process analysis in a published opinion in a high-profile case such as *Chevron/Ecuador* forces the judiciary to make judgments that may be construed as a condemnation of a country's entire government. Further, the court's decision might certainly generate "consternation" to the extent that it complicated foreign relations. It is not hard to imagine that after the Ecuadorian Ambassador had been forced to defend his country's judicial system in the media, that our own ambassadors would have been expelled from the Ecuador had there still been ambassadors remaining in the country.²⁴¹

A ruling based on particular proceedings, rather than a ruling based on the fairness of a foreign court system as a whole might better shield U.S. Courts from entanglement with foreign concerns. In essence, the balancing test that should be used to determine the validity of foreign judgments is one that is not unfamiliar to jurisprudence, as it is the one originally found in *Hilton v. Guyot*, in which the Supreme Court specifically contemplated a due process analysis that would involve an individualized assessment of the foreign proceedings to determine if they were fundamentally fair.²⁴² The *Hilton* Court established the test, and it is only a vagary of time and judicial fiat that completely altered the considerations to the extent that the mandatory exception would become the benchmark. Examining the elements of the *Hilton*

²³⁹ Carodine, *supra* note 20, at 1205.

²⁴⁰ *Id.*

²⁴¹ See Paul Richter, *Ecuador Expels U.S. Ambassador*, L.A. TIMES (Apr. 6, 2011), <http://articles.latimes.com/2011/apr/06/world/la-fg-ecuador-ambassador-20110406>.

²⁴² See *Hilton*, 159 U.S. at 113.

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decision may clarify this assertion. The court noted that “[W]e are satisfied that[.]. . .[firstly,] where there has been opportunity for a full and fair trial abroad before a [foreign] court of competent jurisdiction. . .” speaks directly to the requirement of a “full and fair trial.”²⁴³ A plain reading of this sentence would seem to indicate that the statement covers both the specific proceedings and the general court system of the foreign jurisdiction. The sentence “full and fair trial” would seem to speak to the individual proceedings, and “before a foreign court of competent jurisdiction” would speak to the general validity of the foreign court system. To argue that “opportunity for a full and fair trial” references only opportunities for impartial trials *generally* or *periodically* seems illogical, as it would be so ambiguous as to allow almost any judgment to stand. Under this line of reasoning a foreign state that historically gave the opportunity for a fair trial that had recently been taken over by a dictatorship might qualify as having given the opportunity for a full and fair trial. It would appear that U.S. courts must look at individual proceedings to some extent to measure whether a foreign court generally affords due process rights. As it stands, presiding U.S. judges have to research the current political system of countries on a case-by-case basis before it could be considered in evaluating judgments. If judges are free to determine the fairness of an entire foreign court system based on judicial discretion, it would seem that the particular proceedings in the original judgment court would be some of the *most* appropriate evidence by which to determine the fairness of the foreign system. If not, what is the evidence that should be used, and are the individual members of the judiciary the appropriate parties to be making these value judgments? The analysis, as it stands, does not seem to operate under guidelines that are clear enough to actually aid judges in making these determinations.

Secondly, the *Hilton* Court’s requirement of “conducting the trial upon regular proceedings” can speak *only* to the individual proceedings.²⁴⁴ This mandates an evaluation of the general court procedures balanced against the particulars of the specific trial at issue, and further requires an examination of whether the trial took place “after due citation or voluntary appearance of the defendant.”²⁴⁵ It seems plain that this requirement mandates examining the fulfillment of the due process requirements of the individual proceedings. The *Hilton* court clearly spoke to the system as a whole when it looks to “a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries,” but the following sentence examines whether “there is nothing to show

²⁴³ *Id.* at 202.

²⁴⁴ *Id.*

²⁴⁵ *Id.*



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either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.”²⁴⁶ This directly asks the court to consider reasons why these particular proceedings should not be enforced, as long as the court system itself offers the opportunity for the fair administration of justice.

The *Hilton* court next provided the balance, when it noted that the merits should not be tried anew, as on a new trial or on appeal, simply because the debtor asserts some mistake of law or fact.²⁴⁷ This seems to caution the court to limit the examination of the individual proceedings to ensure only that they meet the minimum standards of fairness and due process, but in no way should this be construed to advocate turning a blind eye to the fairness of the individual proceedings, or focusing only on the foreign court system as a whole at the expense of examining the possibility of fraud in the individual proceedings. Examinations of the individual proceedings are not analyses that are outside the bounds of the court’s competence. On a daily basis, courts are called on to balance the actions of governmental or private interests against individual rights that might be abridged by these actions, and to balance the asserted interests against the burdens of providing adequate due process. However, analyzing entire judicial and political systems in lieu of examining claims of fraud or due process violations during particular proceedings should be outside the realm of the judiciary.

Judge Kaplan noted that the *Chevron* case was remarkable because of the extent to which it implicated comity.²⁴⁸ However, if the international due process analysis can be said to have its foundation in furthering the aims of comity, it may be failing on that front also. Comity does not seem to be served when the lack of integrity of the Judiciary or the interference of the country’s President in the judicial process are brought to light in a judicial proceeding.²⁴⁹ Had Judge Kaplan issued the injunction based on evidence of pervasive fraud by the plaintiff’s attorney, after a careful examination of the individual proceedings and without reference to the fairness of the Ecuadorian court system, it certainly would have promoted comity more efficiently than pointing out the flaws in another country’s entire judicial system. If the injunction had been based on the individual proceedings, Ecuador would have been hard pressed to seriously implicate concerns of comity, because, as the Magistrate Judge in North Carolina noted, “the court must believe that the concept of fraud is universal, and that

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 203.

²⁴⁸ *Chevron Corp. v. Donziger*, 768 F.Supp.2d at 595.

²⁴⁹ *Id.* at 617.

what has blatantly occurred in this matter would in fact be considered fraud by any court.”²⁵⁰ If comity is the concern, examining individual proceedings would allow Ecuador to save face by categorizing cases as an isolated abuse of discretion, and preserve the reputation of its judiciary as a whole. As in the *Dole* case, there is no reason to implicate another country’s entire judicial system if the interests of comity underlie foreign relations, because in like fashion, the plaintiff’s attorneys in *Dole* were eventually discovered to have engaged in such massive fraud that they were recommended for criminal charges by a state Supreme Court Judge in California.²⁵¹

A finding that an entire country’s judicial system is fundamentally unfair is far broader than a judgment regarding a particular act of the government, or indeed, particular acts of the litigants. In some respects, the refusal to enforce the judgments of another country, because of a judicial determination that the entire country’s court system is subject to political influence or bias, is far more troubling than a decision in a particular case that a specific foreign official acted unlawfully. Such a far-reaching opinion would seem to be more appropriately made by the Executive Branch. To avoid implicating the judiciary in foreign affairs, Professor Carodine suggests changing the existing due process analysis to shift the determination that a foreign country’s judgments are not worthy of enforcement to the Executive Branch, which could possibly outline its decisions in a format similar to the U.S. State Department Country Reports.²⁵² These determinations would control enforcement of judgments rendered in that country, rather than determinations by the judiciary. However, if a country renders a judgment that was not on the list, and was subsequently sought to be enforced in the United States, then courts would only then consider whether the court in the foreign proceedings at issue afforded the litigants due process in those particular proceedings.²⁵³ This would promote judicial efficiency by serving as a gatekeeping mechanism, precluding judgments from countries with questionable court systems from being enforced through U.S. courts altogether, and shielding U.S. courts from political controversy.

Claims that the international due process analysis furthers the goal of “judicial efficiency” may be subject to question when one looks at cases like *Ashenden*, or *Chevron/Ecuador*, which has tied up the

²⁵⁰ *Chevron Corp. v. Camp*, 2010 WL 3418394, at *6 (W.D. N.C. Aug. 30, 2010) (ordering that discovery be allowed).

²⁵¹ Martha Neil, *Dole Gets Legal Fees as Calif. Judge Details Attorneys’ Fraud on Court*, A.B.A. J. (June 17, 2009), available at http://www.abajournal.com/mobile/article/dole_gets_legal_fees_as_calif_judge_details_massive_attorney_fraud_on_court/.

²⁵² Carodine, *supra* note 20, at 1224.

²⁵³ *Id.* at 1225.

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courts for decades. Proponents of the analysis would most likely be hard pressed to point to instances where the analysis resulted in quicker resolution of cases, or avoided protracted litigation, and as transnational litigation becomes more frequent as we move to a global society, it may be wiser to change the analysis. Judgments from countries with courts that do not provide due process in proceedings, as determined by the Executive Branch, would not be entitled to recognition by U.S. courts. Judgments from countries that generally provide due process, as determined by the Executive Branch, could be made, subject to review, upon allegations of specific instances of due process violations. These reviews would be confined to examining only the due process violations complained of, and nothing more.

As it stands, the proposal that the international due process analysis prevents parties from re-litigating in the U.S. court system is questionable at best, when examined in the light of *Chevron / Ecuador*. The argument that forcing courts to review individual proceedings would result in shifting the risks and costs from the entity that chose to enter into transactions with foreign entities to the U.S. courts is also subject to challenge. If the Executive Branch were to unequivocally state that certain countries were of a category that their judgments were unenforceable, then there would be no risk or costs to the courts, as judgments rendered by those countries would be precluded from U.S. courts completely. If litigants in countries with court systems that were not at all implicated by the Executive Branch complained of due process violations, courts would only then be obliged to determine whether due process was provided. For example, if the U.S. had placed Ecuador in the list of countries whose judgments were not recognized in the United States, the *Chevron* plaintiffs would most likely not have wasted time seeking enforcement in the U.S., and the court system would have avoided over two decades of legal wrangling by the parties. Alternately, if Ecuador was of the category of countries whose judgments were recognized, the overwhelming evidence of fraud in these individual proceedings may have led to the complaint being dismissed much more quickly.

Rather than promoting judicial efficiency, the international due process analysis seems to impose an even greater burden on judicial resources. A quick review of the *Ashenden* opinion, as well as multiple *Chevron* opinions demonstrates that courts are unlikely to ignore the individual proceedings and rule only on the court system of the judgment court alone. In order to understand the framework for the judgment rendered in the foreign court, both the general court system of the country where the judgment was rendered and the particular proceedings are examined, in almost excruciating detail. To suggest that the retail approach is not viable seems to have missed the mark, as judges are seemingly compelled to examine both the retail and

wholesale nature of the proceedings before them, which does not lead to judicial efficiency. For example, after reviewing the facts, Judge Kaplan rendered his March 2014 ruling in a 485-page opinion with 1,842 citations.²⁵⁴ The international due process comprised the equivalent of three pages out of the entire opinion.²⁵⁵ If – as Judge Kaplan pointed out, based on the wording of the Restatement (Third) – because the “judicial system was not fair or impartial,” the decisions of Ecuador are “not entitled to recognition here,”²⁵⁶ the entire case could have been resolved in a few sentences. However, the analysis does not seem to be effective at lightening the workload of the already overburdened court system by avoiding a retrial of the initial claims litigated in the foreign court.

Further, utilizing the international due process analysis in a high-profile case may lead to increased attempts to try a case in the media or in the court of public opinion. For example, in his March 2014 ruling, Judge Kaplan noted that Donziger was a “master of public and media relations” and that “an extensive public relations and media campaign has been part of his strategy.”²⁵⁷ This has proven to be true even after Judge Kaplan’s ruling. In a recent article, in an attempt to continue to garner support from the public, Donziger was booked to speak at his alma-mater, Harvard Law School, where it has been suggested that he was “tak[ing] his case to the Ivy League Court of Appeal”²⁵⁸ Despite Judge Kaplan’s careful review of caselaw and the facts in a nearly 500-page opinion, in promoting Donziger’s appearance at Harvard, the Human Rights Program at Harvard claimed that Chevron secured “a controversial ruling from a U.S. federal judge in a non-jury trial that Ecuador’s entire judicial system is unworthy of respect, and that the case was marred by fraud.”²⁵⁹ Focusing on the international due process analysis contained on 3 out of the entire 485 pages of Judge Kaplan’s opinion, the promoters of Donziger’s speech may have been attempting to suggest that the ruling was made without consideration of Donziger’s fraud as the primary factor. Judge Kaplan himself noted that he was “obligated” to pass judgment of the “fairness of the judicial system of another country.”²⁶⁰ However, this

²⁵⁴ See *Chevron v. Donziger*, 1:11-cv-00691 LAK-JCF 1, at 485.

²⁵⁵ *Id.* at 417–19.

²⁵⁶ *Id.* at 419.

²⁵⁷ *Id.*

²⁵⁸ Paul M. Barrett, *Attorney Deemed a “Racketeer” Takes His Case to Harvard Law*, BUSINESSWEEK (Mar. 26, 2014), available at <http://www.businessweek.com/articles/2014-03-26/attorney-deemed-a-racketeer-takes-his-case-to-harvard-law>.

²⁵⁹ *The Future of Corporate Impact Litigation After the Chevron Case*, HUMAN RIGHTS PROGRAM WEBSITE, <http://hrp.law.harvard.edu/events/the-future-of-corporate-impact-litigation-after-the-chevron-case/>.

²⁶⁰ See *Chevron v. Donziger*, 1:11-cv-00691 LAK-JCF 1, at 418.

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obligation may subject an otherwise thorough and thoughtful opinion to suggestions that it was rendered by a judge with profound disrespect for an entire country's judicial system. In fact, Donziger has vowed to appeal Judge Kaplan's decision, calling the ruling "appalling", and claiming that Judge Kaplan has let his "implacable hostility towards. . . [Donziger's] Ecuadorian clients and their country infect his view of the case."²⁶¹ It is unlikely that omitting the requirement of performing the international due process analysis in the March 2014 ruling would have prevented from Donziger's resulting claims of bias on the part of Judge Kaplan.²⁶² However, omitting the international due process analysis and focusing only on the particular allegations of fraud by Donziger may have shielded Judge Kaplan from claims that he "made disparaging remarks about Ecuador's judicial system,"²⁶³ or that he found "Ecuador's entire judicial system is unworthy of respect."²⁶⁴

The *Chevron* litigation is remarkable for a number of reasons, as Judge Kaplan noted, not the least of which is that it highlights problems with existing international due process analysis in its current form. In the face of overwhelming evidence of fraud on the part of the plaintiffs, it is possible that Judge Kaplan could have disposed of the case without implicating the Ecuadorian court system at all. As the litigation continues to wind its way through the appeals process, the sheer drama of the case overshadows questions regarding the U.S. judiciary's role in foreign affairs, how comity may best be furthered when enforcing foreign judgments, and the appropriateness of the judiciary evaluating the reputation of a foreign sovereign's courts. Hopefully, the boundaries of the international due process analysis will be clarified, as well as the role of U.S. judges in navigating the controversial international political issues that are implicated in foreign judgment recognition cases will be more fully defined.

²⁶¹ Larry Neumeister, *In Ecuador Pollution Case, New York Judge Rules for Chevron*, HUFFINGTON POST (Mar. 4, 2014), http://www.huffingtonpost.com/2014/03/04/ecuador-pollution-case-new-york_n_4896293.html.

²⁶² Steven Donziger, *Why Judge Kaplan's Decision is Unlikely to Survive Appeal and Will Backfire in Enforcement Courts*, STEVENDONZIGER.COM 2 (Mar. 4, 2014), <http://stevendonziger.com/wp-content/uploads/2014/03/Background-On-Kaplan-Ruling-in-RICO-Case.pdf>.

²⁶³ *Id.*

²⁶⁴ See HUMAN RIGHTS PROGRAM WEBSITE, *supra* note 314.

A NEW AFFIRMATIVE DEFENSE TO THE FCPA FOR COUNTRIES EXITING MAJOR INTERNAL STRIFE

By: Chris Rohde¹

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I. INTRODUCTION

In 1977, in the wake of the largest political scandal in American history, the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA).² This law, the first of its kind in history, targets U.S. citizens and companies who bribe foreign officials.³ After twenty years of almost no enforcement, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) began aggressively enforcing the FCPA in the early 2000s. Facing the threat of massive fines, the U.S. and U.S.-affiliated companies began pulling back from investing in countries that were perceived as “corrupt.” While this is one of the specific goals of the FCPA, there have also been unintended consequences. In particular, this law has harmed countries that have a history of corruption, but because of some form of major internal strife ending recently, are in the perfect position for U.S. companies to enter

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² Foreign Corrupt Practice Act, 15 U.S.C. § 78dd-1 (2006).

³ 15 U.S.C. § 78dd-1(a).



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their market and positively influence the development of a more transparent market.

This paper examines whether the current exception to the FCPA, or the affirmative defenses provided by the FCPA, allow American companies to be this positive influence. Part I examines the background of the FCPA, the current exception and affirmative defenses, and the recent increase in enforcement. Part II examines the issue of whether the current exceptions and affirmative defenses permit US companies to invest in countries currently exiting major internal strife.⁴ Unfortunately, neither the exception nor the affirmative defenses provide companies the leeway necessary to enter these markets without serious risk of running afoul of the FCPA enforcers. Part IV argues that a new affirmative defense should be enacted, creating a system where companies can approach the DOJ and SEC with an outline of a strong compliance program and receive permission to enter these countries without fear of being targeted for investigation.

The Foreign Corrupt Practices Act currently hurts nations coming out of recent internal strife by dis-incentivizing companies from entering into these markets. As none of the current exceptions or affirmative defenses allow companies to enter these new markets, a new exception should be created allowing companies to pre-register with the U.S. government and enter these markets.

II. THE CREATION AND IMPLEMENTATION OF THE FCPA

A. *Events Leading to the Enacting of the FCPA*

The road to the FCPA began on the night of June 17, 1972, with the arrest of five men inside the Democratic National Committee's office in the Watergate complex.⁵ These arrests precipitated the biggest political scandal in United States history and led to the resignation of President Richard Nixon two years later, in August 1974.⁶ While the larger story of Watergate is well known, the subplot leading to the first law to target corruption by domestic companies in foreign countries is not.⁷ The need for this new law became apparent during the Watergate investigations when the Special Prosecutor, Archibald Cox, requested that companies that had made questionable or illegal contributions to the 1972 Presidential Campaign voluntarily disclose

⁴ For the purposes of this paper, major internal strife is defined as a natural disaster, civil war, or political upheaval.

⁵ *Watergate Retrospective: The Decline and Fall*, TIME, August 19, 1974.

⁶ Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, August 9, 1974, at A01.

⁷ See Alejandro Posadas, *Combatting Corruption under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 348 (2000) (providing an excellent overview of how the FCPA arose out of the Watergate Scandal).

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that fact.⁸ Many of these disclosures, which were later turned over to U.S. agencies, indicated that these companies were not only making questionable payments to American political campaigns, but also to foreign governments and political parties.

With this information, the SEC began to investigate payments from U.S. companies to foreign officials. They began in 1975 by investigating five companies—Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation, and Ashland Oil—for violations of the reporting requirements of U.S. Securities law.⁹ The SEC simultaneously began a separate investigation into United Brands after its Chairman, Eli Black, threw himself off the twenty-second floor of a New York City skyscraper.¹⁰ During the investigation, it came to light that Mr. Black had paid the Honduran government \$2.5 million to repeal a tax on bananas.¹¹ The SEC, relying on the laws at the time, found this payment to be a materially relevant payment for reporting purposes, and charged United Brands with violations of the U.S. securities laws.¹² This demonstrates how the contemporary laws in 1975 had to deal with actions covered by the FCPA today.

Meanwhile, in both houses of the U.S. Congress, the committees on Foreign Relations began their own investigations into the practices of multinational companies. After initially holding several closed hearings, the Senate Committee on Foreign Relations held its first public hearing on May 16, 1975.¹³ By making these hearings public, the Senate did much to show transparency in an area where the primary problem is secrecy. These hearings, along with those that followed, produced extensive information on business and government corruption and highlighted the need for major reform.¹⁴ In particular,

⁸ See *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. of Foreign Relations*, 94th Cong. 5 (1975), microformed on CIS No. 76-S381-6 (Cong. Info. Serv.).

⁹ See *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong. 37 (1975), microformed on CIS No. 76-H461-15 (Cong. Info. Serv.).

¹⁰ See JOHN T. NOONAN, BRIBES 656 (1984).

¹¹ See *id.*

¹² See *id.*

¹³ See *Multinational Corporations and United States Foreign Policy*, *supra* note 8, at 1.

¹⁴ See NOONAN, *supra* note 10, at XVI. The legislative history of the FCPA is extensive. See, e.g., *Multinational Corporations and United States Foreign Policy*, *supra* note 8; *The Activities of American Multinational Corporations Abroad*, *supra* note 9; *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong. (1976), microformed



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the hearings showed how the authority vested in the regulatory agencies to deal with foreign payments at the time was in need of major bolstering.¹⁵ These conclusions, along with the details from the various SEC investigations, led Congress to conclude that it was time to focus on this issue.

B. *Passing the FCPA*

By late 1975, Congress had examined government corruption both at home and abroad, and it faced the realization that the current regulatory scheme was inadequate. To fix this inadequacy, Congress would undertake the unenviable task of creating a new type of law targeting bribes occurring outside of U.S. boundaries.¹⁶ This law was the first of its kind, and it laid the foundation for similar efforts by other nations in the past twenty years.¹⁷ But how did it come to be, and what exactly does it say?

After the various investigations surrounding the issues Watergate raised, Congress began to focus on building a new regulatory scheme. In May 1976, the SEC submitted an intensive report to the Senate Banking, Housing, and Urban Affairs Committee concerning questionable and illegal corporate payments and practices.¹⁸ This report showed that, out of the ninety-five companies involved in the report, fifty-nine had been involved in some form of payment to foreign officials, seventeen had paid foreign political parties, twenty-nine had had been involved in sales-type commissions, and twenty-seven were involved in "other foreign matters" including some sort of foreign payment or questionable activity.¹⁹ Combining all of these payments, the total amount spent by these companies on questionable payments was approximately \$250 million.²⁰ What this report really showed was

on CIS No. 76-S241-38 (Cong. Info. Serv.); *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. (1977), microformed on CIS No. 77-S241-23 (Cong. Info. Serv.).

¹⁵ See *The Activities of American Multinational Corporations Abroad*, *supra* note 9, at 40-47 (1975).

¹⁶ It should be noted that this is not the first time that the U.S. Congress had done this. See Alien Tort Statute, 28 U.S.C. §1350 (2006).

¹⁷ See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1; see also Bribery Act, 2010, c. 23 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23>.

¹⁸ See *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing, and Urban Affairs Committee*, reprinted in 353 SEC. REG. & L. REP. 36-41 (1976).

¹⁹ *Id.* at 9.

²⁰ *Id.* at 16-41.

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that, contrary to popular belief, these payments were neither rare nor miniscule, and a major legislative push was needed to root out this corruption.

Simultaneously, both the House of Representatives and the Senate took up this issue. In the House, the Committee on International Relations focused its efforts on this problem, while the Committees on Foreign Relations and on Banking, Housing, and Urban Affairs took it up in the Senate.²¹ By that summer, it became apparent that some action would occur. The only question was what that action would be.

At this point, another branch of government entered the mix. After the Watergate scandal, President Nixon had resigned, leaving Vice President Gerald Ford, a former Representative in the House, to assume the Presidency. In the summer of 1976, President Ford released his legislative proposal on the issue of foreign payments.²² His proposal focused on the reporting responsibilities of U.S. companies for large foreign payments, but unlike some other proposals, Ford was not in favor of criminalizing the payments if they complied with existing law.²³ This was a conservative approach that would have allowed the market to police itself, instead of relying on the government to interfere.

Unfortunately for President Ford, Congress opted to take a different approach. After passing drafts several times, the Senate chose to pursue a stricter approach proposed by Senator Proxmire, which included criminalizing both failing to report foreign payments and making those payments in the first place.²⁴ Eventually, both the House and the Senate approved the Senate Bill, and President Jimmy Carter signed the FCPA into law on December 19, 1977.²⁵

²¹ See *Foreign and Corporate Bribes: Hearing on S. 3133 Before the Senate Comm. on Banking, Housing, & Urban Affairs*, 94th Cong. (1976), microformed on CIS No. 76-S241-38 (Cong. Info. Serv.); *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Senate Comm. on Banking, Housing, & Urban Affairs*, 95th Cong. (1977), microformed on CIS No. 77-S241-23 (Cong. Info. Serv.).

²² See H.R. Doc. No. 94-572, at 1 (1974).

²³ The reports would have flowed through the Secretary of Commerce, who would have made the reports available to other agencies such as the IRS, the SEC, and the DOJ. Additionally, the Secretary of Commerce would have provided Congress with the reports as well. After a year these reports would have been made public, except when the State Department or Attorney General determined they should be withheld for reasons of foreign relations or judicial process. See *id.* at 2.

²⁴ S. 3664, 94th Cong. (1975).

²⁵ See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-2 (1994)).

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Since being originally passed, Congress has amended the law twice, once in the late 1980s and again in the late 1990s.²⁶ The first amendment simply reaffirmed Congress's commitment to combating foreign corruption, while the second was to enact changes in line with the requirements of the Organization for Co-operation and Development (OECD) agreement concerning bribery.²⁷ Neither of these amendments fundamentally changed the FCPA, but they do show that Congress' desire to promote transparency and cooperation, while fighting corruption through the FCPA continues. This article proposes that further changes should be made to the FCPA without compromising either of these goals.

C. *FCPA Structure*

The FCPA is comprised of two major parts: first, the provisions that make bribing a foreign official a crime (i.e. the foreign corrupt practice); and, second, changes to required accounting practices.²⁸ Since this article is concerned with the current affirmative defenses and exceptions, it will focus primarily on the part of the statute covering what constitutes a corrupt practice, by examining what actions Congress prohibited, who the statute covers, and then outline what the current exception and affirmative defenses are.

The FCPA criminalizes offers of payment, or payment of anything of value, to foreign officials, foreign political parties, or third parties for the purpose of influencing their decisions in the accused favor.²⁹ While this sounds like simply a prohibition on an *American Hustle*-style exchange of a briefcase of cash in a hotel room,³⁰ it is a bit more complicated than that. By targeting the offering of anything of value, the statute significantly expands the scope of what it covers to include things such as expensive trips and non-monetary gifts. Additionally, the statute targets actions by third parties likely meant to insulate the American company from liability.³¹ At its core, the statute targets any activity meant to give companies an unfair advantage over the marketplace.

²⁶ See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; see also International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.

²⁷ See 102 Stat. 1107; see also 112 Stat. 3302.

²⁸ 15 U.S.C. § 78dd-2 (1994).

²⁹ See 15 U.S.C. §§ 78dd-1(a), 2(a).

³⁰ See *AMERICAN HUSTLE* (Columbia Pictures 2013) (the movie tells a fictionalized version of the ABSCAM events, where multiple public officials including a Senator and several House of Representative members were convicted of public corruption).

³¹ See 15 U.S.C. § 78dd-1(a).

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The FCPA applies to a wide swath of the American corporate community. The statute specifically calls out two large groups of people.³² First, the statute covers issuers of securities on U.S. markets (i.e. companies).³³ Second, the statute targets officers, directors, employees, stockholders, or agents of these corporations.³⁴ Specifically targeting both corporations and the people involved in corporations covers most of the entities involved in the actions targeted by the FCPA, but how does the statute reach them. The statute lays out two jurisdictional “hooks”³⁵ for prosecuting these crimes. The first is the use of mail or any other means of interstate commerce in furtherance of a foreign corrupt practice.³⁶ The second is where there have been foreign corrupt practices outside the United States.³⁷ Additionally, the statute allows liability to extend to foreign companies and foreign natural persons, their officers, directors, employees, agents, and stockholders when actions occurring in furtherance of the corrupt practices occur while in U.S. territory.³⁸ As such, the FCPA has a wide reach, but the statute does give some breathing room through the exception and affirmative defenses.

There is currently one exception and two affirmative defenses to the FCPA. The exception is for routine government action.³⁹ This sole exception protects companies from liability in situations where payment is simply to get the ball moving on the process. This exception, generally known as the “grease payments exception,” allows payments that merely expedite the process. Thinking about these payments as procedural payments, like fees to expedite permits, helps to distinguish them from prohibited payments meant to bypass the market making its determination.

In addition to the exception, two affirmative defenses to FCPA liability also exist. The first defense pertains to payments that are lawful under the foreign country’s laws.⁴⁰ This is a fairly traditional de-

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ This terminology of jurisdictional hooks is adapted from Magistrate Judge Novak from the Eastern District of Virginia. It means the same thing as the traditional bases for jurisdiction.

³⁶ See 15 U.S.C. § 78dd(a).

³⁷ See *id.* §§ 78dd-1(g), 78dd-2(h)(i), amended by International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.

³⁸ See 15 U.S.C. § 78dd-3(f)(1).

³⁹ See 15 U.S.C. § 78dd-1(b). The exception, as well as the two affirmative defenses, was added in the 1988 amendment to the FCPA. The fact that the original bill did not contain any exceptions or defenses says something about how strongly the enacting Congress felt about corruption.

⁴⁰ *Id.* § 78dd-1(c)(1).

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fense in U.S. laws governing actions outside the United States, as it follows a similar exception in U.S. labor law, which allows companies to discriminate if not doing so would violate the foreign country's law.⁴¹ The desire to see a level playing field lies at the core of this defense. In all situations, the United States wants American companies to have an equal chance at earning business. If it holds them liable for actions that are legal in the country in question, it unfairly handicaps its companies.

The second affirmative defense is the reasonable and *bona fide* expenditure defense. This defense frees companies from liability when "the payment, gift, offer, or promise of anything of value. . . was a reasonable and *bona fide* expenditure, such as travel and lodging expenses. . . and was directly related to—the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency."⁴² The best way to think about this is to distinguish between an American manufacturer flying a Chinese official in to show him some new product or system and paying for the flight, his hotel, and his meals while the company was hosting him. These would all likely be considered reasonable *bona fide* expenditures, but if the company had the flight stop in Las Vegas for four days and picked up the entire tab, it likely would be considered an illegal payment. The point with this defense is that the actions must be what you would expect a company to do in that case, nothing more.

D. Current Enforcement Actions

One might think that these exceptions and defenses sound fairly broad, but by looking at some of the enforcement actions involving the FCPA, one can get an idea of how the FCPA could be improved. Up until the early 2000s, the FCPA was rarely enforced and companies continued doing what they had always done.⁴³ In 2008, Siemens, a German conglomerate, was hit with fines over a billion dollars for their regular practice of sending suitcases of money with their agents to South America to further business interests.⁴⁴ In 2011, the SEC hit

⁴¹ See 29 U.S.C. § 623(f)(1) (1967).

⁴² 15 U.S.C. § 78dd-1(c)(2).

⁴³ See U.S. Securities and Exchange Commission, *SEC Enforcement Actions: FCPA Cases*, available at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.

⁴⁴ See *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, U.S. Dep't of Justice (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>; see also U.S. Securities and Exchange Commission, *SEC Charges Siemens AG for Engaging in Worldwide Bribery* (Dec. 15, 2008), <http://www.sec.gov/news/press/2008/2008-294.htm>.

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Siemens again with charges against some of its directors for a bribery scheme involving identification cards in Argentina. In 2013, one of these directors settled for a \$275,000 fine.⁴⁵

While not the first of the current stream of FCPA actions, the Siemens case does show several important points about current practice. First, the SEC and the DOJ have gotten very serious about policing violations. Second, most cases, like Siemens, settle out of court, but are multi-layered and can go on for years. Finally, the fines levied against these companies are massive, often millions or even billions of dollars.

Another good example of this trend is the fines levied against KBR, Inc. and Halliburton Co. for bribes to Nigerian officials over a ten-year period in order to obtain construction contracts, as well as record violations.⁴⁶ Once again, this was the conclusion of a long-term investigation and negotiations over the fine. In this case, the various entities agreed to pay a total of \$579 million in fines (\$177 million to the SEC and \$402 million to the DOJ).⁴⁷

Up until recently, Siemens was the poster child for FCPA enforcement, but in the last two years, the focus has shifted to the next big case, Wal-Mart. In April 2012, the New York Times ran a piece detailing how Wal-Mart's Mexican subsidiary paid \$24 million in bribes for licenses to expand throughout the country.⁴⁸ As Wal-Mart began its internal investigation into possible FCPA violations, the cost of the investigation began to explode as the breadth of corruption became apparent.⁴⁹ It became clear that these bribes were not only occurring in Mexico, but also in other parts of the world, primarily in India and China.⁵⁰ As the investigation spread, the cost to keep it going ballooned, and by August of 2013 they had spent \$300 million on simply investigating the bribes.⁵¹ This says nothing of the actual cost of the bribes or the potential fines from both the SEC and the DOJ. Neither agency has given any indication of what the likely fine will be,

⁴⁵ U.S. Securities and Exchange Commission, *Securities and Exchange Commission v. Uriel Sharef, et al.*, Litigation Release No. 22676 (April 16, 2013), available at <http://www.sec.gov/litigation/litreleases/2013/lr22676.htm>.

⁴⁶ U.S. Securities and Exchange Commission, *SEC Charges KBR and Halliburton for FCPA Violations* (Feb. 11, 2009), available at <http://www.sec.gov/news/press/2009/2009-23.htm>.

⁴⁷ *Id.*

⁴⁸ David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart after Top-Level Struggle*, N.Y. TIMES, (Apr. 22, 2012), at A1.

⁴⁹ Richard L. Cassin, *Wal-Mart's Whopping FCPA Tab—\$300 Million and Climbing*, FCPA BLOG (Aug. 16, 2013, 9:38 PM), <http://www.fcablog.com/blog/2013/8/16/wal-marts-whopping-fcpa-tab-300-million-and-climbing.html>.

⁵⁰ *Id.*

⁵¹ *Id.*

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but considering how widespread the problem was, it is possible that Wal-Mart's fine will be the largest in history.

E. The FCPA's Collateral Damage to Countries in Desperate Need of Aid

After having established the origin and function of the FCPA, this article will now turn to the issue at hand. While the FCPA's goal of eradicating corruption is a noble one that should be supported, there is great potential for overzealousness to harm the very countries the law is trying to protect. The countries most at risk are those countries that are exiting a period of major internal strife. For the purposes of this paper, major internal strife is considered to be either a long period of government upheaval/civil war or a major natural disaster. These countries are often put in a situation where they are in desperate need of aid from foreign nations and companies, and are also prime locations for investment. They are often hamstrung, however, by the fact that they have a history of corruption, or a fear by foreign companies that simply entering these markets could lead to greater scrutiny from U.S. regulators.

One such country is South Sudan. South Sudan, the youngest nation in the world, came into existence in July 2011, after a January referendum where 98% of the population voted to separate from Sudan and create their own nation.⁵² This was the culmination of negotiations to end an on-going civil war that engulfed Sudan since 1955.⁵³ As one would expect, the creation of South Sudan was met with excitement on an international level.⁵⁴ As South Sudan is a land-locked country whose primary source of revenue is oil, it was in desperate need of foreign investors to help build their fledgling economy. Unfortunately for South Sudan, the country faced several major hurdles.

One of the primary hurdles South Sudan faced in attracting foreign direct investment (FDI) was the perception of South Sudan being linked to corruption. One major contributor was the country's score on the Corruption Perception Index (CPI). The Corruption Perception Index is a score of 1 to 100 given to each nation in the world annually

⁵² See Central Intelligence Agency, *Background, CIA World Factbook: South Sudan*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/od.html> (last updated May 12, 2014).

⁵³ *Id.*

⁵⁴ See Will Connors & Maggie Fick, *At South Sudan's Birth, Eyes Are on Northern*, WALL ST. J. (July 9, 2011), <http://online.wsj.com/news/articles/SB10001424052702304793504576434052777444130?KEYWORDS=South+Sudan>.

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by Transparency International.⁵⁵ For both 2011 and 2012, South Sudan was not given a score.⁵⁶ This alone would deter foreign investors, but on top of that, in both years, Sudan, the country South Sudan split from, scored in the bottom five in the world.⁵⁷ Why would a company in its right mind decide to enter such an environment when other companies are shelling out millions of dollars in fines every year out of fear of being found guilty of violating the FCPA? Sadly with South Sudan, the country may have missed their opportunity to attract necessary foreign investors, as the country has once again descended into civil war.

Another example of a nation exiting major internal strife is Haiti in the aftermath of the earthquake that hit that island in 2010.⁵⁸ Like South Sudan, Haiti has a history of corruption problems, and the earthquake did not help this perception. Prior to the earthquake, Haiti was ranked 168 out of 180 countries that had been given scores.⁵⁹ Since the earthquake, they have seen almost no progress and are currently ranked 163 out of 177.⁶⁰ Like South Sudan, this perception of corruption, whether accurate or not, has seriously harmed Haiti's recovery since the earthquake.

Luckily for Haiti, their plight has not gone unnoticed. In the aftermath of the Haitian earthquake several people began to advocate for changes to the FCPA to allow U.S. companies to enter Haiti and help rebuild both structurally and economically.⁶¹ In particular, peo-

⁵⁵ See *Corruption Perception Index: Overview*, TRANSPARENCY INTERNATIONAL (2013), <http://www.transparency.org/research/cpi/overview> (last visited Apr. 12, 2014).

⁵⁶ See *Corruption Perception Index: Results 2011*, TRANSPARENCY INTERNATIONAL (2013), <http://www.transparency.org/cpi2011/results>; see also *Corruption Perception Index: Results 2012*, TRANSPARENCY INTERNATIONAL (2013), <http://www.transparency.org/cpi2012/results> (last visited Apr. 12, 2014).

⁵⁷ See *Corruption Perception Index: Results 2011*, TRANSPARENCY INTERNATIONAL (2013), available at <http://www.transparency.org/cpi2011/results>; see also *Corruption Perception Index: Results 2012*, TRANSPARENCY INTERNATIONAL (2013), <http://www.transparency.org/cpi2012/results> (last visited Apr. 12, 2014).

⁵⁸ See José de Córdoba and David Luhnnow, *Fierce Earthquake Rocks Haiti*, WALL ST. J., Jan. 13, 2010.

⁵⁹ See Transparency International, *Corruption Perceptions Index 2009*, TRANSPARENCY INTERNATIONAL ARCHIVE SITE, http://archive.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table.

⁶⁰ See Transparency International, *Corruption by Country: Haiti*, TRANSPARENCY INTERNATIONAL (2013), http://www.transparency.org/country#HTI_DataResearch_SurveysIndices.

⁶¹ See Tyler Cowen, *One of the Best Ways to Help Haiti: Modify FCPA*, MARGINAL REVOLUTION (March 15, 2010, 9:24 AM) <http://marginalrevolution.com/marginalrevolution/2010/03/one-of-the-best-ways-to-help-haiti.html>; see also Ashby Jones, *Is the FCPA Standing in the Way of Haiti's Recovery?*, WALL ST. J. L.

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ple were calling for the FCPA to be waived for a period to allow US companies to enter the market and provide the necessary services.⁶² Sadly, this advice went unheeded and Haiti has continued to languish in the hands of a system where paying to play is the norm.

The point of both of these examples is to show how, for some countries, the FCPA actually hinders their development rather than helping it. Whether or not a country is corrupt, the fact that some countries' development is hurt as collateral damage necessitates examination of the current policy.

III. CAN CURRENT STATUTORY EXCEPTIONS AND AFFIRMATIVE DEFENSES ALLOW FOR ENCOURAGING U.S. COMPANIES TO INVEST IN THESE COUNTRIES?

A. *Motivating Hypothetical*

In order to evaluate whether current exceptions and affirmative defenses provide companies adequate room to enter into business in nations exiting major internal strife we will need a case to serve as the instrument of the evaluation. While a real world example would be great, it is far simpler to demonstrate the principles of this article through the use of a hypothetical situation. As a result, the next section of this article will be analyzed through the lens of the following hypothetical.

Imagepriority (IP),⁶³ is a U.S. corporation incorporated in Delaware that specializes in the design, manufacture, and installation of commercial signage.⁶⁴ In recent years, IP has seen rapid growth both domestically and internationally. In particular, one client, McBurger Joint, has just contracted IP to manufacture and install all their signage in the Middle East and Africa. In order to cut down costs and potentially open new markets, the president of the company, Mark Morin, decided to open a factory in South Sudan due to its emerging economy and his sympathy for the South Sudanese people.

Additionally, Morin was comforted by the fact that South Sudan seems to be making an effort to fight internal corruption.⁶⁵ Two

BLOG (Mar. 16, 2010, 4:10 PM) <http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery/>.

⁶² *Id.*

⁶³ IP is a fictional company, but is based on an industry with which I have some experience.

⁶⁴ Commercial signage includes all sorts of signage from the McDonald's arches to the cases surrounding ATMs. See, e.g., *Architectural Graphics Incorporated*, YOUTUBE, <http://www.youtube.com/watch?v=I85VW4ALj1c> (last visited Apr. 12, 2014).

⁶⁵ See The South Sudan Anti-Corruption Commission Act, § 3, (2009) (S. Sudan), available at <http://southsudannngoforum.org/wp-content/uploads/2012/02/Anti-Corruption%20Commission%20Act%202009.pdf>; see also Penal Code Act of 2008

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years after opening the factory business is going well, but it comes to Morin's attention that the SEC and DOJ have begun an investigation into IP's Sudanese facility and several payments made by the head of manufacturing, Miles Gardner, to Sudanese officials. IP opens their own investigation run by their outside counsel into the payments. The investigation finds that the purpose of the payments is not clear.

B. *Exceptions and Defenses Applied*

Using this hypothetical, this article will examine each of the current exceptions and affirmative defenses to see if IP is protected by any of them. The exception for facilitating payments will be analyzed first. The statute specifically exempts "facilitating or expediting payment[s] to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . ." ⁶⁶ For the exception to apply, the question is whether the payment is serving solely the role of speeding up the process and not influencing selection of a winner. ⁶⁷

Applying this to our situation, we see that the actions of Gardner, IP's head of manufacturing, do not fall under this exception. Unless the payments are to expedite the process, they do not fall under this exception. As the payments in this case are for an unclear purpose, they would likely not fall under this exception. This results in IP likely remaining liable for the payments. The facilitating payments exception does not help IP in their effort to continue operating in South Sudan.

Next is the analysis under the affirmative defenses. The first of these is the defense that the payments were lawful under the law of the foreign country. ⁶⁸ This defense is meant to protect U.S. companies from being caught between what is required by the U.S. and a foreign country's laws. ⁶⁹ Payments to government officials are illegal under several sections of South Sudan's Penal Code and are punishable by up to ten years in prison. ⁷⁰ Therefore, these payments were not permissible under South Sudanese law and IP cannot raise the affirmative de-

§§ 88–93, 1 *The Southern Sudan Gazette* 1 (Supp. 2009) (S. Sudan) (South Sudan like many countries has an anti-corruption act, but enforcement of that law is less strenuous than it should be) [hereinafter Penal Code Act].

⁶⁶ 15 U.S.C. § 78dd-1(b).

⁶⁷ R. Christopher Cook & Stephanie Connor, *The Foreign Corrupt Practices Act: An Overview*, 3–4 (Jones Day 2010), available at <http://www.jonesday.com/files/Publication/3325b9a8-b3b6-40ff-8bc8-0c10c119c649/Presentation/PublicationAttachment/d375c9ee-6a11-4d25-9c30-0d797661b5ff/FCPA%20Overview.pdf>.

⁶⁸ 15 U.S.C. § 78dd-1(c)(1).

⁶⁹ Cook & Connor, *supra* note 67, at 4.

⁷⁰ See Penal Code Act, *supra* note 65, at § 88.

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fense that the payments were lawful under foreign law. This leaves them one other option under current law.

The last affirmative defense IP can rely on is the defense of reasonable and *bona fide* expenditure. The statute provides the defense when the “payment. . . was a reasonable and bona fide expenditure[s]. . . incurred by or on behalf of a foreign official. . . was directly related to (A) the promotion. . . of products or services; or (B) the execution or performance of contract with a foreign government or agency thereof.”⁷¹ The DOJ has previously stated that luxury travel provided for foreign officials may form the basis of an FCPA charge.⁷² In this case, this affirmative defense does not get IP very far since in no funds were spent on travel and lodging for officials or visits to the United States. However, even if such expenditures occurred, the defense could not be extended to protect IP for the other payments.

Ultimately, what this shows is that a company with good intentions can suddenly find itself in FCPA trouble for actions by its employees or even accidental actions.

Lest anyone think that this issue is being overblown, the *Wall Street Journal* recently ran an article on a situation that highlights my point exactly. In the run-up to the 2011 overthrow of former Libyan President Moammar Gadhafi, Goldman Sachs, Credit Suisse, J.P. Morgan Chase & Co, and several other major investment companies, with the encouragement and support of the U.S. government, began working with the Libya Fund, a state-run investment group.⁷³ In the aftermath of the Libyan Revolution these relationships attracted the attention of the new government.⁷⁴ What they discovered was a network centering on middlemen known as “fixers.”⁷⁵ These “fixers” established the connections between the investment firms and the individuals with the connections with developing countries, including Libya.⁷⁶ Whether these fixers are funneling money is one of the big questions in this case.⁷⁷ One transaction under scrutiny is a \$120 mil-

⁷¹ 15 U.S.C. §§ 78dd-1(c)(2)–(c)(2)(B).

⁷² See U.S. DEP’T OF JUSTICE, PUB. NO. 08-03, FCPA Review Opinion Procedure Release (2008), available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf>; U.S. DEP’T OF JUSTICE, PUB. NO. 07-02, FCPA Review Opinion Procedure Release (2007), available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf>.

⁷³ Joe Palazzolo et al., *Probe Widens into Dealings Between Finance Firms, Libya*, WALL ST. J., Feb. 3, 2014; see also Richard Cassin, *Hedge Fund Manager Och-Ziff Discloses FCPA Probe*, FCPA BLOG (Mar. 20, 2014, 3:08 AM), <http://www.fcpa.com/blog/2014/3/20/hedge-fund-manager-och-ziff-discloses-fcpa-probe.html#>.

⁷⁴ Palazzolo, *supra* note 73.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

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lion hotel project that has yet to be completed.⁷⁸ This case demonstrates the tension between the United States' desire to police corrupt practices and to encourage U.S. companies to enter developing countries. The fact is that companies can find themselves being punished for something the government encouraged them to do.

Does this mean the government should dump the entire statute and start anew? No, but it does show that there are holes in this statute and its regulatory system that need to be addressed. One possible solution to this concern is outlined below.

IV. A NEW AFFIRMATIVE DEFENSE FOR COMPANIES ENTERING DEVELOPING ECONOMIES

Here is another hypothetical: after adding a room to your house, you walk into that room one day and notice that behind your couch there is a hole in the wall. What do you do? Do you tear down the wall and have it rebuilt, or do you pull out your tools and patch the hole? Hopefully, you make the economic decision to patch the hole instead of rebuilding. Like a hole in a wall, there is a hole in the statute. What shall we do? The U.S. government can do exactly what the system is supposed to do in these cases and tweak the statute by amending it slightly to provide for companies to enter emerging markets with less fear about their own government coming down on them.

What this article proposes is a new affirmative defense that would allow U.S. companies to get approval to enter countries exiting major internal strife and, as a result, be safe from close scrutiny by the DOJ and SEC. This is basically a cross between a compliance defense and the current practice of DOJ issuing opinions on what constitutes corrupt action.⁷⁹ As a result, it satisfies concerns of both sides of this issue, by giving companies a bit more room to take the risk of entering these markets that desperately need foreign direct investment, while still promoting the goal of encouraging clean business.

As with most things in government, this would necessarily be a multi-step process. A company like IP, could approach the Fraud Section of the DOJ⁸⁰, or likely a smaller division within that section, with

⁷⁸ *Id.*

⁷⁹ One provision of the FCPA that I have not discussed in detail is the practice of DOJ issuing opinions on what constitutes actionable conduct. This power is given to the Attorney General in the statute and is regularly used to clarify the rules concerning the FCPA. See 15 U.S.C. § 78dd-1(e); see also Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 RICH. J. GLOBAL L. & BUS. 317, 355–57 (2013) (discussing the guidance system).

⁸⁰ See U.S. Department of Justice, *About the Fraud Section*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/fraud> (last visited Jan. 10, 2014).



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its proposal to enter a foreign market exiting major internal strife, which we have previously defined as a major natural disaster or political upheaval. This proposal should give a brief summary of the circumstances in the foreign nation, as well as the reasons why the company desires to enter that market. The core of this proposal should be a detailed plan for how the company plans to oversee their employees and operations in that market and ensures implementation of anti-corruption measures. If the program was sufficient, the DOJ, along with the SEC could sign off on the program, allow the company to enter the market, and the DOJ and SEC would only investigate if there were reports of rampant, blatant corruption.

To be clear, following this procedure would not exempt companies from the FCPA. Instead, it would increase the threshold of when action should be taken. The new defense should only apply for a relatively short period of time, say four years. This would allow the company time to enter the market, get their business up and running, and hopefully have a positive influence on the country. Additionally, companies do not have to follow this procedure to enter that market, but without following this procedure they would remain under the same level of scrutiny they currently face.

The point of this policy is not to defang or destroy the FCPA, but to fix a fundamental conflict between two major policy concerns involved in the legislation. On one hand, you have the desire to discourage and even eradicate corporate corruption by American companies wherever they may preside.⁸¹ On the other hand, you have the goal of promoting economic growth throughout the world, and especially in developing markets.⁸² As it currently stands, these two policies are in conflict when it comes to U.S. companies entering developing markets and especially markets exiting major internal strife. This proposal finds a happy medium by requiring companies to continue to fight corruption in their midst as well as allowing them to enter into lucrative markets that are desperately in need of their business.

One potential way to evaluate this idea is to look at the policies of other countries toward their own companies. One great example is China. While China has long outlawed the paying of commercial bribes, it only recently amended its Criminal Code to prohibit bribes to

⁸¹ This is most evident in Senator Proxmire's statements at the beginning of the hearings that led to the FCPA. See *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. (1976), microformed on CIS No. 76-S241-38 (Cong. Info. Serv.).

⁸² See USAID Sudan, *About Us: USAID Mission*, EMBASSY OF THE UNITED STATES: SOUTH SUDAN, <http://southsudan.usembassy.gov/embassy-sections/usaid-mission.html> (last visited Jan.17, 2014).

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foreign governments.⁸³ While this amendment has been compared to the FCPA, China's enforcement of their anti-bribery statutes outside China falls far short of the U.S.'s efforts in this area.⁸⁴ Given that it is only two years old and it did take the U.S. a few decades to aggressively begin enforcing the FCPA, some benefit of the doubt can be given to China. Still, despite the relatively young age of China's law it is enlightening to see how this is affecting Chinese companies' investments in foreign countries, especially those in Africa.

China, along with its other BRICS partners (Brazil, Russia, India, and South Africa), made the conscious choice to focus their investments in Africa. China especially has focused much of its outgoing investments into Africa.⁸⁵ In fact, as of last year 49 of the continent's 54 nations had formalized diplomatic ties to China.⁸⁶ The point here is that China, on a national level has made the decision to invest into the African continent, which has led Chinese companies to follow suit. If China is so interested in promoting investment in Africa, why would they hinder that by harming their own companies entering the market? The answer is they would not, and neither should the U.S.

The FCPA plays a vital role in the larger policy of encouraging transparency in business transactions, which is a noble and important goal. At the time of its passage, it shattered international norms about how business should conduct themselves in other countries, but this law, like all law, is not perfect. Fortunately, the United States has a mechanism to fix laws, through an amendment. What the FCPA needs is a new affirmative defense that allows companies to enter into nations exiting major internal strife with the regulators' permission and do the good work that follows.

V. CONCLUSION

In 1975, the U.S. Congress passed the Foreign Corrupt Practices Act as a reaction to the scandal of Watergate. This law, which criminalized bribery and other corrupt practices by U.S. companies in foreign countries, was the first of its kind, but it would spark an inter-

⁸³ Amy Riella & Holly J. Warrington, *Expanding the Boundaries of China's Anti-Corruption Regime*, 4 FIN. FRAUD L. REP. 63, 63 (2012).

⁸⁴ To this point there has been no reported cases of China actually enforcing this amendment.

⁸⁵ See 2 OLIVER C. RUPPEL ET. AL, CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE 558 (2013) (Professor Ruppel devotes a chapter in this book to the relationship between the BRICS partners and African nations. In particular he provides great insights into China's role in this policy).

⁸⁶ See Zhang Chun, *A Promising Partnership between BRICS and Africa: A Chinese Perspective*, THE CHINA MONITOR, Mar. 2013, at 30-37.



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national movement to fight corruption in all its forms.⁸⁷ A little over a decade into the FCPA's life, Congress identified the fundamental flaw in the initial law, that its prohibitions were far too vague for a law with such a wide reach. To solve this, Congress added an exception (the facilitating payments exception) and two affirmative defenses (the foreign law defense and reasonable bona fide expenditure).⁸⁸ All three of which went a long way in fixing the flaws with the FCPA.

The importance of understanding the FCPA skyrocketed once enforcement began in earnest. In the mid-2000s a fundamental change in the importance of the FCPA occurred when the Department of Justice and the Securities and Exchange Commission began aggressively enforcing the FCPA.⁸⁹ Companies quickly realized that an FCPA violation could cost them millions and maybe even billions of dollars.⁹⁰ In this environment, it is likely that these companies began to pass up good business opportunities out of fear of a sanction.

At the core of the FCPA is the need to balance two competing policies. The promotion of transparent business practices stands as the clearest policy behind the FCPA. This policy stands in tension with the desire to promote Americans and for American companies to be active in other countries, by helping those in need. Because the United States should be in the business of promoting both values involved, a middle ground needs to be struck.

That middle ground is a new affirmative defense. To encourage U.S. companies to enter markets exiting periods of civil war or in the aftermath of a natural disaster, Congress should enact a defense to the FCPA that allows companies to approach the DOJ and SEC with a program for entering such a market without knowingly violating the FCPA. If the regulators approved, the companies would be free from close scrutiny for a period of a few years to really pour their efforts into that market. This would not compromise the overall effectiveness of the FCPA or hinder the policy toward transparency, because it would have a limited application. The FCPA is an excellent example of Congress responding to a crisis and making U.S. law better, but it needs some work.

⁸⁷ See OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (2011), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

⁸⁸ See 15 U.S.C. §§ 78dd-1(b-c)

⁸⁹ See U.S. Securities and Exchange Commission, *supra* note 43.

⁹⁰ *Id.*