Canadian Initiatives Against Bribery by Foreign Investors

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* The information in this policy brief is provided for discussion purposes only and does not constitute legal or other professional advice of any kind.

Executive Summary

This policy brief builds on the broad recognition that corruption—with bribery as a particularly significant manifestation—is a grave threat to sustainable development.

It focuses on Canadian legal initiatives against bribery by Canadian businesses investing abroad. By digging into both domestic and international law, the policy brief identifies four key points of interest to sustainable development stakeholders: (1) a spike in enforcement of Canada's Foreign Bribery Prohibition; (2) the recent expansion of firm-level anti-bribery compliance requirements; (3) the adoption of mandatory payment transparency rules for extractive industry firms; and (4) the Canadian government's stated goal to move to a "progressive" trade (and investment) agenda.

The first key development pertains to Canada's prohibition of foreign bribery, as mandated by the Organisation for Economic Co-operation and Development Convention on Combatting Bribery of Foreign Officials (OECD Convention). The paper begins by examining Canada's mixed record in implementing this prohibition approach and the recent focus on enforcement.

The second and third developments aim at shifting away from simple prohibition toward reducing the risk of bribery. To date, this has taken two general forms. Canadian corporations are expected, in an increasingly wide range of circumstances, to implement risk-mitigation best practices through accounting protocols and compliance systems. Furthermore, in the case of extractive sector firms, industry-specific concerns are now addressed through mandatory payment transparency.

The fourth key development is Canada's stated goal for adopting a "progressive" trade and investment policy. This should include a path toward global leadership for Canada in combatting corruption through international investment law. Global Affairs Canada has recently conducted a public consultation on its international investment agreements. There is a need for a new model that will address issues beyond investment protection, including the tackling of corruption.

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1.0 Setting the Scene: Global efforts to tackle bribery and corruption

The importance of combatting corruption—abuse of public office for private gain—has gained traction in the last 30 years and is now broadly recognized.[1] Today, the 2003 United Nations Convention Against Corruption (UNCAC) counts 186 parties.[2] The 1990s witnessed early efforts to curtail corruption in foreign states. In 1996 the then-newly appointed president of the World Bank, James Wolfensohn, became the first leader of the bank to publicly acknowledge that "we need to deal with the cancer of corruption."[3] Three years later, in 1999, the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention)[4] entered into force.[5] As discussed further below, the parties to the OECD Convention reached an agreement on a prohibition approach: signatory states are mandated to make the bribery of foreign officials a criminal offence in their respective domestic laws.

Box 1. OECD Convention Article 1(1)

"Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

In 2010, at the United Nations Millennium Development Goals Summit, U.S. President Barack Obama referred to corruption as "the single greatest barrier to prosperity," and "a profound violation of human rights."[6] Indeed, the United States—whether through the World Bank or at the OECD and the United Nations—has historically played a leadership role in the coalition to combat cross-border corruption. However, the 2016 U.S. election and subsequent developments, such as Washington's withdrawal from the Extractive Industry Transparency Initiative, which is examined in Section 4.0, have raised concerns.

These two trends form the background for this policy brief: first, the proliferation of legal instruments aimed at combatting corruption generally and foreign bribery in particular; second, U.S. leadership in the relevant global governance forums can no longer be taken for granted.

In recent years, growing commitment to sustainable development has coincided with increased awareness that corruption can be a fatal barrier thereto. However, it is far from clear that existing mechanisms for combatting cross-border corruption are sufficient.

Following the OECD Convention's entry into force and then again following recent amendments to Canada's implementing legislation, some stakeholders have expected a "race to the top."[7] According to this model, Canada and other capital-exporting states were expected to compete with the United States to get tough on foreign bribery.

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[1] This definition is used by the World Bank and Transparency International. It has the advantage of simplicity. It draws a sharp distinction between public and private in keeping with the Weberian tradition of social theory. See World Bank. (1997). *Helping countries combat corruption: The role of the World Bank*. Washington, DC: World Bank; World Bank. (2007). *Strengthening World Bank Group engagement on governance and anti-corruption*. Washington, DC: World Bank.

[2] United Nations Office on Drug and Crime. (n.d.). *Signature and ratification status*. Retrieved from http://www.unodc.org/unodc/en/corruption/ratification-status.html

[3] Wolfensohn, J.D. (1996). People and development. Address to the Board of Governors at the Annual Meetings of the World Bank and the International Monetary Fund. Reprinted in *Voice for the World's Poor: Selected Speeches and Writings of World Bank President James D. Wolfensohn, 1995–2005*. Washington: World Bank.

[4] Organisation for Economic Co-operation and Development (n.d.). *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference, Paris, Nov. 21, 1997*. Retrieved from http://www.oecd.org/corruption/oecdantibriberyconvention.htm

[5] The OECD Convention now has 43 signatories, including Canada.

[6] The White House, Office of the Press Secretary. (Sept. 22, 2010). *Remarks by the President at the Millennium Development Goals Summit in New York*, New York (Press release). Retrieved from https://obamawhitehouse.archives.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york

[7] The United States consistently articulates this expectation. See, United States Mission to the Organization for Cooperation and Economic Cooperation. (n.d.). *U.S. leads anti-corruption efforts at the OECD*. Retrieved from https://usoecd.usmission.gov/our-relationship/the-issues/combating-corruption

Box 2. Canadian Participation in International Law Instruments on Corruption

Canada is a signatory to the following instruments (date of entry into force in parentheses):

- *United Nations Convention Against Corruption (2003)*[i]
- *Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions (1999)*[ii]
- *Inter-American Convention against Corruption (1997)*[iii]

United Nations Convention against Corruption: a relatively "universal" instrument in at least two respects. The convention covers various types of public sector corruption, including bribery, trading in influence, and abuse of office, as well as various acts of private corruption. In addition, a large majority of states are parties to the convention.

OECD Convention: mandates that each signatory prohibits bribery of foreign public officials in its domestic criminal law. It further establishes a peer-driven monitoring mechanism—the OECD Working Group on Bribery—to ensure that state parties implement their international obligations. The Working Group liaises with domestic officials and circulates reports containing specific recommendations for each country.

Inter-American Convention against Corruption: adopted on March 29, 1996, and came into force on March 6, 1997. It was negotiated between the 35 member states of the Organization of American States[iv] and was the first international convention to address issues of corruption.

[i] See Footnote 2.
[ii] See Footnote 4.
[iii] Organization of American States. (n.d.) Inter-American Convention Against Corruption, Caracas, March 29, 1996. Retrieved from http://www.oas.org/en/sla/dil/docs/inter_american_treaties_B-58_against_Corruption.pdf
[iv] As of February 2019, the Inter-American Convention against Corruption had been signed by 28 of the 35 member states.

Although the optimists' faith that Canada would get tough on foreign bribes has been slow to materialize, as examined in Section 2.0 below, another ultimately more encouraging pattern is starting to take shape. Rather than merely getting *tough* after bribes have already been paid, Canada is increasingly getting *smart* about the need to reduce the risk of bribes being paid in the first place, as discussed in Sections 3.0 and 4.0.

Concurrently, as examined in Section 5.0, Canada now champions a "Progressive Trade Agenda," and international investment agreements (IIAs)[8] are high on the list of stakeholder calls for reform. Nevertheless, with the exception of its Comprehensive Economic and Trade Agreement (CETA) with the European Union,[9] Canada continues to negotiate and conclude IIAs protecting investors and investments tainted by corruption.[10]

This policy brief focuses on Canada as a case study of how capital-exporting states can contribute to combatting corruption in international investment. It argues that, while consistent enforcement of the prohibition in Canadian law should be encouraged, it may be even more important to mitigate risks of and control incentives for foreign bribery. Development of Canadian law on this subject in recent years demonstrates a tendency in that direction.

Each of the following four sections examines a key development in Canadian legal initiatives related to foreign bribery. Section 2.0 examines increased enforcement of the prohibition approach and the resulting shift from merely formal prohibition to specific deterrence. Sections 3.0 and 4.0 introduce the growing role of ex ante risk management measures and industry-based risk mitigation through payment transparency, respectively. Section 5.0 turns to the emerging issue of accounting for foreign bribery risk in the "progressive" IIAs recently negotiated and envisioned by the Government of Canada.

[8] The term is defined in Section 5.0.
[9] Canada-European Union Comprehensive Economic and Trade Agreement, Chapter 8 "Investment" Art. 8.18(3).
[10] See discussion in Section 5.0.

2.0 The Surge in Enforcement of Canada's Foreign Bribery Prohibition

The first key development is increased enforcement of the OECD Convention's prohibition approach through Canadian law. Canada enacted the Corruption of Foreign Public Officials Act (CFPOA) in 1999. CFPOA S. 3 contains a Foreign Bribery Prohibition, which provides:

> 3(1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
>
> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.[11]

The Canadian Department of Justice describes CFPOA S. 3's Foreign Bribery Prohibition as the act's "centrepiece."[12]

When originally enacted in 1999, the CFPOA contained no specific designation of enforcement authority.[13] Furthermore, as described by Canadian anti-corruption specialist James Klotz:

Canada was the only OECD country to specifically exclude itself from the requirement to include nationality for jurisdiction in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention"). It has been Canada's position that its territorial basis for jurisdiction is effective to combat foreign bribery.[14]

In other words, the CFPOA's centrepiece Foreign Bribery Prohibition originally applied only to cases where either the transaction took place in Canada or otherwise exhibited a "real and substantial link" to Canada.[15] Not surprisingly, the result was only a single case under CFPOA S. 3, and even this case was actually initiated by U.S. authorities.[16]

In the wake of a critical review of Canada's enforcement record by an OECD committee,[17] the Government of Canada introduced amendments to the CFPOA in 2013 (2013 Amendments), reviewed in Box 3.[18]

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[11] Corruption of Foreign Public Officials Act. s.c. 1998 c. 34.

[12] Department of Justice "The Corruption of Foreign Public Officials Act: A Guide" (Department of Justice: Ottawa, May 1999), p 3.

[13] Previously, under the CFPOA, charges could be laid by municipal or provincial police or Canada's federal police force, the Royal Canadian Mounted Police (RCMP). In 2008, the RCMP established an International Anti-Corruption Unit dedicated to investigating cases of foreign bribery As a result of the 2013 amendments, the RCMP is accorded exclusive authority to press charges under the CFPOA.

[14] James Klotz, "Opening Salvo: Testing Territorial Jurisdiction Under the CFPOA in R v. Karigar" Canadian International Lawyer/Revue canadienne de droit international Volume 9 nos. 1 & 2 (2012-2013) 39–40.

[15] The real and substantial link test is a product of Canadian common law, see R. v. Libman (R. v. Libman, 1985, CanLII 51 SCC). This curious scenario has not been widely discussed but is recorded in, for instance, the OECD Working Group's phase II report. OECD Working Group on bribery in International Business Transactions "Phase 2 Report: Canada" (OECD: Paris, 2004).

[16] *R. v. Hydro Kleen Services Inc.*. Following a tip from U.S. authorities, the accused company pleaded guilty to bribing a U.S. immigration officer at the Calgary International Airport and was fined $25,000. Charges against two corporate executives were stayed.

[17] Article 12, Monitoring and Follow-up, of the OECD Convention obliges co-operation in carrying out a program of systematic follow-up to monitor and promote full implementation. The default is for this program to be carried out in the framework of the OECD Working Group on bribery in International Business Transactions (OECD Working Group). The OECD Working Group issued its third report on Canada on March 18, 2011. See, OECD Working Group on Bribery in International Business Transactions. (2011). *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*. Paris: OECD.

[18] Fighting Foreign Corruption Act. s.c. 2013 c. 26

Box 3. 2013 Amendments to the CFPOA

Territorial Jurisdiction – The 2013 Amendments closed the loophole resulting from territorial jurisdiction in Canadian common law. S. 5(2) now deems worldwide acts of Canadian citizens, permanent residents, corporations, societies, firms or partnerships to be acts within Canada for the purposes of liability under the CFPOA.

Facilitation Payments Exception – As originally drafted, an exception from the CFPOA's Foreign Bribery Prohibition existed for so-called facilitation payments. Under the 2013 Amendments, this carve-out was to be removed through a future order of the Governor in Council, which materialized in 2017.

Not For-Profit Loophole – Prior to the 2013 Amendments, application of the CFPOA was restricted to for-profit transactions. This potential loophole has been removed.

Double Jeopardy – As originally drafted, the CFPOA did not specifically address the possibility of prosecution in more than one jurisdiction for the same conduct. The 2013 Amendments clarified that Canadian companies and individuals tried in another jurisdiction cannot be convicted by a Canadian court for the same conduct.

Maximum Penalties – The 2013 amendments significantly increased the maximum penalties for CFPOA convictions. Maximum imprisonment was increased from five years to 14 years.

Books and Records Offence – As examined below, the 2013 Amendments introduced a second offence under the act for failure to maintain adequate books and records.

Following the 2013 Amendments, Canadian practitioners now describe the CFPOA's Foreign Bribery Prohibition as "drafted broadly."[i]

[i] See http://www.mondaq.com/canada/x/258960/. The surge in enforcement, discussed below, is also relevant. CFPOA S. 4 is seen to be drafted broadly in at least three respects: even conspiracies to give or offer a bribe are prohibited; the use of a third party to bribe is captured through the word "indirectly"; and, the definition of both "anything of value" and "foreign public official" are open-ended, as they include a benefit of any kind and anyone who performs public duties or functions on behalf of the state, such as officials of state-owned enterprises, respectively.

Concurrent to the 2013 Amendments, there has been increased enforcement of the CFPOA's Foreign Bribery Prevention. The reasons for this spike, although multifaceted, include scrutiny from the OECD, spillover effects from increased U.S. enforcement and recognition of corruption as a roadblock to sustainable development. A large number of Canadian prosecutions brought during this period were initiated as a result of tips from U.S. authorities.

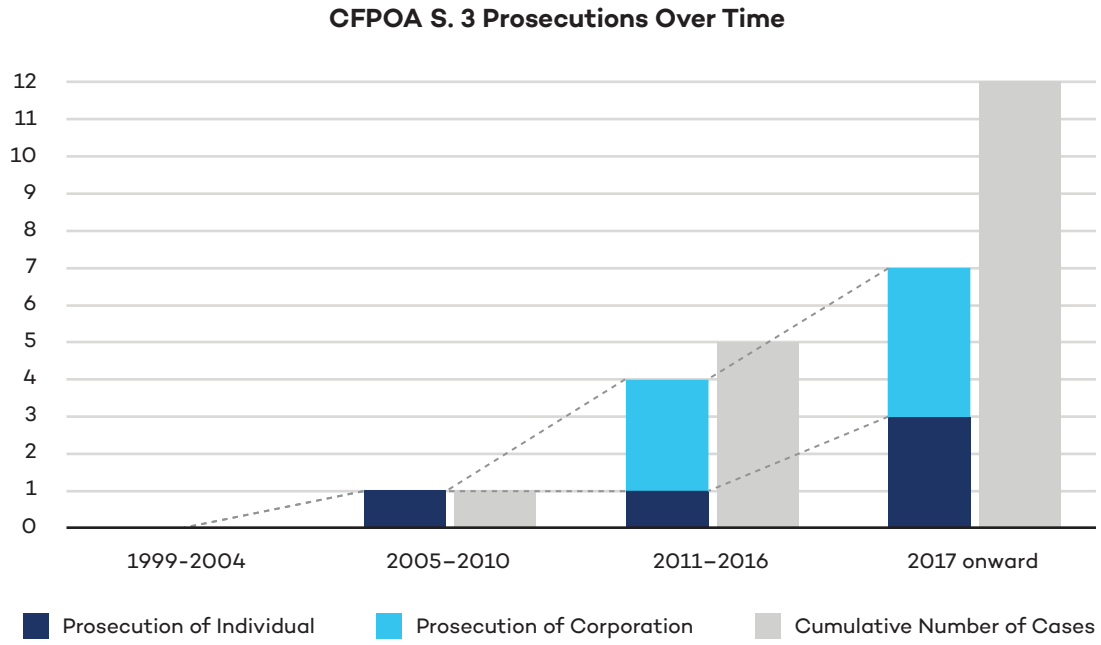

Figure 1. CFPOA S. 3 Prosecutions Over Time

Source: Author's research

As a result, completed prosecutions now include:

- The guilty plea in *R. v. Hydro Kleen Services Inc* from 2005.
- The guilty plea of Calgary-based Niko Resources Ltd. (Niko)[19] in 2011 (compliance consequences of Niko are explored in Section 3.0).
- The guilty plea of exploration-stage mining company Griffiths Energy International Inc. (Griffiths) in 2013.[20]
- The conviction of Ottawa-based businessman Nazir Karigar at trial in 2013,[21] sustained on appeal in 2017.[22]

Charges have been filed under the CFPOA's Foreign Bribery Prohibition in several other cases.[23] The ongoing proceedings involving SNC-Lavalin and its affiliates are particularly noteworthy (see Box 4).

[19] *R. v. Niko Resources Ltd.* (2011), 101 W.C.B. (2d) 118 (Alta. Q.B.).

[20] Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Judicial Centre of Calgary, *Her Majesty the Queen v. Griffiths Energy* International, E-File No.:CCQ13GRIFFITHSENER, Action No. 130057425Q1, January 25, 2013.

[21] *R. v. Karigar*, 2013 ONSC 5199.

[22] *R. v. Karigar*, 2017 ONCA 576.

[23] In addition to the SNC-Lavalin case, charges have also been laid against three individuals who allegedly conspired with Karigar. In November 2016 Larry Kushniruk was charged under CFPOA S. 3 with conspiring to bribe Thai officials in respect of the sale of a commercial passenger airplane. The charges against Kushniruk were subsequently dismissed.

Box 4. CFPOA Charges against SNC-Lavalin

Montreal-headquartered SNC-Lavalin Group Inc is Canada's largest engineering firm, with annual revenue in excess of CAD 8 billion. In 2015, it became the first Toronto Stock Exchange main-board issuer to be charged under the Foreign Bribery Prohibition.

- In 2012 and 2013, former SNC executives were charged under CFPOA S. 3 for allegedly conspiring to bribe officials in Bangladesh to secure a USD 50 million contract on the Padma Bridge project. In 2017, charges were dismissed on the basis that some evidence had been improperly procured and, ultimately, insufficient evidence was presented to the court.
- In 2015, SNC and two subsidiaries were each charged with bribery under S. 3 of the CFPOA as well as one count of fraud. The charges related to SNC's work on the Great Man-Made River project in Gaddafi-era Libya. Preliminary hearings have been scheduled for September 2018.
- In April 2018, Canada's federal government officially launched a scheme for deferred prosecution agreements (DPAs), with SNC expected to serve as a test case. The DPA scheme is examined further in Section 3.0 below.
- In September 2018, SNC was informed by the director of public prosecutions that it would not be offered the opportunity to negotiate a DPA and that the criminal charges would be tried in court.

Source: Author's notes. See also, Canadian Press. (2019). A timeline of the SNC-Lavalin affair. *National Post*. Retrieved from https://nationalpost.com/pmn/news-pmn/canada-news-pmn/a-timeline-of-the-snc-lavalin-affair

A review of prosecutions under CFPOA S. 3 thus reveals increased enforcement peaking in the first half of the current decade.[24] However, it is far from certain that this level of enforcement will continue, let alone increase, in the coming years.[25] As such, the two following sections examine key developments focused on getting smart with the risk of foreign bribery before the fact rather than waiting to get tough.

[24] Barutciski, M. & Bandali, S.A. (2015). *Corruption at the intersection of business and government*. Comparative Research in Law and Political Economy Network. Toronto: Osgoode Hall Law School, York University.

[25] There is a strong consensus amongst scholars that existing Canadian institutions are poorly suited to rigorously enforce prohibitions against financial crime, including foreign bribery See Poonam, P. & Nichol, A. (2015). The role of corporate governance in curbing foreign corrupt business practices. *Osgoode Hall Law Journal, 53*.

3.0 Firm-Level Anti-Bribery Compliance

In addition to increased enforcement of Canadian law's Foreign Bribery Prohibition, recent years have witnessed a second key development: the birth of firm-level efforts to implement ex ante anti-bribery mechanisms aimed at reducing the risk of bribery occurring in the first place.

An example of such mechanisms in Canadian law is the Books and Record Offence, which was created in the 2013 Amendments. Another is the growth of anti-bribery compliance.

3.1 Books and Records Offence

The Books and Records Offence in CFPOA S. 4 covers specific accounting-related corporate practices. It provides:

> **4 (1)** Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
>
> **(a)** establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
>
> **(b)** makes transactions that are not recorded in those books and records or that are inadequately identified in them;
>
> **(c)** records non-existent expenditures in those books and records;
>
> **(d)** enters liabilities with incorrect identification of their object in those books and records;
>
> **(e)** knowingly uses false documents; or
>
> **(f)** intentionally destroys accounting books and records earlier than permitted by law.[26]

According to the OECD Working Group's report in 2011, these sorts of deviations from accounting best practices are correlated with the payment of bribes, either by the corporation or by a rogue employee of the corporation.[27] In other words, they are the first steps on a path that all too often ends with bribery.

The theory in support of imposing the Books and Records Offence is that the threat of criminal liability will induce firms to more completely supervise employee behaviour associated with bribery. Since accounting practices are subject to routine and direct supervision by directors of Canadian corporations, CFPOA S. 4 aims to mobilize existing corporate governance structures to deter bribery by corporations and their agents. Violations are subject to the same imprisonment of up to 14 years applicable to the centrepiece Bribery Prohibition; however, to date there have been no prosecutions under Books and Records Offence.

3.2 Risk-Based Compliance

The growth of anti-bribery compliance programs, despite lack of explicit guidance in the CFPOA, and increased sophistication thereof, are also notable. The following developments illustrate the incremental normalization of risk-based compliance amongst Canadian investors: the sentencing decision in *Niko*,[28] exposure to U.S. regulators and courts, and the recently introduced deferred prosecution agreement (DPA) scheme.[29]

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[26] Corruption of Foreign Public Officials Act. S. 4.

[27] See, OECD Working Group on Bribery in International Business Transactions. (2011). *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*. Paris: OECD. This expectation is based on Article 8.2 of the OECD Convention, which requires that each Party "provide effective, proportionate and dissuasive civil, administrative or criminal penalties" for omissions and falsifications of the books, records, accounts and financial statements of companies done "for the purpose of bribing foreign public officials or of hiding such bribery."

[28] See generally, as above, *R. v. Niko Resources Ltd.* (2011), 101 W.C.B. (2d) 118 (Alta. Q.B.). The sentencing proceedings are referred to as follows: Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary Alberta, *Her Majesty the Queen v. Niko Resources Ltd.*, E-File No.: CCQ11NIKORESOURCES, June 24, 2011.

[29] For a related discussion, see Archibald, T.L., Jull, K.F., & Roach, K.W. (2015). *Regulatory and corporate liability from due diligence to risk management* 2015 looseleaf. Toronto: Canada Law Book.

First, the plea agreement and subsequent probation order in Niko provide a powerful example from Canadian law that a business-as-usual approach to compliance is no longer acceptable. While many Canadian investors may have once viewed paper policies as sufficient compliance, the court in Niko mandated a risk-based compliance system (see Box 5).

Box 5. Niko Probation Order

Calgary-based Niko Resources Ltd (Niko) pleaded guilty to a single charge of violating the Foreign Bribery Prohibition in CFPOA S. 3. Niko had provided material benefits to the Bangladeshi Minister of Energy who was investigating an explosion at Niko's natural gas field in that country.[i] The company was fined more than CAD 9 million and was made subject to an extensive probation order. The probation order requires Niko to adopt, among other measures:

a. a rigorous compliance code, applicable to all directors, officers, employees, and outside parties acting on behalf of the Company, to detect and deter bribery
    i. the compliance code is to be based on a risk assessment, including: i) geographical activities; ii) interaction with government officials; iii) sectors of operation; iv) involvement in joint ventures; v) pertinence of licenses and permits; vi) degree of governmental oversight; and vii) volume and importance of goods and personnel clearing through customs and immigration.
    ii. anti-bribery and corruption compliance responsibility must be assigned to one or more senior executives with direct reporting obligations to independent monitoring bodies (including internal audit, the Board of Directors, or any appropriate committee of the Board of Directors). They must also have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.

b. Tone from the top and appropriate mechanisms to ensure that policies, standards, and procedures are effectively communicated including:
    i. Periodic training;
    ii. Annual certifications; and
    iii. Periodic review and testing of compliance code, in order to evaluate and improve its effectiveness in preventing and detecting violations of anti-corruption laws and the anti-corruption compliance code itself.

c. Systematic internal controls for fair and accurate books, records, and accounts.

[i] *Agreed Statement of Facts*, Court of Queen's Bench of Alberta, Judicial District of Calgary, *Her Majesty the Queen and Niko Resources Ltd.*, June 23, 2011. Retrieved from https://www.millerchevalier.com/sites/default/files/resources/AgreedStatementofFacts.pdf

Second, global enforcement by U.S. authorities has broad ramifications for any business-as-usual approach to compliance by Canadian corporations. Although not examined in detail here, a significant number of Canadian companies have been investigated and prosecuted under the U.S. Foreign Corrupt Practices Act (FCPA).[30] A still much larger number have ongoing disclosure obligations and potential liability in the United States as foreign issuers.[31]

[30] An example of this relationship between Canadian companies with U.S. regulators and courts includes the Securities and Exchange Commission's investigation of Toronto-based Kinross Gold Corporation. In March 2018, Kinross announced that it had settled FCPA charges brought by the SEC for repeated failure to put in place anti-corruption compliance programs and adequate accounting controls at two African subsidiaries. See Cassin, R.L. (2018). Canadian gold miner resolves FCPA charges (Blog post). *FCPA Blog*. Retrieved from http://www.fcpablog.com/blog/2018/3/26/canadian-gold-miner-resolves-fcpa-charges.html

[31] According to one expert, "Approximately 300 Canadian companies have securities registered with and/or report to the U.S. Securities and Exchange Commission." See Koehler, M. & Barutciski, M. (2017). *What Canadian companies need to know about effective compliance with Canadian, U.S. and global anti-corruption laws* (Blog post). Retrieved from https://www.bennettjones.com/en/Blogs-Section/What-Canadian-Companies-Need-to-Know-About-Effective-Compliance--with-Anti-Corruption-Laws. The case of the Munich-headquartered global engineering firm Siemens provides a particularly well-known example of U.S. courts and regulators asserting jurisdiction on this basis. See, *Securities and Exchange Commission v. Siemens Aktiengesellschaft*, Civil Action No. 08 CV 02167 (D.D.C.). The guidance sets out a list of so-called "Hallmarks of Effective Compliance Programs."

Third, and most recently, in June 2018 the Government of Canada formalized a scheme for DPAs in cases of alleged white-collar crime.[32] Prior to offering a DPA, the prosecutor must consider factors pertinent to the existence of a robust compliance program, such as whether the offence was self-reported, the level of involvement of senior officers and disciplinary action already taken by the organization to prevent the commission of similar acts in future. Furthermore, the prosecutor and court retain discretion to require that the corporation enhance its compliance policies and appoint an independent monitor to report on implementation.

This section introduced two channels through which Canadian corporations are increasingly addressing the risk of foreign bribery: improved accounting practices subject to the CFPOA's Books and Records Offence and more sophisticated compliance programs. Although progress has been far from uniform and further research could add clarity on adoption rates, there are good reasons to believe that ex ante anti-bribery mechanisms are increasingly common. The following section turns to an industry-based example of ex ante risk mitigation.

[32] On June 21, 2018 the amending legislation received Royal Assent. The relevant provisions took effect 90 days thereafter.

4.0 Transparency Approach to Industry-Specific Risk

The third key development in Canada's anti-corruption practice mandates payment transparency in specific industries. Extractive industry payment transparency is an area of anti-foreign bribery law where Canada is increasingly a global leader. This section examines the law as well as underlying policy reasons.

Canada is the world's leading capital-exporting state as regards foreign investment in the mining sector: there are more publicly traded mining companies headquartered in Toronto and Vancouver than in all of Australia, South Africa, the United Kingdom and the United States combined.[33]

Natural resources may have historically been a blessing for Canada, but many developing countries have actually experienced a resource curse, the perverse correlation of abundant natural resource rents with weakened economic growth.[34] However, research now shows that the resource curse is not inevitable,[35] and that institutions play a larger role than previously appreciated in its reversal.[36]

Box 6. Extractive Sector Transparency Initiative (EITI)

The EITI is a standard by which information on the oil, gas and mining industries is published. Accordingly, "the EITI is not a prescription for governance of the extractive sector, rather a tool that informs the way the sector is governed."

The EITI is also an institutional structure with an Oslo-based Secretariat that supports programing around the world. The EITI Secretariat works closely with the multistakeholder group in each country that, in turn, actively monitors the implementation of the EITI Standard.

Source: http://www.eiti.org

Significantly, a leading symptom of the resource curse is heightened rates of bribery in mining and other extractive industries.[37] Although there is certainly no one-size-fits-all menu of "resource institutions,"[38] there is increased optimism amongst researchers and policy-makers that improved revenue collection is necessary, if not sufficient, for breaking the resource curse and, also, combatting corruption.[39] The Extractive Sector Transparency Initiative (EITI) is an example of such optimism (see Box 6).

The EITI reflects a conviction that transparency, over the long run, can play an important role in improving revenue collection institutions in developing countries.[40] To complement this, the Natural Resource Governance

[33] Similarly, approximately 70 per cent of equity capital for cross-border mining projects is now raised in Canada. Oliver, E. & Grieve, S. (2013). Canada's TSX: A global mineral plays supermarket. *India Business Law Journal*.

[34] The seminal study is Sachs, J.D. & Warner, A.M. (1995). Natural Resource Abundance and Economic Growth (National Bureau of Economic Research Working Paper No. 5398). Retrieved from https://www.nber.org/papers/w5398. For a leading summary of concern about the resource curse amongst international development stakeholders see Collier, P. (2008). Laws and codes for the resource curse. *Yale Human Rights and Development Law Journal, 11*(1). Retrieved from https://digitalcommons.law.yale.edu/yhrdlj/vol11/iss1/2/

[35] Recent research distinguishes so-called "point source resources" and "non-point source resources." For an important study see, Isham, J., Woolcock, M., Pritchett, L. & Busby, G. (2005). The varieties of resource experience: natural resource export structures and the political economy of economic growth. *The World Bank Economic Review, 19*(2), 141–174. Isham et al. find that oil, minerals and plantation crops including coffee and cocoa—which are all point source resources—are damaging to institutional maturation. The emphasis on point source resources maps with the notion of "extractive industries" and the scope of ESTMA.

[36] Boschini, A. (2007). Resource curse or not: A question of appropriability. *Scandinavian Journal of Economics, 109*(3). Boschini, A., Pettersson, J., & Roine, J, (2013). The resource curse and its potential reversal. World Development, 43(C). Retrieved from https://www.hhs.se/contentassets/7ebe9233ca0a4341b2728fd50fa32194/2012-the-resource-curse-and-its-potential-reversal.pdf. However, reversal is hardly simple or easy to achieve; Boschini et al. (2013) argue that further research is needed to identify the exact institutions at play in a potential reversal. Collier (2008), taking a broader, more theoretical perspective, reviews evidence for a basket of six specific institutions and capacities that developing states must acquire in order to be able to benefit for resource booms. In other words, the academic literature suggests that there is a desirable basket of institutions without offering a guarantee about exactly what institutions are in this basket.

[37] On the broader link between institutional quality and corruption of public power in countries afflicted by the resource curse, see Mehlum, H. (2006). Institutions and the resource curse. *The Economic Journal, 116*, 1–20. Mehlum et al. find that corruption, in the form of rent-seeking, offers an important explanation of why institutions remain underdeveloped in resource-curse-afflicted states. See also, Robinson, J.A. Torvik, R. & Verdier, T. (2006). Political foundations of the resource curse. *Journal of Development Economics, 79*, 447–468. Retrieved from https://scholar.harvard.edu/jrobinson/files/jr_polfoundations.pdf

[38] There is increasing recognition that the unique form of public and private institutions will vary in each country according to local factors such as history and culture etc.

[39] What's more, in the absence of effective revenue collection institutions, the resource curse is almost certain to persist.

[40] For instance, Kolstad I. & Wiig, A. (2009). Is transparency the key to reducing corruption in resource-rich countries? *World Development 37*(3), 521-532. Kolstad and Wiig demonstrate a correlation between a lack of transparency and high levels of corruption. However, they note that, despite enthusiasm amongst stakeholders, it is far from certain that transparency alone can improve institutions.

Institute's (NRGI) Resource Governance Index, for example, provides a mechanism for measuring the quality of revenue collection institutions.[41]

Against this backdrop, revenue transparency interventions in the extractive industries have taken place along two parallel tracks: first, efforts by reformers in capital-importing countries to compel disclosure and then publish the data, which often take place in concert with the EITI (see Box 6); second, legal mechanisms in capital-exporting countries, such as Canada.

In 2011 the G8 Summit (as it was then constituted) considered for the first time the need for rich countries to mandate payment transparency.[42] By 2013 a consensus had been reached between Brussels, London, Paris and Washington. The 2013 Lough Erne Declaration was categorical: "Extractive companies should report payments to all governments—and governments should publish income from such companies."[43]

Following Lough Erne, Canada moved to mandate payment transparency with the expectation that other G8 states would move in parallel. However, U.S. legislation has been delayed initially by industry lobbying and then by executive fiat following the election of Donald Trump.[44]

Examining Canada's specific scheme, we see broad disclosure obligations. The Extractive Sector Transparency Measures Act (ESTMA)[45] applies to firms engaged in the commercial development of oil, gas or minerals. It thus covers a broader range of firms than the proposed rule in U.S. law, which would only have covered publicly listed companies.[46] In ESTMA, the term "commercial development" is defined broadly to include not only extraction but also exploration.[47]

Covered firms must issue an annual ESTMA report that discloses all payments to governments above CAD 100,000 on a project basis.[48] Each covered firm must post its ESTMA report(s) on its own publicly accessible website, and Natural Resources Canada currently maintains a list of links.[49] Recent work by the NRGI points to ways in which journalists and civil society organizations in countries such as Ghana, for example, are starting to use the information disclosed by Canadian gold mining companies.[50]

Two particular limitations, however, merit noting. First, ESTMA pertains only to transparency of payments, and there is thus no contemplated link between ESTMA and the contract transparency movement that has grown within the broader "publish what you pay" (PWYP) movement. Second, ESTMA reports must take one of two formats: XLS or PDF. In practice, early disclosure has been overwhelmingly in PDF. The result is that a fair amount of data recompilation work is needed before the data embedded within individual ESTMA reports can be said to be truly accessible.[51]

In conclusion, ESTMA mandates payment transparency for a large number of extractive industry firms, but uncertainty remains about whether the resulting data is sufficiently accessible for the most affected stakeholders. [52]

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[41] Natural Resource Governance Institute (n.d.). *2017 Resource Governance Index*. Retrieved from https://www.resourcegovernanceindex.org/

[42] http://canadainternational.gc.ca/g8/summitsommet/2011/g8deauvilledeclaration2011-05-27.aspx, para. 62.

[43] Mining Association of Canada. (2014, p. 4). *Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments*. Retrieved from https://mining.ca/documents/recommendations-mandatory-disclosure-payments-canadian-mining-companies-governments/

[44] The U.S. rule provided for payment transparency as a matter of securities regulation. See, *Dodd-Frank Wall Street Reform and Consumer Protection Act* 12 U.S.C. 53 *et seq*. ("Dodd-Frank") S. 1504. In February 2017, the U.S. Congressional Review Act was used to nullify Dodd-Frank S. 1504.

[45] Extractive Sector Transparency Measures Act. S.C. 2014, c. 39, s. 376.

[46] The suspended U.S. law—S. 1504—applies only to issuers of securities: ESTMA applies to all Canadian public companies as well as private companies that satisfy modest financial thresholds over a two-year period.

[47] In the Canadian mining industry, almost all firms operating abroad will have issued securities if only on a venture-exchange and thus be *prima facie* covered by ESTMA.

[48] The term "Payment" is defined in significant detail in the act: it includes monetary or in kind transactions, to an employee or public office holder of a payee is deemed to have been made to the payee; valuation to entity or fair market value.

[49] The link is currently hosted at http://www.nrcan.gc.ca/mining-materials/estma/18198

[50] Malden, A. & Osei, E. (2018) *Ghana's gold mining revenues: An analysis of company disclosures*. Retrieved from https://resourcegovernance.org/analysis-tools/publications/ghanas-gold-mining-revenues-analysis-company-disclosures

[51] A project to consolidate all disclosures into a single XLS database is reportedly being undertaken by Canadian civil society organizations, although progress remains uncertain.

[52] See the Government of Canada website that acts as a centralized hub from which users can pull up the reports and then manually access the data within each report: Natural Resources Canada (n.d.) *Links to ESTMA Reports*. Retrieved from https://www.nrcan.gc.ca/mining-materials/estma/18198

5.0 Progressive Trade (and Investment) Agenda

The first three developments—limited enforcement of prohibition as well as compliance and transparency-based mechanisms to mitigate bribery risks—all illustrate the relevance of domestic Canadian law to efforts against foreign bribery. This section examines a fourth key development in Ottawa whereby the Government of Canada has an opportunity to take a leadership role in global efforts against foreign bribery: the "Progressive Trade Agenda" now championed by Canada, which includes investment issues.

Historically, Canada's bilateral investment treaties—also known as Foreign Investment Promotion and Protection Agreements (FIPAs) (see Box 7)—have focused overwhelmingly on investor and investment protection.[53] This is similar to the traditional approach of other developed country states. To date, most FIPAs as well as investment chapters in Canadian free trade agreements are the type of agreements currently subject to critique and calls for reform, as discussed briefly below.

Box 7. Canada's FIPA Program

Canada began negotiating FIPAs in the late 1980s. This resulted in a first generation of six FIPAs, which were geographically focused on Eastern Europe.

A more systematic approach to FIPAs emerged out of the North American Free Trade Agreement (NAFTA). Following NAFTA's 1994 entry into force, Ottawa developed a first Model FIPA, which was used as the basis of negotiations for the remainder of that decade. More than two dozen treaties—stand-alone FIPAs as well as investment chapters in broader trade agreements—were concluded during this second generation.

A third generation of FIPAs began in 2004 with the publication of revisions to the Model FIPA. As of February 2019, some 37 FIPAs are listed by Global Affairs Canada as being in force.

As of February 2019, more than 50 investor–state arbitrations are known to have been filed by Canadian foreign investors, although not all of these claims have been made under Canadian treaties[i] Particular sustainable development concerns arising as a preponderance of these claims pertain to resource management or environmental protection measures applied to mineral and hydrocarbon extraction projects.

Canada's Model FIPA has not been systematically updated since 2004. Prior to the 2018 announcement of a revised model FIPA, it was informally understood that ad hoc changes were made to the model FIPA through internal discussion within the Canadian government. In August 2018 Global Affairs Canada announced a public consultation on a new model FIPA, which concluded on October 28, 2018. As of May 2019, Global Affairs Canada (GAC) had not made available further information on a new model FIPA.

Source: Newcombe, A. & Lévesque, C. (2013). Canada. in C. Brown (Ed.), *Commentaries on selected model investment treaties* (pp. 53–129). Oxford: Oxford University Press; see also, Levine, M.A.J. (2018). Investor-state arbitration and domestic environmental governance: Recent developments from Canada. In S. Seck et al. (Eds). International law, innovation and the environment (pp. 296–314 esp. 300–305). Cambridge: Cambridge University Press.

[i] Mertins-Kirkwood, H. (2015). *A losing proposition: The failure of Canadian ISDS policy at home and abroad*. Ottawa: Canadian Centre for Policy Alternatives.

Traditional IIAs are characterized by asymmetry: foreign investors are granted rights unaccompanied by obligations, while host states accept obligations unaccompanied by rights.[54] Jonathan Bonnitcha has cogently surveyed concerns about this asymmetry in policy[55] and academic[56] publications. Still more recently, an important study from the OECD has empirically examined the societal benefits and costs of IIAs focused exclusively on investment protection.[57]

[53] Since the first Canadian IIA in 1990, the government has referred to any stand-alone international treaty on investment as a Foreign Investment Promotion and Protection Agreement (FIPA). The single most important consequence of this nomenclature is a policy of excluding liberalization from the scope of investment-related negotiations.

[54] For a lucent overview of this particular problem, i.e. the "Asymmetry Critique," see Yackee, J.W. (2011). Investment treaties and investor corruption: An emerging defense for host states. *Virginia Journal International Law 52*, 723.

[55] Bonnitcha, J. (2017). *Assessing the impacts of investment treaties: Overview of the evidence.* Ottawa and Geneva: International Institute for Sustainable Development.

[56] Bonnitcha, J. (2014). *Substantive protection under investment treaties*. Cambridge University Press: Cambridge; Bonnitcha, J. et al. (2017). *The political economy of the investment treaty regime*. Oxford University Press: Oxford. Additional references are provided in the bibliography that will follow this policy brief.

[57] Pohl, J. (2018), *Societal benefits and costs of international investment agreements: A critical review of aspects and available empirical evidence* (OECD Working Papers on International Investment, No. 2018/01). Paris: OECD Publishing. Retrieved from https://doi.org/10.1787/e5f85c3d-en

Following elections in 2015, Canada started championing a Progressive Trade Agenda, including investment issues.[58] Regulation of Canadian businesses investing abroad and reform of the FIPA program rank high on many stakeholders' reform agendas.[59] Indeed, in January 2018 Global Affairs Canada (GAC) announced an ombudsperson office for foreign investment-impacted communities abroad and appointed the ombudsperson on April 8, 2019 (see Box 8);[60] and, between mid August and late October 2018, GAC held online consultations on how to make its FIPAs more progressive and inclusive.[61]

Box 8. Canadian Ombudsperson for Responsible Enterprise (CORE)

Ottawa has recently taken the important step of creating an ombudsperson office for responsible enterprise, which builds on previous departmental whitepapers about "responsible resource investment."

The CORE office is expected to undertake independent fact-finding and have the power to recommend that investment incentives, such as consular support and government financing but not FIPA protection, be suspended.

In arriving at recommendations in particular cases, the office is expected to seek guidance from transnational norms, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

In April 2019, the Minister of International Trade announced Sheri Meyerhoffer as the first ombudsperson[i] Uncertainty continues to surround the legal scope of the CORE's authority to, for instance, conduct independent investigations.[ii]

[i] Global Affairs Canada. (2019). Responsible business conduct abroad. Retrieved from https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng

[ii] Wells, J. (2019). Canada has a new watchdog for corporate ethics. But where are its teeth? The Star. Retrieved from https://www.thestar.com/business/opinion/2019/04/09/canada-has-a-new-watchdog-for-corporate-ethics-but-where-are-its-teeth.html

Now is the time to ask what a truly progressive investment agreement would look like. While details of GAC's post-consultation intentions for a new model FIPA remain unclear, the paragraphs below contribute to discussion of the key question: how investment agreements can be meaningfully reformed to contribute to sustainable development. They focus particularly on the need to include anti-bribery safeguards in future FIPAs.[62]

Traditional IIAs, including Canadian FIPAs, while providing guarantees to investors, are notorious for remaining silent on investors' obligations when they invest abroad. As a consequence, investors can bring arbitration claims against host states independent of their own behaviour, including when they are involved in fraud, violating national laws or have committed bribery. Canada still needs to ensure that foreign bribery, which is prohibited under Canadian law, is properly addressed in its FIPAs.

[58] This terminology has been advanced by diplomats and politicians during the renegotiation of NAFTA, the negotiation of a Comprehensive and Progressive Trade Agreement for Trans-Pacific Partnership (CPTPP) and, to a certain extent, the inclusion of a Multilateral Investment Court in the final text of the Canada–European Union Comprehensive Economic and Trade Agreement (CETA).

[59] For instance, Herman, L. (2013, updated 2018) *Time to rethink foreign investment protection agreements? Perhaps.* Retrieved from https://www.theglobeandmail.com/opinion/time-to-rethink-foreign-investment-protection-agreements-perhaps/article9256169/

[60] Global Affairs Canada. (2019). *Responsible business conduct abroad*. Retrieved from https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng; Woodin, H. (2019). Canada still without responsible business ombudsperson one year later. *Business in Vancouver*. Retrieved from https://biv.com/article/2019/01/canada-still-without-responsible-business-ombudsperson

[61] Government of Canada. (2018). *Public consultation: Canada's foreign investment promotion and protection agreements*. Retrieved from https://www.international.gc.ca/trade-commerce/consultations/fipa-apie/index.aspx?lang=eng

[62] See also IISD. (2018). *Reply to Public Consultation on Canada's International Investment Agreements (FIPAs)*. Retrieved from https://iisd.org/library/reply-public-consultation-canadas-international-investment-agreements-fipas

Ottawa is not alone in failing to delimit the type of investments that are protected by its IIAs. There is no record of this issue being decided by a FIPA tribunal,[63] but it has been the subject of increasing attention by tribunals constituted under IIAs to which Canada is not a party[64] (see Box 9).

Box 9. Prominent ISDS Cases Involving Bribery

As of 2014, there were at least 20 known cases where the investor was either implicitly or explicitly alleged to have paid a bribe to host state officials in making its investment.[i]

Implicitly suspected

In *Siemens v. Argentina*,[ii] the investor's use of bribery to procure its investment became public only after an award of substantial damages. Although the tribunal did not rule on the legal consequences of bribery, Siemens voluntarily abstained from pursuing the award.

Explicitly accused

In *World Duty Free v. Kenya*,[iii] the host state alleged at the preliminary stages of the arbitration that the investor had used bribery to secure its investment. The tribunal found that it could not affirm jurisdiction under the relevant investment contract's arbitration agreements where the investor obtained its investment through corruption.

A similar result occurred under a BIT in the case of *Metal-Tech v. Uzbekistan*.[iv] The Metal-Tech tribunal found that corruption associated with the investment resulted in a lack of jurisdiction. The tribunal based its decision to refuse jurisdiction on Uzbekistan's lack of consent to arbitration under the BIT and the ICSID Convention. It reasoned that the investment was not made "in accordance with the law" as required in the BIT because there was a violation of domestic laws on corruption.

Article 8(1) of the BIT limited consent to disputes "concerning an investment" while Article 1(1) of the BIT defined "investment" as "...any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made." The tribunal interpreted this "in accordance with the law" clause in the definition to mean that the investment must be made "in compliance with the law at the time when it was established" (para. 193). Furthermore, the tribunal found on the facts that corruption took place, in connection with the establishment of Metal-Tech's investment in Uzbekistan, in violation of Uzbekistan law. Therefore, the tribunal concluded, the investor's business activities were made in noncompliance with domestic law such that they could not qualify as an investment Article 1(1) of the BIT. As a result, the tribunal concluded that MetalTech's claims under the BIT did not fall within Article 8(1), were not covered by Uzbekistan's consent, and did not meet the consent requirement set out in Article 25(1) of the ICSID Convention (paras. 372–373).

In both *World Duty Free* and *Metal-Tech*, the international tribunals concluded on the facts that there was corrupt behaviour. Neither tribunal premised its decision on the requirement of a prior penal outcome in either the host state or the home state, i.e. under the extraterritorial regime now embedded in the CFPOA.

[i] Llamzon, A.P. (2014). *Corruption in international investment arbitration*. Oxford: Oxford University Press. esp 102-192

[ii] *Siemens A.G. v. Republic of Argentina*, ICSID Case No. ARB/02/8, Award of 17 January 2017.

[iii] *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award of October 4, 2006.

[iv] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award of October 4, 2013. See summary by Schacherer (2018). *International investment law and sustainable development: Key cases from the 2010s*. Winnipeg: IISD. Retrieved from https://iisd.org/sites/default/files/publications/investment-law-sustainable-development-ten-cases-2010s.pdf

[63] However, corruption has been raised in two NAFTA cases: *Methanex Corporation v. United States of America*, UNCITRAL and *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL. In *Methanex*, the Canadian investor argued that its domestic competitor exercised inappropriate influence over the relevant government's decision-making process and that was akin to corruption. Although no illegal act was claimed under U.S. law, the investor argued that this resulted in arbitrary decision making with the effect that it was deprived of fair and equitable treatment under Article 1105 of NAFTA. Although sympathetic in principle to a link between corruption of government officials and a breach of fair and equitable treatment, the *Methanex* tribunal found neither direct evidence nor a pattern of circumstantial evidence that could on the given facts sustain the charge of corruption. In *International Thunderbird Gaming Corporation* the host state's lawyers made assertions before the tribunal that the investor's domestic counsel had corrupted local officials in the course of making its investment, but this allegation was not determinative of the case's outcome. In addition, ICSID arbitration under an investment contract between the Canadian firm Niko Resources Ltd and the Republic of Bangladesh remains ongoing. Niko's claim against Bangladesh relates to the same project that resulted in bribery charges being brought under the CFPOA (discussed in S. 1 and S. 2).

[64] A leading treatment is found in Llamzon, A.P. (2014). *Corruption in international investment arbitration*. Oxford University Press. Much of the commentary focuses on the evidentiary difficulties associated with allegations of corruption, as reviewed below. Other writers, however, express concern that the early jurisprudence creates perverse incentives for host states. See Meshel, T. (2013). The use and misuse of the corruption defence in international investment arbitration. *Journal of International Arbitration, 30*(3), 267–281.

The early case of *World Duty Free v. Kenya* stands for the proposition that an investment tribunal should rely on international public policy to find a lack of admissibility where an investor acknowledges having secured its investment through bribery.[65] That an international public policy norm applies even without explicit reference to corruption and bribery in the treaty is referred to below as the IPP Approach. Existing commentary on awards making use of the IPP Approach, however, identifies reasons to question whether it is either optimal or reliable, as reviewed briefly below.

The subsequent case of *Metal-Tech v. Uzbekistan* meanwhile reaffirms the general principle that, where the underlying investment treaty contains an "in accordance with the law clause," an investor's failure to comply with the host state's domestic law results in a lack of jurisdiction for the investment treaty tribunal. It should be noted, however, that not all investment treaties contain an "in accordance with the law clause." And, in any case, even if the treaty does contain such a provision, its effectiveness is contingent on the law of the host state. The central question for this policy brief is whether, considering that Canadian law prohibits bribery of foreign officials, Canadian FIPAs should not exclude corrupted investments from their ambit of protection regardless of the legal particularities of the host state.

Evidentiary considerations suggest that the IPP Approach is not necessarily optimal: while allegations of political bribery may be less taboo than in the past, at least when there has been a change of government, they remain notoriously difficult to prove.[66] The burden of proof for invoking an international public policy-based defence lies on the party alleging malfeasance.[67] Furthermore, a procedural analysis reveals another weakness of the IPP Approach: it entails waiting until the merits stage to consider the implications of foreign bribery, rather than taking up the issue as a matter of jurisdiction.

A corruption defence grounded in the IPP Approach is also less reliable precisely because international public policy is in fact only one item in a dynamic basket of terms that have been used by tribunals seeking to take account of investor misconduct. Commentators have attempted to group these "implicit obligations"[68] through a variety of concepts and labels including, for example, clean hands,[69] illegality[70] and general principles of international investment law.[71] Llamzon cogently describes these interpretative moves as the product of a "moral impetus" on arbitrators stemming from the asymmetry of obligations in IIAs because there is a "need to hold investors seeking redress accountable for their own wrongdoing."[72] The result is described by practitioners as "[a] lack of clarity with respect to the emerging implicit obligation for investments to accord with the law [that] may leave investors, states, and tribunals with an uncertain understanding as to when the substantive protections of an investment treaty should be denied to an investor."[73]

Thankfully, Canada has made some, albeit limited, progress in adding clarity to this otherwise uncertain legal landscape in recent agreements. In CETA, investments made through corruption are excluded from dispute settlement. CETA Art. 8.18(3) states:

[65] Yackee (2011) traces the origin of this doctrine, i.e., international public policy against the use of arbitration to enforce a contract secured corruptly, to Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110.

[66] Neither bribe payer nor bribe taker is likely to record documentary evidence of their transgression. Partasides puts it this way: "It is often said that corruption is easy to allege in international arbitration, but difficult to prove." Partasides, C. (2010). Proving corruption in international arbitration: A balanced standard for the real world. *ICSID Review* 25.1, 47–62, at p. 48. See also Schacherer summary available at https://iisd.org/sites/default/files/publications/investment-law-sustainable-development-ten-cases-2010s.pdf

[67] Lamm, C. B., Greenwald, B. K., & Young, K. M. (2014). From *World Duty Free to Metal-Tech:* A Review of international investment treaty arbitration cases involving allegations of corruption. *ICSID Review, 29*(2), 328–349. The general rule is that the alleging party bears the burden of proof; however, Lamm et al. (at 334–337) note that some tribunals have treated allegations of corruption differently.

[68] Llamzon, A. (2015). *Yukos Universal Limited (Isle of Man) v The Russian Federation*: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as both Omega and Alpha. *ICSID Review-Foreign Investment Law Journal 30*(2), 315-325. Llamzon refers to implicit obligations for limitations that are thought to exist outside the four corners of the treaty text.

[69] Ibid.

[70] Hepburn, J. (2014). In accordance with which host state laws? Restoring the 'defence'of investor illegality in investment arbitration. *Journal of International Dispute Settlement, 5*(3), 531–559.

[71] Moloo, R. & Khachaturian, A. (2010). The compliance with the law requirement in international investment law. *Fordham International Law Journal, 34*, 1473.

[72] Llamzon (2015), *supra* note 68, p. 316.

[73] Moloo & Khachaturian, *supra* note 71, p. 1475.

> For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.[74]

This should be cautiously viewed as a potential step forward.[75] First, by explicitly excluding investments made through corruption, any such objection by a host state would become a matter of jurisdiction rather than admissibility. Second, the uncertainty associated with notions such as international public policy, clean hands and general principles of international investment law dissipates because the rule is written directly into the text of the treaty.

However, the language in CETA Art. 8.18(3) is yet to be interpreted by an arbitral tribunal. What's more, Canadian FIPAs signed and ratified since the conclusion of CETA (i.e., October 30, 2016 when the agreement was signed) do not include the CETA Art. 8.18(3) language.[76] Although this may at first be surprising, it is actually a reflection of the fact that Canadian negotiators have continued to operate under the prior negotiating template and will continue to do so until the model FIPA is updated.[77]

In the two FIPAs concluded after CETA, the most significant development is outside the treaty text, in the form of a joint declaration,[78] substantially identical in both cases and silent on the issue of corruption. In the document, the governments "commit to work together to help make international trade and investment policies more progressive and inclusive, to empower all members of society—particularly women, to have a positive impact on economic growth, and help reduce inequality and poverty." They also reaffirm the right to regulate to achieve legitimate policy objectives and recognize the need to address certain ISDS-related issues.

The model bilateral investment treaty (BIT) prepared by the IISD in 2005 presciently anticipates the issue of corruption and seeks to disincentivize not only investors but also host states.[79] Now is the time for international investment lawyers, especially in Canada, to analyze drafting strategies for codifying these values and interests in a new generation of IIAs generally and Canadian FIPAs in particular. An important point of reference in this regard, not examined herein for simple lack of space, is both the South African Development Community (SADC) model investment agreement as well as the recently concluded BIT between Morocco and Nigeria and the recently finalized model BIT of the Netherlands.[80] The following paragraphs identify the key provisions in each of these three instruments.

The SADC model formulates a shared obligation regarding corruption that applies to investors, host states and home states. The main obligation thereunder is derived from the UNCAC and OECD Convention's prohibition approach on bribery. Enforcement of the prohibition is intended to be carried out by domestic authorities, and a breach of the prohibition is intended to have the effect of vitiating any investment tribunal's jurisdiction.[81] In this regard, it is helpful to recall Articles 10.1 and 10.3

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[74] Canada-European Union Comprehensive Economic and Trade Agreement, Chapter 8 'Investment' Art. 8.18(3). Retrieved from http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng

[75] Prior to CETA, some Canadian FIPAs contained hortatory language about combatting corruption but there was no explicit guidance to tribunals that investments made through corruption were *ultra vires*.

[76] The first FIPA to be signed after CETA negotiations concluded was the Canada–Kosovo FIPA on March 6, 2018, which entered into force on December 19, 2018. Canada also signed the Canada–Moldova FIPA on June 12, 2018, which has yet to enter into force.

[77] Also subsequent to the conclusion of CETA negotiations is the Canada–Burkina Faso FIPA, which entered into force on October 12, 2017.

[78] Joint declaration by the Government of Canada and the Government of the Republic of Moldova regarding progressive and inclusive trade and investment, June 12, 2018. Retrieved from https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/moldova/fipa-apie/declaration.aspx?lang=eng; Joint declaration by the Government of Canada and the Government of the Republic of Kosovo, March 6, 2018. Retrieved from https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/kosovo/fipa-apie/declaration.aspx?lang=eng

[79] International Institute for Sustainable Development. (2005). *IISD Model International Agreement on Investment for Sustainable Development.* Retrieved from https://www.iisd.org/sites/default/files/publications/investment_model_int_handbook.pdf. See Articles 13 and 22.

[80] Southern African Development Community (SADC). (2012, July). *SADC model bilateral investment treaty template with commentary*. Gaborone: SADC. Retrieved from http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf; Netherlands Model BIT 2018, Art. 2(2). Retrieved from https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden/modeltekst-voor-bilaterale-investeringsakkoorden.pdf

[81] Southern African Development Community (SADC). (2012, July), *supra* note 80, see commentary on p. 32.

10.1. Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an Investment.

10.3. A breach of this article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.

10.4. The State Parties to this Agreement, consistent with their applicable law, shall prosecute and where convicted penalize persons that have breached the applicable law implementing this obligation.[82]

The SADC model's linkage between home state enforcement (i.e., retention of sovereign prosecutorial authority over criminal law matters) and exclusion of investment tribunal jurisdiction merits consideration.

The 2016 Morocco–Nigeria BIT introduced a series of obligations on investors, including compliance with a rigorous environmental assessment screening and a social impact assessment.[83] What's more, Article 17 "Anti-Corruption" sets out comprehensive rules for prohibiting corrupt payments to an official or an intermediary of an official in the host state.[84]

Finally, the recently finalized model BIT of the Netherlands also bears noting.[85] The Dutch BIT contains a series of changes aimed at controlling the scope of investment protection and introducing greater guidance as regards investor conduct. In particular, the model follows CETA Art. 8.18(3) and states, in its Article 16(2) that: "The Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process."[86] This language had also been included in the model BIT made available during the Netherlands public consultation.

In the case of GAC's public consultations, although the process concluded on October 28, 2018, to date no indication of future changes have been made available. It is therefore unclear whether and when a new Model FIPA will be published and begin to inform Canada's negotiations. Also unclear is whether the CETA Art. 8.18(3) language will be brought into a new Model FIPA. Certainly, when it comes to bribery of foreign officials, anything less than a continuation of the practice in CETA, in a thoroughly revised model FIPA, would be both without justification as a matter of policy and—on a political level—a betrayal of the government's "Progressive Trade Agenda" rhetoric.

[82] Ibid, p. 32.

[83] Morocco–Nigeria BIT signed December 3, 2016, Art. 14(1) and 14(2). Retrieved from https://investmentpolicyhub.unctad.org

[84] Morocco–Nigeria BIT, Article 17.

[85] On May 16, 2018, the Dutch Ministry of Foreign Affairs published a draft of its new model BIT together with a call for public comment up until June 18, 2018. Subsequently, on October 19, 2018, the Dutch government adopted the Model BIT and made it available publicly on October 26, 2018 at https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden. For a comprehensive review of the draft text, see Verbeek, B.J. & Knottnerus, R. (2018). The 2018 Draft Dutch Model BIT: A critical assessment. *Investment Treaty News*. Retrieved from https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/

[86] *Netherlands model investment agreement*. Retrieved from https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden/modeltekst-voor-bilaterale-investeringsakkoorden.pdf

Conclusion: Potential next steps

The foregoing examined Canada's legal initiatives against bribery by foreign investors. This analysis identified four key developments: a spike in enforcement of the criminal law prohibition; novel firm-level efforts to mitigate the risk of foreign bribery; new mandatory disclosure of payments to governments in the extractive industries sector; and a stated re-orientation on trade and investment agenda to become more "progressive."

In light of broad recognition that foreign bribery compromises sustainable development, this policy brief has examined how Canada might take a leadership role in combatting corruption. The findings are mixed: on the one hand, lax enforcement of white-collar criminal law is a persistent problem in Canada that goes beyond the scope of both this paper and the specific issue of foreign bribery. On the other hand, there is a welcome trend toward ex ante anti-bribery mechanisms that have been rolled out via compliance and transparency requirements. Significantly, Ottawa now has an opportunity to take a leadership role in bringing the campaign to combat corruption into the international investment treaty-making process.

However, there is still significant room for improvement in Canadian efforts to regulate and discipline bribery of foreign officials by foreign investors. The situations calling for potential improvements include the following:

- Canada must ensure that the increased enforcement described in Section 2.0 does not become a historical anomaly. According to Transparency International's most recent report on global enforcement of the OECD Convention's Foreign Bribery Prevention, for 2018, Canada has regressed.[87] This places Canada at the back of the pack of OECD countries and threatens to undermine the deterrence effect created through earlier prosecutions. In this regard, it will be important to watch the outcome of the still ending *SNC-Lavalin* case.
- Concern about enforcement capacity makes the trend toward firm-level risk mitigation identified in Section 3.0 especially salient. CFPOA S. 4 creates a role for accounting practices in preventing rogue actors from hiding foreign bribes. Furthermore, Canadian boards can no longer be satisfied with "paper-thin" anti-bribery compliance, and the court in *Niko* mandated a risk-based system. However, small and medium-sized enterprises are less likely to be aware of these recent developments.[88]
- Given Canada's status as a hub jurisdiction for mining finance, there is a clear national interest in proactively engaging with transnational initiatives aimed at governance shortcomings in extractive industries. The ESTMA scheme mandates disclosure of payments to governments, both domestically and abroad, for almost all Canadian firms engaged in mining, oil and gas extraction. However, further efforts could be taken to ensure that this information is fully accessible to sustainable development stakeholders.
- The recently appointed Canadian Ombudsperson for Responsible Enterprise (CORE) will investigate "complaints related to allegations of human rights abuses arising from a Canadian company's activity abroad."[89] Concerns remain about whether the CORE will have either the resources or authority needed to fulfill this important mandate. The government must now act to fulfill its commitments without further delay.
- Finally, the potential for Canada to play a leadership role in combatting corruption internationally is most evident in the domain of international investment law. CETA took the important step of explicitly excluding investments tainted by foreign bribery from the treaty's ambit of procedural protection.[90] Now that Canada has conducted consultations on the FIPA program, the ball is in Global Affairs Canada's court to ensure that explicit treaty language excluding investments tainted by foreign bribery becomes a standard part of Canadian treaty practice going forward.

[87] Enforcement of the CFPOA has thus fallen from "moderate" to "limited" as assessed in Transparency International's most recent assessment. See Transparency International. (2018). *Exporting corruption – Progress Report 2018: Assessing enforcement of the OECD Anti-Bribery Convention.* Retrieved from https://www.transparency.org/whatwedo/publication/exporting_corruption_2018

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