

SYMPOSIUM[†]

POLITICAL CORRUPTION: AFFLICTING AMERICA AND AFFAIRS ABROAD

WELCOME AND INTRODUCTORY REMARKS

*Matthew Diller*ⁱ

Fordham University School of Law

MODERATOR

*Giselle Sedano*ⁱⁱ

PANEL I: POLITICAL ECONOMY OF CORRUPTION

PANELISTS

*Sean J. Griffith*ⁱⁱⁱ

Fordham University School of Law

Susan Rose-Ackerman^{iv}

Yale University

[†] The symposium was held at Fordham University School of Law on October 21, 2016. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials in respect to certain statements made by the speakers.

i. Matthew Diller is the Dean of Fordham University School of Law.

ii. Giselle Sedano is a fourth-year evening student at Fordham University School of Law, where she is the symposium editor of the Fordham Journal of Corporate & Financial Law, and works full-time as a compliance officer at Fortress Investment Group LLC. Following graduation, she will join the litigation practice of Ropes & Gray LLP in the fall of 2017.

iii. Sean J. Griffith is the T.J. Maloney Chair in Business Law and Director of the Fordham Corporate Law Center at Fordham University School of Law.

iv. Susan Rose-Ackerman is the Henry R. Luce Professor of Jurisprudence (Law and Political Science) at Yale University. Her remarks draw on Susan Rose-Ackerman &

PANEL II: GOVERNMENT INVESTIGATIONS INTO CORRUPTION**PANELISTS**

Zachary S. Brez^v
Ropes & Gray LLP

Michael J. Cohn^{vi}
Fortress Investment Group LLC

Timothy J. Treanor^{vii}
Sidley Austin LLP

Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform* (2d ed. 2016).

v. Zachary Brez is a Partner and Co-chair of the business and securities litigation practice of Ropes & Gray LLP.

vi. Michael Cohn is the Global Chief Compliance Officer and Deputy General Counsel of Fortress Investment Group LLC.

vii. Timothy Treanor is a Partner and Global Co-leader of the white-collar criminal defense and investigations practice of Sidley Austin LLP.

WELCOME AND INTRODUCTORY REMARKS

DEAN DILLER: Good afternoon, everyone. Welcome to Fordham Law School. I am Matthew Diller. I have the honor of being the Dean of this great law school.

Aside from the rain, I would say welcome to a typical Friday afternoon at Fordham Law School. We have, of course, today's fantastic program, which you will be both hearing more about from me in a moment and then experiencing; across the hall, there is a major conference on the vanishing civil trial and its implications for our system of justice; and upstairs is a third major symposium on urban transportation issues in the twenty-first century. All of these are sponsored, hosted, and put together by our student journals. We are very fortunate here. Having said that, I do not mean to lure you from here because, frankly, all of you have picked a great conference to attend. Thank you for joining us.

Today, we will be talking about “Political Corruption: Afflicting America and Affairs Abroad.” This subject does not need much introduction since it is in the headlines every day. It is a subject that is always, unfortunately, timely. However, today it seems even more timely. We are in a state where the heads of both of our houses of legislature were recently convicted;¹ we are all watching the major trial across the river in New Jersey;² and, of course, there are pending investigations concerning a number of our other political leaders.³ And that is just the local story.

This conference focuses not just on the local context but on the global as well. Corruption is on the forefront there: most prominently, a

1. Benjamin Weiser & Vivian Yee, *Dean Skelos Is Sentenced to 5 Years in Prison in Corruption Case*, N.Y. TIMES (May 12, 2016), <http://www.nytimes.com/2016/05/13/nyregion/dean-skelos-is-sentenced-to-5-years-in-prison-in-corruption-case.html?ref=collection%2Fnewseventcollection%2FAlbany%20on%20Trial> [https://perma.cc/L5V9-2H7M]; Benjamin Weiser & Vivian Yee, *Sheldon Silver, Ex-New York Assembly Speaker, Gets 12-Year Prison Sentence*, N.Y. TIMES (May 3, 2016), <http://www.nytimes.com/2016/05/04/nyregion/sheldon-silver-ex-new-york-assembly-speaker-gets-12-year-prison-sentence.html> [https://perma.cc/LVS6-JZX6].

2. Kate Zernike, *2 Ex-Christie Allies Are Convicted in George Washington Bridge Case*, N.Y. TIMES (Nov. 4, 2016), <http://www.nytimes.com/2016/11/05/nyregion/bridge-gate-conviction.html> [<https://perma.cc/MT2E-FGJE>].

3. E.g., Christine Hauser, *Aaron Schock, Ex-Illinois Congressman, Is Indicted*, N.Y. TIMES (Nov. 11, 2016), http://www.nytimes.com/2016/11/11/us/politics/aaron-schock-ex-illinois-congressman-indicted-wire-fraud.html?_r=0 [<https://perma.cc/8Q9U-W67Y>].

corruption scandal recently brought down the government in Brazil.⁴ But you have also been reading about the scandals concerning the Fédération Internationale de Football Association (“FIFA”); even the sports and athletics that we are most passionate about have been tainted with corruption.⁵

So, there is a lot to talk about in terms of how legal regimes intersect and can prevent and respond to corruption. We have a great group of people here to do that today. I want to thank, in particular, Professors Caroline Gentile and Sean Griffith for their immense contributions as faculty advisors to our *Journal of Corporate & Financial Law*.

And lest it go unsaid, today’s program is sponsored by our *Journal of Corporate & Financial Law*, which was founded in 1995 and has grown to become one of the premier student-edited business law journals in the country. In fact, it is the number one most-cited specialty journal in banking and finance.⁶ We are tremendously proud of the *Journal* and all the work that our students do on it and the programs they organize.

I will also say that this program is organized in coordination with the Fordham Corporate Law Center, which is one of our flagship programs directed by Professor Sean Griffith, whom you will all hear from in a moment. Please be sure to pick up the calendar of fall events for the Center because there are a lot of other great things ahead.

I also want to welcome back to the Law School our alum Tim Treanor, who is on the panel, as well as our other guests, and to thank the students of the *Fordham Journal of Corporate & Financial Law* for today’s great program and all your work.

In particular, I want to thank Giselle Sedano, who is a fourth-year student in our evening program. Ms. Sedano works full time as a compliance officer at Fortress Investment Group, a publicly traded,

4. Simon Romero, *Dilma Rousseff Is Ousted as Brazil’s President in Impeachment Vote*, N.Y. TIMES (Aug. 31, 2016), http://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html?_r=0 [https://perma.cc/H9K8-FJQK].

5. Rebecca R. Ruiz, *Venezuelan Soccer Official Pleads Guilty; Promises to Repay Millions in FIFA Case*, N.Y. TIMES (Nov. 10, 2016), <http://www.nytimes.com/2016/11/11/sports/soccer/fifa-venezuelan-soccer-official-pleads-guilty.html> [https://perma.cc/PE2M-ASHT].

6. See *Law Journals: Submissions and Ranking, 2008 – 2015*, WASH. & LEE UNIV. SCH. LAW, <http://lawlib.wlu.edu/LJ/index.aspx> (search using the follow criteria: “Subject: Banking and Finance”; “Edit Type: Student-edited”; and “Ranking Criteria: Case Cites”).

highly diversified global investment management firm, and will be joining the firm of Ropes & Gray next fall. I want to thank you, Giselle, for putting together today's program, along with all the rest of our *Journal* editors.

Thank you all for coming.

PANEL I: POLITICAL ECONOMY OF CORRUPTION

GISELLE SEDANO: Thank you for the very kind introduction, Dean Diller, and good afternoon to everyone. The *Fordham Journal of Corporate & Financial Law* is excited to welcome you here today to our annual symposium. Moreover, we are honored to have a truly wonderful panel of leading scholars and prominent attorneys to share their insights and their expertise surrounding corruption. We have, as Dean Diller mentioned, a Fordham Law School alumnus Tim Treanor, Class of 1995, who is a Partner and Global Co-leader of the white-collar criminal defense and investigations practice of Sidley Austin; Professor Sean J. Griffith from Fordham Law School, who is the T.J. Maloney Chair in Business Law and Director of the Corporate Law Center; Zachary Brez, who is a Partner and Co-chair of the business and securities litigation practice of Ropes & Gray; Michael J. Cohn, who is Global Chief Compliance Officer and Deputy General Counsel of Fortress Investment Group LLC; and we have Professor Susan Rose-Ackerman, who is the Henry R. Luce Professor of Jurisprudence of Law and Political Science at Yale University.

As history demonstrates, the world has not been shortchanged of bad actors willing to facilitate corruption, particularly through the provision and receipt of bribes. The problem of corruption is found in the United States and virtually in every other nation in the world. It is a blight; it disrespects good governance and the rule of law, creates moral and political dilemmas, hinders economic development, infringes human rights, and distorts competitive conditions.

When Edson Arantes do Nascimento, more known as Pelé, a professional Brazilian soccer player celebrated as one of the greatest players in the sport, described soccer as “the beautiful game,” the world ardently agreed.⁷ He felt that he owed the game, not that the game owed him.⁸ Football is played on the poor streets of third world countries as much as it is played in the most affluent nations. While Pelé expressed that he owed the game, those involved in the massive FIFA corruption scheme, which came to light through the recent Department of Justice

7. Barney Corkhill, *Jogo Bonito: The Beautiful Game*, BLEACHER REPORT (Oct. 16, 2008), <http://bleacherreport.com/articles/69649-jogo-bonito-the-beautiful-game> [https://perma.cc/2YG9-6BQW].

8. *Id.*

investigations,⁹ operated as though the game owed them by exploiting their positions for decades to enrich their own pockets. They are not the sole actors of corrupt acts.

We hope today to engender an honest discussion about corruption; normally, honesty is a rarity when you speak about corruption. There will be two panel discussions. The first will focus on the political economy of corruption, and will be led by Professor Griffith and Professor Rose-Ackerman. The second will focus on government investigations into corruption, and will be led by Mr. Treanor, Mr. Brez, and Mr. Cohn.

Professor Griffith, I turn the floor over to you.

SEAN GRIFFITH: Wonderful. Thank you all for being here. Thanks, Giselle, for organizing this. I was delighted when Giselle said, “I am thinking about topics for the *Corporate Journal*’s symposium and maybe I will do something about corruption and foreign anti-corruption laws,” and I said, “Perfect topic, Giselle, because I have a working paper on the very subject and you can invite me to present it and I will.”¹⁰ And so, here I am. Thank you, Giselle, for choosing such a convenient topic, from my own self-interest.

My presentation, in a way, is about self-interest. It is about the self-interest of the regulated entity, which is to say U.S. business interests, in the promotion and promulgation of foreign anti-corruption laws.

What I would like to do in my presentation is to assert my ivory-tower prerogative and step back from the details and ask the larger question of how anti-corruption regulation came to exist at all and, in particular, how it came to exist considering that it is directly contrary to the interests of one of the strongest in-state lobbies in the United States—namely, the business community.

My working paper is with my friend and colleague, Tom Lee, who is on the faculty here. He wishes he could be here today, but he is traveling around the world, speaking on a different issue.

We are talking about foreign anti-corruption laws. It is not a tricky political economy-story to tell, to explain why a state might enact *domestic* anti-corruption laws—in other words, laws against the payment and receipt of bribes to officials inside its own borders. Obviously, that is in the state's interest because corruption has all kinds of negative effects on the country in which it occurs, which is to say that it leads to the

9. Ruiz, *supra* note 5.

10. Sean J. Griffith & Thomas H. Lee, *The Political Economy of Foreign Anti-Corruption Law* (unpublished manuscript) (on file with authors).

misallocation of resources and the disenfranchisement of the poor. Any government that is interested in promoting the benefit of its own people would have an obvious interest in enacting laws against in-state domestic corruption.

What is interesting about *foreign* anti-corruption laws is that they are laws about state actors from one country—corporate actors, say, from the United States—whose bribe is paid elsewhere. This ought to strike us as a little bit odd. It certainly strikes me as odd. While the United States clearly has an interest in protecting the U.S. political system, it is not so obvious what the U.S. interest is in guaranteeing the functioning of political systems in other states. Why should the United States care whether corruption is rampant in other places?

It is particularly odd that the United States was the first and, for a time, only country to pass a law against foreign bribery and corruption. What that meant was that U.S. companies—for example, Exxon—could not bribe or make certain in bidding against their foreign rivals—like British Petroleum and Royal Dutch Shell—to win oil concessions in different states where corruption was maybe necessary to get that concession and where the foreign rivals were not similarly regulated.

A U.S. company that follows U.S. domestic law would be at a competitive disadvantage to a foreign competitor. In fact, this was the case—or at least the business lobby asserted that this was the case—for many years after the passage of the U.S. Foreign Corrupt Practices Act (“FCPA”).¹¹ What we want to do in this paper is to look at that problem and try to assess how foreign anti-bribery laws came to be: not only how they came to be in one state, the United States, but how they have now been passed or promulgated all around the world.

Now, we are not the first people who have ever looked at this or talked about the origins of the FCPA or other foreign corruption statutes. We categorize the prior literature in this area as focusing on rights-based accounts or realist accounts.

Under the rights-based account, there is an altruistic state actor who does not want there to be corruption, for humanitarian or similar reasons, and who works alongside international development goals of preventing corruption all around the world, and thus seeks to promulgate that international human right, if you will, from state to state.

11. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2012).

We think that corruption is bad, but we find those accounts very difficult to believe because there is a collective action problem there. The freedom from corruption is like a public good. The trouble with public goods is that they do not come about by magic on their own because every actor, every person, who would be regulated by the rule that is necessary to create the public good has an incentive to defect. So, you have a collective action problem.

The United States passes the FCPA. That is terrific for French companies. Maybe the French government does not like corruption either, but the French government is going to have an incentive to defect and allow its companies to continue to pay bribes. We find that to be the basic problem with rights-based accounts.

Realist accounts will be just the opposite of the human rights story, which is basically that this is in somebody's economic interest. Maybe it is really good for corporations not to have to pay bribes; maybe it saves them a lot of money, so it is actually in the corporate interest or, alternatively, it is in the enforcement authority's interest.

That is the starting point for us: in whose interest is all this?

A pretty good example that we used to try to poke at some of these realist stories is the Chiquita Banana example. It was one of the motivating stories for FCPA originally.

This involved a bribe that was paid by the predecessor entity of Chiquita Banana, United Brands, in order to avoid an export tax in the state of Honduras.¹² The tax that was going to be assessed against the banana company was \$7.5 million. The bribe that Chiquita Banana had to pay in order to avoid the tax was \$2.5 million. So, it is pretty clear that this is a positive net present value transaction—spend \$2.5 million to get a \$7.5 million gain.

From the company's perspective, bribery can be efficient, which should not be shocking to anyone. So, it is just hard to believe that passing a rule against bribery is somehow in the corporate interest, at least in the short term.

Now, who lost? What happens from the Honduran side? Well, the president got a \$2.5 million bribe but the treasury lost out on collecting the \$7.5 million tax. If that tax had come into the treasury, the treasury would have distributed it to serve the people of Honduras. That did not

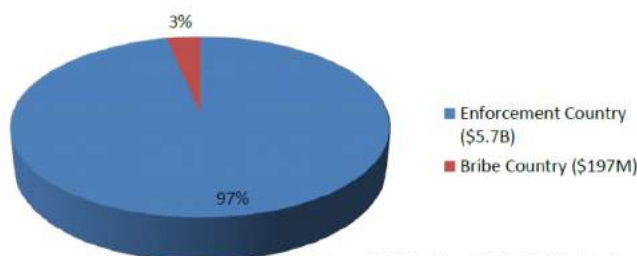
12. Associated Press, *United Brands Bribe Is Laid to Honduran*, N.Y. TIMES (May 16, 1975), <http://www.nytimes.com/1975/05/16/archives/united-brands-bribe-linked-to-honduran-honduran-official-named-in.html> [<https://perma.cc/XV4T-PBP9>].

happen; instead, the president of Honduras bought a private jet, or whatever he did. He was subsequently overthrown, by the way, by Communist revolutionaries, and that is going to be part of our story.

Who else's interest might be affected by the enforcement of foreign anti-bribery laws? One other answer is the enforcement authorities, and there is some support for that claim.

In whose interest? Where the money goes...

Of the \$5.9 B collected where the country of enforcement differs from country where bribe was made...



Source: World Bank Report, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2013).

Figure 1: World Bank Report¹³

This is a graph from a World Bank report from a couple of years ago showing where the money goes in the enforcement of foreign anti-bribery laws. This is in a situation where the enforcing country is different from the country in which the bribe is paid.

What happens to the money that is taken as a fine in those enforcement actions? The answer is it goes to the enforcement country; it goes to the Department of Justice or the U.S. Treasury. It does not go back to Honduras or to some nongovernmental organization that will distribute the money to the benefit of the people of Honduras who were originally deprived of tax revenue as a result of the bribe. It stays in the U.S. Treasury. That is part of the story. We are not as cynical as this, but we acknowledge it.

The fundamental moving part in our story is the U.S. business interest. How can it be that the U.S. business interest, the most powerful lobby in the United States, allowed the FCPA, a statute that is directly contrary to the business community's interests, to be passed?

13. Griffith & Lee, *supra* note 10.

Our answer is foreign policy. This is not an answer that is original to us. In 1977, with the enactment of the FCPA, we were in the middle of the Cold War. A number of corporate executives were parading through Congress in connection with the Watergate scandal, talking about slush funds that they used in domestic bribes—“And, oh yeah, by the way, we pay foreign bribes with those slush funds too.” “How much?” “Well, we are not divulging it on our accounting statements.” So, that is already accounting fraud.

When the Securities and Exchange Commission wanted to go after companies for these bribes, it just wanted to focus on the accounting issues. But Congress got in the act and made it about something else. There are a lot of statements in the *Congressional Record* that show that Congress wanted a substantive prohibition of bribery, not just a bunch of accounting provisions that say you will fully and fairly reflect the disposition of firm assets. Why? For optical reasons, for reasons relating to the Cold War.

Communist revolutionaries around the world were capitalizing on the idea that the capitalist economies were corrupt. They had a number of pretty good examples: one of them was in Honduras; one of them was in Japan; one of them was in Italy; one of them involved the Lockheed Corporation paying bribes to foreign governments. A number of governments fell as a result of this: the Japanese government fell; the Honduran government fell; Italy was in trouble.

The idea was that we needed to draw a line against our Communist adversaries by showing that we are really not that dirty. So, we passed the FCPA. Argument number one in our story is that foreign policy trumps the U.S. business lobby—but not for long. The U.S. business lobby comes back. It is very resilient.

The first best thing for the U.S. business lobby would be a repeal of the statute, but that was not going to happen. It would be bad optics in the ongoing Cold War. The second best thing would be for the statute to not be enforced—and that is what they got. There is a period of very lax enforcement of the FCPA for the first twenty, twenty-five years of its existence.

The argument of the business lobby at this time was: “We need a level playing field against our competitors in foreign states who can continue to pay bribes to foreign leaders. It is not like the foreign leaders stopped accepting bribes just because we cannot pay. But now we, Exxon, cannot pay the bribe and someone else wins the contract. And that is bad for us, that is bad for the U.S. economy, that is bad for U.S. business. So,

we would rather you did not enforce these laws. But if they have to be enforced, we want them to be enforced on the competitors too.”

The U.S. government starts going through multinational, multilateral initiatives to get the other big hegemonic power—Europe—to agree to some kind of foreign bribery rules through the Organisation for Economic Co-operation and Development (“OECD”). It takes a long time. The U.S. government first proposed them in the early 1990s. It did not get them until 1997-1998 with the enactment of the OECD Convention.¹⁴

In connection with the enactment of the Convention, the U.S. amends the FCPA to give the Department of Justice long-arm jurisdiction: so, jurisdiction not just against U.S. incorporated or domiciled businesses but also against businesses that have contacts in the United States.¹⁵

The “contacts” part of the statute, when it is eventually enforced, winds up getting enforced very aggressively. “Contacts” include contact through a U.S. bank—in other words, the use of the U.S. dollar in a bribe. Regardless of whether the bribe is from a foreign company, paid in a foreign country to a foreign dictator, if there is a use of U.S. dollars in that transaction, that is enough for U.S. enforcement authorities to go after that transaction due to its *contact* with the United States.

That amendment to the statute does not take effect until the OECD Convention is enacted, and that gives the U.S. enforcement authorities a very strong jurisdictional hook to go against foreign actors in the event that, as indeed occurred, the OECD Treaty is not enforced evenly among all of its signatories.

Enforcement is still pretty lax at this time. That is a good state of affairs for U.S. businesses. Now U.S. businesses can say: “Look, we live under the same statutory rule that our foreign competitors do, at least in European jurisdictions. We are both barred from committing bribes. But there is not a lot of enforcement, so whatever happens, happens.”

The next big shock to the system, Tom and I want to argue, is another foreign policy shock: the war on terror. After 2001, the government starts going after terrorists’ finances. When they go after terrorists’ finances they try to figure out, “Where did the money come from to pay for these terrorist operations?”

14. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1.

15. International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 78dd-1-3, 78ff (2012).

The first thing they discover is money laundering, so this is when anti-money-laundering rules explode. The second thing they discover is a lot of foreign corrupt payments in connection with the money laundering.

At some point after that “eureka” moment, enforcement begins in earnest. This is now the mid-2000s. At this time, when enforcement finally begins under the FCPA, it does not begin just against the U.S. companies, but U.S. enforcement authorities use their jurisdictional hook against foreign companies—i.e., U.S. businesses’ foreign competitors. There is some international relations (“IR”) theory in the paper, which I am not going to bother you with right now. But I will show you that in two slides.

FCPA Stats: Foreign v. Domestic Offenders			
Year of Resolution	Foreign Company	US Company	Total
2004	1	3	4
2005	0	4	4
2006	2	2	4
2007	1	9	10
2008	3	4	7
2009	0	10	10
2010	11	10	21
2011	8	12	20
Total	26	54	80

Source: Choi & Davis (2013)

Figure 2: FCPA Statistics¹⁶

This is a slide from Steve Choi and Kevin Davis at New York University, who look at how often the FCPA is enforced against foreign companies and against domestic companies. What they find is basically two-thirds of enforcement actions are against U.S. companies.

16. Griffith & Lee, *supra* note 10.

FCPA Stats: The 10 Largest Settlements

1. Siemens (Germany): \$800 million in 2008.
2. Alstom (France): \$772 million in 2014.
3. KBR / Halliburton (USA): \$579 million in 2009.
4. BAE (UK): \$400 million in 2010.
5. Total SA (France) \$398 million in 2013.
6. VimpelCom (Holland) \$397.6 million in 2016.
7. Alcoa (U.S.) \$384 million in 2014.
8. Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy): \$365 million in 2010.
9. Technip SA (France): \$338 million in 2010.
10. JGC Corporation (Japan) \$218.8 million in 2011.

Source: FCPA Blog

Figure 3: FCPA Largest Settlements¹⁷

But then, if you look at another chart, which shows the ten largest FCPA settlements, you get a different picture. Only two of them are against U.S. companies; the other eight are against foreign companies.

So, what we want to argue is that this is evidence of the U.S. enforcement authorities actively trying to level the playing field for U.S. business interests; that one part of understanding how this regime is spread around the world is understanding the interest of the domestic-regulated party and the way in which its interests have—and I do not want to say “captured” in the strict sense—but rather influenced the incentives of the regulators and enforcers of this particular set of rules.

Now, a theory is only as good as its predictions, so we have some. If our theoretical account of how foreign anti-bribery laws and norms have been transmitted is true, we should be able to make a couple of predictions.

Here is one: once foreign companies with U.S. contacts—that is, foreign companies with realistic U.S. risk—become realistic enforcement targets, they will have an interest in leveling the playing field too. Now, who do they want to level the playing field against? Their competitors who have a lesser chance of being enforced against by U.S. regulators.

17. *Id.*

So, if you are a big French company and you are at risk of being enforced against by the U.S. Department of Justice, but you have French and European competitors that do not face the same risk, well, you, the big French company, want a statutory regime in France or in Europe that is enforced against your domestic or regional competitors in order to level the playing field against them.¹⁸ In other words, it is not just U.S. business interests that want to level the playing field. Once enforcement risk is global, foreign businesses will want to level the playing field too.

Another of our predictions is that leveling the playing field against domestic or regional competitors with fewer contacts means more foreign corruption legislation and enforcement, which means more regional treaties and more regional enforcement.

And we are starting to see that, right? After a big enforcement action against British Aerospace,¹⁹ we got the U.K. Bribery Act.²⁰ And France and Korea, which have lagged in terms of enforcement under foreign anti-bribery laws, have started to enforce these laws, and to pass new legislation in the case of France, which might make a difference.²¹

Another prediction, which is an application of IR theory, is that once a big no-bribe coalition has formed, awarding contracts to bribing firms is more difficult from the perspective of the corrupt foreign government. That might be for two reasons: one, it is harder to conceal the fact that you are taking bribes. Assuming that the government is not corrupt all the way to the top and we are just talking about one corrupt official, that governmental official will have a harder time justifying to its superiors why it took a contract from company X but excluded the British, American, German, and Swiss companies that were also bidding. “Why was this the best bid?” “Well, it was from a company that was willing to pay the bribe,” is probably not a good answer.

It is also possible that companies from countries that remain free to bribe might have a real or perceived quality differential in comparison

18. Jonathan Webb, *France Tightens Anti-Corruption Laws*, FORBES (Mar. 31, 2016), <http://www.forbes.com/sites/jwebb/2016/03/31/france-tightens-anti-corruption-laws/#3faed26e2a55> [https://perma.cc/9WNQ-PFT3].

19. Christopher Drew & Nicola Clark, *BAE Settles Corruption Charges*, N.Y. TIMES (Feb. 5, 2010), <http://www.nytimes.com/2010/02/06/business/global/06bribe.html> [https://perma.cc/7LVM-FUQP].

20. Bribery Act 2010, c. 23 (U.K.).

21. Choe Sang-Hun, *Antigraft Law Stirs up Wariness over South Koreans Bearing Gifts*, N.Y. TIMES (Sept. 29, 2016), <http://www.nytimes.com/2016/09/30/world/asia/south-korea-bribery-law.html> [https://perma.cc/QFZ8-WMKH]; Webb, *supra* note 18.

with companies that are precluded from bribing as a result of foreign anti-bribery laws.

So our theory enables us to make some predictions.

But there is one problem—a big problem—with our thesis, and that involves China. China is sort of an equal now to the U.S. in terms of global economic power and reach, and China is one of the countries where companies engage in bribery. So, it is a problem for our thesis that this might be a counter-hegemon. The “invisible hand story” that we are trying to tell might not work with this counter-hegemon. If Chinese companies continue to bribe, that may be a sufficient counterweight to our story.

But who knows how that is going to go? As you may know, there is a big domestic corruption crackdown going on in China.²² And, just as the FCPA began with a domestic corruption crackdown in the U.S., it is possible that the Chinese government will not be willing to allow its companies to bribe in the same way that they have previously.

That is our story about the political economy of the foreign anti-bribery laws. I appreciate your comments at any time. Thanks.

GISELLE SEDANO: Thanks.

Next, Professor Rose-Ackerman will be speaking.

SUSAN ROSE-ACKERMAN: Today I will focus on “grand corruption” in procurement, privatization, and concessions—in other words, corrupt deals that may lead to prosecutions under the U.S. FCPA and in other countries that have signed the OECD Convention.

It is important to understand that not only do large amounts of money change hands in such corrupt deals, but also corruption affects the behavior both of public officials who select the winning firms and of the firms that carry out the contracts.

First, the cost of such corruption is not just a waste of public money—arising from the excess cost of corrupt projects and a distorted distribution of benefits. There are behavioral effects as well. What happens when top officials are willing to be corrupt? First, they might choose projects that are simply too big—not simply white elephants, but very big white elephants, larger than they should be—because if bribes are a proportion of the size of the elephant, a corrupt official will want to have big projects. Second, officials and firms may prefer projects where

22. Tim Daiss, *China Turns up Heat on Corruption: 'No Mercy Against Law Breakers'*, FORBES (Aug. 28, 2016), <http://www.forbes.com/sites/timdaiss/2016/08/28/china-turns-up-heat-on-corruption-no-mercy-against-law-breakers/#12e450165499> [https://perma.cc/P3BN-V4BJ].

they can easily hide bribes. These would be one-of-a-kind projects with lots of special bells and whistles, projects where an outsider cannot say, “Oh, there must be some bribes hidden in there.” Hence, officials will tilt their decisions toward projects and purchases that are too big and too fancy.

But what about investors who are thinking about engaging in corruption? Bribes are costs for firms. They estimate how small a bribe they can get away with and still get the contract. However, corruptly obtained contracts have special uncertainties. The government may change, and a new set of politicians may take power that either cracks down on corruption or, at least, creates uncertainty for existing contractors who are vulnerable to blackmail.

Facing those uncertainties, firms might choose an investment strategy that makes it possible for them to walk away from their investment at minimum cost. My favorite real-world examples are gas-fired power plants that are built on ships. Why would a firm want to use this expensive option? Essentially, it makes exit feasible. The contractor ties up the ship at a port in the host country, and if the country's officials try to extort funds from the investor *ex post*, the firm simply unties the ship and leaves with the investment.

In general, a contractor who has paid a bribe is less likely to invest in fixed capital that cannot be moved away when there is a change in the government or a change in the political situation. So, investors may want to try to get their money out quickly and to design projects with a shorter payback period than would be profitable in an honest environment.

Figure 4: Procurement Process²³

Figure 4 illustrates the various ways that corruption can influence the procurement.²⁴ The opportunities go beyond the bidding process itself. Payoffs can occur up-front in the early stages when the country is deciding what it wants to buy. For example, article businesses in Nigeria are reported to collaborate among themselves and suggest projects that these businesses were particularly able to provide and where bribes could be hidden.²⁵ Corruption can enter when identifying and designing the projects so that the rest of the process looks perfectly honest with a seemingly spotless sealed bidding process. The process is corrupted at the very beginning in a way that favors certain contractors.

A good example of such corruption involved the purchase of telephones in an African country in which the procurement specification required that the telephones had to be able to survive at below-zero Centigrade temperatures. This is a ridiculous constraint in sub-Saharan Africa. Only one telephone company, based in Scandinavia, made telephones that would survive in such cold weather. So the fix can be in at an early stage.

The second set of corrupt opportunities arises during the pre-bid period in which the state decides who is pre-qualified to make bids. Third,

23. Reproduced from Susan Rose-Ackerman & Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform* 104 (2d ed. 2016).

24. For more elaboration of these points, see Glenn T. Ware, Shaun Moss, J. Edgardo Campos & Gregory Noone, *Corruption in Procurement: A Perennial Challenge*, in *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* 295 (J. Edgardo Campos and Sanjay Pradhan eds., 2007).

25. Nnaoke Ufere, Sheri Perelli, Richard Boland & Bo Carlsson, *Merchants of Corruption: How Entrepreneurs Manufacture and Supply Bribes*, 40 *WORLD DEV.* 2440 (2012).

a nominally acceptable sealed-bidding process can be corrupted by the illicit sharing of information with contractors.

Finally, post-bid, after the project goes into effect, it is common for there to be opportunities for renegotiation. If the whole system is undermined by corruption, officials come back after the contract has been signed and demand additional bribes for engaging in contract renegotiations. Conversely, the contracting firm may demand certain extra benefits and make payoffs in return.

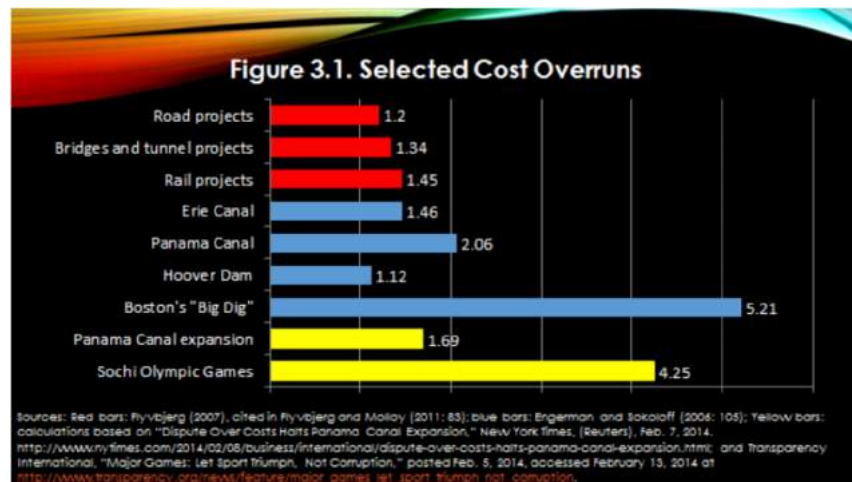


Figure 5: Cost Overruns²⁶

Renegotiations lead to cost overruns on big projects, with or without outright payoffs. Figure 5 provides some recent example, including several U.S. cases. For example, Boston's "Big Dig," cost 5.21 times more than the original estimate. This is not to say that all these projects were corrupt, but they do raise red flags.

Flyvbjerg and Molloy ask an interesting question: How do cost overruns happen? Doesn't everybody know ex ante that the estimates are too low?²⁷ Why does anyone believe the cost estimates? If the estimates were indeed realistic, then cost overruns would more clearly signal corruption and could prompt investigations.

26. Rose-Ackerman & Palifka, *supra* note 23, at 98 which cites the background sources.

27. Bent Flyvbjerg & Eamonn Molloy, *Delusion, Deception and Corruption in Major Infrastructure Projects: Causes, Consequences, and Cures*, in *International Handbook on the Economics of Corruption* 81 (Susan Rose-Ackerman and Tina Søreide, eds., 2011).

The authors' answer is as follows. They posit that within government construction agencies there is competition among engineers, architects, and developers about which project to pick. One way to win support for "your project" is to tell your superiors, "Look, this is going to be really cheap, and it is going to be a terrific project." To win the competition for projects, each advocate has an incentive to underestimate costs. Hence, in an honest bureaucracy with no corruption, groups compete to get "their" projects approved and have a built-in tendency to underestimate the costs. This state of affairs then provides an opening for people who want to benefit through corruption.

Now, consider the related case of concessions that permit investors to exploit natural resources, for example, timber or minerals. Here too, bribes not only personally enrich officials but also distort economic choices. Those who pay kickbacks have an incentive to work quickly. They may, for example, cut down trees before they reach an optimal size because the government might change, or investigators might uncover the corruption. The investor has a shorter time horizon than in an honest polity.

Trees grow a little bit every year, and they increase in value just sitting in the forest. But they are also valuable cut down and sold. So, timber investors must make a trade-off: do they let them grow for another year or do they cut them down right away? My claim is that a firm that corruptly obtains a concession will be likely to speed up its tree cutting because it is in an uncertain environment that has been created by corruption. Corruption creates uncertainty for investors, over and above the ordinary uncertainty of a market.

Similar issues arise in privatization contracts where major state-owned assets are transferred to private hands. Suppose a firm wants to bid on a state electric company. The investor wants to purchase it as cheaply as possible and may be willing to bribe the public officials to value it at a relatively low level and obtain inside information showing a higher value. Then, after buying the private firm, the private owner may bribe the regulators so that they do not impose too many costly constraints. The government treasury does not get the funds that it should have received for selling off its assets, and the actual operation of the firm is distorted.

Even without corruption, a country that is privatizing a public utility faces a trade-off between selling it at the highest price or creating a competitive private market. If the government prioritizes its own revenue it will want to sell the public firm as a monopoly, because that will maximize its value to the private investor. But the resulting monopoly

imposes a social cost. Even with no corruption a government may opt for the monopoly option, but with corruption it gets the worst of both worlds—fewer funds for the government budget and no competition.

I want to end by thinking more generally about the obligations of multinational firms and of the professionals who work on infrastructure projects and other large deals. Do multinational firms have an obligation not to pay bribes, or ought they to simply worry about getting caught? Should professionals blow the whistle if they observe illicit behavior by those who use their services?

First consider the professionals. I advised a commission that was investigating corruption in Quebec involving multiple infrastructure contracts over several decades. What puzzled me was why the professionals involved—lawyers, accountants, and architects—had not blown the whistle years earlier. Even if most avoided direct involvement, they must have had some sense of what was going on. They were benefiting from the underlying corrupt arrangements, but that hardly justifies their silence. To me, the norms of these professions ought to include obligations to report on suspected corruption and fraud.

Second, I believe that corporations have moral obligations, particularly with respect to corruption. The corporation is a creature of law; it is only allowed to exist because laws permit it to exist and permit it to operate. The state allows firms to operate, presumably because the corporate form is a broadly beneficial way of operating in the market. Therefore, corporations have an obligation to act in ways that further the efficiency of the market—and that applies to corruption, not just to monopolization. They should also act in ways that do not undermine the political legitimacy of the countries that are permitting them to operate. One can argue about how far that obligation goes and what it implies. But to me, corporations have a moral obligation to refrain from corruption, both with respect to upholding the efficiency of the market and to supporting the political legitimacy of the political countries where they operate.

There is, of course, controversy about the extent to which ethical behavior is good for the bottom line. I am glad that ethical behavior is often also profitable, but I am a little less proud of a company whose ethical actions makes its profits higher. The corporations that should get the most praise for their behavior are those that act in ways that further ethical concerns arising from their international role but that cannot be explained as profit-maximizing for the individual firm.

GISELLE SEDANO: Thank you, Professor Griffith and Professor Rose-Ackerman, for your theories and insights on corruption. Now we are going to move on to questions and answers. But first we are going to reserve that space for our three panelists to perhaps share some of their experiences or insights or counterarguments to what Professor Griffith and Professor Rose-Ackerman just presented.

Mr. Treanor, do you have any remarks that you would like to share with the audience?

TIMOTHY TREANOR: Sure. I have been practicing in the area of anti-corruption enforcement—the FCPA in particular—for the last ten years or so and my experiences have caused me to think a lot about some of the topics that Professor Griffith has raised in his initial presentation. The work that he is doing is very important: looking at the economic motivations for anti-corruption enforcement. Those who practice in this area, like myself, constantly evaluate whether anti-corruption enforcement is going to increase or decrease because there are so many different factors at play that could change the way enforcement is handled. There are, for example, a variety of political and economic factors that influence whether we as a society push more aggressively to enforce anti-corruption laws or we pull back and push less aggressively. There is a very healthy debate amongst practitioners and academics about the proper role for anti-corruption enforcement. I think Professor Griffith proposes to add something quite valuable to that discussion.

I personally have not thought that the genesis of the FCPA, while very interesting, was all that controversial. I was only about ten years old when the FCPA was passed, so it is not like I consciously lived through those events, but I have always viewed the FCPA as product of the confluence of the Cold War and Watergate. We had a situation where our country was, to a significant degree, in crisis and some private corporations were seen to be deepening that crisis by paying bribes and in the process meddling in foreign affairs, which is traditionally the purview of the federal government.

The Church Committee—the Senate committee that most closely examined the FCPA and its potential impact—found that, where bribes were paid to foreign government officials, we as a nation were damned no matter who was being bribed. If our companies were supporting the “right” political parties in certain countries, the opponents—if they were able to expose the bribes—could gain an advantage by proving that the U.S. was meddling. The Marxist movement got a lot of mileage out of portraying the U.S. and U.S. corporations as corrupting foreign

governments. So, fueling those accusations was not good. And, certainly, where our companies were supporting governments that our government did not support, that was a whole different problem.

There were of course political motivations behind passing an anti-corruption statute. Originally, the FCPA only addressed U.S. domestic concerns and the issuers of securities in the U.S. So, it was very much focused on U.S. entities. As a result, it was not of particular concern to foreign nations. And then, of course, there was Watergate as a factor—not only did the Watergate investigation have a role in uncovering some of the improper corporate payments that were made, but public reaction to the events of Watergate inspired a greater sense of morality in this country: “We need to be a country that stands for the right things. We cannot support this kind of conduct. We should be a leader in the world for doing what is right.” That really gave momentum to the birth of the FCPA. So, I think in a different time that statute might never have come into existence, but the result is that we have it now, although it did sit dormant for a number of years.

My view, in considering how little the FCPA was utilized before 2001 relative to later years, is that there was an increased sense of awareness after 9/11 of our role internationally and even more sensitivity to what we could do to police improper conduct worldwide. The world saw numerous examples of corrupt unfriendly foreign regimes—like the Gaddafi government in Libya—that were being propped up by improper payments which provided good reasons for pursuing enforcement of the FCPA in certain contexts. But enforcement went way beyond seeking to prevent acts that had the potential to corrupt entire foreign governments. And having lived through some of that, I feel like what happened is that we had a somewhat dormant statute that was rediscovered by prosecutors who believed in the value of pursuing provable cases of corruption no matter how big or small the corrupt effect. And during the early 2000s, there were certain enforcement actions against foreign companies that were so egregious that there was not much of an argument about whether there should be enforcement.

There had been changes to the FCPA in 1998 that allowed our government to go after foreign entities if their conduct had some touch point in the U.S. If a corruption-related payment passed through the U.S.—in the government’s view, even perhaps an email through the U.S.—a basis for enforcement would exist, and of course at least domestically, it was more politically palatable for us to chase around foreign entities that were doing bad things in the world.

I also believe that, during the years that I was in the Department of Justice, the DoJ learned how to hold corporations accountable much more effectively. Previously, there had been prosecutions of corporations but typically the corporations were indicted and those cases were more conventionally followed through to the end; maybe there would be a guilty plea but the types of dispositions were limited. The DoJ in the 2000s learned how to use tools like deferred prosecution agreements and non-prosecution agreements to exact from companies fines and compliance control concessions and in some cases to put monitors in place. The Department was able to get a hold of businesses and force change from a compliance perspective.

That was sort of a hybrid of my understanding of some of the history of the FCPA, together with my personal experiences in that area. And, I am glad to see that Professor Griffith is looking at these issues.

GISELLE SEDANO: Thank you, Mr. Treanor.

Mr. Cohn, would you like to offer some of your insights as a leader of an in-house compliance department?

MICHAEL COHN: Sure. Hi there. Not to pick on Professor Griffith, but he had mentioned that he was approaching some of the stuff from an ivory tower. I think that was maybe a little too pejorative. I think what he said was actually pretty interesting. But I will say that I cannot even spend time in the lobby of the ivory tower. I deal with FCPA from a very different point of view from either of the professors and, in many ways, even the practitioners that are up here because I have to grapple with these issues on a day-to-day basis in a fundamental blocking and tackling sort of way.

I believe the FCPA—tying in to some of the themes that the professors just discussed—does have a real impact on business that I actually find in some ways to be negative. For example, people who are operating in a business in various countries around the world—and I worked with Zach here on a number of things in the past—operate in fear of regulatory or criminal prosecution for doing things that may have perfectly legitimate, non-corrupt purposes, such as providing meals, traveling from one place to another in a common vehicle, or other commonplace business-related entertainment.

There is a general fear that I have, which I think is very common among people in my position, that those kinds of things can, even as small isolated instances, get you into the crosshairs of regulators who are very anxious to make a case or make a name for themselves in some manner.

And it does, I think, put an unreasonable burden on business. Certainly, some of the cases we have discussed have been very serious, significant cases with outright corrupt actors engaging in what can only be described as bribery. But there are also lots of cases that are maybe more—since we are in a law school, I will say this—in the penumbra of the FCPA but are probably not really what the FCPA is after. I have not really given a lot of thought to how one might solve that. Instead, I spend most of my time just thinking about how to avoid it. It does really impinge on a small level, but probably cumulatively on a macro level, on normal business interactions throughout the business world, which are impacted in a way that does not serve the purposes of the FCPA.

From a compliance-program perspective, it is very hard to monitor because you have, especially as your organization gets larger and larger, lots of people who are walking around carrying a business card and a credit card from your company who can do things that probably do not qualify as outright bribery but nevertheless can get them and your organization into serious trouble.

Like many compliance issues, keeping up with that starts with who you hire. There are all sorts of techniques people use in terms of monitoring employee expenses and communications, and of course there is always training. But the topic of how to prevent and detect problematic behavior is something that people who are in the compliance business spend a lot of time thinking about.

GISELLE SEDANO: Thank you, Mr. Cohn.

Mr. Brez?

ZACHARY BREZ: Sure. I have got a couple of things to say when I stand up. I have two quick thoughts. I thought both of your presentations were great. I will tell you that last year I probably spent 150 nights overseas, and the number one question I got about the FCPA is: “Why does America care? What do you care what bribes are paid in Brazil?” And I used to have a stock answer that was something like: “America has this view that it does not like to think that it lives in a world where it permits its citizens to do bad things.”

There are a host of laws that fit that scenario: it is illegal to leave the country with the specific intent of sexually abusing a child;²⁸ it is illegal to not wear a helmet on a motorcycle in a number of states,²⁹ and people

28. 18 U.S.C. § 2423(b) (2012).

29. *E.g.*, CAL. VEH. CODE § 27803 (West 2016).

who supported that are people who do not themselves ride motorcycles, right? So, we have a paternalistic view about our own set of laws, and I used to think that Americans did not want to live in a country where its businesses were paying bribes overseas.

I tend to think that is not actually true. I think, more realistically, it is a playing field leveler for U.S. companies against their own U.S. competitors, i.e., if you a very large multinational conglomerate and you are sure that your corporate style is never to pay bribes—and, believe me, every client I have is sure that they are never going to pay bribes—then you want to make sure that your U.S. competitors, in the first instance, are playing by those same set of rules. Before you even get to the foreigners, you want to ensure that your U.S. competitors, whom you realistically view as your biggest threats, are playing by those same set of rules.

Now, frequently, it turns out they are all wrong because it is rare that it is a huge corporate scheme. It is more often about the individual people—the salesman who has to make his targets that month and the manager who is going to make his targets.

I tend to think that also relates to the enforcement piece here. Tim was talking about the change in the late 1990s and early 2000s. I actually think a lot of that is because of Mark Mendelsohn. He was an individual in the U.S. government who saw a set of laws that had not been used in prosecution in a while, and he did not have a very glamorous job, and he decided that he was going to make that a glamorous job. And if you really are a cynic like me, you say that maybe it led to the prosecution of foreign companies over U.S. companies because he realized when he left and went into private practice that his clients were going to be those same U.S. companies and he would not want them to hold a grudge against him. Maybe, maybe not.

On the issue raised about moral companies—I have spent a lot of time thinking about this—I am of the view that altruism is not a reality in humans. It is hard to imagine that if humans are not altruistic, their companies and corporations that are expressions of their views would be altruistic. I think altruism is a lie and people do good things because they want to feel good about themselves. So, it is not altruistic if you are doing it to feel better.

MICHAEL COHN: And on that thought, the sun suddenly shines in.

ZACHARY BREZ: Exactly, right. I think that on some level, though, companies think about it the same way. Is Apple really against the use of conflict minerals because conflict minerals are terrible, or do they know

that if a law gets passed that requires companies to dispose of conflict minerals it is really going to screw their competitors who have been using them and who will have to find a new version of their supply chain? So maybe it is altruistic; maybe it is also just attempting to position yourself for better profits. I would love it if their version was that it was altruistic, but the cynic in me thinks it is probably not.

GISELLE SEDANO: Thank you, Mr. Brez.

I am going to allow Professor Griffith and Professor Rose-Ackerman to respond to what was just said, and then we may have to reserve the rest of the time for the audience questions and answers at the end of the second panel. Professor Griffith?

SEAN GRIFFITH: My only response is thank you for your remarks. I appreciate that very much.

I actually have a question, if I can ask, for Professor Rose-Ackerman. I was very interested in your presentation, especially when you mentioned at the end that you primarily see yourself as an economist. As you were going through your presentation, I was jotting down things that might be testable. Here is my partial list, and I wonder if there is any literature or if you agree that these would be things that might be testable from the story that you were telling.

One, I wonder if we could correlate cost overruns with other kinds of indicia of corruption. The other thing that you were saying was that there is an instability risk associated with winning a contract where corruption is involved. And so, I was wondering if there are ways of mitigating that instability risk. One thing I thought of was political risk insurance. So, I wonder if we could correlate political risk insurance with other indicia of corruption. The other one is about the trees; I mean, the trees were an obvious one. I am assuming that there is a study that correlates the age of trees that are cut down, that are younger, with other indicia of corruption.

SUSAN ROSE-ACKERMAN: There is plenty of empirical work on corruption. But, of course, it is a topic that, in principle, is hard to research.

I have just published a second edition of my *Corruption and Government* book with a co-author who teaches in Mexico [Bonnie J. Palifka] and who convinced me to include more information about organized crime and money laundering in the new edition.³⁰ We also cite much of the empirical work in the field.

30. Rose-Ackerman & Palifka, *supra* note 23.

One valuable study would consider the way in which political risk insurance premiums are calculated around the world. One could easily combine that data with the cross-country indices of levels of corruption from Transparency International or from the World Bank Institute. Of course, there is some circularity, because those indices are based on perceptions. But I think the indices capture something about the pathologies of the relationship between citizens and the state, and between business and the state.

As for the timber industry, there is research on countries, such as Malaysia and Indonesia, that have very important forestry industries that operate both inside and outside the country, and on the relationship between their behavior and the high level of corruption in those countries. It would be valuable to study timber harvests in corrupt and more honest countries, but as far as I know, that work still needs to be done.

GISELLE SEDANO: Thank you, Professor Rose-Ackerman.

We actually do have time for a couple of questions from the audience.

AUDIENCE MEMBER: I am Ian Engoron. I am on the *Corporate & Financial Law Journal*. This question is for Professor Griffith. You spoke about other countries trying to level the playing field against regional competitors when passing their own version of the FCPA. I was just curious if you think that it might, in the end, come back to hurt the U.S. companies when they try to level the playing field against us instead of their regional competitors, say, within the United Kingdom or France.

SEAN GRIFFITH: Interesting question. The question with all of these “level playing field” stories is how serious the enforcement risk is. U.S. enforcement risk is very serious for U.S. companies already. So, it would be hard for me to imagine a U.S. company worrying that there was a greater enforcement risk as a result of a French statute. It will certainly have to do different things from a compliance perspective, but I do not think that its enforcement risk could go up. And if it does not go up, then it is not a business disadvantage. But it might have other kinds of compliance cost disadvantages.

SUSAN ROSE-ACKERMAN: One of the arguments against the FCPA is that American companies lose business. First of all, even if they do sometimes lose business, the losses are often exaggerated. If a firm loses one contract in a corrupt country, it makes an effort to shift its business to countries that are less corrupt. The opportunity cost for the firm is not value of the whole lost contract; it is just the marginal difference between one contract and the other.

Second, if we consider the U.S. national interest, products that enter the global market, such as minerals and commodities, are going to be available to U.S. consumers and businesses no matter whether or not a U.S. company gets the contract. So, the harm for the U.S. is only the possible small increase in the world price because of corruption. Some of the rhetoric about the cost of the FCPA for U.S. business is exaggerated because, obviously, some opponents of the law want to exaggerate the harm.

GISELLE SEDANO: Thank you. Another question?

AUDIENCE MEMBER: I am a Fordham alum from 1998, Cristina Park. Just as a follow up, in terms of strict enforcement here in the U.S., I am unaware of any corporate actors being actually incarcerated for penalties for lack of compliance. I know, for instance, in Korea there is a push with regard to strict enforcement of political corruption because that is a huge problem; I think the largest portion of prosecutions is regarding political corruption of government officials there. Do you see potential actual harm not just in fines but in incarcerations here?

TIMOTHY TREANOR: I think I can answer that question. There is an ongoing debate right now in the U.S. about the degree to which the Department of Justice should be focusing on individual prosecutions where there are corporate prosecutions. As we all know, crimes are committed by individuals, not by companies. Companies are simply legal entities; they are creations of the law. Actions are performed by people. When we hold companies responsible and not the individuals within the companies, are we really addressing the issue in a just fashion?

To address these issues, the Department of Justice just a little over a year ago issued a memo clearly stating what really has always been Department of Justice policy, which is that where crimes are committed, the Department will focus on prosecuting individuals who are responsible. It is called the Yates Memo.³¹ It was issued by Sally Yates, who is the Deputy Attorney General. It basically put in writing the Department's policy that in corporate prosecutions, there will be a focus on individuals. It requires companies that are cooperating, among other things, to present to the DoJ evidence related to the conduct of all individuals involved in the matters under investigation.³² It requires

31. Memorandum from Sally Yates, Deputy Attorney Gen., U.S. Dep't of Justice, on Individual Accountability for Corporate Wrongdoing (2015).

32. *Id.*

prosecutors to rationalize in memos their decision-making with regard to individual prosecutions and to get approvals.³³ It also emphasizes the use of the government's civil enforcement powers against individuals without regard for whether an individual will have the ability to pay fines.³⁴

But that memo, although it came out with much fanfare, was not much of a change of anything other than a public statement that the Department was going to focus on these things. It is conceivable that the memo could effect some change based on the fact that it requires the creation of a formal process that prosecutors and company representatives must adhere to in order to demonstrate that individual prosecutions have been considered. But the real issue in my mind that is not resolved in this memo is that corporate prosecutions are much easier to bring than individual prosecutions which are typically much harder, which is the real reason that we see some corporate prosecutions without any individuals being held accountable. Prosecutors can use evidence of a collective state of mind against a company. They do not have to prove that any particular individual had the necessary state of mind for the offense. Combine this with the fact that companies are not likely to go to trial—they do not want to get indicted and end up out of business like Arthur Andersen—so they typically negotiate a resolution, making it a much easier path to bring a successful prosecution.

Individuals, on the other hand, will fight for their liberty. Companies cannot go to jail but individuals can, and they will put the government to the test to avoid losing their liberty. When an individual is prosecuted, the government has to present evidence regarding the specific individual charged, his state of mind and actions, and has to prove it beyond a reasonable doubt. It is a much tougher undertaking.

So, that memo has come out. I think the segment of the legal community that focuses on these issues is waiting to see if there will be any sort of change in the number of individual prosecutions that results from that policy announcement. Fourteen or so months in, we have not really seen any increase in individual prosecutions, but fourteen months is not a lot of time.

SUSAN ROSE-ACKERMAN: Individual prosecutions are necessary, but in many cases the problems are systemic and go beyond cases of individual malfeasance. The problem cannot be solved through

33. *Id.*

34. *Id.*

individual prosecutions; corruption arises from organizational pathologies.

TIMOTHY TREANOR: I do agree with that. There has been no shortage of corporate prosecutions for that very reason. But the outcry from certain sectors has been, “Where are the individuals?”—and in particular, as a result of the financial crisis—“How come no one was put in jail?” That is a very simplistic way of looking at things. It is not necessarily correct to presume every time you see a company that does something that may violate the law that there is a particular individual who is responsible. I think that would be wrong to conclude in a lot of cases. Interestingly enough, the world used to just be about prosecuting individuals from the criminal enforcement perspective. Then, we started seeing companies being prosecuted, and in some people’s view, the individuals got left behind. Now, there is more of a focus on prosecuting individuals, but I do not think anybody in the Department of Justice is leaving the companies behind.

ZACHARY BREZ: I totally agree with you. I think just because bad things have happened—the financial crisis as the leading example—does not mean there is an individual who caused it all to happen. But I think the tricky part is for prosecutors to divide the cases into the categories of companies that have failed their employees and instances where the employees have failed the company. There are lots of instances where companies have trained their employees, monitored their employees, and used the appropriate legs of the stool of compliance—legal, audit, and finance—to ensure robust compliance, but there are just some bad people in the world. That does not always mean that the company has done something wrong.

On the other hand, there are plenty of examples, as you point out, where the company has not done any of those things—it has not trained the employees, it does not have a compliance regime, it has no audit—and it is the company that is letting those individuals down. To allow an individual in that circumstance to be prosecuted seems wholly unfair, as opposed to targeting a company that, as a whole, is often responsible for creating the type of environment where an individual would do that.

GISELLE SEDANO: Thank you, Mr. Brez.

This is a good point to take a break from our symposium before we commence our second panel. Thank you.

PANEL II: GOVERNMENT INVESTIGATIONS INTO CORRUPTION

GISELLE SEDANO: Welcome back, everyone. We are going to commence the second panel on government investigations into corruption. I am going to go ahead and pass the floor to Mr. Treanor who will be sharing some of his experiences and his deep thoughts on this topic.

TIMOTHY TREANOR: Thank you. As I said earlier in the presentation, I have been handling FCPA matters for almost ten years, at least on the private side. Prior to that, I managed some corruption cases as a prosecutor so I have seen a wide range of issues arising in a wide range of cases. In the private sector, you do not necessarily get to pick your cases; you do so somewhat on the prosecution side. On the private side, when clients come to you with problems, you are not necessarily defining the problem. You typically develop evidence establishing the facts and then perhaps help to articulate the problem in a way that is advantageous to your client. But the problems are what they are, and you deal with them.

I have had the good fortune of handling FCPA matters for a range of clients in different situations, including U.S. companies with operations overseas and foreign companies who are under scrutiny related to contacts they have with the U.S. I have worked for companies that have come under scrutiny by the government in a number of different ways. I have self-reported for some companies and have worked for companies that unexpectedly received subpoenas or calls from the Federal Bureau of Investigation.

Some of the cases I worked on are well-known. I handled the *PetroTiger* case,³⁵ which was an FCPA case involving an oil field services company that was investigated for corruption offenses in Colombia. Executives of PetroTiger paid an employee of the Colombian state-owned oil company in order to win a contract.³⁶ That was a really interesting case because I was brought in to conduct an investigation after the senior management of the company had been chased out by the board of

35. Joel Schectman & Sara Schaefer Munoz, *Current, Former Ecopetrol Employees Charged with Bribery in Colombia* (Mar. 13, 2015), <http://www.wsj.com/articles/current-former-ecopetrol-employees-charged-with-bribery-in-colombia-1426290550> [https://perma.cc/K5HZ-QN2C].

36. *Id.*

directors.³⁷ The board of directors was made up in large part of representatives of private equity firms that held interests in the company.³⁸ The board members had very significant differences with the executives of the firm, and they were completely at odds for good reason. There were issues related to the lack of accurate financial disclosures to the board. The board pushed the executives out and then hired me to commence an investigation, and we found that the former executives—the co-CEOs and the general counsel—made improper payments. They asked me to investigate the issues fully, and I was asked to self-report the matter to U.S. authorities.³⁹

Those three individuals were later prosecuted by the DoJ. All three of them pled guilty. One of the former CEOs went to trial last summer.⁴⁰ The Department of Justice had a very difficult time at trial and ended up giving the former CEO a pretty sweet deal mid-trial, but he did plead guilty to FCPA offenses.⁴¹

The company itself received a declination of prosecution, which was quite notable because it really is the only example of a company that had senior executives prosecuted for FCPA offenses but the company itself had zero consequences and received a written declination of prosecution from the Department of Justice.⁴² An investment bank obtained a similar result in a prominent case, but the individual defendant in that case was not so highly placed within the company as were the PetroTiger executives.⁴³

We obtained the declination by advancing a host of arguments. Among our arguments was that fact that this was a foreign company that had self-reported, and if the DoJ were to come down too hard on the company, other foreign companies would never self-report. We also raised the fact that the company itself did not appear to have made any money off the contract that it won as a result of the improper payments.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA*, DEP'T OF JUSTICE, <https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required> [https://perma.cc/H8BM-SMWF].

It was a \$40 million contract, but our calculations showed the company losing money on the deal. At the end of the day, we also showed that there were significant efforts made by the company to stop corruption. The board sought to put in place an effective compliance program even before the misconduct and had called the ousted executives to task when they saw red flags, and then, after the issues were identified, had aggressively remediated compliance deficiencies. As a result of that and some other issues, the Department of Justice awarded the declination of prosecution, which was the best result the company could have received.⁴⁴

That case involved a foreign company being prosecuted in the U.S. for foreign conduct. The main connection to the U.S. was simply that some of the bribe payments had been routed through a bank account in New Jersey; so it was not simply some tangential act, but the actual bribe payments did come through the U.S.⁴⁵ This case raised all of the issues that the professors have discussed regarding the merits of pursuing under the statute foreign companies with the resulting political implications. But frankly, the Colombian authorities were very much involved in that investigation and instituted their own prosecution of some of those individuals in Colombia, so there really was not a disconnect or any moment in which the governments themselves, either of the U.S. or Colombia, seemed to have a problem with the prosecution.

More recently, a noteworthy case that I have worked on that you all have heard about is the FIFA case.⁴⁶ I have represented for some time the Confederation of North, Central American and Caribbean Association Football (“CONCACAF”). World football—soccer—is governed by FIFA at the top of the pyramid, but under FIFA are continental confederations that carry out a lot of the responsibilities for governing and promoting football.

In this part of the world, we have CONCACAF, a confederation of member associations in North America, Central America, and the Caribbean, and it also has three South American countries that are members. Other continental confederations are also well-known, including the Union of European Football Associations (“UEFA”) in Europe and the Confederación Sudamericana de Fútbol (“CONMEBOL”) in South America. There are also continental confederations for Africa,

44. *Id.*

45. Schectman & Munoz, *supra* note 35.

46. See *Fifa Corruption Crisis: Key Questions Answered*, BBC (Dec. 21, 2015), <http://www.bbc.com/news/world-europe-32897066> [https://perma.cc/7QTM-2TLX].

Asia, and Oceania. Those confederations play very important roles in promoting and governing football. Relative to FIFA, the confederations are closer to the activities of their member associations, so in some ways, they are better positioned to govern conduct within those countries. The confederations are also responsible for running the World Cup qualifying matches, and they run regional competitions like the Gold Cup and the Champions League.

CONCACAF, in partnership with CONMEBOL, ran the Copa América Centenario, which was held here in the U.S. over the summer. The finals were at MetLife Stadium, and I was invited to attend. It was pretty cool. Chile beat Argentina, and it seemed like every time Lionel Messi got the ball Chilean players pulled him to the ground. The strategy worked; Chile got a lot of yellow cards, but they won. The point being, however, that you do get some nice fringe benefits when you have a client in the right industry.

The FIFA case is an extremely interesting case. It touches on many, many countries. The prosecutions thus far have been focused largely on individuals in North America, Central America, and South America, in part because the witnesses developed by the government are from those parts of the world.⁴⁷ Forty-odd individuals have been charged. About half of them have now pled guilty, and a number are cooperating. One interesting thing to note about that prosecution is that it is not at all an FCPA case, even though it is a bribery case, because there are no government officials involved.⁴⁸ The bribes that were allegedly paid were paid to football officials, but FIFA and CONCACAF are not government entities. Their employees do not fit the definition of foreign government officials under the FCPA. As a result, the case has been charged as a racketeering and wire fraud case as opposed to an FCPA case.⁴⁹ It looks a lot like an FCPA case, and it frankly raises a lot of the political questions that arise in an FCPA case, but it technically is not an FCPA case.

That case has given rise to an interesting debate about the role of the U.S. in policing football in the world. It is perhaps ironic that the prosecution is here in the U.S. out of all the football-playing nation, because football has not been so popular in the U.S. relative to some other countries, although the sport's popularity is clearly growing steadily. One might expect that Switzerland, Germany, Brazil or some other country

47. *Id.*

48. *Id.*

49. *Id.*

would have taken this on, but it is the U.S. that has taken this issue on. So it raises the question: Why is the U.S. so aggressively policing corruption in football around the world? There are no doubt some very interesting answers behind the scenes regarding how the Department of Justice came to prosecute this case. And the investigation and prosecution has received full support from multiple agencies: Attorney General Loretta Lynch announced the indictments, together with the head of the Internal Revenue Service and my old boss Jim Comey, the head of the Federal Bureau of Investigation.⁵⁰ The last I counted, there were nine prosecutors in the U.S. Attorney's Office in the Eastern District of New York assigned to investigate and prosecute aspects of the FIFA case.⁵¹ I have never before seen nine prosecutors assigned to any single matter. The DoJ is clearly looking to take this case further and get more mileage out of it. It has been an incredibly interesting case to work on.

If you know anything about the history of CONCACAF, the last three presidents have now been indicted. First, Jack Warner and Chuck Blazer (his general secretary) were found to have engaged in significant wrongdoing and were forced out of the organization. Then, Jeff Webb and Enrique Sanz ran the organization. They claimed to be reformers and to be changing the way football operated, but at the same time they were allegedly taking bribe payments on the side—kickbacks from marketing companies. They were caught and arrested, and Webb already has pled guilty. Then, the interim president, Alfredo Hawit from Honduras, was charged with taking bribe payments and seeking to obstruct the government's investigation subsequent to the first indictment, meaning that the misconduct continued even after the case was first announced. Additional defendants and additional charges were filed in a superseding indictment, which was unsealed in December of 2015.

There really are tough questions raised here: if you look at procurement, for example, you can see all kinds of places where corruption can work its way into a sports organization. An organization can try to build the best compliance program imaginable, but real challenges will remain in preventing highly-placed individuals within an organization from taking payments on the side in connection with the award of valuable contracts. The financial incentive may be there, and the opportunity may be there. The organization has to control procurement

50. *Id.*

51. *Id.*

and its contracting activities and make sure that there is no corruption in the future.

But again, the topics under discussion here in this conference are very interesting to me because they go right to some of the questions that I deal with on an everyday basis.

GISELLE SEDANO: Thank you, Mr. Treanor.

I also had the pleasure of going to the Copa América Centenario final and watching Messi cry when he missed his penalty shot. I feel bad for him. But maybe next year.

Next we will turn the floor to Mr. Brez, who will be sharing some of his insights.

ZACHARY BREZ: Thanks a lot. Let me start by saying thank you, Giselle, for having me today on the panel.

You could spend hours talking about bribery and corruption and what we all do, and I have ten minutes, so I thought I would speak about the evolution of bribery schemes worldwide.

There are times when folks think of evolution as a good thing. Everyone likes to think aliens are going to come down and they are going to be a more evolved species than us. There is obviously a chance that they could come down and be ten million years older than us, and that is not great because we are not going to learn that much from them; or, they are going to be very evolved and they are going to be like the folks from *Predator* or *Aliens*, and that is also a bad thing. So, evolution is not always great.

What I have noticed is that there is an evolution in the bribery schemes worldwide. I spend a lot of time overseas, and I spend the bulk of my time in the space of two areas for our asset management clients. A lot of them are acquiring foreign companies that perhaps did not used to be under, or considered themselves to be under, the jurisdiction of the DoJ and the Securities and Exchange Commission but will be by dint of the fact that they are now being acquired by a large U.S. asset manager. When you are making an acquisition like that, you have concerns about how real are these numbers. If they are reporting sales of \$100 million, how real are they? When they stop being able to pay bribes, are they going to be able to repeat these numbers?

One of the things we do a lot of is diligence on acquisitions for our clients, which is going in and figuring out whether these people are paying bribes or not. That is hard enough to do if you are a federal prosecutor and you can subpoena folks. It is particularly hard when you represent the buyer in a certain situation. That said, we can fire folks frequently, which

the U.S. government cannot always do right off the bat, so sometimes you get a little more cooperation.

The second thing we do is we get a fair amount of whistleblower complaints. Individuals at companies will call the ethics hotline or email anonymously and say, “So-and-so is paying a bribe.” There are a lot of reasons why people will do that; maybe these people are altruistic and are looking for the better good in the world; maybe it is a peer of theirs who they want to get ahead of; maybe they do not even work at the company, and they want the company to spend money on the investigation.

I spend the bulk of my time conducting internal investigations where I am not sure there is anything there to find. One of the ways that you can speed up that effort is to know the bribery and corruption schemes that exist in certain fields and in certain areas of the world. Bribery and corruption, by and large, exist in three big touchpoints: in sales, in the movement of goods across borders, and in the permitting process. So, it is selling goods to government, and outside the U.S., lots of folks count as the government that you would not normally think about—hospitals, universities, etc. It is also moving goods from one country to another, and the permitting process. Think about Walmart in Mexico or the Lava Jato scandal in Brazil.⁵² The biggest scandal that would have been in the news was regarding tax individuals in Brazil collecting tax payments from companies to get their “Habite-se,” their certificate of occupancy.⁵³ A couple of tax folks decided to shake down all of their taxpayers and they said, “You owe us a hundred grand in taxes. I will tell you what: if you pay me personally fifty grand, I will say that you paid the whole hundred grand.” Not surprisingly, some 4000 companies agreed to do that. It came to light because the folks who were the tax collectors decided to keep journals of all of their tax entries with the company—tax owed, bribe paid, date cleared. Good accounting. It turns out that is probably not an SEC violation because the books and records are accurate. It is, “Here’s my bribe; here’s how much I paid; you’re good.” But we do have—

SUSAN ROSE-ACKERMAN: They will be counting this as bribes in the statistics.

52. *What You Need to Know About Brazil’s Petrobras Scandal*, TeleSUR (Mar. 13, 2016), <http://www.telesurtv.net/english/analysis/What-You-Need-to-Know-About-Brazils-Petrobras-Scandal-20160313-0012.html> [https://perma.cc/68H4-SDT4].

53. Samantha Pearson, *Prosecutors Tackle Brazil’s ‘Other’ Corruption Probe*, FIN. TIMES (June 22, 2016), <https://www.ft.com/content/ffc52688-349c-11e6-bda0-04585c31b153> [https://perma.cc/F5XL-MCFC].

ZACHARY BREZ: Exactly, right. You do have bribes.

One of the things that we look at a lot—and the professor referred earlier to Transparency International—is what is called the “heat map.”

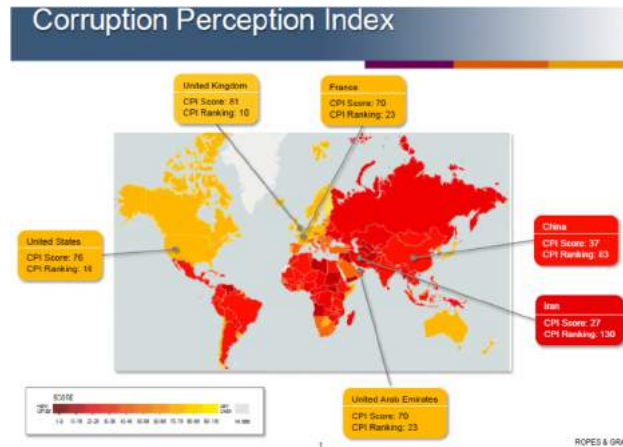


Figure 6: Corruption Perception Index⁵⁴

This is the Corruption Perception Index.⁵⁵ The question is posed to all 193 countries in the world: how corrupt is your country? The results are color-coded: yellow is the least corrupt; white does not count; very, very dark red is the most corrupt. When you show this to foreigners, the first thing they remark is how their country is not as dark red as they thought it was going to be, which is great. I often point out that if you look at the U.S., we are not yellow.⁵⁶ As we said, you have New York State, you have New Jersey, you have Cook County—there are lots of places in this country where we export some of our finest services around the world—i.e., bribery. But if you look at the map, it can help you figure out where to concentrate your resources. A company like Fortress is going to acquire a business that operates all over the world. The business is headquartered in France or England or Italy, but it operates everywhere in the world. You are not going to be able to look at all of their businesses at once.

What you want to think about is this: how am I going to deal with the risk here? What is the most risky place for me to look at, for them? Part of what we look at is where the most revenue is coming from; what business line has the most touchpoints for the government of that sale, border crossing, or permitting process; and then, where are they in the

54. Zachary S. Brez, Anti-Corruption Presentation (2016).

55. *Id.*

56. *Id.*

world? If you have a business that is in one of these dark red regions, and you are acquiring a business that has a lot of sales in one of the BRIC countries—Brazil, Russia, India, China—historically, you are going to want to dive in and think about how they are doing business there and how they are making their money.

What you learn over time is that there are certain schemes that repeat themselves. It is hard to pay a bribe not in cash. The FCPA says bribes do not have to be paid in cash.⁵⁷ So, you have a pricing issue: you have people giving out internships, etc. But at the end of the day, people pay bribes in dollars. Well, if you are a salesperson, frequently you do not want to use your own money to pay a bribe. You want to use the company's money to pay your bribe, so you can get more sales and therefore a higher bonus. Then the question is: how are you going to convert to cash? How are you going to get cash out of the company?

The most common way is a travel and entertainment ("T&E") scheme. Individuals will submit fake T&E receipts. You do not have to generate that much money out of it actually—a couple of thousand bucks of those bribes can go a long way. If you run some analysis on it, you will get people who are submitting T&E receipts for trips on the same day in Hawaii and China, which are not happening. They did not have breakfast in both places at the same time. Or you will get people who are submitting—we see this in China all the time—enough subway receipts that they would have had to have been on the subway all day, every day for a whole month. They are salespersons, and they are doing that over time to build up enough cash in order to pay the bribes.

Another really common way is the conversion of old stock—and I do not mean stock certificates; I mean stock that the company sells. The company sells a product, and most companies' products have a shelf-life. At the end, the product gets destroyed. What if it does not, and instead, when it goes to get scrapped, some guy comes and collects it, sells it out the backdoor as a black market product? That is a whole separate concern for the company because it now has liability for the dangerous products that it has put back into the stream of commerce. But, more often than not, the individuals are collecting money out the backdoor to use that cash to pay bribes to make sales on the original products that they wanted to sell anyway.

So, one of the things we look at is where the country is.

57. 15 U.S.C. § 78dd-1 (2012).

I think one of the surprising pieces is that, in fact, the really corrupt places are, by and large, places where people are not doing business; it is the failed states. If you are acquiring a business and all of its sales are coming from Somalia, Afghanistan, and Libya, there are going to be some concerns. You are going say, “Those sales probably are not repeatable once we get rid of the bribery and corruption that is involved.”

On the other hand, you have companies that say, “We make all of our sales in Scandinavia.” Apparently, Scandinavians are not very corrupt people, or at least want to think the best of people when they fill out those studies that ask, “Is your country corrupt?” Maybe it is just a sign that they are ignorant and the like, or willfully naïve.

The thing I like to think about is how bribery schemes move around the world. I have seen this: I will go into a company in Spain where we have a whistleblower claim about a particular individual who is creating cash by returning old stock. You track it down, and it turns out he is keeping cash in a petty cash drawer and he is siphoning out the money. Flash forward a year and a half later. We have another client who makes a purchase in Spain, and it turns out the same scheme from that first shop has showed up at another store there. I have never seen a scheme like that outside of there. You do not see it again in Portugal; you will not see it again in France; but you are going to see it in Spain, and you are going to see it a bunch of times. For some reason—maybe it is the movement of people from one company to another; maybe it is the lore—within a country and within a particular industry, you tend to see the same scheme repeated over and over again. The benefit of doing this work repeatedly is that you get to see the same scheme over and over, and you get to ask questions such that the folks at this other table are suddenly like, “Oh, so you knew about that? Okay.” The reaction changes a little bit because you see it move.

What is interesting on top of that is sometimes you see it jump. I had a case in Colombia last year where the bribery scheme was not one I had seen in Colombia before, but I had seen it in Italy. It turns out, in this instance, that one of the individuals at the company we were looking at had done a five-year stint at an Italian competitor’s company and had exported all of those bribery concepts back into his country of Colombia. I tend to think that it is interesting to track their movement. It is interesting to think about how the two sides chase each other, as individual employees look to find new ways to pay bribes so they will not be caught by their companies and the government.

Thank you.

GISELLE SEDANO: Thank you, Mr. Brez.

I am going to turn the floor over now to Mr. Cohn. I actually have a couple of questions based on all the remarks that have been made thus far. As the chief compliance officer of a publicly traded global investment management firm, what is your view on allowing companies to have compliance programs as a defense against FCPA violations? How do you think the regulators are going to permit that, if ever, in the future? Aligned with that, I want to know what would be a satisfactory compliance program that, under the scrutiny of a regulator, would suffice to be an actual defense.

MICHAEL COHN: First of all, I just want to note that Giselle has worked at Fortress for seven, eight years now, and never before today has she ever called me “Mr. Cohn.” For the remainder of her time at Fortress, I am going to ask that she continue to do that. Thank you, Ms. Sedano. The first question was, “Do I think it is appropriate for a company to be able to use the quality of its compliance program as a defense to an FCPA or other type of corruption charge?” Is that the question?

GISELLE SEDANO: Correct.

MICHAEL COHN: Naturally, I think the answer to that question is yes. I think it is an interesting question because Professor Rose-Ackerman talked about the idea of a moral company. We have talked about the metaphysical concept of a company—which is really just a fiction, it is just something you create, it is on paper, it does not exist anywhere, you cannot touch it, but it is real—versus the people who express the will of that company.

I do believe that a company can be so fundamentally flawed and corrupted by the expression of enough people and enough systemic issues that the company can be a bad company. The only way to solve the problems of that company are either to change its culture and its people, which is not something you can really do from the outside, so you have to punish that company in a way that the people within choose to make real changes or, in extreme cases, exact a punishment so severe that it may force the company out of existence.

A decision by a prosecutor to punish a company is a very serious one because it can have an effect beyond the company—all the people who work for it, not all of whom are necessarily bad, have husbands and wives and children or other people who rely on them to go to work every day and earn a living. So, the decision to do something that will harm a company, even in a situation where the company itself is deemed to be so fundamentally flawed, is something a prosecutor has to take very

seriously. There are certainly cases where I feel like companies have been unfairly punished either by a prosecution or even by the way in which certain investigations into the company have been handled.

When you look at the bad acts of a person or a number of people at a company, the fundamental question that a prosecutor has to look at, and the fundamental question that I, as the head of a compliance program, look at in thinking about how I design my compliance program is, “Am I doing the things necessary to show that the company put in place all the things we are supposed to do, such that we could reasonably expect that our employees knew what they were supposed to be doing, and that we took measures to make sure they were actually doing it?” If you do those things, if you express as a company that you are a moral company, that you are a good corporate citizen, and that employees, despite your efforts, act inappropriately, I think that the government should take all reasonable precautions to protect that company because they are not just protecting the company, but they are protecting all the people who work there and the extended group of people who rely on them to earn a living.

This also goes to what Zach said earlier, that there is the idea of the company and the people, and who let who down—whether it was the company failing to put the employees in a position to know what the law is and act on it, or if it was the reverse, where the company did its job but the employees failed to carry out what they were taught to do.

So, yes, I do think very much that a quality compliance program should be a defense to the company being prosecuted, and it should be a big red flag for any regulator who is looking at whether or not to prosecute a company in addition to any particular individuals.

The second part of Ms. Sedano’s question was about what do I think are the pillars of a quality compliance program. I think they are pretty well established—not just for corruption and FCPA but really in general. A quality compliance program will, first and foremost, have taught the employees what they are supposed to do and not supposed to do in a variety of different circumstances. Fundamentally, that is one of the things the compliance program is designed to do, which is to tell everybody, “Here is the field of play for your behavior and you need to be inside the lines. And if you are outside the lines, you are on your own.” The way in which you do that is through training—be it training in person, online training, or training in the form of written communications to employees.

Many people who are in-house—lawyers and compliance professionals and others—think about this as transferring risk from the

company to the individuals. The company has done all the things it is supposed to do, and if you as an employee go out there and violate those edicts, the risk is yours; it is not the company's. Clearly, the company still has an interest in you behaving properly, but you have been made aware that this is the right way to act. That is first: training on the policies and the procedures and the way you are supposed to act.

The second piece of a good compliance program would be monitoring, in an effort to detect and prevent improper behavior. It is not enough to just write a compliance manual. It is not enough to say, "You should or should not engage in this particular behavior." You also have to take steps to monitor that people are doing what you have told them to do or what you have told them not to do. It is not enough to say, "Hey, you should never use your T&E account to try to pay bribes to other people." You actually have to monitor people's T&E expenses and look at them and say, "Do these make sense? Is there a reason why this person is suddenly spending so much more on meals and entertainment and tickets to sporting events or other types of things?"

Those are really the two things: training and follow-up monitoring. I do believe that if the company does those two things and never turns a blind eye to perceived problems, those are adequate reasons not to go after a company.

GISELLE SEDANO: Thank you. Could you share some of your experiences where you have had business interests compete with potential FCPA or Anti-Money Laundering risks or concerns and how you navigated through those murky waters?

MICHAEL COHN: Sure. I think a businessperson and a lawyer sometimes come at things in a different way—when I make decisions that are aimed at avoiding risk, a businessperson might say, "You are not being commercial enough," and a lawyer might look at the same decision and say, "You are doing a sensible thing." So, it is all about where you sit. But at the end of the day, when it comes to risks like FCPA and corruption, where the risk involved could be an SEC risk, but it could also be criminal risk, I (and others in my seat) take a pretty conservative view and try not to find out what is going to aggravate a regulator. There is some stuff that is very easy. You know, if someone wants to pay a bribe to someone in another country, you say no.

But there are a lot of things that come up where it is not as clear that it is a bribe. You can easily envision a situation where you have an employee in your firm who wants to do a personal favor for a person who works in government in another country where your firm also does

business. The beneficiary is someone with whom the employee has a long standing personal relationship outside of any business context. The motive for the favor is merely in the spirit of trying to help someone out and there is no obvious evidence of a corrupt intent or other illegal purpose. So, in that situation, as a matter of common sense and humanity, you might say, okay, that seems fine.

On the other hand, you can envision a scenario where your firm is also doing business with that foreign government, and a regulator would view your employee's otherwise innocent good will as a bribe because the prosecutor will say, "No, it was not really just someone being nice to another person. It was actually doing a very significant favor for a government official." It is sometimes hard for people, especially business people, who are not studied in the FCPA to understand how it could be that such a gesture of good will to a friend with no business purpose could still raise the specter of SEC or criminal sanctions.

You asked, "How do you navigate through waters like that?" The answer is you have to educate people, and sometimes you have to spend time explaining to them how things work beyond the more obvious cash in a brown paper bag scenario, which I think is what the average businessperson readily recognizes while not recognizing other more nuanced, and probably innocent situations which can very much end up creating problems.

GISELLE SEDANO: Thank you, Mr. Cohn.

I am going to allow Professor Griffith and Professor Rose-Ackerman to reflect and provide their views or theories based on everything that was just said. Professor Griffith?

SEAN GRIFFITH: Thanks, Giselle. I have a question for each of you guys. I will start with Mr. Brez. You were talking about the evolution of schemes to pay bribes uncovered in due diligence in the merger context, which I think is a very interesting context. I wanted to invite you to comment on the evolution of the FCPA representation that goes into the merger agreement, which I guess is a creature of the last ten years. I am interested in your view on how standard or customized that particular provision of the merger agreement is, how sharply it is negotiated between the acquirer and the target. Let me just go down the row.

For Mr. Cohn, I think most of us would agree that the basics of a compliance program should involve training and then checking in on whether it works, following the audit trail to some degree. I think the question of how much to expend on that effort is contested. My question in general on this topic is: what should the role of the government—or the

Department of Justice or whoever the enforcer or regulator is—be in setting those kinds of standards? What kind of metrics should companies have to demonstrate in order to win the effectiveness-mitigation penalty thing? What metrics are available for these sorts of things? How can we prove what “effective” is or what is not? And what level of investment should the government insist on companies making?

My question for Mr. Treanor would just be to invite him to speculate on the incentives of things like America cracking down on soccer; what was going on there? You mentioned that maybe there is some backroom thing going on at the Department of Justice. But it seems kind of crazy that the nation that uses a different word for the game is the cop of the sport.

Those are my questions for the three.

ZACHARY BREZ: I will start. I think that you are right. The representations and warranties language has changed, and has changed over time because there has been an evolution in the types of prosecutions—i.e., you will not find a businessperson today in a large company who does not know what the FCPA is, but you will find a whole bunch of them who do not think money laundering applies to them because they do not keep cash in banks in Miami, and you will certainly find those who think that the Specially Designated Nations List⁵⁸ and Office of Foreign Assets Control do not apply to them because they do not sell goods to Iran. In fact, sanctions enforcement dollars are much higher now than FCPA enforcement dollars in terms of penalties. Companies are starting to get there.

This is a long way of saying that those representations have gotten much more detailed. It is no longer, “Yes, we do not pay bribes.” There is a much longer, more detailed representation that involves anticorruption, so it will involve the U.S. and the U.K. Bribery Act;⁵⁹ it will involve local bribery laws; it will be a representation as to money laundering proceeds of a transaction and what it is going to be used for because there is a whole host of indirect payment concerns and facilitation concerns; it will involve sanctions, etc.

When we advise companies about having a robust compliance program that is designed to prevent, detect, and mitigate wrongdoing—

58. OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (November 10, 2016), <https://www.treasury.gov/ofac/downloads/sdnlist.pdf> [<https://perma.cc/26VE-8L7W>].

59. Bribery Act 2010, c.23 (U.K.).

those are the three umbrellas that everyone has. The thing you are most trained to look for as a red flag—and it has become pretty standard—is anyone pushing back on what are widely accepted market terms. So, when clients of ours are negotiating a deal, there is pretty standard market language about what the representation is going to say about use of proceeds, history of bribery, current investigations, disclosure schedule, sanctions, money laundering, and the like. If you get pushback where they say, “We are not going to make the representation that we have not paid a bribe in the last five years,” you are immediately going to say, “Okay, that is a red flag. Forget that representation; now I have to do more work to figure out which bribes they paid.” The level of representation is pretty standard.

The ones that you do get negotiation over, particularly in the sanctions and money-laundering space where it is a strict liability offense in a civil context, are knowledge qualifiers. It is a tricky thing for a company to have a knowledge qualifier, as opposed to individuals, because what does a company really know? It is comprised of its individuals who work there, and how can you say that the conduct of a salesperson in India should be ascribed to a company as a whole? So, knowledge qualifiers are ones that are frequently negotiated and given over, particularly if there is no other incidence of past corruption. But you will not give a knowledge qualifier that says, for instance, “None of our employees or officers are currently members of a government in any country, are currently married to someone who is a member of the government, have never paid a bribe themselves; the use of the proceeds here will not be used for anything illegal, etc.” When it comes to individuals, you will not give on that but for corporations, you will. That is one example of things that get negotiated.

But I think in general those representations are pretty standard, whether our clients are on the buy or sell side.

TIMOTHY TREANOR: You know, Zach, I just want to address a few of those points. I also handle compliance representations and warranties in M&A matters, vetting opportunities for asset managers, and conducting due diligence in private equity investments. There is one thing about the typical representations that drives me crazy, and it is when the seller of a company is asked to represent that no one has paid a bribe in the last five years. No company can know that. I mean you cannot know that every single salesperson within your organization has never made an improper payment. In fact, it is very possible, for some companies in risky industries that make those representations, that improper payments have

been made and that a team of forensic accountants could find some improper ones among a sample of high-risk payments. Then, the seller would be in violation of the representations, and the deal could tank or have all kinds of negative consequences.

I have had discussions with M&A lawyers before when I have said, “You know, it is crazy to represent to this because it does not reflect reality. You should be representing, ‘We have an effective compliance program. It comprises all of the most important elements. We have seen the following issues, we have taken them seriously, and we believe that we have addressed, in a meaningful way, corruption within our organization.’” And everybody looks at me and they say, “Yeah, Tim, that is great. But we are never going to get an agreement on that from the buyer, so we are just going to go with it as it is.” So, we end up in this world where sellers make representations knowing that they might not be true.

ZACHARY BREZ: I think what is usually the result of those debates is a knowledge qualifier for the company. It is fair to say, “Do you, the company, currently have knowledge that you have paid a bribe?” If you had an investigation and you found out that the guys in India paid a bribe—not to pick on India; Brazil, wherever—the company then knows it. So, you should not be able to make the representation that, “Okay, none of the officers have, but we are not going to represent that as a company.”

TIMOTHY TREANOR: But you come back to the exact same question because your knowledge is based on the quality of your compliance program. If you have a poor compliance program, your knowledge is not going to be worth much, and if you have a really good compliance program, your knowledge is going to be something that someone can rely upon. So I agree that the knowledge qualifier helps you get better representations, but it does not get you all the way there. The proper way to handle these issues should be for the seller to rep to the quality of the compliance program.

ZACHARY BREZ: I agree. Sometimes you have, “We knew or were reckless in failing to know,” if you have some lousy compliance program. That piece of it is what is fought over usually.

TIMOTHY TREANOR: Agreed.

MICHAEL COHN: I think the question was broadly, “What are the standards for deciding whether or not you have effectively spent time doing the monitoring part of a good compliance program?” Is that it?

SEAN GRIFFITH: What should your standards be for how good your training is? What should your standards be for how good your

monitoring is? How much do you spend? How much do you invest in technology to do it?

SUSAN ROSE-ACKERMAN: Maybe I can put the question in a slightly different way. It is clearly in the interest of business to have a list of actions that the government accepts as compliance with the FCPA. But I am not so sure that there is good evidence for the relationship between any particular list and the absence of corruption. We know very little about the means-end relationship between corporate compliance programs and actual violations.

MICHAEL COHN: I think that there are a couple of problems in answering the question. One is that the question is always answered when it matters in hindsight; that is always the first problem with trying to answer the question. But I am going to attempt to answer it. The second issue with the question is that people use the phrase “compliance” or “compliance program” or “monitoring” in such an incredibly one-size-fits-all way that it really escapes definition at the outset.

A company that has fifty people versus a hundred people versus 25,000 people has a different compliance program. There are different things you need to do. There are different ways in which you need to go about doing it. Frankly, whether or not anyone says it out loud, your ability to truly monitor a company with 25,000 people is just different than one where the entire company fits in a room the size of this and you get to know everybody’s name after a short while and you know what is going on with them and you see them every day.

I cannot say what standard one would use in any empirical way to define what is enough money to spend on compliance or what is enough time to spend on monitoring. What I can say is that the way I think about it, when we decide how much of any given thing to do, is I try to approach it in a way that—short of having an infinite amount of resources—someone could not look back at what I did and say, “You could have figured this out if you did this,” where “this” is not something unreasonable.

That is not a helpful answer in terms of, “Well, what does that mean in my organization?” I think we could have this panel every year for the next 1000 years and no one is ever going to be able to tell you the real answer to that question. But I approach it as trying to figure out: is there any commercially reasonable way that I could be looking at something and have found something and did not? There is always better compliance, right? I could have 1000 people on my team, and they could be reviewing every single line item of every T&E report and every general

ledger and entry. But that is not actually reasonable, and I do not think anyone expects you to do that.

If we ever have problems that come up, then I say, “How did we discover that? Did we discover that based on something we were doing? Did we stumble across it by accident?” And then I use that information to look at new ways to detect issues.

But at the end of the day, I think the reasonableness test is what will prevail when looking back at how you did something. I do not believe any prosecutor, no matter how zealous they may be, is going to look at something and say, “If you had 500 more people in compliance, you could have looked at every single thing and you would have found this.” I think they look at it and decide whether or not what you did was reasonable under the circumstances. I think your question is, “Well, what is reasonable under the circumstances?” and my answer is “Well, it depends on the circumstances.”

ZACHARY BREZ: I was going to add that the notion of folks looking at issues with the twenty/twenty hindsight matters because what is unknowable now is what happened. What went wrong? And if you are talking about somebody paying bribes to build nuclear reactors in Iran, you are going to be held to a much higher standard than if you are talking about somebody paying bribes to sell telephone parts into some other country. Sitting here today, you cannot know it, and you cannot treat them all like the Iran problem. In some ways it is liberating because no matter what you do, if it is really terrible, you are going to get held to a standard that is not fair anyway. What you have to do is try to take the run-of-the-mill reasonable line.

The Department of Justice hired a compliance czar for this purpose—she was formerly at Pfizer.⁶⁰ The idea was that she was going to be able to normalize compliance programs. They felt like everyone was putting compliance programs in front of them saying, “No, no, look, we have a compliance program,” and they could not evaluate what was fair and what was not.

On the one hand, I think it is a nice effort by the government to try and normalize and standardize compliance. On the other hand, she came from a very big company, Pfizer, and—to Michael’s point—what you are

60. Press Release, U.S. Dep’t of Justice, New Compliance Counsel Expert Retained by The DOJ Fraud Section, <https://www.justice.gov/criminal-fraud/file/790236/download> [<https://perma.cc/3UCZ-4QBH>].

going to do at Pfizer is very different than what you are going to do at a fifty-person company, and the standards are going to be different.

SUSAN ROSE-ACKERMAN: As I understand it, one of the differences between the new British anticorruption law and the U.S. statute is that the British law includes a presumption—an excuse—in which a firm can say, “I have a great compliance program, so do not come after me as a firm.” The U.S. has resisted that, and I think that the U.S. strategy is best. I would guess that the DoJ does look at the kind of compliance program that a firm has. But to have a per se list of things—“if you do these things, then you are okay”—does not seem like a good strategy.

ZACHARY BREZ: Under the U.K. Bribery Act⁶¹—you are right—it is an affirmative defense if you have a compliance program and meet certain steps.

SUSAN ROSE-ACKERMAN: First, a comment about FIFA. As you pointed out, it is like a perfect storm in terms of corrupt incentives. The World Cup is a major event that happens every—I am not enough of a fan—four years? How often is the World Cup?

GISELLE SEDANO: Four years.

SUSAN ROSE-ACKERMAN: So, it is a big deal. There is a lot of money at stake. It is an on/off thing. You cannot give everybody 5% of it—some nation is going to host it. And the people on the committees, as you pointed out, are often from relatively poor countries. There is a big pot of money that is sitting there, sort of asking to be taken.

I wonder whether you have any ideas about other ways of allocating the venues. Should FIFA draw names out of a hat? Is there some way to avoid discretionary judgments concerning, not just the location, but, as you were saying, the marketing deals? And, Zach, it is fascinating the way innovation travels across borders, and it would be very interesting to trace that back and to look a little more systematically at how it works. But, of course, the kind of corruption you were emphasizing in your remarks was the kind that damaged the corporation. The top managers want to uncover it. The employees are engaging in fraud. Now, there are other types of corruption that increase corporate profits. I wrote a paper with a Chinese student about corruption in pharmaceutical contracts in Chinese hospitals.⁶² Some of those bribes were similar to the ones that you were

61. Bribery Act, 2010, c.23 (U.K.).

62. Susan Rose-Ackerman & Yingqi Tan, *Corruption in the Procurement of Pharmaceuticals and Medical Equipment in China*, 32 UCLA PAC. BASIN L.J. 1 (2014).

talking about—the money came out of T&E funds—but they were benefiting the company. Those who paid bribes were signing contracts to sell drugs. So, it does seem to me important to think systematically about the alternative ways firms gain and lose from corruption by their employees.

Now, I have been struck, from looking at corruption for many years, at how similar the kinds of things are that people do when they are corrupt around the world over time, even over centuries. There will be interesting little wrinkles, but they do relatively similar things.

TIMOTHY TREANOR: With regard to the FIFA case—and I think Professor Griffith had a question for me about incentives for the U.S. in bringing the case—frankly, I really think the U.S. Attorney's Office for the Eastern District of New York stumbled across obvious criminal conduct in the U.S., decided to go after it, and uncovered this extensive web of—not to be funny here because the lead defendant is Jeff Webb—similar conduct throughout the entire football organization. There are many other nations that have much more involvement and interest in football and whose representatives were implicated, but nobody was addressing the conduct so it really would have been impossible for the DoJ to look past it.

And a lot of the charged conduct was happening in the U.S. It is not like just a single payment was coming through the U.S. Much of the charged acts of bribery had to do with the Gold Cup tournament in the U.S. The Copa América Centenario that was held here this summer was also the subject of some of the alleged bribe payments, related to marketing contracts. So, there were many improper activities in the U.S. I think the DoJ just discovered the conduct and decided that it was all worth going after. In some ways, I feel like the Department of Justice shamed a whole lot of other countries, especially Switzerland. What were they doing all of these years when all those bank accounts, emails, and other evidence were sitting right there in Zurich? Corruption in football has been a topic of conversation for years and years, but what did they do to look at it? Now, all of a sudden, they are actively looking at the issues, but it was only after the U.S. drew attention to them.

I do not know exactly what the incentives were for the DoJ to take this on, other than simply enforcing the law, making sure that crimes that were committed in the U.S. are brought to justice. But I also see in operation this notion that we have seen as part of the FCPA—this moralistic notion that, “We are leaders in the world. We do things the right way. If somebody else is not going to address this misconduct that

we have discovered, we are. And we can rationalize that it has a sufficient connection to the U.S.” It is not like the prosecutors are going after crimes in every part of the world—it is mostly in the Americas, although there is speculation that the DoJ is looking at certain activities of some of the leaders of FIFA, and there are already charges related to the selling of votes for the selection of World Cup venues.

Professor Rose-Ackerman asked about the way the organizations—FIFA and CONCACAF—are structured. They are membership organizations—one nation or member association, one vote—and are structured similar to one another. Both organizations have made very significant changes over the last year in response to the corruption allegations that are directed at preventing corrupt activities in the future. CONCACAF has taken on independent board members. There has been an effort to remove executive functions from the Council of both FIFA and CONCACAF. The Council is now more of a policy body that determines the direction of the organization, with the General Secretary being in charge of its execution. So, there really is a separation between the types of decisions that are made at the Council and General Secretary levels that I think will be helpful in ensuring that the organizations operate legally.

But not surprisingly there is a lot of work to do. I have been a part of looking at these issues to date, and everyone working on this has been very open about the fact that, within the organizations, the work is not done, and that the organizations continue to be self-critical in seeking to figure out how to address corruption issues. There really has been an infinite number of people studying these things.

In the end, such organizations must do their best to put controls in place and create a compliant environment. And as with any organization, it may be that two, five, or ten years down the road a problem arises and the organization’s representatives say to the Department of Justice, “Look at what a great compliance program this organization has. We cannot be responsible for every rogue individual who is going to do something wrong,” because no organization can control for the behavior of every individual, and the government readily acknowledges that. The obligation is to do a reasonable amount under the circumstances, to be smart about it, and to make sure that your compliance program grows and changes. The mission at CONCACAF has been to put in place the best controls, within reason, to make sure the conduct does not continue.

GISELLE SEDANO: Thank you, Mr. Treanor.

We will conclude with Mr. Brez responding to Professor Rose-Ackerman's question.

SUSAN ROSE-ACKERMAN: It was not exactly a question.

ZACHARY BREZ: It was a statement question. Part of what you are getting at is when you have individuals paying bribes in the sales context and it benefits the companies, is that something the company really wants to root out or not, right?

I often have a tough time separating what the company means there. You have got a particular sales associate—maybe they are an agent; maybe they are a third-party distribution; maybe they are a rep—who is paying bribes to a hospital in some small town in some country that is not here. It is going to benefit them; it is going to benefit the company a little bit; it will probably benefit their manager; it will probably benefit their manager's manager. It is going to stop at some point.

The question you have is, at some level the enterprise as a whole is going to want to root it out, right? One of the tricky things that companies have to think about is—when you do these investigations, I finish it, I have a memo, the memo says, “Here are the steps we are recommending you should take: you should fire the following three people.” That is the line that gets debated the most: why did you pick this third person? Why did you draw the line here? How sure are we that it is not their boss? How many emails did you look at? Did you interview them? Why did you go this high? It seems like it is just that lower employee. That is where the debate is: how far up the enterprise it gets. It is rare—and I know there are big cases; Siemens is one of the leading examples—when the corruption is being sanctioned and authorized by the highest levels of the company. More often than not it is local-level corruption.

SUSAN ROSE-ACKERMAN: Willful blindness.

ZACHARY BREZ: The question then is: how much does the enterprise want to get it right? And, is that the only place it is happening? Because the worst thing that can happen is you do a corruption investigation in one country and then you find out it is happening in another country because then the government is going to say—I have had the Albania-to-Zimbabwe conversation with the government before, where they say, “I do not care where you sell it. You do an investigation of the entire company in every country where there are products.”

GISELLE SEDANO: Thank you.

On behalf of the *Journal of Corporate & Financial Law*, I want to thank you for attending the symposium today. I would like to specifically thank all of our panelists. Thank you so much for the interesting and

thought-provoking questions, for contributing to a truly meaningful and honest discussion about the multifaceted and pervasive problem of corruption.

Before we head into the cocktail reception, I want to have an opportunity to thank everybody involved.

Mr. Treanor, who is a Fordham Law alum, thank you for honoring us a panelist. One of Fordham Law's greatest strengths is the alumni's longstanding commitment to the school, and the *Journal* is very grateful to have its alumni come here and support the Symposium today.

Mr. Brez, Mr. Cohn, Professor Rose-Ackerman, and Professor Griffith, thank you for dedicating your valuable time to this event and for sharing your insights with us today.

Professor Caroline Gentile, who is here in the audience with us, and Professor Griffith, our *Journal's* faculty advisors, you provided immense support and guidance in organizing today's event and overall in our law school careers here. The *Journal* is very grateful to have such dedicated faculty, and today's symposium would not have been possible without you.

I would also like to thank Julian Phillippi and Shanelle Holley for all their assistance concerning organization for today's event. Thank you for being responsive and helpful through the entire process.

I would also like to recognize my colleagues, Shrisha, our Editor-in-Chief, and Christian, our Managing Editor, and a special thank you to our *Journal's* symposium committee for helping in multiple ways: Anna, Imran, Jeffrey, Mirin, Tess, and Jenny.

On behalf of the entire *Journal*, I would like to thank absolutely everyone for making this an enjoyable event.