

U4 Expert Answer



The potential of UNCAC to combat illicit financial flows

Query

Can you please outline how the UNCAC framework can be utilised at the global, regional and national levels for combating the illicit outflow of assets obtained through corrupt and other criminal acts (i.e. bribery, fraud, embezzlement, tax evasion, money-laundering)? Please pay particular regard to the recent US Dodd-Frank Act that has highlighted how a national anti-corruption response to an international problem can also impact upon other countries' national responses.

Purpose

We need specific information that addresses the interconnectivity between 1) the incidence of corruption and 2) the resulting anti-corruption efforts, at the global and national levels.

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Caveat

This answer will focus more extensively on the benefits of UNCAC to tackle illicit flows at the national and international levels.

Summary

In an increasingly globalised world, there is a broad consensus that both developing and developed countries share a responsibility in combating corruption and associated illicit financial flows. While both developed and developing countries need to implement policies to fight corruption and illicit financial outflows, financial centres need to put special emphasis on addressing mechanisms that allow their banks and cooperating offshore financial centres to facilitate the absorption of illicit flows. With its wide geographic reach and broad scope, the UNCAC has the potential to address these various dimensions at the global level.

At the national level, UNCAC can provide a basis for combating illicit flows through its extensive preventative measures which are designed to prevent corruption from occurring, in the first place, and illicit flows from being generated. The UNCAC provisions calling for criminalisation of a wide range of corruption related practices and the introduction of adequate penalties for corrupt officials and executives can also have a deterrent effect by increasing the risks and costs associated with corruption. The Convention also contains provisions that are more directly relevant to

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the prevention and sanctioning of illicit financial flows through its anti-money laundering (AML) measures.

At the regional level, UNCAC foresees that States Parties will collaborate as appropriate with regional organisations, and that they will continue to work within the framework of various regional initiatives, arrangements and conventions on this topic.

At the international level, UNCAC provides a global framework for strengthening international efforts against corruption by allowing the tracing and recovery of stolen assets and imposing more stringent global standards relating to international cooperation and mutual legal assistance.

In addition to international instruments, national laws such as the US Foreign Corrupt Practice Act, the UK Bribery Act, or the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act can also have an impact on the international environment through the extraterritorial application of their anti-corruption provisions.

1 Illicit financial flows: an overview

Definition of illicit flows

Illicit financial flows typically refer to the cross-border movement of money that is illegally earned, transferred or utilised. According to Global Financial Integrity, illicit flows encompass “*the proceeds from both illicit activities such as corruption (bribery and embezzlement of national wealth), criminal activity, and the proceeds of licit business that become illicit when transported across borders in contravention of applicable laws and regulatory frameworks (most commonly in order to evade payment of taxes)*” (Global Financial Integrity, 2009). Consistent with this definition, most forms of illicit financial flows share a set of common characteristics (Kapoor, S., 2007):

- These flows are largely unrecorded and are not captured by official statistics or the countries' Balance of Payments;
- They are associated with active attempts to hide the origin, destination and true ownership of funds;
- They are often associated with public loss and private gain;

- They constitute domestic wealth permanently put beyond reach of domestic authorities in the source country;
- They are not part of a “fair value” transaction and would not stand up to public scrutiny;
- In most cases, they violate some laws in their origin, movement or use;
- Earnings on the stock of illicit financial flows outside of a country do not normally return to the country of origin.

All forms of dirty money - criminal proceeds, corruption and tax evasion - use the same financial structures and techniques to illegally cross borders, taking advantage of an integrated global financial structure that facilitates the movement of illicit flows. These techniques include tax havens, high-secrecy jurisdictions and a wide range of services offered by banking institutions such as multiple accounts, high-secrecy products, disguised corporations, anonymous trust accounts, fake foundations, and other complex corporate vehicles. (Chêne, M., 2009). These often require the support of facilitating professionals such as lawyers, accountants, import-export agents, company and trust-formation agents, who, in some cases, actively solicit and enable capital flight as well as manage ill-gotten wealth (Global Witness, 2009).

The scale of the problem

Although there are no accurate statistics on the scale of the problem, Global Financial Integrity estimates that approximately USD 900 to USD 1 trillion disappear annually from poorer countries as proceeds of corruption, state looting and tax evasion (Kar D. and Cartwright-Smith, D., 2008). According to this report, illicit outflows from African countries alone could be as high as \$25 billion per year. These estimates are considered by GFI to be conservative as they do not include several major forms of illicit flows generated through criminal activities or commercial smuggling, for example. However, it is estimated that the cross border component of bribery amounts to about 3 % of the global total of illicit flows (Kar D. and Cartwright-Smith, D., 2008).

A 2010 report by Global Financial Integrity attempts to link these outflows with major points of absorption consisting of developed countries' banks and offshore financial centres (Kar, D. and al, 2010). The report shows that developed countries are the largest absorbers of cash coming out of developing countries. While the offshore centres' share has been increasing

over the five years covered by the study, banks in developed countries continue to absorb between 56 % and 76 % of such flows, considerably more than offshore financial centres and high-secrecy jurisdictions.

Policy implications

Key policy implications emerge from GFI's reports: while both developed and developing countries need in particular to develop and implement policies to curtail illicit financial outflows, in addition to fighting corruption in their own countries, developed country governments, if they are serious about the problem, need to make real efforts to stop their banks and cooperating offshore financial centres from facilitating the absorption of illicit flows.

Without access to the international financial system, corrupt regimes would not be able to place the proceeds of looted state assets in secure locations. This means that, given the close links that exist between large scale corruption and illicit flows, one can stem corruption by designing policies to curb illicit flows (and vice-versa). This can involve preventing large scale corruption at the national level through the effective implementation of anti-corruption policies to contain the generation of corruption-related illicit flows as well as enforcing stricter anti-money laundering provisions to hamper their transfer abroad. At the international level, this includes increasing transparency in the global financial system, putting greater pressure on banks to ensure that they are not dealing with the proceeds of corruption and preventing corrupt leaders' access to the international financial system. This also involves taking appropriate measures to trace and repatriate stolen assets to their countries of origin.

The Group of 20 countries (G20)'s anti-corruption action plan approved in Seoul in November 2010 echoes these concerns by calling for international cooperation in preventing illicit flows into G20's financial markets as well as facilitating the tracing and recovery of stolen assets (G20, 2010). It also recognises the key role that the UNCAC can play in this regard by committing G20 members to fully ratify and implement it, particularly its provisions related to extradition, mutual legal assistance and asset recovery.

2 UNCAC as a tool to prevent the generation and transfers of illicit flows at the national level

Covering about 150 countries worldwide, UNCAC is the first truly global legal instrument aimed at fighting corruption. By providing broad and universal standards, it represents a major landmark in global anti-corruption efforts, with detailed provisions related to prevention, criminalisation and enforcement of a wide range of corruption-related offences, international cooperation, mutual legal assistance, technical assistance and asset recovery. With its wide geographic reach and broad scope, UNCAC addresses both the national and international dimensions of corruption and provides a consensus-based comprehensive framework. The Convention also acknowledges that all States, whatever their level of development have a shared responsibility in corruption-related matters by calling on States Parties to work together to address corruption. With regard to illicit flows, the value of an international framework is critical. If a country, a region or a group of countries is not successful in curbing illicit flows, an international framework can prevent them to flow into other countries.

As an international convention with global coverage, UNCAC is not directly relevant at the regional level and this answer will focus more extensively on the national and international levels. However, UNCAC still foresees that States Parties will collaborate as appropriate with regional organisations, and that they will continue to work within the framework of various regional initiatives, arrangements and conventions (African, Americas, Council of Europe, etc) even as they fulfil their obligations under the UNCAC. There are many references in the Convention to regional level action, in particular with regard to the provision of mutual legal assistance, police and anti-money laundering cooperation, technical assistance, etc.

Preventing the generation of illicit flows

Preventing corruption

At the national level, UNCAC can prevent illicit flows by creating an environment which prevents corruption from occurring in the first place, and illicit flows from being generated. Chapter II of the Convention focuses extensively on preventive measures, directed at both

the public and private sectors. These measures and intelligence gathering are necessary as it is often difficult to precise the victim on a large scale corruption offence. These measures cover areas such as public service ethics and procedures, public reporting, access to information, whistleblower protection, increased transparency in public finances, and the promotion of private sector standards. In particular, key prevention measures addressing the demand side of corruption target public sector corruption through measures such as (Transparency International, No date):

- a) adopting transparent and objective criteria for recruitment and remuneration;
- b) adopting procedures for rotation of individuals in high-risk positions;
- c) applying codes of conduct for public officials;
- d) facilitating reporting by public officials of corruption;
- e) requiring public officials to disclose investments and benefits from which a conflict of interest may arise.

With regard to the private sector, the Convention requires that measures be taken to enhance accounting and auditing standards, with adequate penalties for failure to comply. Other preventive measures mentioned include promotion (in article 12(2)) of, for example, private sector codes of conduct and requirement of disclosure by corporate entities of the identities of those involved in their establishment and management.

Criminalisation and enforcement

In addition, the criminalisation of a wide range of corruption-related practices and the introduction of adequate penalties for corrupt officials and executives can have a deterrent effect by increasing the risks and costs associated with corruption. The Convention addresses a broader array of crimes than most other international agreements: Chapter III of the Convention calls States Parties to establish a number of practices by public officials as criminal offences, including active and passive bribery, embezzlement, trading in influence, abuse of functions and illicit enrichment as well as to apply effective, proportionate and dissuasive sanctions. In ground-breaking provisions, the Convention also addresses the area of corruption within the private sector and calls on states to consider criminalising private-to-private bribery and

embezzlement (Article 21)¹. However, some offences are optional, due to differences in national law (UNODC, 2006).

Detering the laundering of the proceeds of corruption

The international community has invested many efforts in standard setting and follow up in the area of anti-money laundering, especially in the context of the Financial Action Task Force (FATF) but also in international conventions such as the UNCAC. The Convention also contains provisions that are directly relevant to the prevention and sanction of illicit financial flows through its anti-money laundering (AML) measures. There are a number of measures that both developed and developing countries can take at the national level to prevent corrupt officials to benefit from corruption through money laundering schemes. These measures involve preventing capital flight of the proceeds of corruption through the international financial system as well as preventing financial institutions and cooperating offshore financial centres from facilitating the absorption of illicit financial flows.

Anti-money laundering regimes typically include the criminalisation of money laundering offences, the freezing and confiscation of the proceeds of crime, the implementation of “know-your-customer” (KYC) rules as well as the monitoring and reporting of suspicious transactions (Chaikin, D., 2010). Articles 14, 23 and 52² of the UNCAC are especially relevant in these matters, as they require States Parties to establish appropriate AML regimes through criminalisation, adequate disclosure systems and due diligence provisions as well as the establishment of a comprehensive regulatory and supervisory regime to detect and deter money laundering.

¹ These provisions are optional under UNCAC but mandatory under the AU convention against corruption. In this case, the regional standard is actually more stringent than the international standards.

² Article 52 of UNCAC has to be read in accordance to the 40+9 FATF recommendations, especially regarding beneficial ownership and due diligence on the purpose and nature of the business relationship and scrutiny of transactions.

Criminalisation of money laundering related offences

UNCAC requires States Parties to establish the laundering of the proceeds of corruption (article 23) as well as the concealment or continued retention of property resulting from violation of the Convention (article 24) as criminal offences. In addition, States Parties are obliged to establish the liability of legal persons – which would include financial institutions in most countries - that participate in the offences covered by the Convention (article 26). However, if the bank can prove (and it often does) that it took no part in the money laundering and met all of the due diligence and KYC requirements, it will be exempted from criminal or civil liability³.

Asset disclosure requirements for public officials

To allow for assets monitoring of officials vulnerable to corruption, Article 52 of the Convention calls States Parties to establish effective financial disclosure systems for appropriate public officials (article 52.5), including the disclosure of the foreign accounts they may hold (article 52.6).

General due diligence requirements imposed on financial institutions

The lack of transparency of corporate ownership is known to facilitate the concealment of corrupt proceeds. In addition, investigations into corruption-related money laundering are often hampered by secrecy laws in international financial centers. UNCAC addresses these issues by calling on States Parties to ensure that their financial institutions know the beneficial owners of their accounts, the originator of financial transactions and the details of their cross-border financial transfers. More specifically, the Convention recommends that States Parties (Transparency International, No date):

- a) require financial institutions to conduct enhanced scrutiny of accounts of individuals entrusted with prominent public functions (52.1);

³ To counter this, some countries adopt the notion of “wilful blindness”, or that the financial institution did not make the right questions in order not to get a direct answer to what was expected to be known in the circumstances.

- b) institute a regime for beneficial owner identification, record-keeping and the reporting of suspicious transactions (14.1);
- c) implement systems maintaining information on the originator throughout the financial transfer chain (14.3);
- d) issue advisories to financial institutions regarding the type of persons, accounts or transactions to which to pay particular attention (52.2);
- e) require their financial institutions to refuse to enter into relationships with banks that have no physical presence or are not affiliated with a regulated financial group (52.4);
- f) implement measures requiring reports on cross-border substantial financial transfers (14.2);
- g) ensure that bank secrecy is overcome in investigations of offences covered by the Convention (40).

Enhanced due diligence for Politically Exposed Persons

Financial institutions are required to conduct additional due diligence with regard to Politically Exposed Persons (PEPs) and impose stricter obligations on financial institutions when PEPs open bank accounts or conduct financial transactions. These provisions can include having appropriate risk management systems in place to determine whether the customer is a politically exposed person, requiring senior management approval for establishing business relations with such customers, taking reasonable measures to establish the source of wealth and funds and ensuring regular monitoring of the business relationship (Reed, Q. and Fontana, A., 2011).

Although there is no single definition for PEPs, the difficulty in defining them is the broadness of those definitions. Nevertheless, PEPs usually refer to individuals who are or have been entrusted with prominent public functions that make them inherently vulnerable to corruption and at higher risk of indulging in money laundering-related activities. National and regional AML regimes as well as the international FATF standards, typically impose more stringent due diligence obligations on foreign PEPs but not on domestic PEPs, which undermines the monitoring of prominent national officials (Chaikin, D., 2010).

UNCAC reiterates and widens a number of AML requirements, particularly with regards to the identification and monitoring of PEPs. For example, the Convention expands the definition of PEPs to

individuals who are or have been entrusted with prominent functions and their family members and close associates, and *does not specify whether they are national or foreign officials*, providing a basis for imposing AML requirements for both domestic and foreign politically exposed persons. As a result, UNODC and the World Bank consider that countries that implement UNCAC should consider applying their AML regime to national PEPs. In practice, however, only a small number of countries such as Mexico and Singapore have imposed legislative AML requirements on national PEPs (Chaikin, D., 2010).

3 UNCAC and the tracing and recovering illicit financial outflows at the global level

In its preamble, the Convention recognises corruption as a transnational issue that affects all societies and economies and calls for international cooperation to prevent and control it. Beyond the national level, UNCAC therefore provides a global framework to strengthen international efforts against corruption by allowing the tracing and recovery of stolen assets at the international level. In particular, chapter IV on international cooperation and chapter V on asset recovery represent a major breakthrough in the enforcement of regulations for asset recovery against transnational forms of corruption.

International cooperation and mutual legal assistance

Investigating illicit flows generated through transnational forms of corruption requires the mobilisation of considerable resources and expertise and active cooperation from various foreign jurisdictions. International cooperation is recognised as critical for effective prosecution and deterrence of such practices.

Yet, borders remain a major obstacle to law enforcement authorities' gathering of evidence and bringing of successful criminal proceedings, as they are bound by the principle of sovereignty and cannot conduct investigations on the territory of another State without permission. In addition, countries must have both the judicial capacity, legal infrastructure in place as well as the political will to effectively address illicit flows, including laws and practices dealing with mutual legal assistance (MLA) (Chêne, M., 2008). This is not the case in many developing countries, which lack sufficient expertise, resources and capacity to identify and track

funds and illegal transactions. In addition, different national legal systems, models of investigation and prosecution and the absence of uniform procedures for granting MLA result in lengthy and cumbersome procedures that represent major obstacles to effective and timely legal cooperation across borders.

UNCAC addresses some of these challenges by obliging States Parties to assist each other in cross-border criminal matters, resulting in more stringent global standards relating to MLA. It also sets clear rules in which States may decline to render assistance to a request for mutual legal assistance. Chapter V of the Convention requires parties to offer the "*widest measure of cooperation and assistance*" (Art 43). Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders (UNODC, Website).

The Convention loosens the requirement of dual criminality⁴, which has traditionally constituted a major obstacle to effective cooperation. The principle of dual criminality can only be invoked where assistance would imply coercive actions such as arrest, search or seizure (Schultz, J., 2007). Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption (UNODC, Website). In addition, UNCAC also contributes to overcoming bank secrecy laws that have been identified as the single biggest obstacle to international cooperation in criminal matters. Under UNCAC, financial institutions' secrecy laws may not be used as a ground for refusing to provide mutual legal assistance and access financial information in money laundering cases involving corrupt proceeds.

Seizure and recovery of assets

Asset recovery represents an essential element of the international response to combating illicit flows, sending the message to both corrupt officials and complicit financial institutions across the world that there will be no safe place to hide the proceeds of corruption. As such, it can have a deterrent function, by limiting the criminals' prospects of enjoying the proceeds of their crime. It also allows the country of origin to recover at least some of their loss that can be reinvested into poverty alleviation efforts.

⁴ Dual criminality refers to the principle that the alleged crime for which MLA or extradition is sought must be criminal in both the requesting and requested countries.

Asset recovery refers to a multilayered process that reaches from intelligence gathering to actual recovery of assets through successive steps such as tracing assets, linking them to the corrupt activity, allowing for seizure and confiscation of criminal proceeds as well as the prosecution of the corrupt individual(s) (International Centre for Asset Recovery, 2011). It is considered to be one of the most complex legal actions, requiring financial investigators, forensic accountants and attorneys with an expertise in multi-disciplinary and multi-jurisdictional litigation. As such, asset recovery actions face major challenges of resources, technical expertise, coordination and political will. For example, different situations can occur:

- Government is trying to recover the proceeds of corruption but faces barriers in other countries;
- Government lacks resources and capacity;
- The government is in transition and slow to act;
- Some government kleptocrats are still in power, or out of power but their cronies remain in power.

The Convention contains provisions that can help overcome some of these challenges. It explicitly states asset recovery as "a fundamental principle" of the Convention, which represents a major breakthrough and a promising innovation in the fight against corruption and illicit flows (Art 51). By doing so, the UNCAC reinforces the responsibility of interested countries in collaborating in complex bureaucratic investigations that can take years and consume a vast amount of money in order to get the stolen money back to its country of origin. The nine articles of Chapter V of the Convention lay a framework in both civil and criminal law for tracing, freezing, forfeiting and returning the proceeds of corruption to the country of origin or individual victims. Yet some of the articles are mandatory while others are only discretionary and subject to existing domestic laws and practice.

UNCAC outlines specific measures to be taken for the direct recovery of property that has been acquired through corruption and the mechanisms to facilitate this process through international co-operation. Property is broadly defined and includes a range of assets such as money held in bank accounts, stocks and bonds, houses, cars and ownership of companies and properties (Transparency International, 2009). UNCAC

provisions that are relevant to asset recovery include (Smith, J., Pieth, M. and Jorge, G., 2007):

- provisions on MLA (especially helpful when requesting government faces barriers in the countries where the money is held);
- Prevention and detection of transfers of proceeds of crime (article 52);
- Identification, tracing, freezing or seizure of the proceeds of crime (article 31). In particular, article 31 calls for the adoption of laws to allow rapid freezing procedures (24 hours);
- In terms of burden of proof, many recipient countries require victim countries to prove that assets were not obtained legally before considering freezing or confiscating assets. Article 20 calls for recipient countries to consider criminalising unexplained, substantial increase in wealth of public officials and allowing confiscation of assets where public official cannot demonstrate the lawful origin of their wealth (article 31);
- Measures for direct recovery of property (article 53);
- Measures for recovering through international cooperation in confiscation (articles 54 & 55). Typically, jurisdictions only allow confiscation of assets on the basis of criminal conviction. Article 54 recommends that States Parties establish non-criminal systems of confiscation, which lowers the standard of evidence and loosens traditional safeguards on international cooperation;
- Return and disposal of assets (article 57).

UNCAC includes provisions on the importance of providing technical assistance to developing countries. States are also required to develop specific training programmes and afford one another the widest measure of technical assistance. The collection, exchange and analysis of information is provided for, as are practical measures to intensify cooperation at various levels, enhance financial and material assistance to support the efforts of developing countries and countries with economies in transition to prevent and fight corruption effectively (International Centre on Asset Recovery, Website).

Need for an effective review mechanism

UNCAC represents the expression of a national and international intent to fight corruption with a concomitant set of obligations that signing parties take up to enact national laws. Its effectiveness in combating corruption and illicit flows depends on the level of implementation at the national and international levels. To support effective implementation of the Convention, it is very important to set up a transparent and inclusive monitoring process. In the absence of such mechanism, the existence of such an international framework may have limited impact. For example, standards of implementation are still very low in some AML areas, especially with regard to enhanced due diligence for PEPs, and such issues would need to be taken up in the UNCAC review process.

As the banking system may wield a very strong influence on government policy making, it is also important that civil society be given a voice in international for a discussion on related issues and be actively involved in the monitoring process. Civil society can also play an important role in the process by being given standing to bring complaints and law suits, when governments lack the political will to effectively tackle these issues.

4 The potential of national legislation at the international level: the example of the Dodd-Frank Act

Examples of national laws with global impact

Regulatory enforcement of anti-corruption is increasing both at the national and international levels, as seen in current enforcement trends of the US Foreign Corrupt Practice Act (FCPA). The US Department of Justice (DOJ) and the Securities and Exchange Commission⁵ (SEC) have become increasingly aggressive in their pursuit of FCPA violators. They have pursued

⁵ The SEC is a federal agency which holds primary responsibility for enforcing the federal securities laws and regulating the securities industry, the nation's stock and options exchanges, and other electronic securities markets.

more violations in the last 5 years than they have since the law was created in 1977 and imposed record-breaking fines and penalties. A 2010 survey of five notable cases illustrates these legal enforcement trends and offers insights into the legal manoeuvres that enforcers are using to broaden the scope of crimes that fall within the reach of the FCPA (Verman Yap Ong, A., 2010). As the FCPA applies not only to American companies but to any company listed on the US stock market or with a US footprint, it is evolving to become one of the most aggressive extra-territorial laws in the US.

The new UK Bribery Act⁶ which was due to take effect in April 2011 provides another example of this trend (Cote-Freeman, S., 2010). The UK Bribery Act is regarded as one of the strictest legislations in the world to date, with ground-breaking provisions such as the introduction of a corporate offence of failure to prevent bribery, the prohibition of facilitation payments and stringent provisions related to foreign public officials. In addition to bribery of foreign officials, the act prohibits illicit payments between private business people. Similar to the FCPA, the UK Bribery Act provides for extraterritorial application⁷ of its provisions and imposes strict anti-corruption requirements on any companies doing business in the UK, regardless of where the company is based.

As such, both acts illustrate how national legislation can have an impact on the international environment through extraterritorial application of anti-corruption laws.

⁶ The 2002 Proceeds of Crime Act in the UK also contains powerful provisions to counteract illicit financial flows and has been used with quite some efficiency in the combating of corruption. It does not have, however, extraterritorial application per se, although you can apply for a Mareva injunction order which you could enforce anywhere.

⁷ More specifically, the act will apply to firms incorporated under the law of any part of the United Kingdom, any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, any partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

The example of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Overview

The recently passed **Dodd-Frank Wall Street Reform and Consumer Protection Act** reflects a similar trend towards creating a more aggressive regulatory environment and, according to some experts consulted within the framework of this query, could potentially have an impact on business behaviour at the international level that goes beyond existing intergovernmental instruments such as the UNCAC.

The Dodd-Frank Act is a US federal statute that was signed into law on 21 July 2010 as part of the current administration's financial regulatory reform agenda. As such, the Act is not directly connected to UNCAC except through the impact it can have on corruption by improving accountability and transparency in the global financial system. In the aftermath of the global financial crisis, the Act represents an overhaul of the existing financial regulatory structure through the creation of a set of new agencies in an effort to streamline the regulatory process and increase oversight of specific institutions regarded as representing a systemic risk. It represents a significant shift in the American financial regulatory environment with a voluminous and far reaching set of regulations affecting almost every aspect of the nation's financial services industry. The Dodd-Frank Act also contains a number of corporate governance-related provisions. In particular, the Act significantly increases the influence of shareholders on corporate governance matters, provide financial incentives for corporate whistleblowers and impose greater transparency requirements, particularly in the energy and mining industries.

By addressing the regulation of the US global capital markets, this legislation is expected to affect every financial institution that operates in the US, many that operate from outside the US, as well as a large number of multinationals and commercial companies. As such, effective enforcement of the Dodd-Frank Act could have an impact on illicit flows by creating a more strictly regulated, transparent and accountable global financial environment.

Potential impact of the Dodd-Frank Act

Given the wide range of topics covered by the Act and extent of the regulations to be implemented, it is difficult

to assess at this point the full impact the Act may have on anti-corruption in general and on national responses in particular. This section will look more specifically on potential impact of both the whistle-blowing provisions and the extractive industries disclosure provisions of the Act on enforcement of anti-corruption laws.

Whistleblowing provisions

Section 922 of the Act authorises the provision of substantial cash rewards to whistleblowers that voluntarily provide the SEC with original information leading to the successful prosecution of securities laws violations, (International Law Office, 2010). The SEC can grant rewards up to 30 % of monetary sanctions imposed over USD 1 million for providing information that leads to successful enforcement action. The Act also provides whistleblowers with unprecedented protections against employer retaliation, including reinstatement, receipt of double back-pay, and entitlement to litigation costs. As such, the Dodd-Frank Act can be seen as an example of national implementation of Article 33 of the UNCAC on whistleblower protection. FCPA violations are among the offenses that could potentially net whistleblowers a sizable windfall under the Act (Diaz, M. and al, 2011).

In light of the record fines and penalties recovered in recent FCPA enforcement actions, monetary rewards could potentially reach millions of dollars. According to the SEC annual report on the whistleblower program, the Commission has already established a fund of USD 452 million for this purpose (SEC, 2010).

In the general context of aggressive enforcement of the FCPA, this monetary incentive is expected to result in an increased number of complaints submitted to the SEC, including on corruption-related matters, leading to more inquiries and investigations. Given the extraterritorial dimension of the Act, this could also potentially lead to more reporting of corruption cases that take place abroad. Beyond this expected increase in whistleblower allegations and associated investigations, it is too early to speculate on how this legislation will potentially influence other countries' approaches to whistleblowing and enforcement.

For companies, the Act has clear implications, as they need to review their compliance programs to ensure that they are in line with the Dodd-Frank requirements. As companies face increased risks of fraud and corruption-related prosecutions under the Act, those exposed to corruption risks have been advised by

accounting and consulting firms to review their anti-corruption compliance policies and procedure to effectively address these risks and adapt to the changing enforcement environment (Rial, E. and Corbett, K., 2011).

In spite of their potential on fighting corruption and illicit financial flows, these provisions have received mixed response by private sector experts, who are concerned about the potential for abuse and fear that the Act gives employees strong incentives to bypass their companies' internal reporting system, undermining the viability of existing corporate compliance programs (Diaz, M. and al, 2011). There is also a risk of flooding regulators and wounding companies' reputation with a large number of formal complaints based on weak or frivolous grounds.

Transparency requirements

The Dodd-Frank Act also imposes new disclosure and reporting obligations on securities issuers that engage in natural resource extraction projects abroad, an area which is traditionally highly vulnerable to resource plundering, embezzlement and diversion. It requires oil, gas, and mining companies to disclose key financial data relating to their overseas operations on a country-by-country basis, placing a heavier regulatory burden on companies which tend to operate in opaque environments. These provisions represent a major step in the direction of what many advocacy organisations and networks have been advocating for in recent years, calling 1) for companies to disclose anti-corruption measures and key organisational and financial data, especially on a country-by-country level; 2) for governments that are home to oil and gas producers to make country-by-country reporting by companies of their operations and revenues mandatory and, 3) for European Union regulations, international stock exchanges and generally accepted accounting standards to also mandate companies report on a country-by-country basis (Transparency International, 2011).

The related provisions of the Act promote revenue transparency and largely mirror the Extractive Industries Transparency Initiative (EITI)'s transparency standards, which is a voluntary multi-stakeholder disclosure scheme (Firger, M., 2010). Unlike the EITI, the Dodd-Frank Act makes its disclosure obligations mandatory, which can contribute to prevent the generation of illicit flows associated with the plundering of natural resources - provided the various stakeholders have both the incentive and capacity to use the

disclosed information to prevent and detect misconduct. Although there are still some uncertainties about compliance requirements, targeted companies and type of payments to be disclosed, companies are advised to review their existing compliance and financial record-keeping procedures to determine if they can ensure that all payments to foreign governments or to the federal government are properly tracked and recorded (International Law Office, 2010).

At the same time, while momentum is building in the European Union and the UK to adopt Dodd-Frank type transparency laws, some companies have been quite critical of these provisions, arguing that Dodd-Frank transparency requirements infringe national sovereignty and threaten to destroy progress that oil and gas companies and governments have achieved in disclosing money flows between each others. According to Peter Voser, the Chief executive of Royal Dutch Shell speaking at a conference in Paris in March 2011, "*Dodd-Frank treats foreign governments not only as irrelevant, but as a problem and not a solution. (...) it may even require companies to violate sovereign laws to disclose information that the laws do not allow*" (MacNamara, W. and Thompson, C., 2011).

In spite of such comments, the act has received broad international support. According to EU officials, momentum is also building across the European Union to replicate the corporate transparency enforcements contained in the US Dodd-Frank bill, with draft bill proposals for what is referred to as Dodd-Frank plus expected by November 2011, which could require even fuller disclosure of money flows between companies and governments and extend to other types of companies (Tax research UK, 2011).

5 References

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