The Globalization of Anti-Corruption Law

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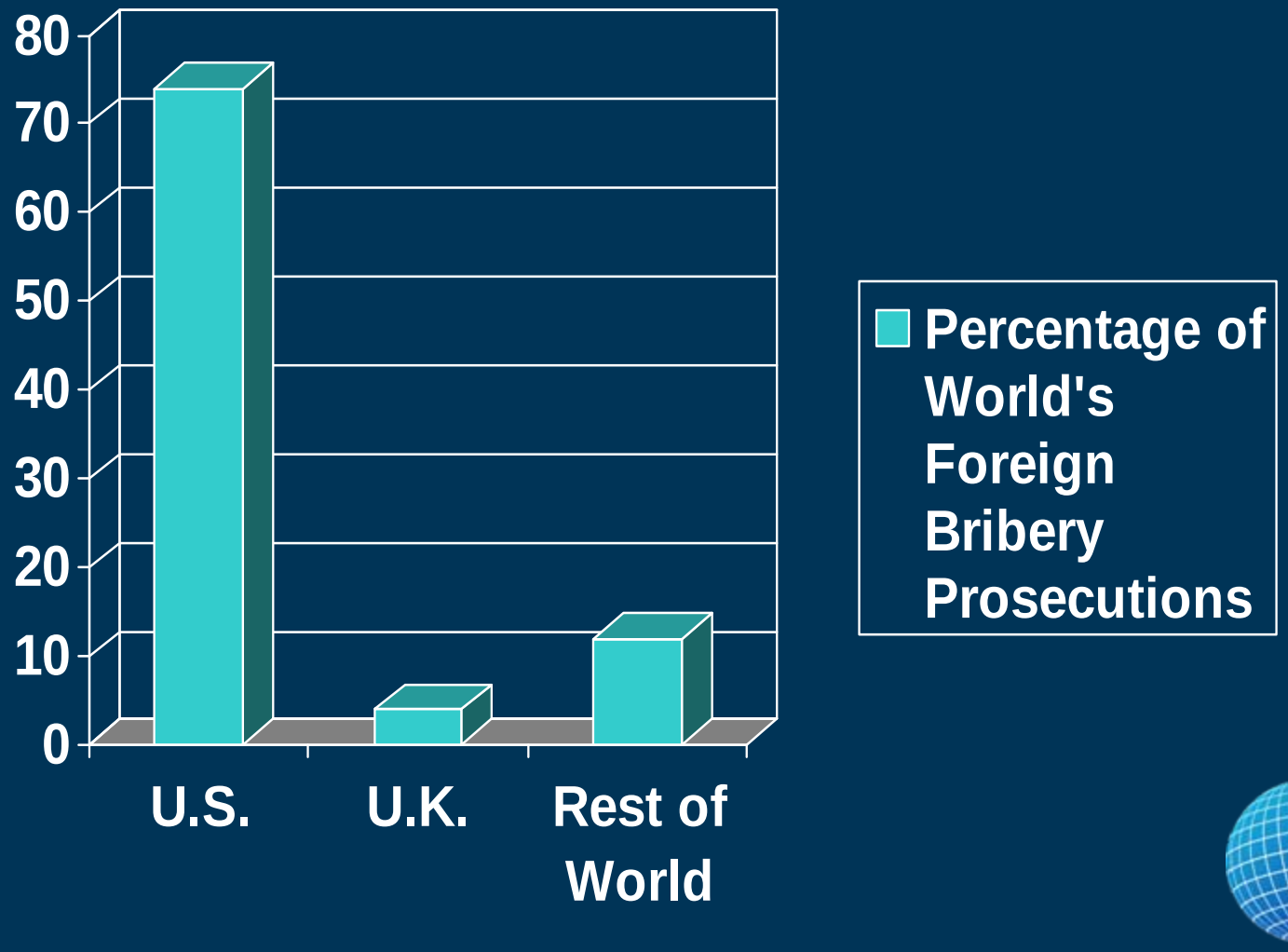
US Enforcement Picture

The US Leads Global Anti-Corruption Charge



FCPA's "Two Parts"

- **Anti-Bribery Provisions**
  - Foreign official
  - Political party/candidate
  - Public international organizations
- **Books & Records Provision**
  - Publicly traded US companies
    - Accurate books and records
    - Accurately and fairly report transactions and asset disposition
    - Adequate internal controls

Breaking Down the FCPA's Anti-Bribery Elements

- Offer/promise
- Directly or indirectly
- *Anything* of value
- To foreign official or group
- With corrupt intent (*quid pro quo*)
- To obtain or retain business (gain business advantage)

Applies to virtually all US companies

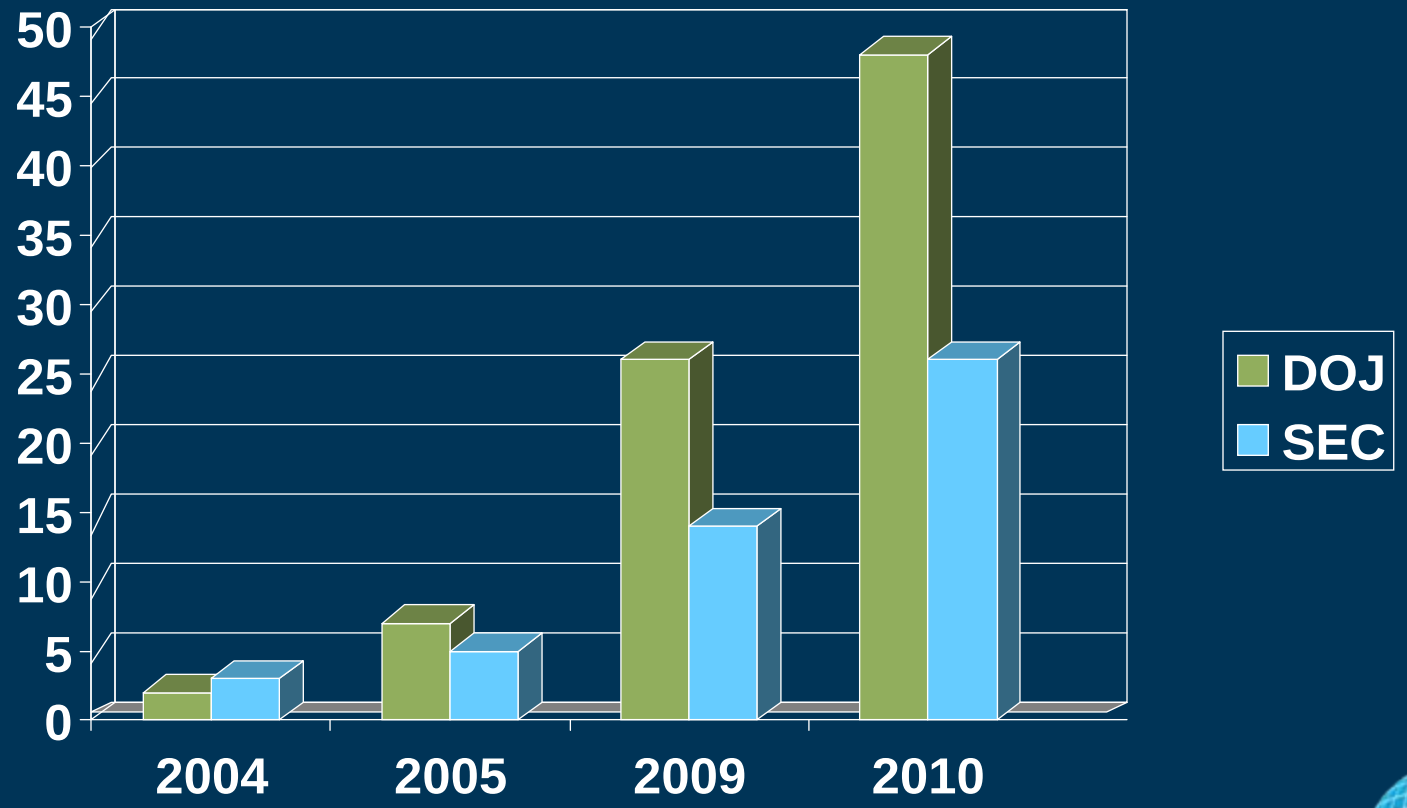
How It All Began…

For 30 Years, Not Much Happened…

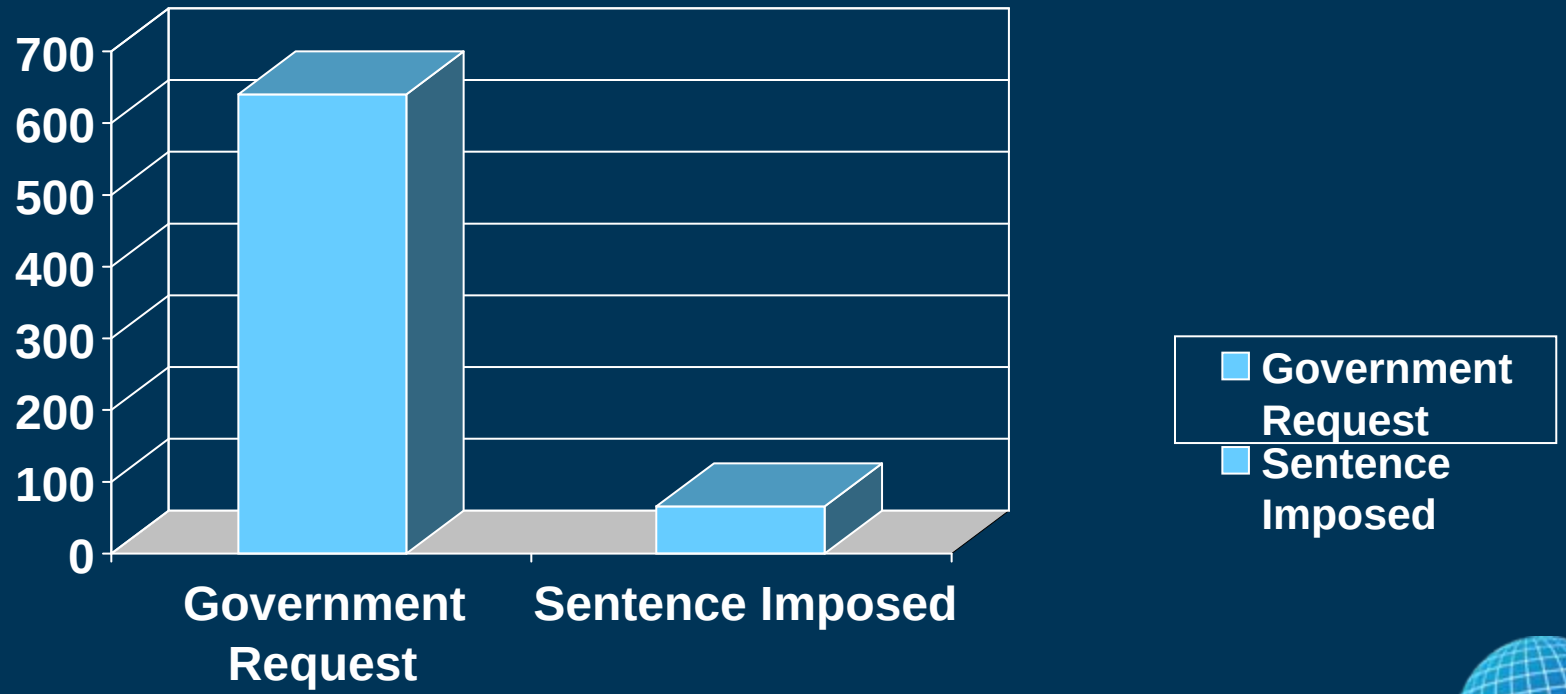
And then…

FCPA: Comeback Statute of Late 2000s

Enforcement Numbers Speak for Themselves



Government's Tough Sentencing Position for Individual Defendants



[Based on 2010 cases]

Standing at the Gate: External Enforcement/Compliance Pressure Mounting . . . .

Mission Accomplished? Lots of Eager "Tip Generators" Worldwide

Going Global: Enforcement in US and Beyond

Andrew S. Boutros (*in his personal capacity*)

Top Rankings – Big Numbers

2010

Company	Country	DOJ & SEC	Current Rank
BAE Systems	UK	$400 million	3
Snamprogetti/ENI	Holland/Italy	$365 million	4
Technip SA	France	$338 million	5
Daimler	Germany	$185 million	7
Alcatel-Lucent	France	$137.4 million	8
Panalpina	Switzerland	$81.9 million	9
ABB	Switzerland	$58.3 million	11
Pride International	*US*	$56.2 million	12
Shell	UK/Holland	$48.1 million	13

2011

JGC Construction	*US*	$218.8 million	6
Johnson & Johnson	*US*	$70.1 million	10

Cooperation with Foreign Authorities

- **Alcatel-Lucent (SD Fla Dec 2010)**
  - "[C]ooperate fully with such other domestic or foreign law enforcement authorities and agencies, as well as Multilateral Development Banks, in any investigation of Alcatel-Lucent" ¶ 5
- **Panalpina (SD Tex Nov 2010)**
  - Cooperate with "any other federal, state, local or foreign law enforcement agency" ¶ 9
- **Shell (SD Tex Nov 2010)**
  - "[C]ooperate fully with other domestic or foreign law enforcement authorities and agencies . . . in any investigation of [Shell]" ¶ 6

"Carbon Copy Prosecutions" Foreign Enforcement *After* DOJ/Section Action

- **Alcatel-Lucent**
  - $137.4 million to DOJ and SEC
  - $10 million to Costa Rican government
  - Under investigation in Honduras and Malaysia
- **Panalpina**
  - $81.9 million to DOJ and SEC
  - Under investigation in Nigeria
- **Shell**
  - $48.1 million to DOJ and SEC
  - $10 million to Nigerian government

Carbon Copy Prosecutions (Cont'd)

- **BAE Systems**
  - $400 million to DOJ
  - £30 million (~$46.5 million) to UK's SFO
- **Innospec**
  - $27.5 million to DOJ, SEC, OFAC
  - £8.5 million (~$12.7 million) to UK's SFO
- **Snamprogetti/ENI**
  - $365 million to DOJ and SEC
  - $30 million to Nigerian government
- **KBR** – acquired by Halliburton
  - $579 million to DOJ and SEC
  - $35 million to Nigerian government
    - Dropped criminal complaint against Vice President Cheney

Double Jeopardy No Bar to Successive Foreign-Federal Prosecutions

***US v Martin*, 574 F2d 1359 (5th Cir 1978)**

- "The Constitution of the United States has not adopted the doctrine of international double jeopardy.

***US v Richardson*, 580 F2d 946 (9th Cir1978) (per curiam)**

- (Same)

***Chua Han Mow v US*, 730 F2d 1308 (9th Cir 1984)**

- Describing contrary argument as "frivolous."

Generally same rule for successive state-federal prosecutions:

- USAM 9-2.031: Petite Policy

Unites States v Jeong, 624 F3d 706 (5th Cir 2010)

- South Korean national convicted in South Korea for paying bribes to American public officials
  - Time served – 58 days + ~$21,000 fine
- US submitted MLAT for evidence: USA "not seeking to further prosecute Jeong"
- Defendant traveled to USA
  - Bribery, wire fraud, and conspiracy
  - Sentenced to 5 years + $50,000 fine

Jeong (cont'd)

- Court held:
  - No violation of Convention on Combating Bribery of Foreign Public Officials in Int'l Business Transactions; Article 4.3 only required consultation upon request
  - Double jeopardy does "not attach when separate sovereigns prosecute the same offense . . . . "
  - Both US and South Korea had right to prosecute defendant

Moving Towards a True One-World Alliance?

Juliet Sorensen

World is Getting Smaller

- Anti-corruption efforts heating up around the world

- Bringing the anti-corruption world together? The history, goal, and Impact of the OECD's Anti-Bribery Convention

The G-7 and the OECD Anti-Bribery Convention: Compliance or Lip Service?

- Three Case Studies:
  - France
  - Germany
  - Japan

The Global Bottom Line:
Is there - and should we expect a world-wide consensus on anti-corruption?

Why a New UK Bribery Law Impacts on the US and its Business

Walter H. White, Jr.

Understanding the UK Bribery Act

What is a Bribe Under the Act?

- It is a crime to offer, promise or give a financial or other advantage to another person with the intention of:
  - Inducing a person to perform improperly a relevant function or activity; or
  - Rewarding a person for the improper performance of a relevant function or activity
- Bribe *recipients* also covered
- Offences apply to both the private *and* public sectors
- Can commit offence through a third party
- Act reaches conduct outside of UK territory
- Provides UK law enforcement a strong platform to modernize enforcement regime under comprehensive, unified legislation

Getting into the weeds: What does the UK Act actually do?

- Revolutionizes UK's approach to anticorruption enforcement
- Has attracted intense attention of lawyers, law enforcement and corporate executives throughout worldwide
- Replaces patchwork of outdated - and largely ignored - anticorruption laws and common law offences dating to World War I and before
- Modeled closely on FCPA, but reaches beyond it in a number of notable respects

UK Bribery Act: Differences and Impact

- One great advantage over FCPA: Robust compliance program = affirmative defense (in US, only mitigates sentence)

- Global impact? Why the Act promises to change the landscape in the UK, and potentially beyond

UK Anti-Bribery Law a shining example of the success of OECD or US "moral pressure" to fight corruption?

Why Bribery Act matters to you - and to the world?

- If you have a footprint in the UK you fall within the scope of the Act
- Could be held strictly liable for actions of third parties (as with FCPA)
- Contracting parties/vendors may insist on Bribery Act compliance
- Adequate procedures are business insurance – would you own factories and offices without insuring them?

- What positive/negative impact does such ramped-up enforcement have on multi-national companies and international commerce?
- Provide "Model Law" for other countries to follow?
- The lessons for other countries?

The View From North Of The Border

Tyler Hodgson

Outlining Canada's Enforcement Picture

- *Corruption of Foreign Public Officials Act*, SC 1998, c 34
- Transparency International (TI) report ranks Canada last among G7 nations in fighting corruption
- OECD expressed "significant concerns" over lack of enforcement

- Two convictions in 13 years:
  Niko Resources & Hyrdo Kleen

- Signs that Canada is becoming more active in bribery and corruption prosecutions
- Bill C-31, Clause 38: application of nationality principle
- RCMP Anti-Corruption Unit
- One outstanding prosecution (Nazir Karigar) and twenty active investigations

Parallel Investigations/Prosecutions

- What do you need to know if you represent a corporation with parallel corruption investigations in Canada and the US?
- Are targets of corruption investigations entitled to the same protections in both jurisdictions?

IT'S NOTHING PERSONAL
PEERAGE
HUNTING DOWN THE BLACK RHINO
MACKAY

Canadian v American Approach To Self-Incrimination

- S 13 of Canadian Charter: "*A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings*"

- 5th Amendment: "*No person shall...be compelled in any criminal case to be a witness against himself”*

US v Canada (cont'd)

- **Front-end protection v back-end protection:** *Hallstone Products* v *Canada Customs* (2006), 82 OR (3d) 368 (SC)

- "*In Canada a witness cannot refuse to answer a question on the grounds of self-incrimination but receives full evidentiary immunity in return. In the US, a witness can claim the protection of the 5th Amendment and refuse to answer an incriminating question. Once the answer is given, however, there is no protection*": *Catalsyt Fund General Partner I Inc v Hollinger Inc* (2005), 79 OR (3d) 70 (CA)

Domestic vs International Double Jeopardy

- Autrefois acquit/convict - Foreign convictions sustainable in Canada:
  R v *Stratton*, [1987] OJ No 3536 (CA)
  Bill C-31, Clause 38, ss 4(4)-(5)
- Not in the United States Application of "two sovereigns" doctrine to international medium: *US* v *Jeong*, 624 F3d 706 (2010)
- *International Transfer of Offenders Act*, SC 2004, c 21

Questions?