



# **GOOD GOVERNANCE: NEGOTIATED SETTLEMENTS FOR FCPA VIOLATIONS AS A MODEL**



## GOOD GOVERNANCE: NEGOTIATED SETTLEMENTS FOR FCPA VIOLATIONS AS A MODEL

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### Samenvatting

De versnippering van de internationale samenleving vermindert de kans op een overkoepelend model van global governance. Meer waarschijnlijk is het ontstaan van bepaalde processen van bestuur die zich ontwikkelen als reactie op specifieke mondiale vraagstukken. Dit artikel beschrijft het proces van implementatie van de US Foreign Corrupt Practices Act (FCPA) als een voorbeeld van een dergelijk bijzonder proces. Het FCPA 'model' wordt gekenmerkt door samenwerking en onderhandeling tussen de publieke en private sector. In dit model is het samenwerken voor het bieden van maatschappelijke veiligheid gebaseerd op wederzijds belang. De mogelijkheid van onderhandelde regelingen heeft een positief effect op het management van corruptie door bedrijven, dat zich verspreidt over de hele invloedssfeer van de onderneming. Tegelijkertijd biedt het de overheid toegang tot de informatie die nodig is om corruptie op te sporen, te onderzoeken en te vervolgen. Het in kaart brengen van dergelijke processen biedt nuttige inzichten over nieuwe benaderingen die nodig kunnen zijn om goed bestuur voor een veilige wereld te bereiken.

The need for effective governance is urgent in a world that is struggling with a financial crisis, global warming, environmental decline, pandemic threats, demographic change as well as the crushing effects of poverty. This situation is made all the more stark by the growing reality of a world without borders. Good governance for a safe world must reconcile the urgency of global problems with the tensions of a plural world. To do this, traditional state-based solutions need to be adapted in order to address de-territorialised interactions that threaten global peace and security. Sector-specific solutions such as the process of enforcing anti-corruption rules under the FCPA provide insights into new approaches to governance in the quest for a safe world.

'... [I]f we are starting with the wrong questions, if we don't understand the cause, then even the right answers will always steer us wrong ... eventually..' *Simon Sinek*<sup>1</sup>

The simplicity of the phrase 'a safe world' shields us momentarily from the jarring effects of the many different ideas of what constitutes a safe world. For some it is a picture of beautiful planet earth as seen from space, a closed system of great fragility. For others, it is an image of human society with its full gamut of colours, languages and cultures all interacting thanks to modern technology. For still others, a safe world pertains to all those things that give a sense of security, as for example, healthcare, electricity, water, transportation, education and social facilities. For some, a safe world is, very simply, a place where the right to be oneself, to work, to vote, to make decisions about one's body, one's sexuality is a given. At the same time, for others the opposite holds true: safety is the right to live according to a set of beliefs that spans heaven and earth. Good governance<sup>2</sup> must encompass different visions, beliefs, ideologies and cultures.

Contemplating governance in the face of such diversity makes Teubner's writings on the fragmented nature of our global world very relevant.<sup>3</sup> In this world, governance solutions are not to be found in a comprehensive, uniform grand strategy but rather in pockets of 'global villages.'<sup>4</sup> From this perspective, a discussion about governance can be enriched by the empirical observation and the mapping of *alternative processes of governance*.



This paper describes one such process of governance which has emerged in the fight against 'grand corruption'. Grand corruption occurs at the highest levels of leadership and 'distorts the central functions of government'.<sup>5</sup> It undermines policymaking on a scale that impacts the social, political and economic growth of nations. It is a problem of a global dimension that is antithetical to the notion of safe governance.<sup>6</sup> The *process of implementing* rules criminalising grand corruption discussed in this paper is an example of a governance approach whose focus has shifted from being state centred to multi-actor centred and which is positively impacting the way corruption is managed by states and corporations.<sup>7</sup> This change of focus is to some degree a response to modern-day challenges to good governance.

## Challenges to Good Governance

In seeking answers on how best to govern society, there is a tendency to extrapolate past solutions. There is also a tendency to see the state as the primary actor in governance. However, in an increasingly integrated world, this traditional starting point is complicated by several factors. First, solutions devised for nation states with clearly defined territorial boundaries have become more experimental in the so-called world without borders.<sup>8</sup> Threats to security are often of a global dimension that 'can no longer be plausibly analysed only within a national state framework'.<sup>9</sup>

Second, the multinational corporation of today has an unprecedented influence on the economies and societies in which it operates.<sup>10</sup> We live in the reality of shadowy *de facto* forms of 'private government' not fully acknowledged in our *de jure* theories on public government. In Shearing's words, we have moved from 'single node configurations of power' to constructions where several actors are providers of security.<sup>11</sup> Making the jump from single node to multi-node systems implies a need for a fundamental shift in the way we view governance.

Third, in an information age individuals are linked to each other more intensively and more intrusively as virtual communities develop around services like 'Facebook' and 'What's App'. In virtual space, territorial borders can no longer fully control what comes in or goes out. The resulting interconnection of individuals creates new forms of social groupings whose need for security requires new models of governance.<sup>12</sup>

A final reason to revisit our processes of governance is the fact that the integrated market is a reality that is not easily undone. The free flow of goods and services as well as cheap transportation has ushered in a level of economic growth that makes the case for liberal markets.<sup>13</sup> Globalisation has become 'hard wired'<sup>14</sup> as manufacturing and trade have become truly international.<sup>15</sup> No single national public sector can oversee or control this transacting environment. Despite the rise of anti-globalisation sentiment,<sup>16</sup> reversing the status quo, even if possible, will probably only mean a repeat of history.<sup>17</sup>

These challenges throw up fundamental questions about governance. Where is the nexus of governance in today's world? Who are the providers of security? What boundaries define societies? How does the internationalisation of processes of production affect policy making? These questions underscore the need for governance processes that take as a starting point a plurality of interests that must be accommodated in a global community.

## Agreement – The starting point of Global Governance.

The fact that corruption has moved from the shadows of moral condemnation to become a major issue of corporate policy and strategy planning is due in no small measure to a carrot-and-stick mechanism resulting from the implementation of the US Foreign Corrupt Practices Act (FCPA).<sup>18</sup> This domestic US law laid the foundation for an international framework of rules that has given us a starting point for a common strategy. The FCPA created a modality where a domestic standard criminalising corruption in commercial transactions would apply to acts of corruption occurring in other countries.<sup>19</sup> Through aggressive lobbying, the US has ensured that this standard is now applied worldwide.<sup>20</sup> The resulting global criminalisation of corruption in international commerce has created a supranational platform upon which the fight against grand corruption is crystallising.<sup>21</sup>

However, the FCPA and international rules are not enough. The challenge of good governance lies not just in fashioning new rules but in devising *effective methods to encourage compliance*.<sup>22</sup> In fact, the rules themselves may structurally impede good governance. The criminalisation-based approach to fighting corruption has fundamental 'fault lines' and 'gaps' that impede its effectiveness as a sanctioning process.<sup>23</sup> First, the principal actors in grand corruption are corporations and governments, yet the principal enforcer of criminal law is that same government. Second, international rules are generally subject to the political will of the participating nations to ratify and implement them. A state that is compromised by corruption is unlikely to possess this political will. Third, even where a state has domestic anti-corruption rules, the challenge of actually proving that corrupt payments have been made, particularly in foreign countries, requires a capacity to detect, investigate and prosecute that not many countries have. A further complicating factor is the fact that criminal law solutions that are heavily territorial do not translate readily in a de-territorialised global world. All this leads to a compromised ability to enforce meticulously drafted anti-corruption rules and a predictable low-risk environment for parties engaging in corrupt acts. This results in a low incentive for compliance.<sup>24</sup>

In addition to the abovementioned 'fault lines', an important 'gap' that the traditional criminal law process does not sufficiently address is the contracts that result from successful acts of corruption.<sup>25</sup> The law's focus is on punishing the giver and taker of the bribe. The contract for which the bribe is given remains largely outside the scope of criminal law. Furthermore, even where tainted by corruption, oversight of such international contracts is limited as they often fall under the jurisdiction of private international arbitration which keep disputes relating to such contracts outside national courts systems.<sup>26</sup> These contracts remain as incentives for risk taking and further acts of corruption, and consequently undermine good governance.

The urgency of the problem of corruption means that these 'fault lines' and 'gaps' have somehow to be overcome. There are early signs that one path to overcoming them lies in the development of public-private partnerships in the fight against corruption. An example of such partnering has emerged in the process of implementing the FCPA rules. This is described below as the FCPA model. Unfortunately, this model is still very much US centred. In an integrated market, such a solution needs to become common strategy to be fully effective.<sup>27</sup>



## The FCPA ‘Model’<sup>28</sup>

The FCPA ‘model’ of implementation is characterised by public and private co-operation and is underpinned by soft and hard law elements. When considering its enforcement mechanism to fight foreign bribery in commercial transactions, the United States quickly realised that without access to a corporation’s books and records, investigating and proving acts of corruption by corporations would be challenging.<sup>29</sup> This realisation resulted in two broad planks to the anti-corruption strategy of the FCPA.<sup>30</sup> The first is normative, with anti-bribery rules that criminalise the bribery of foreign officials.<sup>31</sup> The second is the creation of a means to detect and control the giving of bribes by establishing requirements for books and records, as well as the implementation of internal and accounting controls that provide reasonable assurance that financial reports are accurate.<sup>32</sup>

Consequently, the FCPA criminalises two types of conduct: acts of bribery that distort honest competition and false accounting practices that can be utilised to cover up corrupt activities.<sup>33</sup> To implement these criminal laws, the US authorities established a ‘unified approach’ that combines reporting requirements by corporations to the Securities and Exchange Commission (SEC) with the activities of the US Justice Department (DOJ).<sup>34</sup> Key to this unified approach is the voluntary disclosure programme operated by the SEC.<sup>35</sup>

A fundamental aspect of the FCPA ‘model’ is the voluntary participation of corporations in the sanctioning process. Several other US laws and initiatives reinforce the incentive for corporations to self-report instances of bribery and corrupt activities by their agents, employees and subsidiaries. The *Sarbanes-Oxley Act of 2002*<sup>36</sup>, for example, requires companies to establish effective internal controls and ensure that their accounts and financial statements accurately reflect the current financial status of the company. Severe criminal penalties in the form of fines of up to \$5 million and up to twenty years in prison are imposed on the CEOs and CFOs of companies that cover-up the payment of bribes or otherwise render false statements. The personal liability of the CEO and CFO increases the incentive to detect and disclose any in-criminating activity.<sup>37</sup>

The Department of Justice (DOJ) *Thompson Memo on Principles of Federal Prosecution of Business Organizations*, 20 January 2003 encourages self-reporting and self-policing. It advises prosecutors to take a number of factors into consideration when deciding on whether and how to prosecute companies for FCPA violations.

These factors include the corporation’s timely and voluntary disclosure of wrongdoing; its willingness to cooperate in the investigation of its agents; the waiver, where necessary, of corporate attorney-client privileges and work-product protection; the existence and adequacy of the corporation’s compliance program; the corporation’s remedial actions including any efforts (i) to implement an effective corporate compliance programme or to improve an existing one, (ii) to replace responsible management, (iii) to discipline or terminate the employment contracts of wrongdoers, (iv) to pay restitution, and (v) to co-operate with the relevant government agencies. The Thompson Memo makes it clear that where there is voluntary co-operation with the authorities, companies may be able to avoid prosecution or have the charges reduced.<sup>38</sup>

Another example of a cooperation-inducing regulation is Section 21 of the Securities Exchange Act of 1934. This section grants the SEC the discretion to investigate whether a person has violated the provisions of the act which is the umbrella act of the FCPA. In arriving at its decision, the SEC considers whether, and to which degree, to credit self-policing, self-reporting, remediation and cooperation. The SEC may then decide to take no enforcement action, bring reduced charges, seek lighter sanctions, or include mitigating language in documents used to announce and resolve enforcement actions.<sup>39</sup>

Similarly, the *Federal Sentencing Guidelines for Organisations*<sup>40</sup> require federal courts handing down criminal sanctions to take into account the existence or absence of effective corporate compliance programmes. The presence of an effective compliance programme can significantly reduce a corporation’s sentence, in some cases by as much as 95%, while the absence of such a programme can increase the sentence. These guidelines offer incentives to organisations to reduce and ultimately eliminate criminal conduct by providing a foundation from which an organisation can self-police its own conduct through an effective compliance and ethics programme.

In addition to these provisions, the US also has one of the world’s most advanced systems of private prosecution in which private litigants are encouraged through rewards to launch criminal prosecutions.<sup>41</sup> Moreover, individuals who have suffered damage as a result of corruption can benefit from a well-developed system of class actions that empower otherwise disadvantaged potential complainants. The contract that results from successful acts of bribery is also subject to possible nullification as a result of the public policy positions adopted by the US judiciary.<sup>42</sup>

## Developing Public-Private Partnering

The net effect of the FCPA in combination with the aforementioned rules and initiatives has created a carrot-and-stick dynamic that encourages and rewards a corporation’s participation in the fight against corruption. The stick that makes the carrot attractive is the tenacity shown by US authorities in instigating prosecutions. This determination is also beginning to spread to Europe. Increased cooperation between governments means that companies can expect a higher likelihood of prosecution to follow any FCPA violations. Added to this is the increasing level of awareness of shareholders, stakeholders and consumers. Shareholders may seek to hold company directors accountable using derivative actions, or pursue class action lawsuits against the company itself. In addition, stakeholders, such as pension funds, are less willing to be associated with corrupt organisations. Also important are threats of legal suits brought by private parties that have suffered damage, not to mention civil boycotts and other forms of agitation by increasingly informed consumers. This scenario presents corporation in a riskier environment where there is more incentive to comply with the anti-corruption rules and stay on the right side of the bargaining table.<sup>43</sup>

The carrot of the FCPA process of implementation is the opportunity that corporations have to positively influence the exercise of prosecutorial discretion by the authorities.<sup>44</sup> The possibility of negotiated settlements, deferred and no-prosecution agreements, encourages the



corporation to engage in mitigating behaviour in advance. Not surprisingly, within this framework effective compliance and ethics programmes, robust internal controls, good training programmes, short and long-term anti-corruption policies, accessible and comprehensive company codes, the involvement of all levels of company management are becoming the norm for multinational corporations.<sup>45</sup>

Unfortunately, this is still very much a US-driven process. The idea of negotiated settlements has yet to take root across the Atlantic.<sup>46</sup> Yet, the realities of the integrated market, the complexity of corporations' activities and the opportunities for changing internal corporate culture make a strong argument for the internationalisation of the FCPA 'model' of implementation. Accepting the limitations of the state in an international society founded on the power of agreement calls for the adoption of models of governance that reflect this reality.<sup>47</sup>

## Conclusion

In the many layers of our global world, there is probably no single overarching system of governance that will cater to its plurality of interests. In the absence of world government, governance becomes the task of the actors that occupy the global stage. These actors are far more than nation states alone and increasingly include private actors, such as multinational corporations, civil society, consumers and private individuals. Accepting plural processes of governance and mapping sector-specific responses may provide a more realistic theory of governance.

The process of implementing the FCPA is a bottom-up process that can have a real impact in the societies in which multinational corporations operate. It is a supplement to the criminal law process from which it gets its driving power. Yet it is also a response to the problems caused by the 'fault lines' in the criminalisation-based approach to fighting corruption as well as to the 'gaps' that the criminal process has not been able to fill. It is not a strictly public or private approach. It is best described as a hybrid, or as governance based on partnering. The world is changing, driven by conditions that are pushing society on a trajectory that is evolving away from traditional forms. If nothing else, the story of the fight against corruption shows that the significance of the public-private divide is changing in today's environment. Neither the private nor public sector acting alone is in a position to solve global problems. Mutual self-interest sets the stage for partnering in the provision of security. Mapping possibilities for governance such as negotiated settlements for FCPA violations help us to formulate the 'right' questions and signal new ways of managing and exercising power in the quest for good governance in today's world.

## (Endnotes)

- <sup>1</sup> Simon Sinek, *Start with Why: How Great Leaders Inspire Everyone to take Action*, (Portfolio Penguin, 2009) 1.
- <sup>2</sup> This paper adopts the World Bank's definition of governance as 'the manner in which power is exercised in the management of a country's economic and social resources for development' for the same reason given by the bank. This definition enlarges the notion of governance 'beyond the capacity of public sector management to the rules and institutions which create a predictable and transparent framework for the conduct of public and private business...' (Italics mine) See the World Bank, *Managing Development: The Governance Dimension* (Discussion Paper, August 1991) 1.
- <sup>3</sup> Gunther Teubner, 'Global Pluralism in the World Society' in Gunther Teubner (Ed), *Global Law without a State*, (Dartmouth: Aldershot 1997) 3, 5.
- <sup>4</sup> Gunther Teubner, Id.
- <sup>5</sup> The United Nations Office on Drugs and Crime UN United Nations Anti-Corruption Toolkit 3rd Edition, (Vienna, September 2004) 10 < [http://www.unodc.org/documents/human-trafficking/Toolkit-files/o8-58296\\_tool\\_g-4.pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/o8-58296_tool_g-4.pdf)> accessed 7/02/2013.
- <sup>6</sup> The World Bank has identified corruption as 'the greatest obstacle to economic and social development' whose harmful effects are 'especially severe on the poor, who are hardest hit by economic decline, are most reliant on the provision of public services, and are least capable of paying the extra costs associated with bribery'. See World Bank Website on Corruption < <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,contentMDK:21540659~menuPK:384461~pagePK:148956~piPK:216618~theSitePK:384455,00.html>> accessed 7/02/2013.
- <sup>7</sup> This process is more fully described in Abiola Makinwa, *Private Remedies for Corruption: Towards an International Framework*, (Dissertation Edition), (Eleven 2012) 65 – 134.
- <sup>8</sup> The words of Jean Monnet, who conceived the notion of the European Community, are probably more relevant now than they were when he uttered them over three decades ago. He stated, '... [t]he sovereign nations of the past can no longer solve the problems of the present: they cannot ensure their own progress or control their own future...' Jean Monnet, *Memoirs* (trad. R. Mayne): London, etc., (William Collins and Son Ltd 1976) 524.
- <sup>9</sup> See Robert Harris, *Political Corruption in and beyond the Nation State* (London Routledge 2003) 1.
- <sup>10</sup> Anderson and Cavanagh have reported based on a comparison of corporate sales and country GDPs that 'among the 100 biggest "economies" in the world 51 are corporations and only 49 are countries.' Sarah Anderson and John Cavanagh, 'Top 200: The Rise of Corporate Global Power,' (Institute for Policy Studies 4 December 2000) <http://www.corpwatch.org/article.php?id=377> accessed 7/02 2013.
- <sup>11</sup> Shearing strongly criticises the continued focus on the state as the primary provider of security in the face of the de facto reality of private government. See Clifford Shearing, 'Reflection on the Refusal to Acknowledge Private Governments' in Jennifer Wood and Benoît Dupont (Eds.), *Democracy, Society and the Governance of Security* (CUP, 2006), 11-32, 26.
- <sup>12</sup> Saskia Sassen describes how privatisation, deregulation and digitalisation have resulted in the weakening of the nation state. See Saskia Sassen, *The Global City: New York, London, Tokyo* (Updated 2nd ed. Princeton University Press 2001) xviii.
- <sup>13</sup> Friedman talks about the reality and rewards of a world that has become flat as a result of globalisation. See Thomas Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (New York, Farrar, Straus and Giroux 2005).
- <sup>14</sup> John Hancock and Robert Greenhill, 'News of Globalisation's Death vastly Exaggerated', *The Toronto Star*, Sunday, 6 December 2009 <<http://www.thestar.com/opinion/article/734748--news-of-globalization-s-death-vastly-exaggerated>> accessed 7/02/2013.
- <sup>15</sup> Dickens describes globalisation as 'a more advanced and complex form of internationalisation, which implies a



degree of functional integration between internationally dispersed economic activities.’ Peter Dickens, *Global Shift: the Internationalisation of Economic Activity*, (London: Chapman 1992) 1, 87.

- <sup>16</sup> Some speak of the death of globalisation. John Gray, in *The New Statesman* states, ‘[t]he notion that trade and wealth creation require global laissez-faire has no basis in history. The cold war – a time of controls on capital and extensive intervention in the economy by national governments – was, in western countries, a time of unprecedented prosperity. Contrary to the cranky orthodoxies of market liberals, capitalism does not need a worldwide free market to thrive. It needs a reasonably secure environment, safe from the threat of major war, and reliable rules about the conduct of business. These things cannot be provided by the brittle structures of the global free market.’ J. Gray, ‘The Era of Globalisation is Over’, *The New Statesman* (London, September 24, 2001) < <http://i-p-o.org/globali-ation-gray.htm> > accessed 7/02/2013. See also John Gray, *False Dawn: The Delusions of Global Capitalism* (Granta Books 1998) However see *Review of False Dawn: The Delusions of Global Capitalism* by Paul Krugman at <<http://web.mit.edu/krugman/www/gray.html>> accessed 7/01/2013 and Robert Skidelsky, ‘What’s wrong with global capitalism,’ *Times Literary Supplement*, (London, Friday 27 March 1998) < <http://www.skidelsky.com/site/article/whats-wrong-with-global-capitalism> > accessed 7/03/2013
- <sup>17</sup> Godwin sums up this cycle as follows in an old Eastern European Joke, ‘What is communism? Communism is the longest and most painful route from capitalism to capitalism.’ Jeff Godwin, revolutions and Revolutionary Movements, in Thomas Janoski, Robert. Alford, Alexander Hicks, Mildred Schwartz (Eds.) *The Handbook of Political Sociology: States, Civil Societies, and Globalisation*, (Cambridge 2005) 404, 407.
- <sup>18</sup> The Foreign Corrupt Practices Act, 15 USC Sec. 78dd-1, et seq., 1977. (Hereinafter, the ‘FCPA’).
- <sup>19</sup> In the words of Noonan, ‘[f]or the first time, a country made it criminal to corrupt the officials of another country.’ John Noonan, *Bribes: The Intellectual History of a Moral Idea*, (University of California Press 1987) 680. For the history and internationalisation of the FCPA standard see Abiola Makinwa, *Private Remedies for Corruption*, Id., Note 7, 65 – 134
- <sup>20</sup> See Abiola Makinwa, ‘The Rules Regulating Transnational Bribery: Achieving a Common Standard?’ [2007] *International Business Law Journal* 17. In 1996, the Organisation of American States adopted the Inter-American Convention against Corruption (1996), 35 ILM 1996 at 724. Other instruments include the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), 37 ILM 1998 at 1, the Council of Europe’s Criminal Law Convention on Corruption (1999), European Treaty Series No. 173 and its Civil Law Convention on Corruption, the Convention of the European Union on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States 37 ILM 1998 at 12, the UN Convention against Transnational Organised Crime, 40(2) ILM 2001 at 353 the African Union Convention on Preventing and Combating Corruption, 43(1) ILM 2004 at 5 and, finally, the recent UN Convention Against Corruption, (2004), 43(1) ILM 2004 at 37.
- <sup>21</sup> Nichols on this international consensus describes it as a new ‘hyper norm’ repudiating corruption that ‘transcends national boundaries.’ See Philip Nichols, ‘Regulating Transnational Bribery in Times of Globalisation and Fragmentation’ (1999) 24 *Yale J. Int’l L.* 257, 302–3.
- <sup>22</sup> As I have noted elsewhere, ‘... it is the environment, not the anti-corruption rules per se, that influences the choice for or against compliance. The rule creates the standard against which choices are made. It is the environment that influences *the choice that is made*.’ (italics mine) Abiola Makinwa *Private Remedies for Corruption* id., Note 7, 506.
- <sup>23</sup> On these ‘fault lines’ and ‘gaps’ see generally Abiola Makinwa *Private Remedies for Corruption* id., Note 7, 53, 480, 492, 505 – 509.
- <sup>24</sup> Id.
- <sup>25</sup> Id. 488 – 489.
- <sup>26</sup> Id., 329 – 331, 491 – 492.
- <sup>27</sup> In July 2009 the Serious Fraud Office (SFO) in the United Kingdom (UK) released Guidelines for *Prosecutors on*

*the Bribery Act 2010*: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecution. <http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>. However, the plea bargain system in the United Kingdom has met with a mixed response. In an action brought to approve such a settlement, the UK court held that as a matter of constitutional principle the SFO could not enter into an agreement under English law with an offender as to the penalty in respect of an offense. The court stressed that, for crimes of corruption, it is in the public interest for the court to rigorously scrutinise the basis of the plea bargain agreement in open courts, in the interest of transparency and good governance. See *R v. Innospec Limited* [2010] Lloyd’s Rep. F.C. 462 Crim. L.R. 665 Official Transcript, 2010 WL 3580845. More recently, Canada entered into a Probation Agreement in a process described as ‘a Canadianised version of similar enforcement actions in the United states. See Transcript of Proceedings Taken in the Court of Queen’s Bench of Alberta, Calgary Courts Centre, Calgary Alberta, Her Majesty the Queen v. Niko Resources Ltd., E-File No.: CCQ11NIKORESOURCES, 24 June 2011 cited in John Boscaroli, ‘A Deeper Dive Into Canada’s First Significant Foreign Bribery Case: Niko Resources Ltd.’ (McCarthy Tétrault LLP November 21, 2011). [http://www.mccarthy.ca/article\\_detail.aspx?id=5640](http://www.mccarthy.ca/article_detail.aspx?id=5640) accessed 7/02/2013.

- <sup>28</sup> This model is not contained in the FCPA itself but rather is used to refer to the processes that have emerged in the US authorities’ implementation of the FCPA rules.
- <sup>29</sup> US House of Representatives, *Foreign Corrupt Practices Act*, and (House Report 95-640, 95th Congress, 1977) 9.
- <sup>30</sup> ee generally Abiola Makinwa *Private Remedies for Corruption* Id., Note 7, 68 – 105.
- <sup>31</sup> 15 USC Sec. 78dd-1, 15 USC Sec. 78dd-2, 15 USC Sec. 78dd-3.
- <sup>32</sup> 15 USC Sec. 78m.
- <sup>33</sup> The Senate Committee on Banking, Housing and Urban Affairs remarked that: ‘In the past, corporate bribery has been concealed by the falsification of corporate books and records. Title I removes this avenue of cover-up, reinforcing the criminal sanctions which are intended to serve as the significant deterrent to corporate bribery. Taken together, the accounting requirements and criminal prohibitions of Title I should effectively deter corporate bribery of foreign government officials.’ See US. Senate, Committee on Banking, Housing and Urban Affairs: *Foreign Corrupt Practices and Domestic Foreign Investment Improved Disclosure Act of 1977, Foreign Corrupt Practices Act* (Senate Report, No. 95-114, 1977) 3.
- <sup>34</sup> The Department of Justice operates as the traditional prosecutor of crimes against the public interest and, on the other hand, the Securities and Exchange Commission is responsible for maintaining standards of transparency and information on the part of listed corporations.
- <sup>35</sup> A Letter from the Department of Justice dated 20 April 1997 to the Hon. Harley O. Staggers, Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington D.C., (House Report), id., Note 26 above, 17-18, states: ‘The Department fully recognises the expertise developed by the Securities and Exchange Commission over the past several years in the area of illicit foreign payments and believes they must play a vital role in any future attempt to deter and eradicate once and for all bribery of foreign officials by American issuers. Through their voluntary disclosure programme they have performed a vital public service in exposing the pervasive and apparently longstanding practice of some businesses to engage in such illicit practices. Their proposed Rules governing corporate record keeping, if promulgated, should further thwart attempts by issuers to conceal such payments and will presumably result in many fertile investigative leads’.
- <sup>36</sup> The Public Company Accounting Reform and Investor Protection Act, Pub.L. 107-204, 116 Stat. 745, enacted 29 July 2002.
- <sup>37</sup> 15 USC Sec. 7241 (civil provision) 18 USC Sec. 1350 (criminal provision).
- <sup>38</sup> See [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm). There have been several Guidance Memos issued by Attorney Generals regarding the exercise of prosecutorial discretion in determining when and how to prosecute FCPA violations. These include the Holder Memo (1999) – Federal Prosecution of Corporations by Deputy Attorney General Eric Holder JR, [http://federalevidence.com/pdf/Corp\\_Prosec/Holder\\_Memo\\_6\\_16\\_99.pdf](http://federalevidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf);



The Thompson Memo (2003) – Principles of Federal Prosecution of Business Organisations – by Deputy Attorney General Larry D. Thompson; The McNulty Memo (2006) – Principles of Federal Prosecution of Business Organisations – by Deputy Attorney General Paul J. McNulty, [www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf); and the Filip Memo (2008) – Principles of Federal Prosecution of Business Organizations – by Deputy Attorney General Mark Filip, [www.justice.gov/opa/documents/corp-charging-guidelines.pdf](http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf).

<sup>39</sup> The factors that the SEC will take into consideration in making this determination are listed in the Securities and Exchange Commission's (SEC) Report of Investigation Pursuant to Sec. 21(a) of the Securities Exchange Act of 1934 (otherwise known as the Seaboard Report).

<sup>40</sup> See [www.usssc.gov/guidelines/2010\\_guidelines/Manual.../Chapter\\_8.htm](http://www.usssc.gov/guidelines/2010_guidelines/Manual.../Chapter_8.htm).

<sup>41</sup> Private parties are enabled to file actions against government contractors or other recipients of government money in the name of the US government under the qui tam provisions of the False Claims Act, Codified at 31 USC Sec. 3729-3733. See also Paul Carrington, 'Law and transnational corruption: the need for Lincoln's law abroad' (2007) 70 Law and Contemporary Problems 109, 112.

<sup>42</sup> See generally for private remedies in the United States, Abiola Makinwa, *Private Remedies for Corruption*, Id., Note 7, 137 - 205.

<sup>43</sup> Abiola Makinwa, *Private Remedies for Corruption*, Id., Note 7, 509 - 528.

<sup>44</sup> Cassin writes that the idea is to 'punish, not kill.' In his words, the underlying principle is that 'no company is beyond redemption.' See Richard Cassin, *Bribery Everywhere, Chronicles From the Foreign Corrupt Practices Act*, (Lulu 2009) 22.

<sup>45</sup> For this reason the position of the Department of Justice is to be encouraged. Assistant Attorney Lanny Breuer, the head of the Criminal Division, recently stated: 'I am aware that there have been a number of efforts made this year to amend the FCPA by the Chamber of Commerce and others. We in the Justice Department are always open – and I personally am – to working with Congress on ways to improve our criminal laws. That said, I want to be clear about one thing with respect to these proposals: we have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.' L. Breuer, 26th National Conference on the Foreign Corrupt Practices Act 2011 FCPA Conference, available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>.

<sup>46</sup> First steps have been taken in the United Kingdom and in Canada. However, this is still a very novel approach outside the United States. See Note 27 above.

<sup>47</sup> As I have mentioned elsewhere about the nature of the transacting environment in which grand scale corruption occurs, 'The environment of international corruption knows no [...] sovereign, is premised on the power of agreements rather than a monopoly on violence, and is peopled by a shifting collection of artificial persons, state officials, and [the] persons who suffer the social and economic consequences of corruption.' Abiola Makinwa, *Private Remedies for Corruption*, Id., Note 7, 56,399.

## Abstract

*The fragmentation of international society reduces the likelihood of a single overarching model of global governance. More likely, is the emergence of particular processes of governance that develop in response to specific global issues. The paper describes the process of implementing the US Foreign Corrupt Practices Act (FCPA) as an example of one such particular process. The FCPA 'model' is characterized by co-operation and negotiation between the public and private sector. In this model, partnering for the provision of security is based on mutual self-interest. The possibility of negotiated settlements has a positive effect on the management of corruption by corporations with a ripple effect throughout the corporations' sphere of influence. At the same time, it provides governments with access to the information necessary to detect, investigate and prosecute corruption. Mapping such processes provides useful insights about new approaches that may be needed to attain good governance for a safe world.*