

Global Compact Network Canada

AFRICA

Chapter Thirteen of Designing an Anti-Corruption Compliance Program:
A Guide for Canadian Businesses

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I. INTRODUCTION

Africa has some of the fastest-growing economies in the world and has been a magnet for massive investment in the extractive, infrastructure, telecommunications and several other sectors over the past decade.¹ The opportunities in several of the continent’s economies seem almost boundless, but successfully doing business in Africa involves unique challenges and risks, including in relation to corruption.

Africa is huge and extremely diverse, and there is often little economic and infrastructural connection between countries, even ones that are in close proximity to each another. Sweeping generalizations about Africa are, therefore, inherently misguided, but it is clear that many countries on the continent suffer from similar high levels of corruption and score poorly in corruption surveys like the Transparency International Corruption Perceptions Index. The latest AlixPartners Annual Global Anti-Corruption Survey of General Counsel and Compliance Officers noted that Africa was perceived to be the riskiest place to do business.²

At the same time, Control Risk’s annual survey, “International Attitudes Towards Corruption”, reveals an increasing awareness within Africa of the corruption problem and the importance of addressing

it.³ Major global companies are demonstrating every day that carrying on ethical business in Africa is not only possible, but also profitable. Anyone looking to initiate new business ventures in Africa would be well advised to consider and learn from the experience of these companies. In this chapter, we aim to profile the corruption and bribery concerns that most often arise in Africa, outline some of the most significant recent cases of corruption, describe the local legislative environment using South Africa as an example and provide some practical considerations on how to avoid bribery when conducting business in the region.

Bribery Concerns – Significant Corruption Cases Involving Africa

a. General Observations

Hardly a week goes by without some fresh corruption allegations or scandal involving Africa. A few of the most recent examples involve the Nigerian Army,⁴ the Kenya Electoral Boundaries Commission,⁵ Ghanaian judges⁶ among many others. The actual scale of corruption across the continent is difficult to measure, but it appears to have reached epidemic proportions in several countries. According to a 2015 survey by Transparency International (“TI”), “People and Corruption: Africa Survey 2015” (“Africa Survey”),

¹ See, e.g., “Foreign Direct Investment in Africa Surges”, FT.com, May 19, 2015: www.ft.com/cms/s/0/79ee41b6-fd84-11e4-b824-00144feabdc0.html#axzz3x9W4QGYo.

² AlixPartners Annual Global Anti-Corruption Survey | Survey of General Counsel and Compliance Officers, available at www.alixpartners.com/en/Publications/AllArticles/tabid/635/articleType/ArticleView/articleId/949/AlixPartners-Annual-Global-Anti-Corruption-Survey-Survey-of-General-Counsel-and-Compliance-Officers.aspx#sthash.4vKe661t.6OZWpFqI.dpuf.

³ “Anti-Corruption Culture Stronger Than Ever in African Countries – While Political Will and Legislative Frameworks Still Limp Behind”, Control Risk, October 1, 2015: www.lexology.com/library/detail.aspx?g=92f9966d-5df3-45b0-912f-9be2ba1aad39.

⁴ “Nigeria President Orders Probe into Army Corruption”, *Wall Street Journal*, January 15, 2016, www.wsj.com/articles/nigeria-president-orders-probe-into-army-corruption-1452875613.

⁵ “Kenyan Election Agency Seeks \$440 Million Despite Allegations of Corruption and Fraud”, Sahara Reporters, January 14, 2016: <http://saharareporters.com/2016/01/14/kenyan-election-agency-seeks-440-million-despite-allegations-corruption-and-fraud>.

⁶ “Twenty-One of 32 Indicted Judges in Anas Scandal Sacked in Ghana”, Sahara Reporters, December 7, 2015: <http://saharareporters.com/2015/12/07/twenty-one-32-indicted-judges-anas-scandal-sacked-ghana>.

75 million people in Africa paid bribes in the year before the survey and, over the same period, 22% of Africans who had contact with public services admitted to having paid a bribe. In some countries like Liberia, Kenya and Nigeria, the percentage of people surveyed who have paid bribes is much higher.⁷

According to the Africa Survey, a few countries were noted as presenting very low levels of corruption. Notably, only 1% of respondents in Botswana and Mauritius reported paying a bribe. These are levels comparable to those observed in highly developed economies.⁸ Botswana has mechanisms in place to combat corruption and its primary legislation is the *Corruption and Economic Crime Act no. 13 of 1994* (the “CEC Act”). The CEC Act defines the crime of corruption and economic crime and also establishes the Directorate on Corruption and Economic Crime, whose main function is to:

- receive and investigate any complaints of alleging corruption in any public body;
- investigate the conduct of any person who may be connected with or conducive to corruption;
- assist any law enforcement agency of the government in the investigation of offences involving dishonesty or cheating of the public revenue;
- advise heads of public bodies of changes in practice and procedures compatible with the effective discharge of their duties that the director believes is necessary to reduce the likelihood of corruption; and
- create public awareness and support for combatting corruption.

Transparency International also reported that while there are wide discrepancies from country to country in this regard, the services that are reported as being most affected by corruption are the courts and police, with relatively lower (but still high) levels of corruption observed in utilities services and in official documents offices (e.g., places that issue ID cards, permits, licences). The lowest levels of corruption were observed in schools and health care services (although over 10% of respondents reported having to pay bribes even in these “low” corruption sectors).⁹

South Africa has the second-largest economy in Africa and is by far the leading African destination for Canadian Foreign Direct Investment. In 2014, Canadian businesses invested over \$3.7 billion in South Africa.¹⁰ The country ranks 67th on TI’s 2014 Corruption Perceptions Index, ninth among sub-Saharan countries.¹¹ Corruption is perceived to be on the rise in South Africa, however. According to the Africa Survey, 83% of South Africans surveyed say they have seen corruption increase recently¹² and around four out of five respondents say their government is doing badly in combatting corruption.

Similarly, in a 2014 article published by Corruption Watch, Gareth Newham maintains that corruption in South Africa has gotten worse even though the country is in a better position than other African countries to tackle the problem. Newham highlights the multiple public agencies tasked with combatting corruption and the establishment of the National Anti-Corruption Task Team, arguing that the heart of the problem is lack of accountability for maladministration and corruption and that scandals such as the Gupta wedding saga and the controversy surrounding the diversion of funds to upgrade the president’s private homestead are indicative of a

⁷ Transparency International, *People and Corruption: Africa Survey 2015*: file:///C:/Users/lalondep/Downloads/2015_GCB_SubSaharanAfrica_EN.pdf.

⁸ Ibid. See, for example, pages 9 and 13. We note that Botswana is also Africa’s richest country, with per capita GDP of approximately US\$17,000 in 2014. [Source: CIA’s World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html>.]

⁹ Ibid, page 17.

¹⁰ Global Affairs Canada: www.canadainternational.gc.ca/southafrica-afrique-afrique/bilateral_relations_bilaterales/fs-south-africa-afrique-du-sud-fd.aspx?lang=eng.

¹¹ See www.transparency.org/country/#ZAF.

¹² Transparency International, *People and Corruption: Africa Survey 2015*: file:///C:/Users/lalondep/Downloads/2015_GCB_SubSaharanAfrica_EN.pdf.

climate of impunity at the very highest levels of the government.¹³

b. Significant Cases – United States

In recent years, there have been several international corruption enforcement cases involving Africa under the U.S. FCPA or other international corruption statutes. Some of the higher-profile cases include the following.

Goodyear Tire & Rubber Company – Kenya/Angola

In February 2015, Goodyear agreed to pay more than US\$16 million to settle U.S. Securities and Exchange Commission (“SEC”) charges arising out of bribes paid by its subsidiaries in Kenya and Angola to acquire tire sales in those countries.¹⁴ According to the SEC’s order instituting the cease-and-desist proceedings against Goodyear, the company failed to prevent or detect more than US\$3.2 million in bribes during a four-year period as result of inadequate FCPA compliance controls at its subsidiaries in sub-Saharan Africa. Bribes were paid in cash to, among other people, employees of government-owned companies, police and city council officials. The bribes were recorded as legitimate business expenses that were then consolidated into Goodyear’s books and records.¹⁵

Bilfinger SE – Nigeria

In December 2013, Bilfinger SE, an international engineering and services company based in Germany, agreed to pay a US\$32 million penalty to resolve charges that it violated the FCPA because of activities connected to its operations in Nigeria. According to court documents, Bilfinger entered into a consortium with subsidiaries of Willbros Group, Inc., an oil and gas services business with a principal place of business in Oklahoma (now Houston) to obtain and retain contracts related to the Nigerian

Eastern Gas Gathering System project, valued at US\$387 million.¹⁶ Bilfinger and Willbros conspired to make corrupt payments totalling more than US\$6 million to Nigerian government officials and inflated the price of bids by 3% to cover the cost of these bribes.¹⁷ In related proceedings, two former Willbros executives pleaded guilty to conspiracy to violate the FCPA and were sentenced to prison terms of 15 months and received fines of US\$2,000 and US\$1 million, respectively.¹⁸

c. Significant Cases – Canada

MagIndustries Corp. – Congo

In January 2015, the board of directors of MagIndustries Corp., a potash company, formed a special committee to complete an internal review of allegations regarding a breach of the CFPOA by certain officers and employees.¹⁹ The internal review began shortly after a raid by RCMP officers at MagIndustries’ Toronto office. MagIndustries is controlled by a Chinese firm and has subsidiaries in the Congo, where it is developing a \$1.5 billion potash mine. There are allegations, none of which have been proven in court, that, in connection with the mine project, MagIndustries or its affiliated entities made payments to Congolese officials for the purpose of reducing taxes owing, built a villa for a government official, paid for trips by Congolese officials to China and South Africa, and purchased furniture and vehicles for officials.²⁰

¹⁶ Information, *United States of America v. Bilfinger SE*, filed December 9, 2013, U.S. District Court, Southern District of Texas: www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/12/12/bilfinger-information.pdf.

¹⁷ U.S. Department of Justice, Office of Public Affairs, press release, “German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay \$32 Million Criminal Penalty”, December 11, 2013: www.justice.gov/opa/pr/german-engineering-firm-bilfinger-resolves-foreign-corrupt-practices-act-charges-and-agrees.

¹⁸ Ibid.

¹⁹ MagIndustries Corp., press release, “MagIndustries Announces Formation of Special Committee in Connection with RCMP Investigation”, January 29, 2015: www.magindustries.com/news.aspx?newsid=127&pageid=3.

²⁰ Peter Koven, “MagIndustries Corp. Reveals Evidence that Subsidiaries Allegedly Paid Major Bribes in Republic of Congo”, June 17, 2015: <http://business.financialpost.com/news/mining/magindustries-reveals-evidence-that-company-paid-major-bribes-in-republic-of-congo>.

¹³ Gareth Newham, “Why Is Corruption Getting Worse in South Africa?”, Corruption Watch, January 17, 2014, www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa.

¹⁴ SEC press release – 2015-38, “SEC Charges Goodyear with FCPA Violations”, February 24, 2015: www.sec.gov/news/pressrelease/2015-38.html.

¹⁵ SEC Administrative Proceeding, File No. 3-16400, February 24, 2015: www.sec.gov/litigation/admin/2015/34-74356.pdf.

SNC-Lavalin Group Inc. – Libya

In February 2015, the RCMP charged SNC-Lavalin Group Inc. and affiliated entities (“SNC”) with one count of corruption under section 3(1)(b) of the CFPOA (as well as fraud under the *Criminal Code*). The corruption charge stems from SNC’s business dealings in Libya.²¹ It is alleged that over a period of 10 years, commencing in 2001, for the purpose of securing benefits, SNC agents gave, or offered to give, approximately \$48 million to Libyan officials, including the son of former Libyan dictator Muammar Gaddafi.²² The RCMP investigation led to convictions in Switzerland of former SNC executives for corruption and money laundering related to SNC’s activities in Libya.²³

Griffiths Energy International Inc. – Chad

On January 22, 2013, Griffiths Energy International (“GEI”)²⁴, a Calgary-based oil and gas company, pleaded guilty to one count of bribery under section 3(1) of the CFPOA. The company was sentenced to pay \$10.35 million (including a 15% victim surcharge) for providing a \$2 million consulting contract to a company controlled by the wife of the Chadian Ambassador to Canada, as well as making an offer to her and several officials to purchase a significant amount of shares of GEI in return for preferential treatment to secure lucrative energy properties in Chad.²⁵ The problematic arrangement with the spouse of a senior public official was uncovered in the course of due diligence being carried out in preparation for an initial public offering of the

company’s shares. Notwithstanding that GEI self-reported and fully co-operated with the authorities, the penalty imposed – the largest to date in Canada – was intended to show the court’s denunciation of GEI’s conduct as well as provide deterrence to other potential offenders.²⁶

Other Anti-Corruption Measures That Can Apply to Canadian Companies

Anti-corruption measures against Canadian companies with activities in Africa have not only been pursued under the CFPOA, but also under the sanctions power of the World Bank. In 2004, the World Bank Sanctions Committee found that Acres International Ltd. (subsequently acquired by Hatch Ltd.), a closely held Canadian engineering firm, breached the World Bank’s procurement standards and as a result was rendered ineligible to receive any new World Bank-financed contracts for a period of three years. Specifically, the World Bank’s Sanctions Committee found that Acres engaged in corrupt activities for the purpose of influencing the decision-making of the then chief executive of the Lesotho Highlands Development Authority,²⁷ the implementing agency for the Lesotho Highlands Water Project, a significant water-sharing and hydropower program in South Africa and Lesotho. The World Bank’s sanction in 2004 followed a 1999 indictment of Acres in Lesotho and a bribery conviction in 2003. In this regard, the World Bank provided extensive evidentiary support to the Lesotho prosecutors.²⁸

²¹ Royal Canadian Mounted Police, National Division press release, “RCMP Charges SNC-Lavalin”, February, 19 2015: www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm.

²² Graeme Hamilton, “RCMP Charges SNC-Lavalin with Fraud and Corruption Linked to Libyan Projects”, *Financial Post*, February 19, 2015: <http://business.financialpost.com/news/rcmp-charges-snc-lavalin-with-fraud-and-corruption-linked-to-libyan-projects>.

²³ *Ibid.*

²⁴ Renamed Caracal Energy Inc. and subsequently purchased by Glencore Xstrata PLC.

²⁵ Global Affairs Canada, 14th Annual Report to Parliament: *Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act*, September 2012–August 2013: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-14.aspx?lang=eng.

²⁶ *R. v. Griffiths Energy*, [2013] A.J. No. 412 [Alta QB] as cited in *R. v. Kariagar*, 2014 ONSC 3093 at para. 15.

²⁷ World Bank Group, Historical Chronology 2004, “World Bank Sanctions Firm in Lesotho Water Project”, July 23, 2004: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20653969~menuPK:1689538~pagePK:36726~piPK:437378~theSitePK:29506,00.html>.

²⁸ Probe International, “World Bank Sanctions Acres International Limited”, July 23, 2004: <http://journal.probeinternational.org/2004/07/23/world-bank-sanctions-acres-international-limited-2>.

Fighting Corruption in South Africa – Legal Framework

a. General Observations

South Africa has a variety of laws in place to combat corruption. The main statute governing instances of corruption is the *Prevention and Combatting of Corrupt Activities Act 12 of 2004* (“PCCA”) – its primary purpose is for stamping out corruption. In addition to this, the *Competition Act 89 of 1998* (“*Competition Act*”) is used for going after corrupt companies whose activities have an anti-competitive effect on the markets. Other legislation that combats corruption through implementing good governance principles and structures include the *Companies Act 71 of 2008* (“*Companies Act*”) and *Public Finance Management Act 29 of 1999* (“PFMA”).

b. Summary of Applicable Legislation

A brief summary of the applicable legislation provides insight into the measures being taken in South Africa to combat corruption and the penalties applicable to a conviction on charges of corruption.

PCCA

The PCCA establishes the general offence of corruption. Section 3 of this legislation states that a person is guilty of the offence of corruption if such person accepts, agrees to or offers gratification in order to act or influence another person to act in a dishonest, unauthorized, illegal or biased manner or to misuse or sell information/material acquired in the course of the carrying out of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation, that amounts to the abuse of position of power, breach of trust or violation of a legal duty or a set of rules, designed to achieve an unjustified result or that amounts to any other unauthorized or improper inducement to do or not do anything.

In addition to the above general offence of corruption, the PCCA sets out specific activities that it deems are forms of corruption carried out by a category of persons – this includes, among others, the following:

- in relation to public officers, voting at any meeting of a public body, performing or not adequately performing any official function, expediting, delaying, hindering or preventing the performance of an official act, favouring a particular person in the transaction of any business with a public body, showing favour/disfavour to a person performing a function as a public officer, diverting any property belonging to the state which such officer has received by virtue of his/her position to another person, exerting improper influence over decision-making of any person performing functions in a public body;
- in relation to foreign public officials, the using of one’s position to influence any acts of the foreign state or public international organization or obtaining or retaining of a contract, business or advantage in the conduct of business of that foreign state or public international organization; and
- any persons in an employment relationship who accepts, agrees or offers gratification in respect of that party doing any act in relation to the carrying out or performance of that party’s duties/functions in terms of an employment relationship is guilty of an offence.

Sections 11 to 16 of the PCCA also prohibit forms of corruption in a variety of specific contexts such as the conduct of witnesses (section 11), contracts (section 12), procuring and withdrawal of tenders (section 13), auctions (section 14), sporting events (section 15) and gambling (section 16).

Section 24 provides that where there is proof of an official (in a public or private institution) accepting or giving gratification to/from any other person who seeks to obtain a contract, licence, permit, employment or is concerned or likely to be concerned in any proceedings or business transaction, and there is no reasonable link between the offer/acceptance of the gratuity to any lawful authority, then that person serving as an official is presumed to have acted in a manner that amounts to dishonest, unauthorized, illegal or biased manner or to misuse or selling of information/material acquired in the course of exercising their duties that amounts to the abuse of position of power, breach of trust or violation of a legal duty or a set of rules designed to achieve an unjustified result or that amounts to any other unauthorized or improper inducement to do or not do anything.

Section 25 provides that it is not a defence if a person did not have power, right or opportunity to perform the act for which a gratuity was given or accepted, or that the person who received the gratuity did not actually perform the act for which the gratuity was given or accepted.

The PCCA imposes stiff penalties for offences committed, including fines or life imprisonment (if the penalty is imposed in the High Court), a fine or up to 18 years' imprisonment (if the penalty is imposed in a regional court) and a fine or imprisonment of up to five years (if a penalty is imposed in the magistrate's court). In addition, the fine that a court imposes may be up to five times the value of the gratification.

Competition Act

The *Competition Act* prohibits certain activities by companies that have an anti-competitive effect on the markets. The prohibited activities include collusion, price fixing and market segmentation.

Companies Act

The *Companies Act* sets the standards of accounting, record keeping and financial statements to be kept by a company. Section 28(3) of the *Companies Act* provides that it is an offence for a company, with the

intention to deceive or mislead any person, to fail to keep accurate or complete accounting records or to falsify any of its accounting records.

The *Companies Act* sets the standards for the conduct of directors. Directors are prohibited from using their positions of power or information received in their position as director to gain advantage for themselves or for any other person or to knowingly cause harm to the company or its subsidiaries. In addition, directors are obliged to divulge any financial interest they may have in other companies.

PFMA

The PFMA applies to certain state-owned companies, state departments, provincial legislatures and constitutional institutions. The objectives of the PFMA are to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the above-mentioned institutions.

c. Case Law and Prominent Cases in the Media

State v. Selebi [2012] 1 All SA 332 (SCA)

The case involved Mr. Jacob Sello Selebi, a former national commissioner of police, and Mr. Glen Agliotti, a businessman and convicted drug dealer. It was alleged that Mr. Selebi had received various payments from Mr. Agliotti in exchange for information that Mr. Selebi had access to in his position as the national police commissioner.

The court found that the essential elements of the crime of corruption are (i) the acceptance (ii) of gratification (iii) in order to act in a certain way (inducement), (iv) unlawfulness and (v) intention. The court convicted Mr. Selebi on the charge of corruption and sentenced him to 15 years' imprisonment. Mr. Selebi appealed his conviction, but the appeal court held that Mr. Selebi, by his own admission, abused his position of authority and breached the trust placed in the position that he held in contravention of the PCCA. The court dismissed his appeal.

Hitachi Corruption Allegations

According to a statement released by the U.S. SEC on September 28, 2015, the United States Securities and Exchange Commission charged Hitachi, Ltd. with violating the FCPA. The charges related to a transaction whereby Hitachi sold a 25% stake in a South African subsidiary to a company serving as a front for the African National Congress. This arrangement gave the front company and the African National Congress the ability to share in the profits from any power station contracts that Hitachi secured. Hitachi was ultimately awarded two contracts to build power stations in South Africa and paid the African National Congress's front company approximately \$5 million in "dividends" based on profits derived from the contracts. Through a separate, undisclosed arrangement, Hitachi paid the front company an additional US\$1 million in "success fees" that were inaccurately booked as consulting fees. Without admitting to the charges, Hitachi agreed to pay US\$19 million to settle the SEC charges.

Practical Consideration – Avoiding Corruption in Africa

While Africa presents undeniably attractive opportunities in the extractive industries, that is only part of the story. Growth opportunities exist in virtually every main sector of economic activity (e.g., manufacturing, health care, financial services, IT, infrastructure, telecommunications), but investor confidence and government policies have not yet created a very healthy business environment throughout the continent. That time may yet come, but there remains substantial risk in doing business in Africa and much of the continent remains plagued with high degrees of corruption. Transparency International reports, such as the Africa Survey and the Corruption Perceptions Index, along with other sources like the OECD Bribery Report suggest high corruption-related risks in many public services and industries.

The reality is that the promising opportunities of Africa are coupled with substantial risk. Other chapters of this book provide advice and insight on various components of effective compliance programs that can help reduce this risk. Things like "tone from the top", effective management of intermediaries and other elements of sound compliance programs and cultures are all reviewed in detail elsewhere in this book and are essential to carrying on corruption-free business in Africa. Important elements of a robust anti-corruption compliance environment include:

- the right "tone from the top" concerning ethical business conduct;
- detailed policies and practices that reflect a company's values by prohibiting improper payments;
- effective management of risks related to third-party intermediaries such as commercial agents and representatives, distributors and service providers through extensive due diligence in selecting them, training them on company policies and effective control of their activities;
- a detailed focus on key risk areas such as hospitality, gifts and entertainment, per diems for officials, travel and living expenses, donations and facilitation payments;
- effective detection programs (including through tip lines and meaningful whistleblower protections) and thorough investigation and remediation of any concerns;
- training of employees on company policies and ethical conduct generally; and
- robust internal audit, control and accounting processes, and accurate books and records.

Understanding and managing the risks associated with doing business in Africa is achievable. Getting a clear understanding of the risks in particular locations of interest is a good place to start. Africa is extremely heterogeneous – it contains 54 countries

(not counting Western Sahara), each with its own history, government structure, subdivisions, cultural norms and languages. Ethiopia alone, for example, is divided into nine states (kilil) and two administrative regions, where no less than 82 different recognized indigenous ethnic groups live.²⁹ As such, generally available tools like the Transparency International Corruption Perceptions Index may assist in getting an overall impression of a country's risk profile, but prudent entrepreneurs will probe more deeply before committing personnel and financial resources into a specific venture.

Successfully investing in Africa requires a keen understanding of the peculiarities of each market and at least a country-specific approach (if not one that is even more geographically targeted). This is no different than, for example, investing in the North American real estate market. Obviously, the market (and likely risks and returns) is very different in Vancouver than it is, for example, in New Orleans. Similarly, successfully investing in Africa and avoiding corruption requires a local approach. There are countries in Africa, such as Swaziland and Lesotho, that have put legislative measures in place to combat corruption, the Lesotho legislative framework including the *Criminal Procedure and Evidence Act* of 1981, the Penal Code of 2010, the *Prevention of Corruption and Economic Offences Act* of 1999, the *Prevention of Corruption and Economic Offences (Amendment) Act* of 2006, the Public Procurement Regulations of 2007 and the *Money Laundering and Proceeds of Crime Act* of 2008. Swaziland has adopted the Prevention of Corruption Act of 2006, which provides, among other things, for the establishment of an anti-corruption commission.

Local laws and regulation providing for domestic preferences exist across Africa, and are reflected in prescriptive measures such as local investment rules, local employment preferences, joint venture requirements or other obligations. There are a number of reasons why such measures have evolved,

including the response to employment imperatives in countries with large youth populations, post-colonial responses to foreign control over resources and the absence of meaningful economic growth resulting from raw materials exports. Obviously, it is important to abide by these rules where they are in place, even though such rules may seem inefficient or have a negative impact on the attractiveness of specific ventures. But being local, being “in and of the community” (an expression used by the global law firm Dentons),³⁰ is generally considered good advice and has worked well for several companies, such as General Electric (“GE”).³¹

In practical terms, being local can take many forms, from working with local partners, representatives and agents in developing a business venture to having a local senior executive and leadership team in the region or country. For GE, having a significant number of local employees, particularly at the leadership level, has been critical for its credibility and its broader efforts to promote better governance and accountability and to carry on corruption-free business in Africa.³²

Given the corruption risk profile of many African countries, effective due diligence on prospective business partners and acquisition targets is key. But carrying out due diligence in Africa can present a number of unique challenges. Public records and registers can lack centralization, and they can be unreliable and difficult to access. Personal information on individuals can be difficult to locate and verify. Only 22% of Africans, for example, receive mail at home and a large proportion does not have identity documents (such as original birth certificates).³³ As well, Internet access, telecommunications systems and the ability to access and print documents can be poor.

²⁹ Population and Housing Census Report – Country – 2007, Central Statistical Agency of Ethiopia, www.csa.gov.et/newcsaweb/images/documents/surveys/Population%20and%20Housing%20census/ETH-pop-2007/survey0/data/Doc/Reports/National_Statistical.pdf.

³⁰ See www.dentons.com/en/global-presence/canada.aspx.

³¹ Jay Ireland, “Accelerating Africa’s Growth”, GE Report, August 1, 2014: www.gereports.com/post/93473425718/accelerating-africas-growth.

³² *Ibid.*

³³ African Development Bank, *Financial Inclusion in Africa*, 2013, page 113: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Financial_Inclusion_in_Africa.pdf.

The being local ethos applies in the context of due diligence as well. In order to maximize the quality of due diligence, it may need to be tailored to local conditions. A “cookie cutter” questionnaire completed by a proposed business partner is not likely to yield meaningful or sufficient risk-management results. At the same time, presenting a standard due-diligence questionnaire to a prospective business partner or asking numerous probing questions may in some contexts be so offensive as to entirely compromise a budding business relationship. Once again, local cultural proficiency will be key to carrying out verifications that provide the needed assurances, without compromising the relationship. In-person interviews with local officials, management and business partners can be a key source of information.

Corruption and bribery tend to occur with greater frequency where state institutions and rule of law are weak (which remains the case in many parts of Africa). In other words, strengthening governance institutions and accountability decreases the risk of corruption. This principle has underpinned the approach of some companies to doing business in Africa. GE Africa’s focus, for example, has been on engaging in a country’s long-term development and building governance capabilities. In short, GE’s approach is to “create a better customer” by demonstrating a long-term commitment, focusing on a broader collaborative relationship (rather than specific transactions), building the local skill set, and generating local employment and knowledge transfer.³⁴

³⁴ The GE approach in Africa is explained in detail in Jonathan Berman, *Success in Africa: CEO Insights from a Continent on the Rise*, Bibliomotion, 2013. For a summary of Berman’s conclusions, see Richard Bistrong, *Success Without Corruption in Africa*, January 5, 2015, <http://richardbistrong.com/success-without-corruption-africa>. For a review of *Success in Africa*, see <http://www.publishersweekly.com/978-1-937134-46-4>.

Obviously, not everyone has GE’s capital and resources (and the ability to be patient that comes with these). That said, there are some elements of the GE approach that can be adopted by companies of any size, such as:

- setting the right tone from the outset, communicating clearly and early that you are interested in doing business only if it does not involve corruption;
- focusing on delivering value over the long term (which may mean being prepared to accept that some specific opportunities may go to less scrupulous competitors, or that the business grows slower than anticipated);
- facing corruption by having the company maintain consistent communications on its business-ethics policies and practices, including through local media (the objective of this is to make sure local populations understand the benefits the company is trying to offer); and
- insisting on and adhering to a zero-tolerance policy on bribes and ensuring that all business partners, suppliers, customers and relevant authorities are aware of your policy.

II. CONCLUSION

There are sound reasons to be optimistic about the economic prospects for Africa. Some countries will no doubt continue to struggle, but forecasts for the region are generally positive.³⁵ In many ways, Africa is a continent where everything is new: new governments, new institutions and even entirely new countries (e.g., South Sudan). The populations are generally young, which means there is a plentiful and energetic workforce to tap. At the same time, there is fast-growing demand for just about everything: infrastructure, health care, financial expertise and services, housing, leisure products, telecommunications, manufactured goods, technology and so on.

³⁵ For example, the African Development Bank anticipates 5% growth for Africa overall in 2016: www.afdb.org/en/knowledge/publications/african-economic-outlook.

Along with all the opportunities Africa offers, it remains a region that presents significant risks, including in relation to corruption and bribery. In some areas, bribery and corruption are endemic, entrenched and widespread. Succeeding in Africa without corruption requires a clear understanding of the risks and a deliberate, thoughtful and concerted anti-corruption strategy. The experience of GE Africa and other companies who have succeeded in the region should be carefully considered by anyone launching a new business venture in Africa. Where possible, the approaches of these companies should be adopted.

By contrast, the actions of companies that have resulted in international anti-corruption enforcement should also be considered and understood. They are stark reminders of the price that companies, their employees and shareholders may end up paying when ethical lapses occur.