RUSSIAN ROULETTE: DOING BUSINESS IN RUSSIA IN COMPLIANCE WITH ANTI-BRIBERY LAWS AND TREATIES

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Fans of *Casablanca* will recall the scene when Inspector Renault shuts down Rick's Café because he is "shocked, shocked, to find gambling going on in here" — and then graciously accepts his winnings from the croupier. Renault closes the café on orders from the loathsome Major Strasser, who is not concerned with enforcing the law, but rather with stamping out unwanted competition: *la Marseillaise* has just drowned out *Die Wacht am Rhein.* Unfortunately, this scene neatly encapsulates certain features of the international legal framework for combating the bribery of foreign public officials. First, there is the *law.* Gambling was presumably illegal in Casablanca,[1] as is bribing foreign officials in many of the world's countries today. Second, there is widespread *violation* of the law; in Rick's Café gambling is the norm, not the exception. Third, there is spotty *enforcement,* undertaken in fictional Casablanca only when Strasser wants to thwart the competition. And last, there is a *conflict of interest*: by enforcing the public good (the law), Renault forgoes his private gain (further roulette winnings). This article expands on these four themes by examining the possible effect that three legal regimes that implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Conven-

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1. Though not certain, this seems a safe assumption from the fact that the gaming room in Rick's Café is behind closed doors and Rick has no response to Renault's explanation why he is closing the café.

tion")[2] might have on the shape of international business dealings in Russia: the laws of the United States, Canada, and the United Kingdom.

I.
CULTURE CLASH AS LEGAL PROBLEM

If various studies, anecdotal evidence, and Russian government statements are to be believed, bribes are being paid in Russia. According to the *Bribe Payers Index 2002,* prepared by Transparency International, Russia ranked last (worst) out of the 15 emerging market countries surveyed[3] and, with regard to corruption generally, 126th out of 159 in Transparency International's more recent *Corruption Perceptions Index 2005* (Russia shares that rank with Albania, Niger, and Sierra Leone).[4] So widely acknowledged is the problem that a guidebook published by the Finnish-Russian Chamber of Commerce in 2003 called *Customs for Finns* (later withdrawn)[5] provided tips on how to recognize the solicitation of a bribe (key phrases, gestures) and gave advice about what might constitute appropriate bribes under various circumstances ("Requested service fees might include package tours to sunny climates or

2. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, *available at* http://www.oecd.org/EN/document/0,,EN-document-88-nodirectorate-no-6-7198-31,00.html [hereinafter *Convention*].

3. In the *Bribe Payers Index 2002,* the following question was asked: "In the business sectors with which you are most familiar, please indicate how likely companies from the following countries are to pay or offer bribes to win or retain business in this country?" Transparency International, *Bribe Payers Index 2002,* May 14, 2002, *available at* http://www.asre.org/files/pdf/global/tibpi2002tablesqafinalenglish.pdf.

4. Transparency International, *Corruption Perceptions Index 2005,* Oct. 20, 2005, *available at* http://www.transparency.org/cpi/2005/cpi2005_infocus.html#cpi. In the *Corruption Perceptions Index 2004,* Russia ranked 90th out of 146. Transparency International, *Corruption Perceptions Index 2004,* Oct. 20, 2004, *available at* http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004.

5. Lack of veracity does not seem to be one of the reasons for withdrawing the book. A senior official at the Finnish Trade and Industry Ministry, Henrik Raiha, was quoted as saying "of course you have to tell about the operating environment, but not like that." *Finns Advised on Bribery in Russia,* MOSCOW TIMES, Jan. 24, 2005, at 5. A Finnish-Russian Chamber of Commerce spokesman was more defensive: "it is a description about how real life is in Russia." *Id.*

trips to Lapland").[6] The Russian government itself has acknowledged the problem, and has taken steps to combat corruption on the institutional level.[7]

Compounding the difficulty of doing business in Russia is the widespread practice of creating Byzantine offshore corporate holdings that often make identifying the ultimate beneficial owner of a given entity or stake in an entity difficult or impossible. It is not uncommon for a piece of Russian real estate, for example, to be owned by a Russian company that is 100%-owned by an offshore entity, which is in turn owned by one or more offshore companies or trusts ranging from Cyprus to the British Virgin Islands.[8] One result of this practice is that even the principals in a Russian deal sometimes do not know for certain with whom they are ultimately dealing.

This combination of a treacherous business environment and often murky ownership structures presents a considerable problem for foreign companies that want to do business in Russia in compliance with their domestic legislation criminalizing the bribery of foreign officials. These companies are sometimes faced with a stark choice between refusing a deal for fear of violating the law or doing a deal and living in fear of being caught. Probably more often, the choice is not so stark, as even considerable due diligence will not always dispel doubts about the ultimate identity of a prospective business partner. Moreover, the very process of conducting the neces-

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6. The author has been unable to obtain a copy of this book. The quoted passage was taken from HARPER'S MAGAZINE, May 2005. The book seems to take a remarkably flexible approach to the problem of doing business in Russia in light of the fact that Finland is a signatory of the Convention and its domestic laws criminalize the bribery of foreign officials by its nationals. Moreover, Finland consistently ranks as among the least corrupt countries in the world. *See, e.g.*, Transparency International, *Corruption Perceptions Index 2005, supra* note 4 (ranking Finland second).

7. Among other initiatives, the Ministry of Internal Affairs created a "Coordinating Group Against Corruption" in mid-2005, and in late 2003 a "Counsel Against Corruption" was created under the auspices of the Russian Presidential Administration. The former head of the Counsel, Mikhail Kasyanov, was fired in 2004 on allegations of corruption.

8. This practice is not new to post-Soviet Russia. The Soviets were well-versed in the use of offshore companies during the Cold War for the purpose of conducting foreign trade, funding espionage, and supporting foreign communist parties and various other licit and illicit organizations outside of the U.S.S.R. *See* MARSHALL I. GOLDMAN, THE PIRATIZATION OF RUSSIA 162-63 (2003).

sary due diligence will often meet with incredulity and resistance: Russian and other non-U.S. counterparties can find it difficult to understand how U.S. or other non-Russian anti-bribery legislation could apply to actions taken in Russia. Such a disparity in risk-assessment can also exist *within* an organization, as when certain of its employees are worried about exposure to the law of their country of citizenship, whereas the employer does not share the concern because it is incorporated in a jurisdiction with weak or non-existent anti-bribery legislation. Finally, there is an ever-present risk of denunciation to the authorities in accordance with the Russian practice of "*kompromat*," that is, the gathering and turning over of compromising materials about one's rivals and enemies to the authorities. As it turns out, denunciation by a business rival or disaffected insider is one of the more common sources of evidence for the prosecutors.[9]

Russia thus presents a challenging business environment whose potential rewards are nonetheless generally regarded as attractive enough to warrant the development of often extensive mechanisms for minimizing exposure to anti-bribery legislation. The first step in assessing the risk of exposure is to gain a clear understanding of the precise contours of liability under the various applicable laws. Despite the Convention's purpose of harmonizing the signatory states' domestic legislation, the risk varies widely, depending on the particular gaps in domestic laws and the vigor of their enforcement. Certain points in this regard merit particular attention: jurisdictional limitations (by territory or nationality), subsidiary liability, and the likelihood of enforcement.

II.
THE CONVENTION

The Convention resulted largely from U.S. pressure on other countries to enact legislation comparable to the Foreign Corrupt Practices Act ("FCPA") so as to diminish the competi-

9. *See, e.g.*, the UNITED STATES PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, at 10 (2002), *available at* http://www.oecd.org/dataoecd/7/35/35109576.pdf [hereinafter U.S. PHASE 2 REPORT].

tive disadvantage that U.S. companies complained of vis-à-vis their competitors from countries with weak or non-existent anti-bribery legislation.[10] Until the Convention entered into force in February 1999, certain signatory states considered bribing foreign officials to be not only legal, but also tax deductible.[11]

The Convention addresses that disparity by requiring signatory states to criminalize actions taken by "any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[12] A signatory state is also to "take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign official."[13] As not all jurisdictions impose criminal liability on juridical persons, the Convention requires signatories to "ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of public officials."[14]

With respect to jurisdiction, the Convention distinguishes between acts committed inside and acts committed outside the relevant signatory state. Regarding the former, a state is to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the

10. *See* S. Rep. No. 105-277, July 30, 1998, *available at* http://usdoj.gov/criminal-/fraud/fcpa/senate1.htm.

11. *See id.*

12. *Convention, supra* note 2, at Art. 1(2). Although the Convention has been ratified by 36 countries to date and has resulted in the enactment of FCPA-like legislation in those jurisdictions, it seems to have enjoyed rather less notoriety in the international business community than the FCPA. According to Transparency International's *Bribe Payers Index 2002*, only 42% of the 835 "business experts" interviewed had ever heard of the Convention. *Supra* note 3, at 3. Its relative obscurity could perhaps be chalked up to the fact that as a treaty among states it does not create bases of liability for natural and juridical persons, but rather imposes on signatory states the obligation to enact domestic legislation imposing such liability.

13. *Convention, supra* note 2, at Art. 2.

14. *Id.* Art. 3(2).

offense is committed in whole or in part in its territory."[15] Regarding the latter, the obligation to take similar steps is further qualified: "Each Party *which has jurisdiction to prosecute its nationals for offenses committed abroad* shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, *according to such principles.*"[16] These qualifications permit a country that does not generally apply its legislation extraterritorially to forgo extraterritorial application of its implementing legislation. This discretion, however, is limited by the obligation to "review whether [the state's] current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps."[17] The Convention does not otherwise require a signatory state to apply so-called "nationality jurisdiction," that is, to extend the scope of application of its implementing legislation to offenses by their nationals wherever committed.

In sum and substance, therefore, one could say that the Convention *requires* the enactment of domestic legislation that sanctions the bribery of a foreign or public official when the forbidden actions are committed inside the relevant state, but merely *exhorts* signatory states to enact legislation that sanctions prohibited conduct engaged in outside the signatory state.

Of further note is the Convention's mechanism for monitoring compliance. Under Article 12, so-called "OECD Working Groups on Bribery in International Business Transactions," which are composed of jurists from various countries, are required to periodically monitor and report on the progress made in the signatory states to implement and enforce their domestic anti-bribery legislation. To date, there have been two rounds of review, the most recent results being set forth in a number of "Phase 2" reports devoted to individual signatory states. This article relies heavily on these Phase 2 reports, as they incorporate a more extensive review of the state of affairs in the relevant jurisdictions than any single commentator could ever hope to do.

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15. *Id.* Art. 4(1).

16. *Id.* Art. 4(2) (emphasis added).

17. *Id.* Art. 4(4).

III.
THE FOREIGN CORRUPT PRACTICES ACT

The Foreign Corrupt Practices Act[18] predates the Convention by some 20 years and was the first law of its kind, enacted in 1977 on the heels of the Watergate scandal and the ensuing movement to combat corruption in U.S. business and government. The FCPA followed a Securities and Exchange Commission ("SEC") report that more than 400 U.S. companies, including some of the largest and most prominent entities in the nation, had been making "questionable payments" to foreign officials in exchange for business favors.[19] Since its enactment, the Act has been amended twice to expand its scope of its application and, most recently, to conform with the requirements of the Convention.

The conduct prohibited by the FCPA's anti-bribery provisions ("Anti-Bribery Provisions") may be broken down into the following three principal elements: (1) an offer of payment, (2) for the purpose of corruptly influencing a foreign official, (3) in exchange for a business favor. More specifically, the FCPA bars doing any act in furtherance of an offer, payment, or promise to pay anything of value to a "foreign official,"[20] a "foreign political party or official thereof or any candidate for foreign political office,"[21] or "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly"[22] to either of the foregoing two categories of person, for the purpose of:

> (A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful

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18. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977), *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1419 (1988) and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. § 78dd, *et seq.*).

19. *See* U.S. Dept. of Justice & U.S. Dept. of Commerce, *Foreign Corrupt Practices Act Antibribery Provisions*, (Jan. 2006), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm.

20. 15 U.S.C. §§ 78dd-1(a)(1), 2(a)(1), and 3(a)(1) (1998).

21. *Id.* §§ 78dd-1(a)(2), 2(a)(2), and 3(a)(2).

22. *Id.* §§ 78dd-1(a)(3), 2(a)(3), and 3(a)(3).

> duty of such foreign official, political party, party official, or candidate, or (ii) securing any improper advantage; or
> (B) inducing such foreign official, political party, party official, or candidate to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such ["issuer," "domestic concern," or certain others, described below] in obtaining or retaining business for or with, or directing business to, any person.[23]

The Anti-Bribery Provisions apply to: (a) "issuers,"[24] that is, U.S. and foreign companies with securities issued in the U.S., as well as their directors and employees, agents, and shareholders acting on behalf of the issuer; (b) "domestic concerns,"[25] comprised of business entities organized under the laws of a state of the U.S. or having their principal place of business in the U.S., as well as any individual "who is a citizen, national or resident of the United States;" and (c) persons other than domestic concerns whose prohibited conduct occurs "while [they are] in the territory of the United States."[26] Enforcement of the Anti-Bribery Provisions falls within the jurisdiction of the U.S. Department of Justice. There are criminal and civil penalties for violating the FCPA. A criminal penalty of up to $2 million may be imposed on legal entities, and a penalty of up to $100,000 may be imposed on officers, directors, employees, and agents violating the Act's provisions. Individuals are also subject to imprisonment for up to 5 years for violations of the FCPA.[27] These penalties can be considerably higher under the Alternative Fines Act.[28] Civil fines of up to

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23. *See, e.g., id.* at § 78dd-1(a)(3) (the same prohibition appears elsewhere in the FCPA). To assist companies facing such difficult issues, the Department of Justice ("DOJ") established a "Foreign Corrupt Practices Act Opinion Procedure," whereby the U.S. Attorney General will issue an opinion within 30 days of a request. Although this procedure could provide some clarity, the disadvantage is, of course, that the DOJ is informed of the kind of information that most businesses prefer to keep to themselves.

24. *Id.* § 78dd-1(a).

25. *Id.* § 78dd-2(a).

26. *Id.* § 78dd-3(a).

27. *Id.* § 78dd-2(g).

28. 18 U.S.C. § 3571(d) (1987) provides: "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a

$10,000 may be imposed on both the legal entities and natural persons who violate the FCPA's anti-bribery provisions.[29]

The FCPA permits so-called "facilitating payments." That is, the FCPA does not impose liability for "any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."[30] The FCPA lists as examples of "routine governmental actions" such things as obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country, processing governmental papers, such as visas and work orders, providing police protection, mail pick up, and "actions of a similar nature."[31] Expressly excluded from the definition is "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business or to continue business with a particular party."[32]

The FCPA provides only two "affirmative defenses," that is, defenses which the defendant must prove and which do not negate the truth of the allegations made against the defendant, namely: (a) the payment is legal under the "written laws and regulations" of the foreign official's country, and (b) the payment represents reimbursement of "reasonable and bona fide" expenses incurred by the foreign official in connection with the demonstration of products or services.[33]

These Anti-Bribery Provisions also form the foundation for another distinct basis of liability under the FCPA. The Foreign Corrupt Practices Act also requires the keeping of books and records in such a way that payments made in violation of the above-quoted provision are not concealed ("Books &

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person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process."

29. 15 U.S.C. § 78dd-2(g) (1998).

30. *Id.* § 78dd-1(h), 2(h), 3(h).

31. *Id.* § 78dd-1(f)(3)(A), 2(h)(4)(A), 3(f)(4)(A).

32. *Id.* § 78dd-1(f)(3)(B), 2(h)(4)(B), 3(f)(4)(B).

33. *Id.* § 78dd-1(c), 2(c), 3(c).

Records Provisions").[34] The Books & Records Provisions, which are generally enforced by the SEC, apply primarily to companies whose shares trade on U.S. exchanges, that is, to the so-called "issuers" noted above.[35] Such issuers must file certain information and documents as required by the SEC,[36] keep internal books and records "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issue,"[37] and maintain a system of internal accounting and controls "sufficient to provide assurances" that corporate transactions are executed in accordance with management's instructions and properly recorded.[38] The Books & Records Provisions of the FCPA are enforced by the SEC, which can impose fines of up to $100,000 for natural persons and $500,000 for legal entities violating these provisions.[39] Offending persons and firms may also be barred from doing business with the U.S. federal government, ruled ineligible for export licenses, and disbarred from various relevant programs.[40]

In broad outline, the FCPA thus criminalizes the bribing of foreign officials by U.S. citizens and companies around the world, and by non-U.S. persons and entities acting in the U.S., unless the payment in question qualifies as a "facilitating payment." Non-U.S. subsidiaries are not technically subject to the FCPA with regard to their actions outside the U.S., although the U.S. parent company exposes itself to liability to the extent it authorizes, directs, or controls a foreign subsidiary in the act of bribery, and even if it is reckless with regard to the subsidiary's actions (but probably not if merely negligent).[41] Assessing a corporate parent's risk of vicarious FCPA liability for a subsidiary's actions is usually an intensely fact-specific inquiry that counsels caution on the part of the parent. A U.S. issuer parent is, in any event, obligated to enforce the FCPA's Books & Records Provisions with regard to the foreign subsidiaries that it controls.

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34. *Id.* § 78m. *See also id.* § 78dd-1.
35. *Id.* § 78m(a), 78l.
36. *Id.* § 78m(a)(1) & (2).
37. *Id.* § 78m(b)(2)(A).
38. *Id.* § 78m(b)(2)(B).
39. *See supra* note 19.
40. *Id.*
41. .U.S. PHASE 2 REPORT, *supra* note 9, at 7.

The FCPA's expansive scope has resulted in about fifty FCPA prosecutions[42] — an average of almost two per year since 1977 — and a steadily increasing number of investigations: 7 in 2002, 11 in 2003, and 18 in 2004.[43] The *U.S. Phase 2 Report* therefore had no significant complaints about U.S. enforcement practice or jurisdiction, but focused instead on certain relatively arcane aspects of interpretation.[44]

IV.
CANADA

Canada ratified the Convention on December 17, 1998, and Canada's implementing legislation, the Corruption of Foreign Public Officials Act ("CFPOA"), entered into force on February 14, 1999.[45] The bases for liability under the CFPOA closely parallel those of the FCPA:

> Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

The CFPOA further contains an exemption similar to the "facilitation payment" exemption contained in the FCPA for payments made "to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions."[46] The CFPOA does not, however, contain any accounting provisions comparable to the Books & Records Provisions of the FCPA.

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42. *See id.* at 42-53 (table of cases).

43. *See, e.g.*, Shearman & Sterling, *Recent Trends and Patterns in FCPA Enforcement*, Oct. 2005, *available at* http://www.shearman.com/lit_1005/.

44. *See* U.S. PHASE 2 REPORT, *supra* note 9, at 38-40.

45. Corruption of Foreign Public Officials Act, ch. 34, 1997-1998 S.C. 1 (Can).

46. *Id.* § 3(4).

The Canadian government is apparently of the view that existing Canadian legislation adequately addresses such issues, a view not shared by everyone.[47]

Transparency International has concluded that the CFPOA is "technically in compliance" with Canada's obligations under the Convention, although it suggests that there is room for improvement in two particular areas: the aforementioned lack of accounting provisions and jurisdiction.[48]

With regard to jurisdiction, Canada has decided not to establish extraterritorial jurisdiction in the CFPOA to govern the conduct of its nationals when they are acting outside of Canada. A national acting outside of Canada could therefore be prosecuted for an offense under the CFPOA (*i.e.*, Canada could apply the CFPOA) only if there were a "real and substantial" link between the offense and Canada.[49] According to the *Canada Phase 2 Report*, "[t]he Canadian authorities explain that nationality jurisdiction was not established over the foreign bribery offense because it has generally been the policy to only take extraterritorial jurisdiction where there has been a treaty obligation to do so."[50] As a result, the Ontario Provincial Po-

47. *See* OECD CONVENTION: OVERCOMING OBSTACLES TO ENFORCEMENT. SUBMISSION OF TRANSPARENCY INTERNATIONAL CANADA (Paris, October 2-3, 2003), at 8 [hereinafter TI CANADA REPORT].

48. *Id.* at 7-8.

49. *See* R. v. Libman, [1985] 2 S.C.R. 178 (Can.).

50. ORG. FOR ECON. CO-OPERATION & DEV., CANADA PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, at 32, (2004), *available at* http://www.oecd.org/dataoecd/20/50/31643002.pdf [hereinafter CANADA PHASE 2 REPORT]. Justice LaForest of the Supreme Court of Canada, Canada's highest court, has articulated the rationale behind Canada's general policy not to exercise extraterritorial jurisdiction as follows: "[B]ecause of Canada's respect for the underlying premises of international relations, i.e. comity and respect for the sovereignty of independent states, a self-imposed limit is placed on its ability to prosecute . . . culpable acts when committed outside its territory. As part of our respect for sovereignty and part of our confidence in the standards of other nations, we would normally expect that other nations would punish the culpable conduct. Such a limit is also justified on the basis of efficacy of prosecution; it is usually more efficient and effective to prosecute in the place where the criminal act actually occurred . . . [W]hether the relevant conduct constitutes a situation evaluated by the international community to constitute warranting treatment exceptional to the general precepts of international law [ ] involves an assessment of Canada's international obligations and other ques-

lice and Ontario Ministry of the Attorney General have confirmed that "jurisdiction could not be exercised [under the CFPOA] where a person made a telephone call from Canada to set up a meeting with a foreign public official, and then flew from a Canadian airport to a foreign jurisdiction to meet with the foreign public official, in order to make an offer or promise or gift."[51]

Canada is therefore one of only "two or three countries" that does not enforce its anti-bribery law on the basis of nationality,[52] and this jurisdictional limitation has caused some concern outside of Canada. The U.S. Department of State has recommended that "Canada reconsider its decision not to establish nationality jurisdiction over the offense of foreign bribery (as most other commonlaw [sic] countries did, including the United States and the United Kingdom, when they enacted laws implementing the antibribery [sic] Convention)."[53] The OECD's *Canada Phase 2 Report* was "not convinced that territorial jurisdiction under Canadian law is broad enough to enable the effective application of the offense under the [CFPOA]" and recommended that Canada "reconsider its position in this respect."[54] Transparency International is of essentially the same view: the "addition of 'nationality jurisdiction' would, no doubt, as per Article 4 of the Convention, be more effective in the fight against bribery of foreign public officials . . ."[55]

Indeed, because it would generally be unlikely for a Canadian to bribe a non-Canadian in Canada (and certainly easy enough to avoid doing), it is probably of little surprise that in the five years between the CFPOA's entry into force in February 1999 and the issuance of the *Canada Phase 2 Report* in March 2004, there were "no completed prosecutions involving

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tions concerning the interrelationship of nations." R. v. Finta, [1994] 1 S.C.R. 701, 770-71 (Can.) (LaForest, L'Heureux-Dube, McLachlin JJ. dissenting).

51. CANADA PHASE 2 REPORT, *supra* note 50, at 32-33.

52. TI CANADA REPORT, *supra* note 47, at 8.

53. U.S. Dept. of State Bureau of Economic and Business Affairs, *Battling International Bribery 2004*, at 27, Sept. 28, 2004, *available at* http://www.state.gov/e/eb/rls/rpts/bib/c12941.htm [hereinafter *State Department Report*].

54. CANADA PHASE 2 REPORT, *supra* note 50, at 33.

55. TI CANADA REPORT, *supra* note 47, at 7.

bribery of foreign officials in Canada."[56] Of course, it may well be that Canadians (with one exception)[57] have not bribed a foreign official *in Canada*, or that they have been clever enough not to get caught.[58] Yet if Canada's territorial restriction hinders the effectiveness of CFPOA in combating bribery, the Convention's exhortation to punish acts outside of Canada could become a requirement to take appropriate measures under Convention Article 4, as Transparency International noted. The *Canada Phase 2 Report* corroborated this concern: "In the event Canada does not change its position [concerning nationality jurisdiction], the Working Group recommends that this issue continue to be monitored."[59]

If Canada is willing and able to assert nationality jurisdiction in cases of, for example, bigamy and sex tourism,[60] it is not entirely clear why it is hesitant to do so with regard to the bribery of foreign officials. An uncharitable observer might be tempted to conclude that Canada has little to lose by punishing, say, bigamy, whereas the same is not necessarily the case with regard to the bribing of foreign officials on behalf of Canadian enterprises.[61]

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56. *State Department Report*, *supra* note 53, at 27. *See also Development and Society, Corporate Social Responsibility-Bribery and Corruption, Fifth Report to Parliament*, (Oct. 26, 2004), *available at* http://www.dfait-maeci.gc.ca/tna-nac/DS?5-report_parliament-en.asp.

57. At the time of the CANADA PHASE 2 REPORT, there was one ongoing CFPOA proceeding against the Hydro Kleen Group Inc. and two individuals. *See* CANADA PHASE 2 REPORT, *supra* note 50, at 6.

58. Canadians have been less lucky outside of Canada. Individuals from some notable Canadian companies have been convicted under non-Canadian anti-bribery law before the enactment of the CFPOA. An agent of the state-owned Atomic Energy of Canada was convicted in South Korea in 1994 of bribing the head of the South Korean state utility that operates South Korea's nuclear reactors, and Acres International was convicted in Lesotho for paying bribes to a Lesotho government official. *See* CANADA PHASE 2 REPORT, *supra* note 50, at 6 n. 19.

59. *Id.* at 39.

60. *See* TI CANADA REPORT, *supra* note 47, at 8.

61. Transparency International has noted that Canada's reputation for honesty has worsened in recent years: "In the case of certain higher-income countries such as Canada and Ireland . . . there has been a marked increase in the perception of corruption over the past few years, showing that even wealthy, high-scoring countries must work to maintain a climate of integrity." *See Corruption Perceptions Index*, *supra* note 4, at 2.

IV.
THE UNITED KINGDOM

Many investors are doubtless attracted to the U.K. by its deeply-imbued respect for the law and honest business dealing,[62] an attitude aptly described by British Foreign Office Minister Baroness Symons, who stated: "the U.K. has a strong reputation for honesty and integrity . . . we were one of the first countries in the world to introduce an anti-corruption law."[63] In fact, one could even say the U.K.'s reputation for honesty and integrity is, in a certain sense, unblemished. As an anonymous British lawyer quoted by THE ECONOMIST said in 2002: "there has been only one successful prosecution for bribery of a public official in Britain *in the past century*, never mind a prosecution of anybody abroad."[64] Whether this assertion is accurate or not, the *U.K. Phase 2 Report* (approved March 17, 2005)[65] has done nothing to dispel it. The Report noted that "it is surprising that no company or individual has been indicted or tried for the offence of bribing a foreign pub-

62. The Russians are no exception: the U.K. is currently one of the largest recipients of Russian foreign investment. The Duke of York, during a visit to Moscow as the U.K.'s Special Representative for International Trade and Investment, remarked that "[t]he U.K. has attracted the most Russian direct investment since 1999 - nearly 18% of the total." Andrew Albert Christian Edward speech to Moscow, (Oct. 25, 2004), *available at* http://www.royal.gov.uk/output/Page933.asp. In a speech given to the Russian Foundation by Douglas Alexander, Minister of State at the Department of Trade and Industry on March 22, 2005, said that "[t]he U.K. is now the second largest overseas investor there, and we are also the most attractive destination for Russian Capital investing abroad. Our bilateral trade last year was worth £5 billion. Over 400 British companies operate in Russia: BP's total investment there now stands at over $8 billion." Douglas Alexander speech, (Mar. 22, 2005), *available at* http://www.dti.gov.uk/ministers/speeches /alexander220305.html.

63. *The Short Arm of the Law*, THE ECONOMIST, Mar. 2, 2002, at 64 (statements of Baroness Symons).

64. *Id.* (emphasis added).

65. UNITED KINGDOM PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Mar. 17, 2005) [hereinafter U.K. PHASE 2 REPORT].

lic official since the ratification of the Convention by the U.K."[66]

The current U.K. law on bribery is contained in the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916, and the Public Bodies Corrupt Practices Act 1989. Additionally, in October 2002, the U.K. responded to the Convention, implementing Part 12 of the Anti-Terrorism Crime and Security Act 2001 ("2001 Act"), legislation previously introduced in response to the September 11, 2001 attacks, largely for the purpose of combating international terrorism.[67]

Despite the lack of enforcement, this legislation remains something to be reckoned with by those falling within its scope. The 2001 Act essentially amends and expands the older English anti-bribery laws alluded to by Baroness Symons that criminalize the bribing of foreign officials by U.K. nation-

66. *Id.* at 8. The U.K. PHASE 2 REPORT further voices some concern about the apparent failure of the U.K. prosecutors to investigate numerous press reports of bribery-related violations, the high level of proof demanded, the paramountcy of national interest over enforcement of the law, and the adequacy of various checks and balances. *See id.* at 48-49. This is a subject that has been receiving increasing attention in the press: "Despite the existence of this legislation, there have been no prosecutions in the U.K., to date, for overseas bribery and corruption, and less than a handful of allegations have been or are being investigated, even though more than 20 have been registered by Government departments or reported to the various enforcement agencies since 2002. These statistics increase the pressure on the Government to explain why there have been no prosecutions three years after the [2001 Act] was implemented, and seven years after the OECD Convention was ratified." Susannah Williams and Talia Zubil, *Banking and Finance: Shining a Light on Corruption*, LEGAL WEEK, May 12, 2005, *available at* http://www.legalweek.com/ViewItem.asp?id=24040&Keyword=Susannah.Moreover, in House of Commons Hansard Written Answers for June 27, 2005, Mr. Ian Pearson stated: "I understand that 24 matters referred to U.K. law enforcement under part 12 of the Anti-terrorism, Crime and Security Act 2001 since February 2002 are under investigation. In those cases under investigation, no charges have yet been brought under these provisions . . ." Ian Pearson, Hansard Written Answers, Hansard Vol. 435, Part No. 23, (Jun. 27, 2005) *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmhansrd/cm050627/index/50627-x.htm.

67. In response to increasing international concern over escalating corrupt practices and the findings of previous reports on the application of the Convention in the U.K., on March 24, 2003, the U.K. Government also issued a draft Corruption Bill intended to clear up the legislation on bribery and corruption and tie up some of the existing loopholes. However, the Bill was not included in the current Parliamentary session and there has been no indication as to the future of the Bill.

als throughout the world. More specifically, the 2001 Act applies if "(a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and (b) the act would, if done in the United Kingdom, constitute a corruption offence."[68] A "corruption offence" is defined as any common law bribery offense, an offense under the Public Bodies Corrupt Practices Act 1889 (Section 1: corruption in office) or the first two offenses under the Prevention of Corruption Act 1906 (Section 1: bribes obtained or given to agents).[69] As a result, a natural person who is a U.K. national, as defined for the purposes of the 2001 Act, can be prosecuted in the U.K. for a qualifying offense wherever it may have been committed.

The peculiarities of the U.K.'s territorial holdings, however, render the jurisdictional scope of the 2001 Act somewhat less clear with regard to juridical entities. The term "national of the United Kingdom" as it appears in the 2001 Act includes British nationals, British Dependent Territories citizens, British National (Overseas) or British Overseas citizens, persons who under the British Nationality Act 1891 are British subjects, and British protected persons within the meaning of that Act[70] (*i.e.*, all natural persons). With regard to juridical entities, the 2001 Act applies, as noted above, only to "bod[ies] incorporated under the law of any part of the United Kingdom."[71] The 2001 Act does not, therefore, criminalize the bribing of foreign officials by wholly-owned foreign subsidiaries of U.K. companies, as they are not "nationals or citizens" of the U.K. or "bodies" incorporated in the U.K.[72] To impose liability for

68. 2001 Act, Art. 107(1) (Eng).

69. *See id.* Art. 107(3).

70. *See id.* Art. 107(4).

71. *See id.* Art. 107(1). It is also notable that the 2001 Act excludes unincorporated associations such as partnerships and trusts. However, individuals employed by such organizations could be prosecuted as U.K. nationals.

72. The U.K. Trade & Investment Department has stated: "Like most countries throughout the world, we do not think it appropriate to take jurisdiction over a foreign company for actions which take place entirely in a foreign country. To do so, could well be regarded as interference in the internal affairs of another country. The position of overseas subsidiaries is an international problem, which needs to be tackled on an international basis. The OECD is examining this issue." *See* U.K. Trade & Investment Dept., *Corruption Overseas*, (Nov. 23, 2004) *available at* http://www.uktradeinvest.

the conduct of such offshore subsidiaries under the 2001 Act, one would have to make the usually difficult showing that a U.K. parent has authorized or conspired with the foreign subsidiary or is complicit in a foreign bribery transaction by its subsidiary.[73]

Moreover, the 2001 Act does not *automatically* apply to juridical entities incorporated in the U.K.'s Crown Dependencies or Overseas Territories, certain of which happen to be popular venues for the incorporation of Russian-related offshore entities. There are three Crown Dependencies: the Isle of Man (where the Convention has been ratified and the legislation mirrors Part 12 of the 2001 Act), Jersey (where the Convention has not been ratified),[74] and the Bailiwick of Guernsey (where local law is said to comply with the Convention and extension of the U.K.'s ratification is being sought). The situation is murkier with regard to the U.K.'s fourteen Overseas Territories, which include such popular sites for Russian business interests as the British Virgin Islands.[75] The *U.K. Phase 2 Report* found that the "legislation in the British Virgin Islands

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gov.uk/ukti/appmanager/ukti/home?nfpb=true&searchPageSearch_action Override=pub/portlets/search/displayDetail&searchPageSearchdocument= %2FBEA+Repository%2F328%2F354169.

73. The U.K. PHASE 2 REPORT, *supra* note 60, at 10 and 65, recommends that official guidance should be given to explain the current legal position that U.K. parent companies are liable for foreign bribery offences committed by foreign subsidiaries, where the parent company authorizes, conspires with the foreign subsidiary or is complicit in bribery committed by the foreign subsidiary. *See, e.g.*, Criminal Justice (Terrorism and Conspiracy) Act, 1998, Art. 5(1) (Eng.), with regard to conspiracy.

74. *See* U.K. PHASE 2 REPORT, *supra* note 65, at 68-69. Jersey has played a key role in a number of dubious transactions that have come to light, including one in which a "conduit through which more than £100m had flowed in undercover payments from Britain and France to the regime in Qatar was also stopped up, exposing along the way a £6m payment from the arms firm BAe to the Middle Eastern country's foreign minister in connection with a deal for Hawk warplanes." David Leigh, *Africa: special report: Jersey breaks promise to outlaw bribes*, THE GUARDIAN, Jun. 2, 2005, *available at* http://www.guardian.co.uk/hearafrica05/.story/0,15756,1497221,00.html

75. The BVI, according to the U.K. PHASE 2 REPORT, had over 17 times more companies than people early in 2005 (approximately 350,000 vs. 20,000). *See* U.K. PHASE 2 REPORT, *supra* note 65, at 70 n. 159. The author has been given to understand from BVI counsel that today's number of BVI-registered companies is now considerably higher and growing fast.

. . . does not comply with the requirements of the . . . Convention."[76]

Thus, apart from the practical consideration of the U.K.'s minimalist approach to enforcement thus far, the effectiveness of the 2001 Act is diminished also in theory by the absence of an express provision for non-U.K. subsidiary liability and the fact that the Convention and 2001 Act are not in force in all the U.K.'s multifarious territorial holdings.

VI.
A RATIONAL RESPONSE TO THE LAWS AND THEIR (NON) ENFORCEMENT

Because causality is often difficult to establish even in the most concrete of cases, it is probably more useful when examining the possible effect in Russia of the existing anti-bribery framework to ask how a rational Russian executive would respond to that framework in making certain business decisions.

If that executive wanted to recruit a foreign national for a position of responsibility in Russia, it would become immediately clear that certain nationalities are likely to present more problems than others. As noted above, a Canadian citizen cannot violate the CFPOA if he or she acts outside of Canada — something that should be easy enough to achieve for a Russia-based executive. The U.S. and U.K. counterparts, on the other hand, are subject to their domestic legislation wherever they act. Thus, all things being equal, the Canadian candidate is likely to be preferred over any U.K. or U.S. candidate, because the Canadian will be less worried about personal liability and could therefore be expected to take a more flexible approach, perhaps like the one tacitly endorsed in *Customs for Finns*. As between U.K. and U.S. citizens, the rational executive would prefer the U.K. citizen to the extent that he or she, though subject in theory to prosecution at home, is in fact less likely to be prosecuted, in light of the U.K.'s enforcement record to date.

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76. *Id.* at 70. As for the other Overseas Possessions that are popular offshore financial centers, the OECD reports as follows with regard to compliance with the Convention: Bermuda ("Bermuda does not criminalize the bribery of a foreign official"), the Cayman Islands (a bill is under review), Gibraltar (a bill is under review), and Turks and Caicos (not compliant). *See id.* at 70-71.

With regard to juridical entities, the situation is similar. A Canadian company, acting outside of Russia, cannot be prosecuted under the CFPOA, whereas U.K. and U.S. companies can be prosecuted under the 2001 Act and FCPA, respectively. And as between the U.K. and U.S. companies, the U.K. company would appear to be less likely to face prosecution.

Finally, with regard to foreign subsidiaries of Canadian, U.K. and U.S. companies, here the U.K. achieves rough parity with Canada, as neither is subject to a serious threat of liability so long as it acts outside of its home jurisdiction, whereas the U.S. subsidiary poses a somewhat heightened threat for its U.S. parent. The U.K. has the additional advantage of holding a number of offshore territories that qualify as part of the U.K. but have not adopted the Convention or otherwise enacted comparable domestic legislation.

Thus, although generally applauded in U.S. business circles as a step in the right direction, the Convention may have thus far done less than expected to diminish the competitive disadvantage of U.S. companies, at least with respect to their Canadian and U.K. counterparts.

The Canadian law, the CFPOA, constitutes merely formal (or, as the OECD Working Group noted, "technical") compliance with the Convention, but otherwise seems *designed* to result in very few prosecutions. One need only do one's dirty work (or even just the bulk of it) outside of Canada to avoid its scope.[77] Of course, bribe-paying Canadians could fall afoul of the law of the jurisdiction in which they commit a violation, but the resultant outsourcing of Canadian enforcement to other countries cannot be what the drafters of the Convention had in mind.[78] It is just too simple, in this age of easy transportation, to commit a crime in some far-flung corner of the world during a fleeting visit — perhaps between planes in an airport lounge — and then return home, safe in the knowledge that there is no threat of prosecution there.

The U.K.'s 2001 Act, in contrast, appears to comply in spirit with the Convention, but for reasons unknown has yet to be tested. Given the U.K.'s status as an international financial

77. *See* CANADA PHASE 2 REPORT, *supra* note 50, at 32-33.

78. *See, e.g., Convention, supra* note 2, at Preamble, stating "Considering that all countries share a responsibility to combat bribery in international business transactions."

center, its zero enforcement rate to date must be considered, with perhaps English understatement, as "surprising" indeed.[79] One is tempted to say that the U.K. too might someday be "shocked, shocked" — to find bribery of foreign officials being committed by its citizens and companies.

As a result, of the three laws examined here only the FCPA can be seen as likely to exert a noticeable effect on the attitude and conduct of persons and entities acting in difficult environments like Russia. The author's own informal and admittedly unscientific poll of western lawyers practicing in Moscow has not refuted this tentative conclusion: none had more than the vaguest notion there might be Canadian and U.K. anti-bribery legislation in force, although all knew the FCPA by name and were familiar with it at least in broad outline.

The post-Convention situation therefore seems to be largely the *status quo ante* with regard to the U.S., Canada, and the U.K., which is not what the U.S. intended in pressing for the Convention. Accordingly, one could expect a response from the U.S. There are a few possibilities. First, the U.S. could write Strasser out of the script, sit down at the roulette table, and let its nationals and companies take their fair share of the winnings: it could repeal the FCPA and abrogate the Convention. Although delicate in light of the U.S.'s previous backing of the Convention, abrogation should not be impossible, as general non-compliance with a treaty can be a valid ground for abrogation.[80] Alternatively, the U.S. could follow the Canadian example by amending the FCPA so that it does not apply to actions outside of the U.S. If Canada could achieve "technical" compliance with the Convention while effectively outsourcing anti-bribery enforcement, perhaps the U.S. could too.

Additionally, the U.S. could follow Inspector Renault's example by enforcing the FCPA with English understatement. The FCPA would then become like other often disused statutes, such as local ordinances that prohibit jaywalking. Or the U.S. could spy and denounce. Existing institutions such as the National Security Agency and Central Intelligence Agency,

79. *See supra* note 66.

80. *See* Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 211 (2d ed. 1996).

and networks such as Echelon,[81] could be employed to learn of violations by companies from other countries. As former CIA chief James Woolsey once remarked: "When we have caught you [Europeans] . . . we have gone to the government you're bribing and tell its officials that we don't take kindly to such corruption."[82] A major disadvantage of this approach is that it is essentially a rearguard action; one simply cannot monitor all people all the time. For high-stakes matters in selected areas, however, the costs might outweigh the returns, as in the case of the aviation, defense, oil and gas, and certain high-tech industries.[83]

Finally, the U.S. could play the role of Strasser and apply pressure, perhaps by linking anti-bribery enforcement to U.S. trade relations in the manner of the Helms-Burton[84] or D'Amato-Kennedy Acts.[85] That is, companies and people suspected by U.S. authorities of engaging in foreign bribery to the detriment of U.S. business interests could be called to ac-

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81. Echelon is a electronic surveillance system created by the National Security Agency that intercepts and analyzes telephone calls, faxes, emails, telex messages and other electronic communications around the world. It is operated in cooperation with the British Government Communications Head Quarters, the Canadian Communications Security Establishment, the Australian Defense Security Directorate, and the New Zealand General Communications Security Bureau. Given its backers, it is little wonder that many in France in particular consider Echelon to be a particularly dangerous tool of Anglo-Saxon influence. *See, e.g.*, Philippe Rivière, *Le Renseignement Américain en Accusation, Petits débats sur Echelon*, LE MONDE DIPLOMATIQUE, (Apr. 18, 2000), *available at* http://www.monde-diplomatique.fr/dossiers/echelon. For the same reason, one could imagine that Echelon might not be terribly effective against U.K., Canadian, Australian, New Zealand, or U.S. companies.

82. *Airbus's Secret Past*, THE ECONOMIST, June 12, 2003 (statement of James Woolsey).

83. An under-secretary for international trade, Grant Aldonas, told a congressional committee that aircraft manufacturing is an industry where foreign corruption has a real impact . . . this sector has been especially vulnerable to trade distortions involving bribery of foreign public officials." *Id.* at 56.

84. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 170 Stat 785 (1996), allows U.S. citizens to claim damages against foreign entities that own or benefit from formerly U.S.-owned property expropriated by Cuba.

85. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 170 Stat 1541 (1996), authorizes sanctions against entities that engage in certain specified trade with Iran or Libya.

count to the extent they have other, unrelated business dealings or trade in the U.S. that would expose them to U.S. sanctions. The rancor that such laws have caused outside the U.S. suggests that they might work.

In any event, it seems that the U.S. is most likely to play the role of the loathsome Major Strasser and to put some kind of pressure on the Inspector Renaults of the world to close the casino. The patrons will no doubt resent the arrogance of the U.S. for pressuring them to enforce their own laws to the detriment of their perceived self-interest. But to continue to allow Convention signatories merely to pretend to comply with the Convention, as Inspector Renault tolerated gambling, would be, in a word, "shocking."