

FCPA Update

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Technip S.A. and Snamprogetti Settlements Highlight the Importance of Due Diligence When Selecting Joint Venture Partners

On June 28 and July 7, 2010, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) reached agreements to settle alleged FCPA violations with Technip S.A., a French global engineering, construction, and services company, and Snamprogetti Netherlands B.V., a wholly-owned Dutch subsidiary of Snamprogetti S.p.A., which is an Italian engineering, procurement, and construction company.

Technip and Snamprogetti were two of four partners in a joint venture, TSKJ, which purportedly bribed Nigerian government officials over a ten-year period in order to win more than \$6 billion in construction contracts. Technip, Snamprogetti, Kellogg Brown & Root LLC (“KBR”), and JGC Corporation, a Japanese company, owned TSKJ in equal shares. The joint venture operated out of entities incorporated in Portugal.

According to the SEC complaints, senior executives at Technip, Snamprogetti, and the other joint venture partners formed a “cultural committee” to consider “how to implement, but hide, the scheme to pay bribes.”¹ The joint venture allegedly funneled payments to high-ranking Nigerian officials through an agent based in the UK and to low-ranking Nigerian officials through an agent in Japan. These agents were sometimes referred to as “Cultural Advisors.”² Over the course of ten years, the joint venture supposedly paid \$132 million in bribes through the UK agent and \$50 million through the Japanese agent. In return, the joint venture allegedly won contracts to build more than \$6 billion worth of liquefied natural gas production facilities in Nigeria.

Technip agreed to pay a \$240 million criminal penalty and enter into a two-year deferred prosecution agreement with the DOJ that requires the company to retain an independent compliance monitor for two years and to cooperate with the government’s

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¹ *SEC v. Technip*, Civ. No. 4:10-cv-02289, Complaint ¶ 12, (S.D.Tex. (Houston) 2010) available at <http://www.sec.gov/litigation/complaints/2010/comp-pr2010-110.pdf>.

² *Id.* at ¶ 13.

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Our First Year of Publication

This issue marks *FCPA Update*'s 12th monthly issue and our first full year of publication. Through reports on the *Bourke* and *Green* trials, the *Nature's Sunshine* "control person" liability settlement, and significant resolutions in the *Daimler AG*, *UTStarcom*, *Innospec*, and *BAE Systems* matters, to name a few, and with periodic updates on developments related to anti-bribery compliance in the BRIC countries, the editors and staff of *FCPA Update* have sought to contribute to the ongoing discussion of enforcement trends and best practices for compliance with the U.S. Foreign Corrupt Practices Act. As we head into our second year of publication, we look forward to continuing to serve our readership. We welcome article ideas and comments, which may be forwarded to any of the editors listed on the masthead within.

– Steven S. Michaels
Managing Editor

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ongoing investigation. Snamprogetti also agreed to pay a \$240 million criminal fine and enter into a two-year deferred prosecution agreement, but is not required to retain an independent monitor. Additionally, Technip agreed to disgorge \$98 million to settle the SEC's charges, and Snamprogetti and its former parent company ENI S.p.A. agreed to disgorge \$125 million. To date, three of the four TSKJ joint venture partners have settled with US authorities for a total of over \$1.28 billion in civil and criminal penalties.³

Lessons for Joint Ventures

After KBR became the first company in the joint venture to settle and agree to cooperate with the US government's ongoing investigation, the other joint venture partners soon followed. In fact, less than one year after KBR settled, Technip and Snamprogetti had already announced that they were setting aside reserves to pay for potential future settlements.

Most recently, on July 12, 2010, only five days after Snamprogetti announced its settlements with the government, JCG Corporation, the fourth TSKJ joint venture partner, disclosed in its annual report that the "DOJ has been in contact with JGC regarding their investigation of the TSKJ matter and JGC and DOJ are engaging in discussions about a potential resolution of that investigation relating to JGC."⁴ It may not be long before all four joint venture partners will have settled FCPA charges.

Because joint venture partners share liability for FCPA violations, this case highlights how critical it is for companies to select joint venture partners carefully and to conduct thorough due diligence. Companies should scrutinize all agents, consultants, distributors, and other third parties when entering into joint venture relationships. Additionally, companies should take extra steps during project performance to ensure that their joint venture partners are continually compliant with the FCPA. The ideal joint venture partner will have a comprehensive compliance program, employee and management training, a top-down culture of compliance, and will conduct extensive due diligence on third parties and agents.

International Cooperation and Extraterritorial Jurisdiction

The Technip and Snamprogetti settlements also demonstrate the international reach of recent FCPA enforcement efforts. Although Technip is a French company, it listed American Depository Receipts ("ADRs") on the New York Stock Exchange ("NYSE") from 2001 through 2007. Snamprogetti, a Dutch company, is a wholly-owned

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³ DOJ Press Rel. 10-780, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty, (Jul. 7, 2010), <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html>. See also SEC Litig. Rel. No. 21588, Securities and Exchange Commission v. ENI, S.p.A. and Snamprogetti Netherlands, B.V., Case No. 4:10-cv-02414, S.D. Tex. (Houston), (Jul. 7, 2010), <http://www.sec.gov/litigation/litreleases/2010/lr21588.htm>.

⁴ JGC Annual Report, (May 14, 2010), available at <http://www.mainjustice.com/wp-content/uploads/2010/07/JGC-annual-report-bonny-island.pdf>.

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subsidiary of Snamprogetti, S.p.A., an Italian company, which in turn is a wholly-owned subsidiary of ENI, an Italian multinational oil and gas company, which lists its ADRs on the NYSE. These connections to US stock exchanges allowed the US government to investigate and prosecute the companies. JCG has never listed shares on a US stock exchange; thus the SEC does not have jurisdiction. The DOJ, however, may still have jurisdiction based on co-conspirator liability, as well as on JCG's own independent conduct to the extent that conduct otherwise had a jurisdictional nexus to the US.

Furthermore, the settlements showcase the high level of international cooperation between enforcement agencies, a hallmark of recent FCPA enforcement. In their press releases, the DOJ and SEC thanked the authorities in France, Italy, Switzerland, and the United Kingdom for their significant assistance and cooperation.⁵ The prosecutions of Technip and Snamprogetti were truly global efforts, and this trend shows no sign of slowing.

Instrumentality of a Foreign Government

A further lesson from these cases lies in the manner in which the government characterized recipients of alleged corrupt payments. As the DOJ and SEC acknowledged, the Nigerian government owned only 49 percent of Nigeria LNG, the company created to capture and sell Nigeria's natural gas, and whose officials allegedly accepted the joint venture's bribes.

Even though the Nigerian government did not have majority control of Nigeria LNG, the US enforcement agencies reasoned that Nigeria LNG was still an “instrumentality” of the Nigerian government because it had effective control by virtue of the fact that the government appointed a number of the Nigeria LNG board of directors.

Although the DOJ and SEC have not provided guidance regarding their understanding of what constitutes an “instrumentality” of a foreign government, it is clearly not limited to simple majority control of a company. A company can also be considered an instrumentality of a foreign government if that government exercises substantial control—known as “control in fact”—over the company. Consequently, one must evaluate the totality of the circumstances when determining whether a company will be deemed an instrumentality of a foreign government, including the government's control over the board of directors and management, as well as the nature of the company's business.

Because Congress, the courts, and regulatory agencies have not provided guidance on how to define the term “instrumentality,” an analogous control-in-fact test found in a similar context can provide a useful roadmap. The Foreign Sovereign Immunities Act (“FSIA”), which provides the circumstances under which a foreign sovereign nation—or its political subdivisions, agencies, or instrumentalities—may be sued in US courts, defines an “agency or instrumentality” as any entity

which (i) has a separate legal identity; (ii) is either (a) an “organ of a foreign state or political subdivision” or (b) a “majority of whose shares or other ownership interest” is owned by a foreign state or political subdivision; and (iii) is not a citizen of the US and is not “created under the laws” of a third country.⁶

Although the different circuit courts take various approaches in determining whether an entity is an “organ” of a foreign state, many circuits, including the Second, Third, Fifth, and Ninth Circuits, employ a multifactor control-in-fact analysis. This analysis examines “the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.”⁷ This comparison between the FSIA and the FCPA is instructive because both statutes use the term “instrumentality” in a similar context, but the courts have clearly applied a control-in-fact test to the FSIA. ■

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⁵ See DOJ Press Rel. and SEC Litig. Rel., note 3, *supra*.

⁶ Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b) (2009), available at <http://uscode.house.gov/download/pls/28C97.txt>.

⁷ *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807-08 (9th Cir. 2001), affirmed on other grounds, 538 U.S. 468 (2003).

One Trillion Dollars: Fact or Fancy?

On May 31, 2010, Attorney General Eric Holder delivered remarks at the Organization for Economic Cooperation and Development (“OECD”) in Paris concerning the heightened commitment that the Department of Justice (“DOJ”), and the Obama Administration, more broadly, have made to combating corruption.¹ Holder invoked a speech then-Senator Obama made in 2006 at the University of Nairobi in which the future president stated that “the struggle against corruption is one of the great struggles of our time.”²

The Attorney General cited the World Bank’s 2004 estimate that over \$1 trillion in bribes are paid on an annual basis, accounting for three percent of the world’s \$30 trillion economy.³ The World Bank further calculated that corruption on foreign investments amounts to a 20 percent “tax” on such investments.⁴ The accuracy of these figures remains open to question. The World Bank calculated the \$1 trillion figure in 2004 using data collected in 2001-2002.⁵ Daniel Kaufmann, the former World Bank Institute Governance director, acknowledged in 2004 that the estimate is

“very rough.”⁶ Accurate or not, DOJ representatives have continually cited these figures over the course of this summer when speaking about the scope of the corruption problem and the corresponding importance of sustained anti-corruption efforts.

Stating that as Attorney General, he has made fighting corruption one of the government’s highest law enforcement priorities, Holder described the DOJ’s participation in the Financial Fraud Enforcement Task Force, which is the largest anti-fraud coalition in American history, with other US enforcement agencies. He explained, “We’re aggressively prosecuting perpetrators, sending a loud-and-clear message that they will be found, prosecuted, and punished.”⁷ Since 2004, the DOJ has prosecuted 37 corporations and criminally charged nearly 80 individuals for FCPA violations. In that same period, the United States has repatriated over \$156 million in the proceeds of corruption to victims abroad and is currently in the process of repatriating \$68 million more.⁸

Attorney General Holder further stated in his Paris speech that “the costs of

corruption are immeasurable....

[C]orruption erodes, even destroys, the faith of citizens in their governments.... [I]ts effects are felt most severely not by the powerful, but by the powerless.”⁹ A year and a half into the Obama Administration, such statements by senior Administration officials and the repeated citation to the World Bank’s \$1 trillion estimate of the corruption problem, constitute further evidence – if any were needed – that continued vigilance by corporate compliance officers and in-house legal personnel on questions related to anti-bribery compliance and controls is fully warranted. ■

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¹ Remarks as Prepared for Delivery by Attorney General Holder at the Organization for Economic Cooperation and Development, DOJ, (May 31, 2010) <http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html>.

² Barak Obama, “An Honest Government, A Hopeful Future,” Speech delivered at the University of Nairobi, (Aug. 28, 2006), available at <http://wragblog.org/2009/01/19/president-elect-obamas-2006-speech-at-the-university-of-nairobi/>.

³ “The Costs of Corruption,” World Bank, (Apr. 8, 2004), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187-menuPK:34457-pagePK:34370-piPK:34424-theSitePK:4607,00.html>.

⁴ “Six Questions on the Costs of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann,” World Bank, (Apr. 8, 2004), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295-menuPK:34457-pagePK:34370-piPK:34424-theSitePK:4607,00.html>.

⁵ “The Costs of Corruption,” note 3, *supra*.

⁶ “Interview with Daniel Kaufmann on Corruption - Can It Ever Be Controlled?,” World Bank Speak-Out, (Apr. 13, 2004), <http://discuss.worldbank.org/content/interview/detail/1196/>.

⁷ Holder, note 1, *supra*.

⁸ *Id.*

⁹ *Id.*