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The Other FCPA Shoe Drops: Expanded Jurisdiction over Non-U.S. Companies, Foreign Monitors, and Extending Compliance Controls to Non-U.S. Companies

On June 28, 2010, the U.S. Department of Justice and the U.S. Securities & Exchange Commission charged Technip, a French company, with conspiring with its joint venture partners to pay bribes to Nigerian officials as well as substantive violations of the U.S. Foreign Corrupt Practices Act's anti-bribery, books & records, and internal controls provisions. One week later, the U.S. authorities charged another joint venture partner, Snamprogetti Netherlands, and its parent, the Italian oil company Eni S.p.A., with similar violations. The pleadings provide revealing insights into how the U.S. authorities view the jurisdictional scope of the FCPA over non-U.S. companies and how they intend to force such companies to implement the U.S. government's view of what constitutes adequate and effective internal anti-corruption controls, thereby seeking to establish an international standard based on U.S. experience under the FCPA.

Background

Beginning in 1990, Technip, Snamprogetti, M.W. Kellogg (KBR's predecessor), and Japan Gas Corporation (now JGC Corporation) formed the TSKJ consortium to bid on contracts to construct natural gas "trains" on Bonny Island in Nigeria. According to the pleadings, the partners quickly concluded that it was necessary to pay bribes to Nigerian officials to win these contracts, and they retained two "consultants" – Jeffrey Tesler, a U.K. solicitor with a Gibraltar consulting business, Tri-Star, and an unnamed Japanese company – to pay the bribes. From 1994 to 2004, the partners allegedly agreed to pay over $180 million in bribes to Nigerian officials at all levels of the Nigerian government. In return, TSKJ was awarded four contracts, with an estimated value of over $6 billion.

In 2003, a French magistrate began investigating the Bonny Island contracts. Over time, however, the French essentially handed the matter over to the U.S. authorities. In 2008, Jack Stanley, the former president of KBR, pleaded guilty to FCPA charges; although not yet sentenced, his agreement contemplates a maximum sentence of 84 months. In 2009, the U.S. authorities brought civil and criminal charges against Halliburton and its former subsidiary, KBR, pursuant to which the companies paid combined fines and disgorgement of $579 million. In the pleadings, the other TSKJ partners were each

named as “unindicted co-conspirators.” Soon after, the United States charged Jeffrey Tesler, the U.K. agent, and Wojciech Chodan, a former KBR officer, and is presently seeking their extradition from the U.K. In early 2010, Technip and Eni, the parent company of Snamprogetti, announced that they had established reserves on their books in contemplation of settling the U.S. investigation. More recently, JCG Corporation has similarly announced it is negotiating with the U.S. authorities.

The Technip settlement consists of criminal and civil proceedings. In the criminal case, the DOJ filed an Information charging the company with conspiracy and a single substantive violation of the FCPA. At the same time, it filed a Deferred Prosecution Agreement in which Technip admitted that the facts set out in the Information and a separate Statement of Facts were “true and accurate,” took responsibility for the actions of its employees and consultants, agreed to pay a fine of $240 million, and agreed to retain an Independent Monitor for a period of two years. In the civil case, the SEC filed a Complaint charging the company with violations of the anti-bribery, books & records, and internal controls provisions of the FCPA. In settling this action, Technip, while neither admitting nor denying the facts in the SEC’s complaint (as opposed to in the DOJ’s Deferred Prosecution Agreement), agreed to disgorge an additional $98 million.

The Snamprogetti settlement similarly consists of criminal and civil proceedings, albeit with some perhaps critical differences. In the criminal case, the DOJ filed an Information charging the company with conspiracy and with aiding and abetting KBR’s violations of the FCPA. At the same time, it filed a Deferred Prosecution Agreement with Snamprogetti *and* ENI and Snamprogetti’s immediate parent, Saipem S.p.A., in which Snamprogetti accepted responsibility and admitted that the facts in the Information and the Statement of Facts were true, while all three companies agreed to not contest the admissibility or contract those facts in any future proceeding against any of the companies. In the civil case, the SEC filed a Complaint charging Snamprogretti “as an agent of an issuer” with violating the anti-bribery provisions and, further, falsifying an issuer’s books. It also charged ENI, the parent, with having false books and records and failing to implement an effective system of internal controls. As part of the settlement, the companies agreed to pay a criminal fine of $240 million and to disgorge $125 million in the civil case.

Jurisdiction Over Non-U.S. Companies through Bank Transfers

U.S. companies have been subject to extraterritorial jurisdiction under the FCPA since 1998. Non-U.S. companies, even ones that are “issuers” under the U.S. securities laws, on the other hand are subject only to territorial jurisdiction, requiring the non-U.S. person “while in the territory of the United States, corruptly make use of the mails or any means or instrumentality of interstate commerce or to do any other act.” As we have discussed previously, however, the U.S. government takes a very broad view of what constitutes “territorial” jurisdiction.

For many years, U.S. officials have stated that they viewed the FCPA as providing for jurisdiction whenever a non-U.S. person “causes” an act to be done in the U.S. and that, moreover, such acts could include not only transfers through deposit banking accounts but also through “correspondent” accounts maintained by foreign banks at U.S. banks to clear foreign U.S. dollar transactions. In the *Siemens* action in December 2008 and the *Halliburton/KBR* action in February 2009, the U.S. authorities explicitly included allegations concerning transactions through such correspondent accounts, even though they had clear and uncontroversial territorial jurisdiction based on meetings and bank transfers to and from the U.S. At the time, we suggested that the U.S. authorities did so deliberately to put pressure on foreign enforcement authorities and the TSKJ partners. *See* “It Doesn’t Take Much: Expansive Jurisdiction in FCPA Matters,” Shearman & Sterling LLP, March 2009.

The pleadings in the Technip and Snamprogetti matters, particularly in the DOJ action, establish that the U.S. government has fully embraced the concept of territorial jurisdiction premised on incidental use of correspondent accounts. Although the DOJ included two internal communications between KBR employees in Europe and Houston as overt acts in the conspiracy, the focus of the conspiracy charge is on financial transactions between European banks, and the government specifically alleges two transactions that cleared through correspondent accounts in New York. This focus is even clearer for

the FCPA offense, which alleges that the joint venture partners "caused the following corrupt U.S. dollar payments to be wire transferred from Madeira Company 3's [a TSKJ entity] bank account in Amsterdam, The Netherlands, *via correspondent bank accounts in New York, New York*, to bank accounts of Tri-Star in Switzerland for use in part to bribe Nigerian government officials." Similarly, the SEC charged in its Complaint that "[p]ayments made by the joint venture to the bank accounts of the UK Agent were routed through banks in New York, New York."

The use of correspondent account liability, which has not yet been challenged or litigated by any defendant, is a powerful tool for the U.S. authorities. In the past, although the U.S. authorities had jurisdiction over a foreign issuer's books & records and internal controls by virtue of the issuer having filed periodic reports with the SEC, the U.S. authorities' ability to reach conduct by foreign companies under the FCPA's anti-bribery provisions had been circumscribed by the implicit requirement that the government prove that the foreign company had knowingly and deliberately taken some action in the United States in furtherance of a bribe to a foreign official. Correspondent account liability, assuming it can withstand judicial scrutiny, however, provides the U.S. government with the effective ability to reach the vast majority of U.S. dollar transactions,[1] regardless of whether the foreign company recognized that a financial transaction between two foreign banks would pass through a bank in the United States along the way. It is true that, strictly speaking, the DOJ's assertion of FCPA still does not impose extraterritorial jurisdiction on non-U.S. companies, but correspondent account jurisdiction takes it pretty far along the road.

SEC's Creeping Jurisdiction over Non-Issuer Subsidiaries

In several cases, including KBR and now Snamprogetti, the SEC has charged a subsidiary for falsifying its parent's books and records and evading its internal controls. Thus, in this case, the SEC alleged that Snamprogetti caused "the books and records that supported the financial statements of ENI [to] falsely reflect[] the payments to the UK Agent and Japanese Agent as legitimate business expenses instead of bribes." Further, the SEC alleged that Snamprogetti, "[b]y falsifying documents and authorizing the agent contracts and by failing to conduct any due diligence on the agents, . . . knowingly circumvented certain accounting controls of ENI." These types of allegations are an imaginative but not necessarily controversial strategy for allowing the SEC, whose jurisdiction in this area is primarily targeted at issuers, to reach out to an issuer's subsidiary and hold it accountable under the FCPA's books and records provisions.

Much more questionable, however, is the SEC's attempts to hold subsidiaries liable under the FCPA's anti-bribery provisions. The SEC's jurisdiction under these provisions is expressly limited to issuers and "any officer, director, employee, or agent of such issuer, and any stockholder thereof acting on behalf of such issuer." In this case, however, the SEC charged Snamprogetti with acting as an *agent* of its parent, ENI, the issuer, *without alleging a single fact to establish such an agency relationship*. Instead, the sole allegations relating to ENI were (i) that "ENI failed to ensure that Snamprogetti complied with ENI's policies regarding the use of agents," (ii) Snamprogetti was a wholly-owned subsidiary of ENI, and (iii) "ENI exercised control and supervision of its wholly-owned indirect subsidiary Snamprogetti during the relevant time and on certain of its business decisions, *such as Snamprogetti's entry into the joint venture.*" There is simply no allegation in the

[1] Most foreign U.S. dollar transactions clear through correspondent accounts in the United States. While a very small percentage of transactions may clear outside the United States, these are generally not done to accommodate a customer request.

SEC's complaints (or, for that matter, in the DOJ's Information) to support a finding that ENI directed or controlled Snamprogetti's decision to pay bribes or that, in doing so, Snamprogetti acted as ENI's agent.

Under black-letter law, one corporation cannot be held liable for the acts of another unless the two corporations were members of a conspiracy (as was the case with the four joint venture partners) or one corporation authorized another to act for it, making that corporation its agent for certain conduct. Here, there may be unpled facts that persuaded ENI and Snamprogetti to agree to the SEC's terms, particularly as in a civil case the companies could settle "without admitting or denying the allegations of the complaint." However, in the absence of pleadings to establish the agency relationship between the parent and its subsidiary, the SEC appears to have simply asserted jurisdiction over Snamprogetti simply because it was the subsidiary of an issuer.

Compliance Guidance: Due Diligence

In the pleadings, the U.S. authorities outlined what they viewed as weaknesses in Technip's, Snamprogetti's, and ENI's compliance controls. In doing so, they provide some guidance as to what they consider best practices for compliance.

For example, the SEC's allegations provide a good roadmap to what it considers adequate due diligence on third parties. In contrast to what Technip allegedly did to conduct due diligence, which was to send "a written questionnaire, seeking minimal background information about the agent," the SEC made it clear that it expects companies to go beyond formulaic written responses, noting that Technip had not conducted an interview of the agents, performed background checks, or inquired beyond the written responses to the questionnaire (some of which were demonstrably false). In the case of the TSKJ agents, this is not surprising given that Technip admitted in the DOJ matter that it knew that the agents were retained to pay bribes, but the SEC noted that a Technip official had stated that, as a general matter, Technip's due diligence procedures "were a perfunctory exercise, conducted so that Technip would have some documentation in its files of purported due diligence."

Technip did not become an issuer under U.S. securities laws until August 2001, well after the bribery scheme had started. Nevertheless, the SEC emphasized that non-U.S. companies who become issuers, and thus subject to the FCPA's anti-bribery, books & records, and internal controls provisions, have an obligation to implement effective controls that are adequate "to ensure compliance with the Act." Approaching anti-corruption controls as a paper exercise that is intended only to create "documentation" fails to satisfy the Act's requirements and, as here, creates significant exposure for both U.S. and non-U.S. issuers.

Similarly, the SEC outlined what it viewed as ENI's failure to supervise properly its subsidiary. For example, it noted that although ENI's "policies and procedures governed Snamprogetti's use of agents," ENI had "failed to ensure that Snamprogetti conducted due diligence on agents hired through joint ventures in which Snamprogetti participated." As a result, according to the SEC, ENI's internal controls had failed to detect or prevent the "decades-long bribery scheme." Although it is commonplace to expect that a company will conduct due diligence on its own agents, the SEC's pleadings are notable in making it clear that the government will hold joint venture partners accountable for agents retained by the joint venture and that, accordingly, such joint venture partners are advised to ensure that the joint venture itself conducts adequate due diligence or to do it themselves.

Compliance Monitors

Compliance monitors have become almost routine in FCPA actions against U.S. companies, although the U.S. authorities have, in the recent past, demonstrated some flexibility. *See* "Recent Trends & Patterns in FCPA Enforcement," Shearman & Sterling LLP, March 2010. Technip is now the fifth non-U.S. company that the DOJ has required to retain a monitor, following *Statoil*, *Siemens*, *BAE*, and *Daimler*.

On the other hand, neither Snamprogetti nor its parents were required to retain a monitor. The government's papers, which are otherwise almost identical word-for-word do not explain why one company was required to retain a monitor and the other was not. There are only two divergences, which may or may not provide a hint of a suggestion of an explanation. First, the Technip statement of facts refers to "senior executives" participating in the conspiracy, while the Snamprogetti facts refer only to "officers, employees, and agents" of the company. Second, Technip was charged with a substantive violation of the FCPA's anti-bribery provisions, while Snamprogetti was charged with aiding and abetting KBR's violation. It is not clear, but these differences may reflect a different view of the degree of each company's involvement in the conduct.

Significantly, the terms of reference established for Technip's Monitor reflect an interesting mix of sensitivity to the French legal environment and an obvious effort to hold the company strictly accountable for its compliance obligations under the Agreement.

First, as in *Siemens* and *BAE*, the DOJ agreed that the company may retain a Monitor of its own nationality. In the *Siemens* matter, the Monitor was a former German minister, but, significantly, the Monitor was obligated to retain a qualified U.S. firm to assist him. In *BAE*, the company was similarly permitted to retain a U.K. national as its Monitor, but, as reflected in recent news reports, it has not been able to identify one that is satisfactory to the DOJ. Although the reasons for DOJ's dissatisfaction are not entirely clear, it appears they involve issues relating to qualifications and independence.

Perhaps in reaction to these difficulties, the Technip agreement spells out in some detail the process for selecting the French Monitor and the DOJ's expectations. For example, the agreement requires Technip to propose a pool of three qualified candidates but reserves to the Department the right to require Technip to suggest additional candidates. Further, the Department, not Technip, reserves to itself the sole authority to choose the Monitor from amongst the candidates. As it did in the *BAE* case, the Department set outs three minimum qualifications for Monitor candidates: (i) qualification and experience; (ii) the ability to deploy adequate resources; and (iii) sufficient independence from Technip.

Second, as in the previous agreements with non-U.S. companies, the Technip agreement reflects a sensitivity to non-U.S. laws. In particular, the Technip agreement contains specific provisions addressing the French blocking statute (designed to prevent French companies from being forced to participate in U.S.-style discovery), the French data protection law, and French labor laws. Sensitivity, however, is not the same as complete deference. Thus, the Agreement provides that if Technip withholds any information based on data protection concerns the Monitor is required to retain an independent French data protection expert and that the expert's opinion is *binding* on Technip. Similarly, if Technip concludes that any portion of the Monitor's report may not be disclosed to the DOJ under the French blocking statute, it is obligated to provide an unredacted version to the French authorities and not to object to (in fact it is required to cooperate with) the U.S. authorities' request for its disclosure under mutual legal assistance agreements between the U.S. and French governments.

Third, the Technip agreement reflects a deliberate attempt by the U.S. government to bring the French authorities into play. Thus, the Monitor is encouraged to consult with the French government's Central Service for the Prevention of Corruption ("SCPC"), part of the Ministry of Justice, "to ensure that Technip's compliance program and procedures meet the SCPC's standards and are consistent with French anti-corruption laws." Further, to the extent that Technip does not agree with a particular recommendation by the Monitor, it and the Monitor are directed, in the first instance, to consult with the SCPC rather than the DOJ. In the end, however, it is the Monitor's determination "taking into consideration the views of the SCPC" that will be binding on Technip. Finally, the Technip agreement all but requires the company to make voluntary disclosures to the French authorities, similar to the U.S. model, of any subsequent violations of anti-corruption laws, establishing a structure in which the Monitor shall first report any suspected violations to the Technip's management and its Board, review Technip's investigation and response, and *direct* the company to make a voluntary disclosure of any violations or, if it refuses, to do so himself. In such an instance, Technip or the Monitor are also required to notify the DOJ that such a disclosure has been made.

Finally, the Technip agreement includes a provision directing the Monitor, "to the extent the Monitor deems appropriate, [to] rely on Technip processes, on the results of studies, reviews, audits, and analyses conducted by or on behalf of Technip, and on sampling and testing methodologies." It is clear that this provision reflects a sensitivity to the financial costs of a Monitorship. Although a similar provision has been included in one previous deferred prosecution (*Control Components*), it is not clear whether the DOJ will routinely include this type of provision in future agreements or whether it reflects specific circumstances in this and the *Control Components* cases.

Calculation of Sanctions

In many ways, Technip and ENI/Snamprogetti appear to have been treated more leniently than Halliburton or KBR, which were involved in the same bribery scheme. Although both companies had to agree to approximately $350 million in financial penalties, these penalties are markedly less than the $579 million imposed on KBR (and its former parent, Halliburton). As the DOJ noted, the two companies' penalties represented a 20-25% reduction from the minimum Sentencing Guidelines fine. Further, in contrast to KBR, neither company was required to enter a guilty plea, although each did have to admit to having paid bribes over a lengthy period.

In explaining its decision to agree to deferred prosecution agreements, the DOJ stated only that it was recognizing "individual facts and circumstances." These included the companies' cooperation, willingness to undertake remedial measures, agreement to continue cooperating, and, in the case of Technip, "the impact on Technip, including collateral consequences, of a guilty plea or criminal conviction." These are, of course, present in most cases, and, in the absence of more explanation from the government, it would be speculation as to why these factors were persuasive in these cases. It is possible, however, that the reference to "circumstances presented by this case" and the reference to "impact on Technip" of a conviction may relate to debarment issues that arise under European Union law upon conviction of a corruption-related offense or to the difficulty of bringing a litigated enforcement action against a foreign company.

The reason for the difference in penalties between these companies and KBR/Halliburton is difficult to determine from the face of the pleadings. On the SEC side, some of the explanation may relate to the fact that Technip was not an issuer until August 2001. Thus, the SEC's ability to force disgorgement was limited to illicit gains resulting from bribes paid after that date. This, however, was not true for ENI, which became an issuer in 1995.

On the DOJ side, it is even less clear. Although the DOJ charged Technip under the provision of the statute relating to issuers and Snamprogetti under the provision relating to domestic concerns (because it allegedly aided and abetted KBR), it had the option of charging both companies instead under the parallel provision relating to non-U.S. companies. Had it done so, subject to the statute of limitations, it could have alleged conduct dating back to 1998. This, however, may be a small point, as the conspiracy count appears to reach back to the inception of the conspiracy in 1994, holding the companies responsible for the entire term of the conspiracy.

Finally, it is notable that the terms of the deferred prosecution agreements and, in the Technip case, the accompanying Monitorship are only two years rather than the three years that has been standard in most FCPA cases. Indeed, KBR, a company newly spun off from Halliburton and under new management, was required to agree to a three-year term only last year. Again, there is no particular explanation given for the different treatment.

What Next?

DOJ still has some additional work to do in the Bonny Island matter: its request for extradition of Tesler and Chodan remains pending in the United Kingdom., and it is apparently in the process of negotiating a settlement with the fourth TSKJ partner, JGC Corporation.

Even so, there are a couple of lessons that can be drawn from this matter already. First, the DOJ will continue to seek to enforce the FCPA against non-U.S. companies, particularly in the absence of effective enforcement by those companies' home countries. Second, the DOJ and the SEC are committed to relatively even-handed enforcement; here they were not content to stop with the U.S. partner in TSKJ but clearly intend to hold all of the partners, regardless of nationality, accountable. Third, as suggested in *Halliburton/KBR* and *Siemens*, the U.S. authorities have embraced the concept of correspondent account liability.

In addition, of perhaps most relevance to U.S. and non-U.S. companies alike, the U.S. authorities remain committed to raising the bar on what constitutes an effective compliance and encouraging the development of global compliance standards. In the Technip agreement, as noted, the DOJ explicitly directed the Monitor to consult with the French government concerning French compliance standards. In another provision, the DOJ emphasized that an effective program must include *self-monitoring* in the form "periodic testing of the compliance code, standards, and procedures to evaluate their effectiveness," language that echoes both previous DOJ agreements and is now included in the recently issued Good Practice Guidance by the OECD's Working Group on Bribery.

This publication is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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