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The Foreign Corrupt Practices Act and Overseas Environmental Crimes: How Did We Get Here and What Happens Next?

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The regulation of natural resources by developing countries, including through limits on the harvesting of local fish or the extraction of lumber, has evolved into a major new risk area for a wide range of companies. Inconsistent or ineffective local enforcement, cultural expectations of bribery, and the huge profits at stake are adding up to increasingly high levels of risks of concurrent violations of environmental and anti-corruption laws.

Environmental regulation by any country creates a series of touch points between the private sector and government authorities, any one of which may provide an opportunity and a temptation for an unscrupulous employee or agent of a company to seek to corruptly influence a government official. Opportunities for corruption occur, for example, from the moment officials decide how to regulate local natural resources through laws and regulations; how and when they decide who may harvest resources and in what amounts; how permit requests are reviewed; and how local laws are actually enforced in practice. Each point of contact creates an opportunity for offering or making bribes or otherwise seeking improper influence. And, of course, the risks of having a rogue employee or agent corruptly influencing environmental regulators are greatest in countries already prone to corruption, through weak governance structures, poorly paid employees, and local expectations of payments in return for government actions or inactions.

The connection between bribery and environmental crimes is real, and so are the risks to companies wishing to avoid being the target of a government investigation or enforcement action. Corrupt acts to influence the enforcement of foreign environmental laws are unfortunately common. For those subject to U.S. jurisdiction, which frankly is most of the world, this illegal conduct can lead concurrently to violations of two major U.S. statutes now being enforced vigorously: (i) the Foreign Corrupt Practices Act, which prohibits offering or paying bribes to foreign government officials at any level of government, and (ii) the Lacey Act, which prohibits trafficking in wildlife and plant products in violation of foreign law. Enforcement of both of these laws by U.S. authorities is increasing, and companies involved in international commerce in fish and wildlife, lumber, or paper products, for example, must be increasingly vigilant to avoid being caught up in bribery schemes related to imports into the United States that violate foreign environmental law.

Connections Between Corruption and Foreign Environmental Crimes

The connections between corruption and environmental crimes are very much in the news, frequently highlighted and exposed by international organizations, nongovernmental organizations, and individual nations in reports, investigations, and prosecutions. A recent report by the United Nations Environment Program laid out the many connections between violations of conservation laws and bribery, both as a general matter and with specific reference to connections between corruption and illegal exploitation of fisheries in West Africa:

Fisheries crime undermines resource conservation; threatens food security and livelihoods; is linked to up- and down-stream crimes including money laundering, fraud, human trafficking, and drug trafficking; and is destabilizing vulnerable coastal regions, such as West Africa, due to its close links with corruption.[1]

A 2011 report from the United Nations Office on Drugs and Crime titled Transnational Organized Crime in the Fishing Industry tells a similar story, collecting examples of investigations and reporting on corruption in the fishing industry in countries around the world and at various stages of the environmental regulatory process.[2] The 2011 U.N. report details allegations in the Solomon Islands related to corruption during the licensing and oversight process, with suggestions of illegal actions both by lower-level licensing officials and government ministers.[3] In the coastal states in Africa, there have been allegations of fishing licenses being issued by officials “with a direct interest in the fishing industry, often fishing vessel owners or partners in fishing vessel operations, as well as persons associated with the fishing industry such as shipping agents.”[4] In Japan and Russia, there have been reports of possible payments by Japanese fisherman to Russian officials in return for fishing rights.[5]

Illegal logging raises similar concerns about corruption. In 2010, the United Nations Office on Drugs and Crime reported on illegal logging in Indonesia:

Illegal logging [in Indonesia] relies on corruption to stay in business. It depends on the complicity of officials throughout the entire production chain from forest to port, including forest rangers, local government, transport authorities, police and customs. Organized criminal groups are involved in transporting illegal timber, as well as endangered species, out of the country and across multiple borders.[6]

And, earlier this year, a report by the nonprofit Environmental Investigation Agency about illegal logging in Peru exposed significant connections between illegal logging and corruption involving numerous companies and government officials.[7] EIA described an elaborate scheme of corrupt Peruvian authorities issuing false documentation permitting loggers to remove trees that simply do not exist, and a black market where these phony permit documents are traded and then used to launder wood extracted illegally from such places as national parks, indigenous territories, or other public lands.[8]

One of the most well-known recent Lacey Act prosecutions involved the joint efforts by U.S. and South African authorities to break up a scheme of illegal harvesting of rock lobster in South Africa. In United States v. Bengis, the defendants engaged in a scheme to illegally harvest large quantities of rock lobsters in South Africa for export to the United States, in violation of the South African Marine Living Resources Act and South African export controls.9 In addition to the Lacey Act violations, the evidence in the case showed that the Bengis organization paid 14 South African fisheries inspectors bribes during the course of the scheme.10 Recipients of the bribes were charged and prosecuted in South Africa.

Expanded U.S. Enforcement Relating to Foreign Conservation Laws

Congress enacted the Lacey Act in 1900. It is the nation's oldest wildlife statute.11

Although the Lacey Act originally was designed to protect U.S. migratory birds, Congress has expanded the statute's reach through the years. It has been used repeatedly to prosecute overseas illegal activity in the fisheries industry, including important cases involving violations by U.S. defendants of fisheries laws and regulations of Honduras and Taiwan.12

Most recently, in 2008 Congress expanded the act to cover any plant or plant product—including paper and wood—taken or logged in violation of a federal, state, or national law, including foreign laws. The 2008 amendment was intended in part to help counter the world's illegal logging trade by making it a crime to knowingly import wood unlawfully logged elsewhere in the world and to protect American forestry jobs against cheap and illegal wood imports.13

Recent attention on the Lacey Act has focused on the first set of enforcement proceedings brought against the plant and plant products amendments to the act. The U.S. Fish and Wildlife Service's searches at Gibson Guitars in 200914 and 201115 and subsequent investigations have led to a very public, sometimes acrimonious, and always fascinating discussion about the scope and purpose of the Lacey Act.16 In the 2009 search, which brought the matter to national attention, federal agents seized guitars made partially from ebony and "ebony wood in various forms," such as fingerboards and guitar necks, that allegedly had been harvested and exported in violation of the law of Madagascar.17

Exposure Under the Foreign Corrupt Practice Act

Virtually any case involving U.S. jurisdiction under the Lacey Act and corrupt interactions with foreign officials also will implicate foreign bribery and therefore the sweeping jurisdiction of the Foreign Corrupt Practice Act.18 The FCPA—which the Department of Justice and the Securities and Exchange Commission like to enforce with particular vigor and enthusiasm—criminalizes corrupt payments to foreign officials, and can play a role wherever logging or fishing involves illegal payments to foreign officials. The FCPA was enacted in 1977 and amended in 1998, but enforcement has increased dramatically in the past five years. Though there is no explicit statutory link between the Lacey Act and the FCPA, the possibilities are endless: Potential bribe takers in forestry and fishery schemes could run the gamut from the police, to forestry and fishery officials, to guards, to regulators, to customs and export officials, and even to officials at state-owned companies. All of these are government officials within the meaning of the Foreign Corrupt Practices Act. While there has been no public case charging both Lacey Act and FCPA violations thus far, we believe such investigations may well be just around the corner, and, in any event, responsible companies should do what it takes to protect themselves from the risks.

The DOJ and SEC have a long history of educating themselves in the practices of particular industries and then targeting those industries where they believe that anti-corruption efforts are lagging. In the recent past, for example, the government has set its sights on the oil, telecom, and pharmaceutical industries. The current press and high-profile cases involving alleged corruption abroad related to environmental laws and regulations only heighten the likelihood that the government will focus on an FCPA matter involving illegal fishing or logging—particularly in light of the heightened public focus on supply chain and environmental issues.

The FCPA is notable for how broadly it was drafted and how vigorously it is enforced. It prohibits U.S. corporations and individuals, or those acting on their behalf, from corruptly giving anything of value to a foreign official in exchange for the official acting or failing to act, securing an improper advantage, or in order to obtain or retain business.19 The FCPA also applies to non-U.S. firms that cause, directly or through agents, an act in furtherance of a corrupt payment to take place within the territory of the United States. Under some circumstances, non-U.S. companies that sell product to U.S. firms can also fall under the FCPA umbrella, perhaps finding themselves charged with conspiracy to violate the FCPA or aiding and abetting a violation.

The scope of the FCPA is staggering, as it encompasses corrupt payments made to government officials to facilitate matters as diverse as granting an import or export license, approving an inspection, awarding a contract, not imposing a duty or tax obligation, modifying a regulatory requirement, or granting or expediting visas. The United Kingdom has implemented similar anti-bribery legislation.20 The Bribery Act applies to UK citizens, residents and companies established under UK law, for corrupt actions anywhere in the world. Somewhat remarkably, non-UK companies which do business in the UK also can be held liable for failing to take adequate steps to prevent bribery and are found to be responsible, for example through their personnel or agents, of acts of corruption.

Increased Worldwide Enforcement of Anti-Corruption Laws

As noted, the United States, United Kingdom, and other countries are ramping up enforcement of anti-corruption laws. In the United States in the last two years, for example, the DOJ brought 71 enforcement actions against companies and individuals, while the SEC brought 51 such enforcement actions.21 The penalties in those two years totaled approximately $2.45 billion.22 The last year also saw the longest FCPA-related jail sentence ever: a 15-year sentence for the former president of a Miami based telecommunications company for his role in a bribery scheme involving officials at a government-owned Haitian telecom firm.23 In addition to the jail time and the criminal and civil penalties, companies are spending millions of dollars on investigations into suspected FCPA violations, as well as shareholder derivative suits. The U.K. Serious Fraud Office, which enforces the U.K. Bribery Act, has made clear that it will vigorously enforce the act.24

Companies and persons involved in corrupt acts overseas also are at risk of prosecution under the local law where the conduct took place. Most countries have become party to the U.N. Convention Against Corruption (UNCAC), which requires nations to put in place anti-bribery laws, enforce those laws, and cooperate with other countries that are investigating whether their citizens have engaged in corrupt activities anywhere in the world.25 Even before the UNCAC, the members of the Organization for Economic Cooperation and Development (OECD), including most of the major industrialized countries, became parties to the sweeping 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires parties to enact laws similar to the FCPA.26

A number of countries central to the forestry and fishing industries are overhauling their anti-corruption laws. As examples, a bill before Indonesia's Parliament would criminalize bribery of foreign officials and private sector officials. Foreigners also can be charged with corruption under the new law.27 India similarly is grappling to overhaul its anti-corruption laws, with great political pressure to pass a strict law that will address India's extreme bribery problems.28 And Brazilian President Dilma Rousseff has been aggressively pursuing anti-corruption initiatives since taking office, leading to several high-profile arrests and close cooperation with the United States on new government transparency programs and laws.29

Looking Ahead and Taking Action

With all of the illegal logging and fishing taking place, companies should be aware that an “I don't bribe” defense will not save them under the FCPA and analogous laws. In some circumstances, they may be held responsible for the corrupt actions of persons acting corruptly on their behalf. In addition, liability may be triggered if a company covered by the FCPA is aware of a bribe or suspects one is likely, or if it deliberately avoids knowledge of a corrupt act. For instance, Halliburton/KBR paid over $500 million in penalties for illegal payments made by agents hired by its joint venture to bribe Nigerian government officials.30 Biomet Inc. recently was investigated and settled a major investigation involving alleged illegal payments in China and Latin America.31

To avoid undue risks of liability for the actions of third parties or others, a company should make a serious assessment of its corruption risks, including examining carefully the myriad interactions it is likely to have with government officials, such as customs officials, regulators, or, especially in the logging and fishing industries, inspectors. It should develop and implement an effective, written anti-corruption compliance program that addresses those risks, and put a system in place to review third parties who will interact with foreign officials and limit hosting and gifts provided to government officials. It should train employees on its anti-corruption program to ensure they understand the rules and monitor the program to be sure it works.

Companies subject to U.S. jurisdiction potentially can help themselves when they uncover a suspected FCPA violation by undertaking an internal investigation into the matter. Once the facts are fully known, a company may decide to try to limit the potential damage by proactively self-reporting the results of its investigation to the SEC and DOJ. The government encourages this practice and has stated that there will be “meaningful credit” given to the company for such cooperation, as it helps the government root out and prevent corruption, with relatively little cost to the government because the company bears the expense of conducting the investigation itself.32 Additionally, companies trying to avoid trouble, but concerned that some of their planned activities could implicate the FCPA, can submit the facts to DOJ in advance to obtain an opinion about whether the specified prospective conduct conforms with DOJ's enforcement policies.33

Environmental corruption has taken a prime spot in the news cycle, and companies in the forestry, paper, and fishing industries need to pay attention. As mentioned previously, harvesting and trade in wood and wood products and highly sought-after seafood often takes place in developing countries that present high corruption risk—just think of Indonesia, Cameroon, Brazil, Malaysia, Peru, Madagascar, and India—all of which have been deemed “highly corrupt” by the Transparency International's Corruption Perceptions Index.34

Conclusion

The connections between environmental crimes and corruption are broad and deep, and enforcement is increasing in both areas. The potential for huge profits from illegal environmental activity has led to corrupt acts both by rogue employees or agents of companies seeking to profit from lax enforcement and by unethical government officials. The increase in international attention and enforcement actions has heightened the risks and exposure and requires enhanced vigilance. It is imperative for companies to take proactive steps now to review policies and procedures and ensure that comprehensive anti-corruption compliance programs are in place—before enforcement authorities come knocking.

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