

Establishing the reporting duties of the auditor in terms of corruption and cross-border anti-corruption legislation

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“But those who trust in the Lord for help will find their strength renewed. They will rise on wings like eagles; they will run and not get weary; they will walk and not grow weak” –Isaiah 40:31

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Abstract

This study revolves around the reporting duties of an auditor in terms of national and international anti-corruption legislation, in the event that the auditor discovers or uncovers proof of irregularities regarding corruption. The research method used in this dissertation is a literature study or literature review.

Firstly, this dissertation analyses the history and development of International Conventions, PRECCA (Act 12 of 2004), the FCPA (1977) and the UK Bribery Act (2010). The aforementioned analysis determines that it is imperative that a global solution for corruption as well as international cooperation has to be obtained.

Subsequently, the dissertation establishes what corruption entails and a comparison is drawn between South African anti-corruption legislation and similar worldwide legislation and conventions.

Applicability; jurisdiction; investigation and enforcement; penalties and exceptions prescribed by applicable legislation; the UNCAC (2003); and OECD are compared. Furthermore, an analysis and comparison is done on the way in which FCPA (1977), PRECCA (Act 12 of 2004) and the UK Bribery Act (2010) follow these prescriptions.

The dissertation finds that the APA (Act 26 of 2005) is the most relevant South African law in regulating the reporting duty of an auditor according to section 45. The APA (Act 26 of 2005) provides for a systematic response upon the discovery of a reportable irregularity, which also includes corruption.

The auditor's duties are analysed in terms of ISA 240. The study finds that, although this standard does not specifically address corruption, the regulations of this standard provide that an auditor should communicate findings regarding fraud "as soon as practicable" (paragraph A60) to management (paragraph 40).

Furthermore, the study verifies that the FCPA (1977) and UK Bribery Act (2010) both have limited regulations regarding the auditor and his reporting duties.

The Companies Act (Act 71 of 2008) itself provides little regulation on an auditor's reporting duty in terms of corruption; therefore the Companies Regulations were issued in 2011. Said Regulations reflect that an independent reviewer, that becomes aware of a reportable irregularity, should send a written report to the Companies Commission in terms of Regulation 29(6)(a).

PRECCA (Act 12 of 2004) regulates reporting duties in section 34, but only of a person holding a “position of authority”. A definition of said person does not specifically include an auditor, as an auditor is considered independent of the entity. Despite this reason, the lack of regulations regarding an auditor’s reporting duties in terms of corruption may be a limitation in terms of PRECCA (Act 12 of 2004). Despite this, it is a requirement for an auditor, under alternative laws such as the APA (Act 26 of 2005), to report corrupt actions in violation of PRECCA (Act 12 of 2004).

The study further finds that, according to the IRBA Code (2010) of professional conduct, the duty of confidentiality is outweighed by disclosures required by law, especially disclosures of irregularities under the APA (Act 26 of 2005).

Finally, it is the auditor’s responsibility to act in an open and accountable manner (according to the King III report (2010)) and to disclose and report corrupt activities to third parties.

Opsomming

Die studie wentel om die rapporteringspligte van 'n ouditeur in terme van nasionale en internasionale teenkorrupsie-wetgewing, in die geval waar 'n ouditeur enige bewyse van ongerymdhede met betrekking tot korrupsie ontdek. Die navorsingsmetode wat in hierdie skripsie gevolg is, is 'n literatuurstudie of literatuuroorsig.

Eerstens analiseer die skripsie die geskiedenis en ontwikkeling van Internasionale Konvensies, die Wet op die Voorkoming en Bestryding van Korrupte Aktiwiteite (Wet 12 van 2004), die FCPA (1977) en die *UK Bribery Act* (2010). Die studie bevind dat 'n wêreldwye oplossing vir korrupsie asook internasionale samewerking verkry moet word.

Vervolgens word 'n begrip verkry van wat korrupsie behels en 'n vergelyking getref tussen Suid-Afrikaanse teenkorrupsie-wetgewing en soortgelyke wêreldwye wetgewing en konvensies.

Toepasbaarheid; jurisdiksie; ondersoek en toepassing; boetes en uitsonderings wat voorgeskryf word deur toepaslike wetgewing; die *UNCAC* (2003); en *OECD* is vergelyk. Voorts analiseer en vergelyk die studie die wyse waarop die *FCPA* (1977), die Wet op die Voorkoming en Bestryding van Korrupte Aktiwiteite (Wet 12 van 2004) en die *UK Bribery Act* (2010) hierdie voorskrifte volg.

Die studie stel vas dat die Wet op die Ouditprofessie (Wet 26 van 2005) die toepaslikste Suid-Afrikaanse wetgewing is vir die regulering van die rapporteringsplig van 'n ouditeur, volgens artikel 45. Die Ouditprofessie Wet (Wet 26 van 2005) voorsien 'n sistematiese reaksie op die ontdekking van 'n rapporteerbare onreëlmatigheid, wat ook korrupsie insluit.

Die ouditeur se pligte is ook geanaliseer ooreenkomstig Internasionale Ouditstandaarde 240. Die studie bevind dat, hoewel korrupsie in hierdie standaard nie spesifiek aandag geniet nie, die regulasies van hierdie standaard voorsiening maak daarvoor dat 'n ouditeur bevindings rakende bedrog so gou doenlik (paragraaf A60) aan bestuur moet rapporteer (paragraaf 40).

Voorts is daar bevind dat sowel die *FCPA* (1977) as die *UK Bribery Act* (2010) beperkte regulasies bevat rakende die ouditeur en sy rapporteringspligte.

Die Maatskappywet (Wet 71 van 2008) self voorsien min regulasies 'n ouditeur se rapporteringsplig met betrekking tot korrupsie en gevolglik is die Regulasies op die Maatskappywet (Wet 71 van 2008) in 2011 uitgereik. Genoemde Regulasies weerspieël dat 'n onafhanklike beoordelaar, wat bewus word van 'n rapporteerbare onreëlmatigheid, 'n geskrewe verslag aan die Kommissie vir Maatskappye moet stuur ingevolge Regulasie 29(6)(a).

Die Wet op die Voorkoming en Bestryding van Korrupte Aktiwiteite (Wet 12 van 2004) reguleer die rapporteringspligte in artikel 34, maar slegs van persone wat “gesagsposisie” beklee. ’n Definisie van genoemde persoon sluit nie spesifiek ’n ouditeur in nie, aangesien ’n ouditeur as onafhanklik van die entiteit beskou word. Ten spyte van hierdie rede kan die gebrek aan die regulering van ’n ouditeur se rapporteringspligte met betrekking tot korrupsie ’n beperking wees ingevolge die Wet op die Voorkoming en Bestryding van Korrupte Aktiwiteite (Wet 12 van 2004). Ten spyte hiervan word daar van die ouditeur vereis om optredes van korrupsie wat die Wet op die Voorkoming en Bestryding van Korrupte Aktiwiteite (Wet 12 van 2004) oortree onder alternatiewe wette soos die Ouditprofessie (Wet 26 van 2005) te rapporteer.

Die studie bevind verder dat, volgens die *IRBA* se Kode, onthulling wat deur die reg vereis word, veral onthulling van onreëlmatighede onder die Ouditprofessie (Wet 26 van 2005), swaarder weeg as die plig van vertroulikheid.

Ten slotte sal die ouditeur verantwoordelik wees daarvoor om ’n deursigtige en verantwoordbare wyse op te tree (volgens die *King III* verslag (2010)) en om korrupte aktiwiteite aan derde partye te rapporteer.

List of abbreviations

Abbreviation:	Meaning:
APA	The Auditing Profession Act, 26 of 2005
BBA	British Bankers Association
BRICs	Brazil, Russia, India, China and South Africa
IFAC	International Federation of Accountants
IFAC Code`	IFAC Code of professional conduct for registered auditors (2009)
IRBA	Independent Regulatory Board for Auditors
IRBA Code	IRBA Rules regarding improper conduct and code of professional conduct for registered auditors (2010)
ISA	International Standards on Auditing
NPA	National Prosecuting Authority
OECD	The Organization for Economic Co-operation and Development
OECD Convention (1997)	The Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business transactions (1997)
PRECCA	The Prevention and Combating of Corrupt Activities Act (12 of 2004)
SAICA	The South African Institute of Chartered Accountants
SIU	Special Investigating Unit
The DOJ	The United States Department of Justice
The FCPA	The Foreign Corrupt Practices Act (1977)
The Hawks	The Directorate for Priority Crime Investigation
The Republic	The Republic of South Africa
The SAPS	The South African Police Service
The SEC	The United States Securities and Exchange Commission
The SFO	The United Kingdom Serious Fraud Office
The UNCAC	The United Nations Convention Against Corruption (2003)
UK	United Kingdom
UN	United Nations
US	United States
USA	United States of America

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1. CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 Key Words

Auditor; corruption; cross-border; facilitation payment; Foreign Corrupt Practices Act of 1977 (FCPA); foreign public official; penalties; reporting; the Prevention and Combating of Corrupt Activities Act (Act 12 of 2004); transnational legislation; UK Bribery Act 2010; UN Convention Against Corruption; the Auditing Profession Act (Act 26 of 2005).

1.2 Introduction

During recent years it has become evident, especially locally in South Africa, that corruption is a great concern for this country. The aforementioned issue has become apparent in recent newspaper articles in which it was found that out of 3 553 cases of corruption referred to the national department, merely 453 of these cases were solved (Slabbert, 2011). In the light of such revelations, it has become a well-known fact that the prevention, detection and investigation of corrupt practices have to be improved. The question that arises is how can this be done?

It is important to combat cross-border corruption and therefore the analysis of international legislation on this matter is imperative. By researching worldwide legislation and comparing it to similar local South African legislation, a better understanding was obtained of the history, similarities, differences, and definitions of corruption. Ultimately this was done to determine, in relation to cross-border corruption, what the reporting duties of an auditor are (in South Africa), or should be (internationally).

This analysis was done because an auditor is the leading examiner of accounting records and therefore clear regulations on reporting procedures in cases where an auditor discovers extraterritorial corruption in these records had to be examined. This included the duties of a South African auditor in relation to a foreign subsidiary of a local parent company being audited, or vice versa, in relation to a foreign parent company with a local South African subsidiary.

Similar to the position in South Africa (Slabbert, 2011), corruption across the world keeps increasing and with the new ways of committing such crimes, stringent legislation has to be put in place to help prevent it (Schmidt, 2009:1123). Countries have to ensure that their own domestic corruption legislation, as well as cross-border anti-corruption legislation, are at par with international standards. To aid with this, international conventions have been signed and ratified, providing a framework that addresses different aspects of corruption (Anon., 2011c).

Examples of such conventions that have been signed by South Africa are the United Nations Convention Against Corruption (hereafter referred to as UNCAC) of 2003 and the Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter referred to as the OECD Convention) of 1997.

The UNCAC (2003) provides an international response to a global problem. It is a legally binding international anti-corruption instrument, with some provisions being mandatory and others optional, and South Africa is known as a party to the UNCAC (2003). It addresses the cross-border nature of corruption and is one of the first global anti-corruption frameworks, along with the OECD Convention (1997). Following the South African position on corruption sanctions discussed previously, the UNCAC (2003) requires countries to establish criminal and other offences to criminalise acts of corruption.

The UK Bribery Act (2010) and Foreign Corrupt Practices Act (hereafter referred to as the FCPA) of 1977 are, without a doubt, currently two of the leading examples of anti-corruption legislation addressing extraterritorial jurisdiction in the world. Therefore, it had to be compared to the South African equivalent thereof.

The United States Congress approved the FCPA in 1977. It was implemented primarily for the reason found in the Watergate investigation, which concluded that US companies regularly paid bribes to foreign officials to win or retain business (Stander, 2005:30). It also has wide cross-border jurisdiction, being applicable to foreign companies listed on the US stock exchange (Lestelle, 2008:533). The act therefore applies to South African companies such as Telkom, Sasol and Sappi, which are examples of leading local companies listed on a US stock exchange (Stander, 2005:30).

In South Africa, the main anti-corruption law is known as the Prevention and Combating of Corrupt Activities Act (hereafter referred to as PRECCA), 12 of 2004. This law has amended the 1992 version thereof, namely the Corruption Act (Act 94 of 1992). The 1992 version created merely one general crime of corruption, while the 2004 Act created a general crime, as well as other specific corrupt activities, which were declared as a crime (Snyman, 2006:383). A comparison of the similarities and differences between PRECCA (Act 12 of 2004) and the American and British legislation was completed to discover whether it measures up to international standards. PRECCA (Act 12 of 2004) was also compared to global convention agreements undersigned by South Africa and expected to serve as a framework when conducting processes locally. The history and development of these laws from common laws was also examined.

Some major differences between the anti-corruption legislations are the exceptions that the acts allow for, such as facilitation payments. It has been a matter of great debate that the FCPA (1977) does not criminalise facilitation payments even though the UK Bribery Act (2010) criminalises these payments, in the same way as the OECD Convention (1997) does.

The differences and similarities between the applicability, jurisdiction, investigation, enforcement and defences provided for in the different pieces of legislation were further explored. One of the major differences between South Africa's approach, and those of other countries, is the enforcement of corruption provisions. In the recent newspaper article, "[c]ourt sends Hawks law back to parliament" (Anon., 2011a), it was explained that states are required to create independent anti-corruption entities by the Constitution, Bill of Rights as well as other parliamentary-approved international anti-corruption agreements.

The corruption provisions under the FCPA (1977) are jointly enforced by the US Department of Justice (hereafter referred to as the DOJ) and the Securities and Exchange Commission (hereafter referred to as the SEC) (Schmidt, 2009:1125). The Serious Fraud Office (hereafter referred to as the SFO) enforces the UK Bribery Act (2010) (Warin, *et al.*, 2010:3). In South Africa, the former National Prosecuting Authority (hereafter referred to as the NPA) leader, Advocate Vusi Pikoli, was of the opinion that we still need to have a dedicated independent agency (Anon., 2011b).

Ultimately, the goal of the research is to answer the problem statement. The problem statement revolves around the reporting duties of an auditor who has found any of the irregularities associated with corruption, and especially cross-border corruption, reflected in the international anti-corruption legislation that is analysed. One of the key acts, which prescribe an auditor's duties, is the Auditing Profession Act (hereafter referred to as the APA) (Act 26 of 2005). According to section 45 of the APA (Act 26 of 2005), it is the duty of the auditor to report irregularities, immediately, to the Independent Regularity Board for Auditors (hereafter referred to as IRBA). Section 52 of the APA (Act 26 of 2005) proceeds to say that an auditor will be guilty of an offence if he or she fails to report a reportable irregularity in accordance with section 45.

The definition of a "reportable irregularity" under section 1 of the APA (Act 26 of 2005) is perused to determine whether it refers to merely fraud, or both corruption and fraud. If it only refers to fraud as a "reportable irregularity", a void could exist within this law in terms of the regulation of an auditor's duties in terms of corruption.

PRECCA (Act 12 of 2004) lays out the duty to report corrupt transactions in section 34 of chapter 7 and this is analysed in Chapter 4 of this study. Another standard which holds guidance for auditors with regard to their reporting duties during an audit, is the International Federation of Accountants' (hereafter referred to as IFAC) International Standards on Auditing (hereafter referred to as ISA) 240.

Another predicament, which exists in South Africa, is to whom an auditor should report. As seen in Chapter 4, an auditor is not specifically addressed within the definition of whom the reporting duty falls upon in section 34 of PRECCA (Act 12 of 2004). Therefore, uncertainty may arise as to whether the auditor should report corruption found in the audit of a client. Issues around the confidentiality of client information as well as ethical concerns arise.

How aforementioned situations are handled in practice as well as practical scenarios is scrutinised. In particular, the Enron scandal is analysed to obtain a better understanding of what may happen if an auditor refrains from acting on an irregularity uncovered during an audit.

Ultimately, an understanding of what corruption entails will be achieved before analysing the complete reporting duties of auditors in relation to corrupt activities. However, the focus of the study remains on the duties of a South African auditor to report corruption.

1.3 Problem Statement

To minimize the effects of foreign public bribery of officials, many countries have created domestic corruption legislation as well as cross-border anti-corruption instruments (e.g. the UK and the USA). The FCPA (1977) is rigorously enforced and its influence stretches far and wide; therefore it is important to understand the differences and similarities that exist between South Africa's PRECCA (Act 12 of 2004) and international anti-corruption legislation.

It is important to firstly identify and understand the definition of corruption; the background of PRECCA (Act 12 of 2004) and other similar acts and to compare aspects of these acts to obtain an answer to the problem statement. Ultimately, the problem statement is: In relation to corruption and cross-border corruption, what are the reporting duties of an auditor according to local and international anti-corruption legislation?

1.4 Research Goals and Objectives

The main objective is to establish the reporting duties of the auditor, locally and internationally, in terms of corruption and cross-border anti-corruption legislation.

To achieve the main objective, additional secondary objectives are:

- a. To achieve an understanding of what corruption entails and to make a comparison between South African anti-corruption legislation and similar worldwide legislation and conventions;
- b. To identify the historical framework of anti-corruption legislation both nationally and internationally;
- c. To identify shortcomings to national legislation relating to the reporting duties of the auditor;
- d. To compare different aspects of international anti-corruption legislation;
- e. To obtain an auditor's reporting duties in terms of reporting cross-border corruption according to South African Legislation, namely the APA (Act 26 of 2005) or PRECCA (Act 12 of 2004); and
- f. To discover whether South African principles on corruption and reporting thereof are on par with international anti-corruption legislation and international convention agreements.

1.5 Research Method

The research method used in this dissertation is a literature study or literature review. The definition of "literature study", according to the Oxford Dictionary, is the following: "The study of pieces of writing or printed information on a particular subject".

As an alternative to using a conventional empirical study, a literature study is completed which focuses on textual analysis, especially the analysis of legislation, as well as textual criticism. In order to do this, the literature study entails the analysis of historical facts and phenomena in the fields of accounting and auditing and logical reasoning. It is also important to examine different theories, models and existing data to arrive at the conclusions.

Throughout the literature review, the following are analysed:

- a) National legislation, including PRECCA (Act 12 of 2004);
- b) International legislation, including the FCPA (1977) and the UK Bribery Act (2010);
- c) International Conventions;
- d) Academic journals;
- e) Case law;
- f) Articles, newspapers and books; and
- g) Internet sources, including online databases and internet searches.

1.6 Conclusion

Subsequently, Chapter 2 will commence by providing the history and development of a couple of international agreements approved by parliament and anti-corruption legislations (locally and internationally), containing cross-border provisions. The histories of each of these were analysed to determine how they became the pieces of legislation and agreements they are today. Firstly, the history and development of international agreements such as the OECD Convention (1997) and the UNCAC (2003) was analysed along with similar previous international initiatives.

Thereafter the history and development of the local PRECCA (Act 12 of 2004) will be discussed in Chapter 3, before an analysis of the FCPA (1977) and the history and development of a relatively new piece of anti-corruption legislation, the UK Bribery Act (2010), will also be completed in Chapter 3.

Finally, Chapter 4 will proceed to address the reporting duties of, particularly, the South African auditor. This will include an analysis of the APA (Act 26 of 2005) and ISA 240, which are also applicable to South Africa. Finally, section 34 of PRECCA's (Act 12 of 2004) will be perused. It is important to understand the provisions of these pieces of legislation before inadequacies can be identified in the regulation of an auditor's reporting duties.

2. CHAPTER 2: HISTORY AND DEVELOPMENT OF SELECTED INTERNATIONAL ANTI-CORRUPTION LEGISLATION

2.1 Introduction

This chapter will analyse the history of international conventions on combating corruption as well as the history of important legislation currently governing cross-border anti-corruption provisions. Said legislation will include PRECCA (Act 12 of 2004), the FCPA (1977) and the UK Bribery Act (2010). Furthermore, the development of these international agreements and local and international anti-corruption legislation will be analysed to determine the process through which they originated and their subsequent development to determine how they became the pieces of legislation and agreements they are today.

By analysing the history of- and comparing international legislation against similar local South African legislation, an understanding is achieved of the history, similarities, differences and definitions of corruption. Ultimately, the purpose of this analysis is to determine, in relation to cross-border corruption, what the reporting duties of a South African auditor are, internationally and locally. Additionally, the identification of shortcomings in South African cross-border corruption legislation may occur.

2.2 International Anti-Corruption Conventions

The focus on corruption resulted from different countries realising the dangers corruption entails, not only financially and economically, but also politically and socially. There is a link between the offence of corruption and other forms of crime such as organised as well as economic crime (see for instance the Preamble of PRECCA (Act 12 of 2004)). In the wake of this realisation came the recognition that a global solution needs to be found.

There have been numerous worldwide attempts at combating corruption through the signing and ratification of international anti-corruption conventions. One of these includes the Organization of American States' Inter-American Convention against Corruption (1996) that was signed in Caracas on 29 March 1996, a year before it came into operation. This Convention deals with the corruption as well as the bribery of national public officials and illicit enrichment (Argandona, 2007:483).

The European Union also created a few agreements. Amongst these were the Convention on the Protection of the European Communities' Financial Interest (1995); the Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member

States (1997) and the Council Framework Decision on combating corruption in the private sector (2003).

Other similar conventions made by the Council of Europe are the Criminal Law Convention on Corruption (1999), adopted on 4 November 1998, before it came into force on 1 July 2002, and the Council of Europe's Civil Law Convention on Corruption (1999), adopted in 1999, before it came into force on 1 November 2003 (Interpol, 2010). The Criminal Law Convention on Corruption (1999) deals with such crimes as the bribery of public officials, laundering of the proceeds of corruption and accounting crimes and bribery in the private sector, amongst others (Argandona, 2007:483). The Civil Law Convention on Corruption (1999) on the other hand defines international civil law rules on corruption (Argandona, 2007:483).

Africa also joined the anti-corruption fight when the African Union adopted the Convention on Preventing and Combating Corruption (2003) on 11 July 2003, which only came into force years later on 4 August 2006 (Interpol, 2010). Some provisions in the African Union are considered more descriptive when compared to the same provision in the UNCAC (2003) (Babu, 2006). An example of this is held in the definition reflected in Article 4.1(a) of the AU Convention, where passive and active bribery is criminalised by not merely a "public official", but also by "any other person" (Babu, 2006).

The United Nations similarly added another important convention when the General Assembly adopted the United Nations Convention against Transnational Organized Crime (2000), which came into force on 29 September 2003 (Argandona, 2007:483). This Convention defines corruption offences, lays down various procedures for corruption prevention and detection, criminalises Corruption in article 8, and provides measures against corruption in article 9. It also requires the creation of a criminal offence for the corruption of public officials (Argandona, 2007:483).

By analysing in further detail the history and development of the two most important international initiatives, the OECD Convention (1997) and the UNCAC (2003), a better understanding will be achieved of the reasons for the implementation of these international conventions.

2.2.1 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

2.2.1.1 Historical development

The Organization for Economic Cooperation and Development is a Paris-based group, which was founded in 1960 with a commitment to democracy and the market economy (Cleveland, *et*

al., 2009:205). According to Cleveland *et al.* (2009:205), the OECD then consisted of 30 member countries as well as 1850 staff members and as of 1997 its members produced two-thirds of the world's goods and services and hosted large multinational companies. The OECD Convention's (1997) goals are to encourage sound economic expansion and development in its member countries (George, *et al.*, 2000:486).

Numerous events, amongst which were economic crises and large bribery scandals, resulted in this group realising the need to join the fight against corruption and bribery. One of these events constituted to be a "heightened consciousness" regarding corruption which started in the early 1990s and led to the realisation that a Convention was needed to address these matters and to ensure that a level playing field was established to preserve international trade (George, *et al.*, 2000:490).

The OECD Convention (1997) followed a few years after the adoption of the "Recommendation of the OECD Council Bribery in International Business Transactions in 1994", which was not legally binding, but encouraged the criminalisation of the bribery of foreign officials (George, *et al.*, 2000:497). The adoption of a Revised Recommendation on the 23rd of May of the same year in which the actual Convention was signed reaffirmed the OECD commitment to the criminalisation of bribery and predicted that an instrument such as a Convention was to be signed to achieve their goals (George, *et al.*, 2000:497). The 1997 Revised Recommendation focuses on areas the Convention does not address in adequate detail (Cleveland, *et al.*, 2009:233). Before signing the OECD Convention (1997), a recommendation, namely the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, was made by the OECD for its member countries to reject tax deductions of bribery payments made by businesses (George, *et al.*, 2000:498). The OECD Convention (1997) did not include this recommendation.

The OECD Convention (1997) is one of the most well-known international anti-corruption instruments targeting the bribery of foreign officials and was modelled after the US FCPA (1977) (George, *et al.*, 2000:501). The OECD Convention (1997) was signed in Paris on 17 December 1997 before it subsequently came into force two years later, on 15 February 1999 (Interpol, 2010). The formal requirement before the Convention could come into force was that five out of the ten countries with the largest export shares among member countries should ratify the Convention (George, *et al.*, 2000:500).

The Convention was ratified by South Africa in 2007, the only African country that is a party to the agreement (Lestelle, 2008:543). A vast number of 34 member countries and 6 non-member countries have adopted the OECD Convention (1997) (Interpol, 2010).

Corruption is not considered to be a South African problem exclusively; therefore the need was realised for the ratification of an anti-corruption Convention by many countries, including most of the BRICs countries. The BRICs countries consist of Brazil, Russia, India, China and South Africa. Something the BRICs countries have in common is difficulty regarding corruption (Anon., 2012b).

Amongst the 6 non-member countries that adopted the OECD Convention, were three of the BRICs countries namely, South Africa, Brazil and Russia. A problem exists that two of the five BRICs countries, namely India and China, are not signatories to the OECD Convention (1997), even though they are very important countries in terms of international trade (Cleveland, *et al.*, 2009:205). Until 2012 Russia, another member of the BRICs countries, was not a signatory to the OECD Convention (1997). This changed when Russia signed the Convention on 1 February 2012, and China is looking to obtain OECD membership (Cassin, 2012). India and China are, however, already signatories to the UNCAC (2003), which is therefore deemed to be farther reaching than the OECD Convention (1997).

The OECD Convention (1997) was prepared as the result of a trend starting with the 1996 Organization of American States Inter-American Convention Against Corruption and the 1996 International Chamber of Commerce Revisions to its Rules of Conduct on Extortion and Bribery in International Business Transactions (Watson, 1998).

2.2.1.2 Convention aim

The Preamble to the OECD Convention (1997) states that the goal of the agreement is to combat the widespread phenomenon of bribery in international business transactions. The Preamble also holds that bribery “raises serious moral and political concerns, undermines good governance and economic development and distorts international competitive conditions.” These are also the main reasons for wanting to combat bribery of foreign public officials and constitute as a reason for the implementation of the OECD Convention (1997).

2.2.1.3 Convention content

The OECD Working Group is responsible for monitoring the implementation and enforcement of the OECD Convention (1997), according to article 12 of the Convention. The Committee on International Investment and Multilateral Enterprises (CIME) established the Working Group in

1994, which now consists of senior legal experts from all signatory nations to the OECD Convention (1997) (George, *et al.*, 2000:504). The Convention contains 17 articles that vary from provisions for jurisdiction to sanctions.

The Convention obliges its member countries to criminalise certain forms of bribery. It describes the offence of bribery of a foreign public official as the following, in article 1(1):

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

In article 1(1), the OECD Convention (1997) merely sets a standard for its member parties, and the countries need not use its precise terms in their own municipal law to define bribery. Article 1(2) continues by demanding each Party to take any necessary measures to make sure that any action resulting in bribery of a foreign public official shall be deemed a criminal offence.

It is important to note that the OECD Convention (1997) is not self-executing, which means that it does not in itself criminalise or prohibit bribery (Cleveland, *et al.*, 2009:233), but merely provides the framework which its signatories are required to take further by implementing it as such in its domestic laws and existing legal structures. In other words, the signatories to the OECD Convention (1997) voluntarily agreed to bind themselves to the provisions of the Convention, while still leaving its members' authorities to decide on the form and methods of implementation (George, *et al.*, 2000:499).

The OECD Convention (1997) has received some criticism because it may not be realistic to expect all the signatory countries with their different legal systems to adopt an identical criminal statute on bribery (Watson, 1998). Other criticism includes not mentioning in its definition of a "foreign public official" the officials of foreign political parties of candidates for office, even though bribery of these people amount to a serious source of corruption (Watson, 1998). Furthermore, the OECD Convention (1997) fails to criminalise corrupt payments to officials of state-owned companies (Watson, 1998).

In general, the OECD Convention (1997) requires each member who undersigned the agreement to prohibit the bribing of foreign officials, set criminal and civil penalties for violations and either extradite or prosecute its nationals who are accused of bribery by another signatory (Schmidt, 2009:1126). The Convention also contains an anti-bribery provision and accounting provision, much like the FCPA (1977), and adopts an extraterritorial approach similar to its

predecessor. The OECD Convention (1997) addresses the issue of the bribe-giver, but fails to address concerns relating to the bribe-taker (George, *et al.*, 2000:486).

The OECD Convention (1997) was amended in 1998, a year after its enactment. This amendment refers to corrupt payments as those aimed at securing any improper advantage, which may include a wider range of facilitation payments (Argandona, 2005:255).

After having analysed the history and development of the OECD Convention (1997), there still seems to be a need for an even farther reaching convention, especially one undersigned by the rest of the two BRICs countries. Therefore the history and development of a very important convention, the UNCAC (2003), will be further explored.

2.2.2 The United Nations Convention Against Corruption (2003)

2.2.2.1 Historical development

As anti-corruption efforts were expanding internationally, it became apparent that a global initiative by the United Nations was required. The Secretary General argued for UN-wide support in the fight to put a stop to corruption by, particularly, government leaders (Vogl, 2004:15). The United Nations had not established a global anti-corruption initiative, but the collection of support from an increasing number of world leaders was in progress.

The USA realised that it was losing its competitive advantage in business transactions when it was the only nation to implement cross-border corruption legislation through the FCPA (1977) (Schmidt, 2009:1126). Bribery was still occurring and international tenders were lost as a result of corrupt officials. An explanation of this occurrence is that when one state rigorously enforces prohibitions against foreign public bribery, firms from that country are disadvantaged against firms from other states, which do not enforce their prohibitions as rigorously (Lestelle, 2008:546). It therefore became apparent that the UNCAC (2003) was needed to set all countries on the same playing field, while at the same time prohibiting the illegal actions taking place in international transactions.

The need was realised for a broad-based international cooperation instrument and a united global perspective for a few additional reasons, firstly, to ensure that measures adopted in individual countries to combat corruption were consistent, fair and furthered international relations and, secondly, to provide all governments with an instrument to overcome corruption (Argandona, 2007:482).

The United Nations satisfied this requirement with the UNCAC (2003). This Convention originated from the Vienna Declaration which was adopted by the 10th UN Congress on the

Prevention of Crime and the Treatment of Offenders during April 2000 (Argandona, 2007:485). The Convention against Transnational Organized Crime (2000) was amended during the same time to include measures against corruption which could be linked to organised crime before the decision was made to establish an independent corruption instrument, which later became known as the UNCAC (2003) (Argandona, 2007:485). The states parties to the UNCAC (2003) mandated the UN Office for Drugs and Crime through the UN General Assembly to establish an Ad Hoc Committee with the purpose of negotiating the UNCAC (2003) (Babu, 2006). Eventually, many officials and experts gathered during seven sessions from 21 January 2002 until 1 October 2003 of the Ad Hoc Committee for the Negotiation of the Convention against Corruption (Vogl, 2004:16).

The first global corruption fighting instrument based on broad international consensus, the UNCAC (2003), was finally adopted and approved by the UN General Assembly on 31 October 2003 (Argandona, 2007:482).

The Convention was presented at the High-level Political conference hosted in Merida, Mexico from 9 to 11 December 2003 where 95 countries became signatories to the UNCAC (2003) on 10 December (Argandona, 2007:485).

The UNCAC (2003) was ratified by South Africa in November 2004 and came into force on 14 December 2005 after its ratification by the minimum required 30 countries (Article 68). In February 2011, there were 148 countries bound to it, making it the most extensive global framework to harmonise anti-corruption efforts to date (Anon., 2011c). Signatories to the UNCAC (2003) also include countries that did not sign the OECD Convention (1997), particularly the BRICs countries India and China.

Article 63(1) of the Convention reflects that a Conference of states parties must be called within one year of the date that the agreement came into force to achieve its objectives, review, and promote its implementation. This is also an opportunity for states parties to verify the appropriate implementation of the Convention in their domestic laws and, if they are not appropriate, to amend or implement laws (Argandona, 2007:485). It is the task of this Conference to review the Convention's implementation by its states parties periodically, according to article 63(4).

2.2.2.2 Convention aim

This Convention is unique, because of the detail of its provisions as well as its extensiveness, covering worldwide efforts to address cross-border corruption. It promotes the cooperation needed by countries to work together in the fight against corruption.

According to article 1 of the UNCAC (2003), its objective is to promote “integrity, accountability and proper management of public affairs and public property”. The UNCAC (2003) requires of its signatories to cooperate in prosecutions and to adopt appropriate procedures to recover assets stolen through corruption (Gibeaut, 2007:51).

2.2.2.3 Convention content

The UNCAC (2003) comprises 71 articles, contained within 8 chapters, as well as a Preamble. This Convention is more detailed and further reaching than its predecessors which consisted of regional treaties such as the Inter-American Convention against Corruption (IACAC), the United Nations Convention Against Transnational Crime and the African Union Convention on Preventing and Combating Corruption (Lestelle, 2009:539).

The UNCAC (2003) reflects in its Preamble that corruption threatens “the political stability and sustainable development of states” and that corruption should no longer be considered merely a local matter, but one that is transnational which affects all societies and economies. This is why the prevention, detection, investigation and prosecution of corruption are of utmost importance and, according to the Preamble, a responsibility of all States. The UNCAC (2003) therefore exclaims the necessity of international cooperation to combat this crime.

According to Vogl (2004:16), Transparency International’s chairman, Peter Eigen, noted that the Convention provides a comprehensive set of standards and measures which helps to promote equally the international cooperation along with domestic efforts in the anti-corruption fight. The Secretary General’s mission to implement the UNCAC (2003) was aided by the increased focus on corruption prevention by Transparency International and non-governmental organisations (Vogl, 2004:16).

The Convention consists of four pillars, namely the prevention, criminalisation, international cooperation and asset recovery (Babu, 2006). The UNCAC (2003) especially requires countries to establish a wide range of corruption acts as offences in their laws, if this is not already the case in domestic laws (Anon., 2011c).

The UNCAC (2003) is a legally binding international anti-corruption instrument by any country that decides to adopt it. The UNCAC (2003) legally obliges its signatories to establish these offences in some cases, while in other cases the signatories should consider the establishment of these offences (Anon., 2011c). The enactment of the UNCAC (2003) may be a major reason for the implementation of PRECCA (Act 12 of 2004), as it was South Africa’s aspiration to adhere to certain obligations resulting from international anti-corruption agreements (Snyman, 2006:383).

As explained before, it is important to note that only some of the provisions of the UNCAC (2003) are mandatory while others are optional to implement by the countries' government discretion as to whether or not it should be implemented (Anon., 2011c). The UNCAC (2003) contains a range of implementation options to choose from in some instances. The Convention does not merely consider the government, but even provides tools for citizens and civil society organisations to hold their governments accountable to an international standard that was set (Anon., 2011c).

The Convention does not include a definition of corruption, but merely provides definitions for different types of corruption such as bribery of public officials (Article 15). The reason for the deficiency of a corruption definition is as a result of corruption being an evolving concept, which has different meanings for various people, as well as to allow greater flexibility for future interpretations (Argandona, 2007:488). However, the UNCAC (2003) does provide a definition for a foreign public official in article 2:

Any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.

The UNCAC (2003) goes further than similar Conventions before it by providing preventative measures as well as by criminalising not only basic forms of corruption, but also calling on signatories to ban actions such as bribery, money laundering, trading in influence and embezzlement of public funds (Schmidt, 2009:1128). The UNCAC (2003) surpasses the scope of the OECD Convention (1997) in its provision for the criminalisation of extortion of public officials in article 15 (Argandona, 2007:490). Article 15 prohibits passive and active corruption by a public official and obliges states to create an offence on this matter.

The most important improvement with the UNCAC (2003) is that it binds countries to it by rendering specific forms of mutual legal assistance in gathering and transferring evidence for use in court to extradite offenders (Vogl, 2004:16). This helps countries to investigate corruption and aids them to combat it even though the perpetrator may be residing outside country borders and jurisdiction. The international cooperation to combat corruption will also require countries to support the tracing, freezing, seizure and confiscation of proceeds of corruption (Anon., 2011c).

Along with mutual legal assistance, the UNCAC (2003) addresses another important inadequacy in international tools for combating worldwide corruption such as the repatriation of funds sent abroad by corrupt foreign officials (Vogl, 2004:16). According to Article 35 of the Convention, legal proceedings may be initiated by entities of persons who have suffered damages resulting from corruption and seeking to obtain appropriate compensation.

The UNCAC (2003) also acknowledges inadequacies in its own approach in combating corruption. These include, according to Argandona (2007:485), the recognition of State sovereignty, as well as “legal, cultural, social and political differences between states parties and their different levels of economic development”. It is still regarded as limited in a sense of having a tendency to prioritize political and economic interests above human, legal and moral interests (Argandona, 2007:490). Furthermore, it may be seen as a shortcoming that the Convention does not oblige its states parties to criminalise various acts, including the passive bribery of a foreign public official, abuse of public functions, bribery or embezzlement in the private sector and illicit enrichment, amongst others (Argandona, 2007:490).

This newfound international cooperation will most certainly contribute to a major decrease in corrupt activities across borders. This Convention is truly a unique initiative to unify international legislation in the fight to combat corruption.

After having analysed the various international anti-corruption conventions, it is important to take a closer look at local corruption legislation that contains cross-border provisions. PRECCA (Act 12 of 2004) is currently South Africa’s leading anti-corruption instrument; hence its history and development has to be analysed, especially in relation to the frameworks provided in the UNCAC (2003) and the OECD Convention (1997).

2.3 The Prevention and Combating of Corrupt Activities Act (Act 12 of 2004)

2.3.1 History and development of bribery and corruption in South Africa

The crime of bribery originated in South Africa’s common law. The common law of South Africa is based mainly on Roman-Dutch law, which was in operation in the Dutch Republic from the late sixteenth century to the eighteenth century (Henning, 2009:295). The Roman-Dutch law itself originated more than two-and-a-half millennia ago in Rome after which it spread to Western Europe, including the Netherlands, from the late thirteenth century (Henning, 2009:296). Roman-Dutch law was the combination of Roman law with local Netherlands law (Snyman, 2006:9)

The crime of corruption was better known in South Africa’s common law (Roman-Dutch law) as bribery, and bribery was merely applicable in relation to a state public official (Henning, 2009:298). The Dutch Republic also expressed bribery in additional enactments, namely the *Placaat* of 1651 and the *Placaat* of 1751, which formed part of the common law and therefore also helped shape the basic elements of the common law crime in South Africa (Henning, 2009:298).

The Roman-Dutch law punished fraud in its widest sense, namely *stellionatus* and *crimen falsi* (Henning, 2009:297). Even though the Roman-Dutch law did not clearly separate the two parts of fraud (*stellionatus* and *crimen falsi*), Snyman (2006:524) separates the two. He states that *stellionatus* consisted of making an intentional misrepresentation, leading to the actual harm or prejudice to another, whereas *crimen falsi* (a collective name for a number of crimes relating to falsification) did not require actual harm to someone. *Crimen falsi* was incorporated in the definition of fraud, which makes the act of misrepresentation a crime if it leads to actual, or even potential, prejudice of another (Snyman, 2006:524). South African courts abandoned the distinction between these two parts and recognised a single crime of “fraud” at an early stage (Henning, 2009:301).

According to Henning (2009:299), other Roman-Dutch writers also recognised a general crime of falsity, a term which contains a very wide application. It is defined in Henning (2009:299) as “the thing which takes place by ill-fraud to the prejudice of another with the intention of distorting the truth”. This rings similar to the definition of fraud in current South African law, which is “the unlawful, intentional making of a misrepresentation” which causes actual or potential harm or prejudice to another (Snyman, 2006:523).

The common law crime of bribery was extended by statutory prohibitions of electoral and commercial bribery and corruption, but still exists today alongside PRECCA (Act 12 of 2004). A definition of this common law crime of bribery in Burchell & Milton (2005:889) reflects:

The practice of tendering (and accepting) a private advantage as a reward for the performance of a duty. The crime is committed both by the person who corrupts another by giving the bribe and by the person who corruptly receives it.

2.3.2 History and development of anti-corruption legislation in South Africa

As the corruption crime expanded, so did the legislation applicable to it. The Act on Prevention of Corruption was implemented in 1958 in South Africa (Act 6 of 1958). This act created a separate crime of corruption (Snyman, 2006:383).

Many years thereafter, in 1992, the common law and its concept of bribery, as well as the 1958-act were repealed by the Corruption Act (Act 94 of 1992), which came into force in South Africa on 3 July 1992. This law still had a void, namely of acknowledging South Africa's pursuit to combat corruption internationally across all borders by meeting important obligations originating from international treaties (Snyman, 2006:383). Therefore no satisfactory provision for combating extraterritorial corruption existed in the 1958 and 1992 corruption acts and this also meant that there were no reporting duties on the auditor on this matter.

The Corruption Act (Act 94 of 1992) is not a very detailed piece of legislation, with the whole act extending less than three pages. Within the Preamble of the Act, a definition of its objective reflects: "... to provide anew for the criminalisation of corruption and for matters connected therewith." The Act proceeds by reflecting a description of the act of corruption in section 1, followed by setting out jurisdiction in section 2 and penalties in section 3.

Section 1(2) of the Corruption Act (Act 94 of 1992) deals with jurisdiction in respect of offences committed outside the Republic of South Africa (hereafter referred to as the Republic). This section establishes a criminal liability for a corrupt offence (set out in section 1(1)) committed outside the Republic. In such a case it will be deemed committed in South Africa if the power or duty held by the recipient of the benefit is connected to any person, institution or government body in South Africa. In terms of section 2, a court will have jurisdiction over a corruption offence when a person, institution or government body is domiciled or seated in the area.

2.3.3 History and development of PRECCA (Act 12 of 2004)

The void which existed in previous corruption laws finally lead to PRECCA (Act 12 of 2004) replacing the 1992-act in 2004. Even so, numerous court rulings are still applicable in relation to the 1992-act because of many important liability principles which were formulated differently (Snyman, 2006:383). This is because the 1992-act created one general crime of corruption, while the 2004-act creates a general crime, as well as specific corrupt activities that were also declared as crimes (Snyman, 2006:383). The other important differentiating factor is that the 1992-act was directed at corrupt payments relating to future and past actions, while the new 2004 amendment is only directed at corrupt payments related to future actions that have not yet taken place (Snyman, 2006:383).

The definition of corruption in the 1992 Corruption Act referred to an intention (*mens rea*) to influence or reward while 2004's PRECCA (Act 12 of 2004) does not use the exact word "intention", but the words "in order to act...or by influencing to act" in section 3 (Burchell & Milton, 2005:893). The words "in order to" could also hold the meaning of "for the purpose of" and therefore could indicate some element of intention (Burchell & Milton, 2005:893).

PRECCA (Act 12 of 2004) came into force on 27 April 2004 (Loxton, *et al.*, 2010). This occurred after its approval by the National Assembly in November 2003 (Masitha, 2004). According to Pragal (2006:20), the enactment of PRECCA (Act 12 of 2004) goes hand in hand with the reinstatement of the common law crime of bribery. This reinstatement followed after the common law of bribery was repealed by the Corruption Act (Act 94 of 1992), which in turn was

repealed by PRECCA (Act 12 of 2004), thus, by implication, reinstating the common law of bribery, which now exists alongside PRECCA (Act 12 of 2004) (Burchell & Milton, 2005:891).

2.3.4 Aim of PRECCA (Act 12 of 2004)

PRECCA (Act 12 of 2004) originated because South Africa had a desire to “provide anew for the prevention of corruption and related offences” through the replacement of its predecessor (Sibanda, 2005:1). Burchell and Milton (2005:892) contends that PRECCA’s (Act 12 of 2004) fundamental purpose is to “unbundle” the offence of corruption by creating a general corruption offence as well as specific forms of corruption relating to specific persons.

2.3.5 Content of PRECCA (Act 12 of 2004)

The question arises as to what corruption can be defined as currently in South Africa. The answer to this question is contained in section 1 of PRECCA (Act 12 of 2004) where a definition of corruption reflects:

Anyone, who directly or indirectly accepts, agrees to accept, or offers to accept a corrupt payment to their own, or another person’s benefit; and/or gives, agrees to give, or offers to give a corrupt payment to their own, or another person’s benefit, in exchange for an agreement to act either personally or influencing another to act in a way that amounts to the illegal, dishonest, unauthorised, incomplete, or biased; or misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitution, statutory, contractual or any other legal obligation; that amounts to: the abuse of a position of authority; a breach of trust; or the violation of a legal duty or a set of rules; designed to achieve an unjustified result; or that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.

A gratification, according to PRECCA (Act 12 of 2004), is not merely limited to monetary gains. According to the definitions in chapter one of the Act it also includes gifts, the avoidance of loss, services, favours and privileges as well as receiving a contract of employment or a specific status (among other things). Discounts, bonuses and receiving votes are also considered gratifications in this definition.

The main reasons for the creation of PRECCA (Act 12 of 2004) were to reinforce South Africa’s fight against corruption and to abide by the UNCAC (2003) (Pragal, 2006:18), which was ratified by South Africa in late 2004. Section 231 of the Constitution (1996) reflects that an international agreement will bind the Republic after approval by resolution in both houses of Parliament (section 231(2)) and a self-executing provision of an agreement that has been approved by Parliament is law in the Republic, unless it is inconsistent with the Constitution (section 231(4)). In South Africa, the process of ratification entails obtaining Parliament’s approval and South Africa does comply with the mandatory requirements of the UNCAC (2003) (NACF, 2009).

The UNCAC (2003) contains the obligation to its members to create a law especially addressing cross-border corruption. Even though South Africa did not create a new law especially for this purpose, PRECCA (Act 12 of 2004) was drafted to comply with these obligations by adding section 5: “Offences in respect of corrupt activities relating to foreign public officials” as well as section 35, which addresses extraterritorial jurisdiction. Therefore, the consequence of section 35 is that offences in terms of PRECCA (Act 12 of 2004) committed beyond the Republic’s borders can be prosecuted, even if they do not amount to an offence in foreign jurisdictions.

Section 5 creates the offence relating to a specific person, namely a foreign public official. A definition of the term “foreign public officials” in section 1 of the act reflects:

any person holding a legislative, administrative or judicial office of a foreign state; any person performing public functions for a foreign state, including any person employed by a board, commission, corporation or other body or authority that performs a function on behalf of the foreign state; or an official or agent of a public international organisation.

It is important to note that merely corruption committed by the giver is punished in this definition (unlike the general definition of corruption which punishes both the giver and acceptor), which means that the foreign public official cannot be charged for accepting or receiving the corrupt payment, even if arrested while, coincidentally, being in South Africa (Snyman, 2006:398).

Section 35 determines that if the actions (amounting to the offence of corruption under PRECCA (Act 12 of 2004)) occur outside the Republic, a court in the Republic will have the jurisdiction regarding that offence, even if the offence is not recognised as such in the country in which the crime was committed (Snyman, 2006:400).

PRECCA (Act 12 of 2004) is a commendable initiative by South Africa to get in par with ratified international standards, including the UNCAC (2003). The only remaining matter is whether PRECCA (Act 12 of 2004) is sufficient to address cross-border corruption, especially when compared to the FCPA (1977), a piece of legislation especially designed to address this inflating issue. The FCPA (1977) will subsequently be analysed further.

2.4 The Foreign Corrupt Practices Act of 1977

2.4.1 History and development of the FCPA (1977)

The FCPA (1977) was passed in the wake of public revelations which were made as a result of large multinational corporations using their great wealth to bribe foreign governments (Schmidt, 2009:1123). These happenings became known as the Watergate scandal and made it clear that large American companies used slush funds to make illegal political contributions as well as to bribe foreign public officials (Stander, 2005:30). According to Gibeaut (2007:49), the Watergate

hearings and illegal contributions made by corporate executives to a re-election campaign, lead to the downfall, or resignation, of President Richard M Nixon.

During the Watergate scandal, it was discovered that funds were masked in mislabelled accounts and that secret funds were used for illegal payments, including funds used for the bribery of high officials of foreign governments (Gibeaut, 2007:50). During this scandal, it was mainly corporate funds, which were laundered in foreign countries before being returned to the US in black satchels that financed the break-in at Watergate and the illegal payoffs to cover it up that followed (Cleveland, *et al.*, 2009:202). The scandal reached its conclusion on 6 February 1976. These happenings provided a realisation of the need for cross-border legislation.

An investigation conducted afterwards uncovered about 400 companies (including 117 companies listed on the Fortune 500) each paid some \$300 million to officials, politicians as well as political parties (Gibeaut, 2007:50). More than 50 countries disclosed their improper political payments to the SEC by April 1976 (Cleveland, *et al.*, 2009:203). These undertakings made it clear to the public and the government that the nation was in need of a solution in the form of a new piece legislation to combat cross-border corruption.

President Ford took action by appointing a 10-member “Task Force on Questionable Corporate Payments Abroad”, whose recommendations subsequently became the FCPA (1977) (Cleveland, *et al.*, 2009:203).

The FCPA (1977), as amended, 15 U.S.C. §§ 78dd-1, *et seq.*, was approved in 1977 by the United States Congress. It is an amendment to the Securities Exchange Act (1934) as the first domestic legislation to criminalise foreign corruption, while other countries merely had laws against localised bribery implemented (Lestelle, 2008:530). The FCPA (1977) remained the only domestic legislation to criminalise the bribery of foreign public officials until 1996, when the USA implemented and became a signatory to the Inter-American Convention Against Corruption (Lestelle, 2008:530).

2.4.2 Aim of the FCPA (1977)

According to Lestelle (2008:530), the FCPA (1977) was specifically enacted with the main purpose of making it unlawful for persons or entities to make payments to foreign government officials to assist in obtaining or retaining business.

After the Watergate scandal, it became apparent that a culture of compliance had to be strived for. Furthermore, the enactment of the FCPA (1977) occurred largely because of the fact that the American Congress wanted to restore public confidence in the business system (Prins, sa).

2.4.3 Content of the FCPA (1977)

The FCPA (1977) is the first law that specifically targets the bribery of foreign officials. The Act does not render all payments made to foreign officials as illegal, but, according to Biegelman & Biegelman (2010:24), it makes it a crime to bribe any foreign government official in return for assistance in:

Obtaining or retaining business, or directing business to any particular person.; influencing a foreign government official to do or to omit an act in violation of his duty and influencing a foreign government official to affect or act or decision by a foreign government.

An extension of the provision includes privately held companies and individuals (Gibeaut, 2007:50). The law also applies to bribes offered to any foreign official, candidate for foreign political office, foreign political party or anyone acting on behalf of one of these categories (15 USC § 78dd-1(a) (2)). According to Keenan (2011:7), there are some items that are allowed to be given to a foreign official, including low value items such as t-shirts, hats and other small marketing items.

Actions by foreign subsidiaries of American companies and hired third parties may also result in a liability, even if the parent company did not authorise these actions or was even aware of the fact that they were occurring.

The corruption provisions under the FCPA (1977) are jointly enforced by the US DOJ and the SEC. The FCPA's (1977) rigorous enforcement has wide extra-territorial jurisdiction and with its no-tolerance approach it may have serious consequences for United States businesses being operated, even in South Africa, 34 years after implementation (Gibeaut, 2007:49). The increased enforcement of the FCPA (1977) in recent years was experienced as the government was conducting 43 investigations at November 2007 as opposed to the 60 corporate cases pursued in the first 30 years of the Act's existence (Gibeaut, 2007:49). The number of cases being conducted had increased to 74 in 2010 (Anon., 2011d:68), continuing the trend of rigorous enforcement. This is proof of how the act has developed and expanded over the years. Examples of some of the largest settlements to date were a \$400 million fine against a British defence contractor, BAE Systems, and a \$365 million fine against an Italian oil firm, both in 2010 (Anon., 2011d:68).

The FCPA (1977) contains two major provisions. Firstly, the anti-bribery provision in section 30A makes it illegal to make an offer, gift or payment to any person, while having the knowledge or reasonably expected to know, that these bribes will eventually find its way to an official. Secondly, the accounting provision requires companies whose securities are listed in the United States to keep the proper accounting books and records which “accurately and fairly reflect the transactions” of the company and maintain adequate internal accounting controls (15 USC § 78m (b) (2) (A) & (B)).

More specifically, the anti-bribery provision involves a few main elements, according to Lestelle (2008:531):

An issuer, domestic concern, or any other person while in the territory of the US (or agents thereof); makes use of the mails or any other means or instrumentality of interstate commerce corruptly; to offer, pay, promise to pay, or authorize the payment of money or anything of value.

This bribe can be to any:

foreign official, foreign political party or candidate for foreign political office; or any person, while knowing that some portion of the payment will be given to any such person...for the purpose of influencing any act or decision (Lestelle, 2008:531).

According to the FCPA (1977) (15 USC § 78dd-1(f) (1) (A)), a “foreign official” covers any officer or employee of a foreign government, any department or agency of a public international organisation, as well as family members of the aforementioned entities.

The term “bribery” in the FCPA (1977) encompasses any offers, payments, promises to pay, authorisations of the payment of any money, or offer, gift, promise to give, or authorisation of the giving of anything of value (Biegelman & Biegelman, 2010:26).

Even with its abundance of provisions, the FCPA (1977) receives its share of criticism. Except for not providing a compliance defence such as in section 7(2) of the Bribery Act (2010) which can cause one rogue employee to cause unwanted effects on a business, some other aspects of the FCPA (1977) receive frequent criticism. The FCPA (1977) is considered to be written confusingly, while it is applied so vigorously (Anon., 2011d:68). Companies that have to apply to the FCPA (1977) also have the problem of facing an ever-expanding interpretation of the FCPA (1977) by the DOJ and the SEC (Gibeaut, 2007:49).

US companies viewed the implementation of the FCPA (1977) as an unfair advantage to the rest of the world, while reducing their own competitiveness, especially in relation to European companies, and this led to a loss of billions of dollars (Babu, 2006). The disadvantage for American companies was that foreign companies still routinely made these fraudulent payments and could even deduct these payments from tax as business expenses (Prins, sa).

2.4.4 Amendments to the FCPA (1977)

Eleven years after its enactment, the FCPA (1977) was amended in 1988 by adding two affirmative defences to liability (Cleveland, *et al.*, 2009:203), which included the payment of facilitation payments that were not recognised as bribery. Eventually, the FCPA (1977) was amended again with the International Anti-Bribery and Fair Competition Act (IAFC) (1998), which came into force on 10 November 1988 (Cleveland, *et al.*, 2009:236).

The 1998 amendments were implemented to amend the Securities and Exchange Act (1934) and the FCPA (1977) for purposes of improving the competitiveness of American business, to promote foreign commerce, amongst others, and to make the FCPA (1977) consistent with the OECD Convention (1997). According to Cushman and Myers (1999:1844), the amendments to the FCPA (1977) were called the Anti-Bribery and Fair Competition Act (1998) and therefore this title did not take over that of the FCPA (1977), as it is still known today.

An expansion of the anti-bribery provision, which originally applied only to payments made in the USA, occurred in 1998 to include bribes originating outside the USA (Gibeaut, 2007:50). The amendment also expanded the FCPA (1977) by inserting a provision to hold US companies liable for acts of foreign employees (Gibeaut, 2007:50). Other amendments of the FCPA (1977) include amendments to penalties in section 104(g) and to prohibited conduct (section 104(a)).

The FCPA (1977) led the way regarding the concept of cross-border corruption. This first initiative in cross-border anti-corruption legislation was decades ahead of its followers. In 2010, one of these constituted to be the UK Bribery Act (2010).

2.5 The UK Bribery Act (2010)

2.5.1 History and development of the UK Bribery Act (2010)

Before the creation of the UK Bribery Act (2010), the UK's corruption legislation merely consisted of complex Victorian bribery and corruption laws, which were very difficult to understand (Great Britain Parliament: Joint Committee on the Draft Bribery Bill, 2009:137). These previous laws consisted of three statutes, which dated back to the late nineteenth century to early twentieth century, and in addition to these laws a common law offense of bribery also existed (Warin, *et al.*, 2010:5). In these laws there was a lack in the establishment of a comprehensive statute prescribing bribery and corruption as well as the laws being considered outdated and difficult to apply in practice (Warin, *et al.*, 2010:5).

The revision of the old law and implementation of the new bribery law therefore resulted after regarding previous bribery legislation of England and Wales as outdated and uncertain. These

inadequate laws were the subject of constant criticism by OECD Working Groups (Warin, *et al.*, 2010:4), and the UK government wanted to improve the UK's standing among developed countries (Wehner, 2011:118). The OECD Working Group, responsible for implementing the OECD Convention (1997), also put pressure on the UK government to simplify their corruption legislation by revising it. The OECD took more severe measures by threatening to blacklist British exports unless they implemented tough new legislation (Wehner, 2011:118). In 2008, the OECD published a report, "The Bribery in International Business Transactions, United Kingdom: Phase 2bis, Report on the application of the Convention on combating bribery of foreign public officials in international business transactions", which heavily criticized the UK's continuous failure to address inadequate anti-bribery laws (Warin, *et al.*, 2010:5).

Before the UK Bribery Act (2010) was passed and after the implementation of ancient laws that dated back to the 19th and 20th century the UK also implemented the Anti-Terrorism, Crime and Security Act (2001) which did include corruption provisions that criminalised the bribery of foreign officials by UK nationals or companies (Warin, *et al.*, 2010:5). However, it did pose the problem of only being applicable to UK nationals, while ignoring the corrupt actions of foreign nationals domiciling in the UK (Warin, *et al.*, 2010:5).

Finally, the issue was addressed when the Serious Fraud Committee issued a review of its anti-corruption practices, and the UK government referred the issue to the English Law Commission, who were in charge of the draft Bribery Bill (Warin, *et al.*, 2010:5).

The UK Bribery Act (2010) proceeded through the final Reading in the House of Commons on 7 April 2010 and after the House of Lords' final consideration became law on 8 April 2010 (Warin, *et al.*, 2010:6). The UK Minister of Justice decided that the enforcement of the UK Bribery Act (2010) would occur once he had addressed all the concerns and published the applicable guidance to the Act (Warin, *et al.*, 2010:6). The Guidance was published in March 2011 (Kirk, 2011:157). The words of the actual statute therefore do not seem to be the only explanation of the Act and this may cause a considerable amount of concern and even more uncertainty in businesses that strive to comply with the new Bribery Act (2010).

As the Guidance on especially section 7(1) of the UK Bribery Act (2010) had to be published by the Ministry of Justice, according to section 9(1), the implementation of the Act was delayed until 1 July 2011, when the Act officially came into force (Kirk, 2011:157).

The further delay in implementation of the UK Bribery Act (2010) until July 2011 was largely due to a good deal of criticism that the UK Bribery Act (2010) generated. Examples of criticism attracted by the UK Bribery Act (2010) includes trouble over the section 7(1) offence of

negligently failing to prevent bribery, as well as other uncertainty surrounding this new Act, especially regarding matters such as facilitation payments and corporate hospitality (Kirk, 2011:157).

Other criticism on the UK Bribery Act (2010) includes that the definitions are considered “complex and elusive” and leaves a great deal to the imagination (Kirk, 2011:158). This is opposed to the FCPA (1977) which is deemed to cover more ground. Some parts of the UK Bribery Act (2010) are also in language that would not appeal to the Plain English Campaign (Kirk, 2011:158).

This criticism has mainly come from respected organisations such as the OECD as well as Transparency International, amongst other groups. Nevertheless, the Act’s core aim of combating bribery in UK businesses overseas is well supported.

The implementation of the Act itself followed soon after the guidance was published at which stage the existing UK bribery and corruption laws were to be repealed. It is contained in section 17(1) of the Act as a consequential provision that selected common law offences would be abolished upon implementation, namely “the offences under the law of England and Wales and Northern Ireland of bribery and embracery” and “the offences under the law of Scotland of bribery and accepting a bribe”.

As predicted in the draft Bribery Bill, upon implementation, the Bribery Act (2010) repealed the common law offence that existed on bribery as well as ancient pieces of legislation such as the Public Bodies Corrupt Practices Act (1889); the Prevention of Corruption Act (1906) and the Prevention of Corruption Act (1916) (Kirk, 2011:157).

2.5.2 Aim of the UK Bribery Act (2010)

The apparent need arose for a modern piece of bribery legislation as these previous laws were very complex, which added to the difficulty of interpretation thereof by the public and businesses alike, as well as making it difficult to prosecute bribery, penalise corrupt practices and enable appropriate staff training on these matters (Great Britain Parliament: Joint Committee on the Draft Bribery Bill, 2009:137). Britain had to improve their previous bribery legislation to the same calibre that similar cross-border anti-corruption legislation, such as the FCPA (1977) and the OECD Convention (1997), was already on.

2.5.3 Content of the UK Bribery Act (2010)

According to Maton (2010:37), the Bribery Act (2010) has even wider extra-territorial jurisdiction than the Foreign Corrupt Practices Act (1977). The UK Bribery Act (2010) has also created a

new offence for failure to prevent bribery by someone performing the organisation's services (section 7(1)). This has been met with a great deal of scepticism, as innocent people running their businesses in the UK, with no knowledge of bribery or how to prevent it, might have to explain implemented corruption procedures in their businesses and why they have failed to prevent this offence to a prosecutor.

The guidance was specifically published by the Minister of Justice to provide assistance on compliance with section 7(1) of the Act, the section that addresses the failure of commercial organisations to prevent bribery. This section has been the source of much uncertainty and has caused a great deal of trouble (Kirk, 2011:157). The guidance to adequate procedures under the Bribery Act advises: "Audit is an essential part of the monitoring and improvement process" (Transparency International, 2010:61).

However, the Act does contain a statutory defence in section 7(2) which allows the proof of adequate procedures for prevention that was already in place, to render the business as not guilty of such an offence. Therefore, unlike the FCPA (1977), this defence causes the UK Bribery Act (2010) to be more fair on blameless companies as some of the harshest penalties can be avoided if the guilty person is a junior employee and prevention measures are in place and implemented effectively (Anon., 2011d:68).

The Guidance to Adequate Procedures provides that the Board should consider external verification or an assurance opinion after an assessment of the anti-bribery policies and systems has been carried out (Transparency International, 2010:80). This assessment could be in the form of an audit to test the performance and effectiveness of the program and measures already in place. An assurance engagement would typically result when the external auditor or accountant fits into the adequate procedures provision (Transparency International, 2010:80).

The UK Bribery Act (2010) contains three other offences, including one which criminalises the bribery of foreign public officials (section 6), as well as adding specific offences for senior company officials ignoring or consenting to bribes received. Two other broad offences included in the Act are the offering or giving of a bribe (bribing another person) in section 1; or requesting or receiving a bribe in section 2. The four broad offences contained in the Act were based on a Law Commission Report on reforming bribery (Kirk, 2011:157).

The UK Bribery Act (2010) applies in part to non-UK businesses and addresses the bribery of foreign public officials in section 6. The offence will be committed, according to section 6(1) and 6(2), if the defendant offers or pays a bribe with the intention of influencing a foreign public official, in his or her official capacity, to obtain or retain business or an advantage in conducting

business. This section may have been specifically inserted into the Act for the UK to adhere to its international obligations to prevent and punish cross-border corrupt transactions, in terms of the OECD Convention (1997).

The foreign public official does not have to act improperly or corrupt for the person bribing him to be guilty of an offence. Even the intention to influence the official is punished by the Bribery Act in section 6(7).

The UK Bribery Act's (2010) rigorous new measures, in applying wide-reaching extra-territorial application and penalties, are even applicable to companies that carry on businesses in the UK without a connection to the bribe (Eastwood, 2011:13). This means that the UK Bribery Act (2010) fights corruption head on and we hope that corruption will show a steep decline in the years to come.

The global solution in the fight against corruption has therefore evolved from earlier years, but has shown even greater growth in the past decade because of companies becoming more aware of the cross-border corruption threat. Globalisation also has an enormous influence on the increasing effects of extraterritorial corruption as international integration has become the norm in times more recent.

2.6 Conclusion

The history of International Conventions, PRECCA (Act 12 of 2004) the FCPA (1977) and the UK Bribery Act (2010) has been analysed and a better understanding of their development has been obtained. Through numerous international attempts came the ratification of many international anti-corruption conventions. The most important of these are the OECD Convention in 1997 and the UNCAC in 2003, both leading the international fight against cross-border corruption.

South Africa ratified the UNCAC (2003) in November 2004 and the OECD in 2007, which was a positive step in joining the cross-border corruption fight. The ratification of these conventions entailed that the country, including South African auditors, began to act in response to the global problem.

Apart from South Africa joining these international Conventions, it became clear that our national legislation had improved immensely from the crime of bribery in South Africa's common law to the Act on Prevention of Corruption (1958) to the Corruption Act (Act 94 of 1992) and finally to the PRECCA (Act 12 of 2004). Even though South Africa may still need improvement on anti-corruption legislation, specifically addressing cross-border legislation, the country has come a long way in regulating corruption.

South Africa has followed older legislation, such as the FCPA (1977), which was approved in 1997 after corruption scandals. Following these corruption legislations, the UK Bribery Act (2010) shows the UK's effort to join this fight. A background of both the UK and US acts were analysed to obtain an understanding of South Africa, especially PRECCA's (Act 12 of 2004), development in relation to foreign developments.

Now that an understanding of the history of anti-corruption legislation has been obtained, the following chapter will proceed by drawing comparisons between the laws and conventions that currently contain the leading cross-border corruption provisions.

3. CHAPTER 3: A COMPARISON OF CORRUPTION LAWS

It is important to compare international anti-corruption legislation to obtain a better understanding of any shortcomings that may exist, especially in South Africa's own legislation.

Consequently, the similarities in these laws concerning applicability, jurisdiction, investigation, enforcement, penalties and the exceptions and defences allowed will be further examined.

3.1 Applicability

Applicability of the law examines whom the specific piece of legislation relates to; the people it addresses; and which parties should adhere to its regulations.

3.1.1 Adhering to the United Nations Convention Against Corruption (2003)

The OECD Convention (1997) and the UNCAC (2003) are both agreements that are applicable only to the states parties to the Conventions (signatories). The OECD Convention (1997) binds 37 nations while a vast number of 148 countries are considered parties to the UNCAC (2003). Therefore, the UNCAC (2003) may be considered the largest convention of its kind in the world.

It was brought to the reader's attention before that the UNCAC (2003) only contains some provisions which are considered mandatory while others are optional to implement by the countries' government discretion (Anon., 2011c). Therefore not the entire convention may be applicable to a country, as many different options exist, but the mandatory provisions must be adhered to if the Convention is undersigned.

South Africa, the UK and USA are all signatories to the UNCAC (2003) (United Nations Office on Drugs and Crime, 2012) and the mandatory provisions of this Convention are considered to be applicable to the UK, USA and South Africa (NACF, 2009).

3.1.2 Adhering to the OECD Convention (1997)

Firstly, it is important to note that the OECD Convention (1997) mainly only addresses the offering of bribes by companies or individuals (Article 1(1)). Therefore, parties soliciting or accepting the gratification from foreign public officials will not be held accountable for the offence of bribery, and the OECD Convention (1997) will not be deemed applicable to such a party.

This is opposed to PRECCA (Act 12 of 2004), which addresses both the giving and accepting of a gratification in its definition of corruption, as contained in section 3. The OECD also differs

from the FCPA (1977) in the sense that it does not include foreign political parties within its anti-bribery provisions.

The provisions of the OECD Convention (1997) refer to “Each Party”. Therefore, the Convention’s provisions are applicable to Parties that have made the agreement with the OECD and have ratified the Convention. The Convention was ratified by South Africa in 2007 (Lestelle, 2008:543) and the UK and USA are both current members of the OECD (OECD, 2012).

3.1.3 Comparison of laws

An analysis of the FCPA (1977) reveals that it is widely applicable. In fact, the US DOJ and the SEC expect all US persons, US companies and business entities, as well as their foreign subsidiaries to comply with the Act (Biegelman & Biegelman, 2010:25). The latter provision does not apply to foreign subsidiaries of US companies who do not act as an agent or represents their parent company situated in the US, but alternatively acts on their own behalf (Lestelle, 2008:534). Cleveland *et al.* (2009:203) states that if an issuer controls more than 50% of the stock of its foreign subsidiary, it must ensure that the controlled entity adheres to the books and records provisions.

It is important to realise that a void exists in PRECCA (Act 12 of 2004), as it does not specifically include a provision for foreign incorporated subsidiaries of South African parent companies, especially where the officials of the subsidiary cannot be considered South African citizens (Sibanda, 2006:149). This does not necessarily mean that the parent company will not be held liable for the actions of its foreign subsidiaries, especially when asserting the standard of reporting corruption when one “reasonably should have known” it was occurring. An elaboration of this provision, which is contained in section 34(1) of PRECCA (Act 12 of 2004), will follow in chapter 4.

In the case of BAE Systems, a defence contractor, the company did not create adequate mechanisms in order to monitor its non-US affiliates’ compliance to FCPA (1977) and OECD stipulations, even though claiming otherwise (Hughes Hubbard, 2011:92). They also failed in taking steps to determine FCPA (1977) compliance of its advisors and agents (Hughes Hubbard, 2011:92). This illustrates why knowledge regarding the applicability of the FCPA (1977) is of utmost importance.

Any US “issuers” and those with agency relationships to such issuers are bound under the FCPA (1977) (15 USC § 78dd-1(a)). More specifically, the FCPA (1977) prohibits “directors, officers, employees, or agents of registered companies or stockholders thereof, domestic

concerns, or foreign nationals in the United States” from committing an offence under the Act (15 USC § 78dd-2(a) & (1)).

A company can be neither a domestic concern nor an issuer and be expected to adhere to FCPA (1977) regulations. This becomes evident in the case of Alcatel Lucent, in which some of its subsidiaries were criminally charged under the FCPA (1977) (Hughes Hubbard, 2011: 43). None of these subsidiaries was deemed domestic concerns or issuers, but the FCPA (1977) was still applicable to them for “acts in the US in furtherance of the FCPA (1977) violations” (Hughes Hubbard, 2011:43).

Similar to the FCPA (1977), the UK Bribery Act (2010) follows a very strict approach and makes a company liable for bribes paid by its agents or joint venture collaborates even if these payments are made without the company’s knowledge (Syedain, 2011:24).

The UK has therefore taken a strict approach from the start. The offences under sections 1 and 2 are also applicable to those committing the offence abroad, even if that person or group has no jurisdictional nexus with the UK, as long as the person paying the bribe or the person being bribed has a “close connection” with the UK (Warin, *et al.*, 2010:23). For purposes of the UK Bribery Act (2010), a “close connection” may be considered a British citizen (overseas or not), or British passport holder; a UK resident; an entity incorporated under the law of any part of the UK; or a Scottish partnership, according to section 12(4). Other persons qualifying under the “close connection test” of section 12(4) include a British overseas territories citizen or a British national that is overseas, a person who was a “British subject” under the British Nationality Act (1981), a British protected person and an individual “ordinarily resident” in the UK.

Since the FCPA’s 1998 amendment, its provisions apply to foreign firms and persons who take any act in furtherance of corrupt payments (directly or indirectly), while being in the USA (Biegelman & Biegelman, 2010:26).

The FCPA (1977) applies when any person or group, stated before, bribes (or offers to bribe) any foreign official, foreign political party, or candidate for foreign political office (15 USC § 78dd-2 (1) & (2)). A foreign official is defined in the FCPA (1977) (15 USC § 78dd-1(f) (1) (A)) as:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

As opposed to the FCPA (1977), which only refers to the bribery of foreign officials, outside US borders, PRECCA (Act 12 of 2004) refers to public officials (both local and foreign) in section 2 as well as private individuals or companies and their business transactions. Similarly, the UK Bribery Act (2010) applies to commercial (public) or private bribery, including the bribery of UK and non-UK public officials (British Bankers Association (BBA), 2011). The Bribery Act (2010) contains no requirement that the bribe has to merely be paid to a public official.

In its section providing definitions (section 1), PRECCA (Act 12 of 2004) covers the applicability of the Act. Included in the definition are individuals, agents, distributors, auctioneers, companies, corporations and other business establishments, as well as the manager, director, principal of a business, banks and other financial institutions (Sibanda, 2006:149).

PRECCA (Act 12 of 2004) contains a section covering foreign businesses registered or incorporated in South Africa, under any law, in section 35(1)(d). In section 35(1)(a) and (b) any person may be charged of an offence under PRECCA (Act 12 of 2004) if also deemed a citizen or ordinarily a resident of the Republic, including businesses merely domiciled in the country or which may have offices in the Republic. Any body of persons (corporate or unincorporated) in the Republic (section 35(1) (e)) and any person who was charged while arrested in the territory of the Republic at the time the offence was committed (section 35(1) (c)) are also considered liable to this act.

The FCPA (1977) is applicable to foreign companies that trade securities in the US; their subsidiaries; and service providers (Stander, 2005:30). All companies listed on the US stock exchange are considered liable to the FCPA's (1977) accounting provisions (DOJ, 2011). According to these principles, even companies situated in South Africa may be liable under the FCPA (1977). Important examples of such companies in South Africa are Telkom, Sasol and Sappi (Stander, 2005:30). Because of these companies being incorporated in South Africa, it is important to note that they must still adhere to the provisions PRECCA (Act 12 of 2004). Therefore, South African companies may be liable under both the FCPA (1977) and PRECCA (Act 12 of 2004).

The FCPA (1977) may therefore be enforced against anyone inside the USA or even against any US person or entity outside the USA (Schmidt, 2009:1124). The FCPA (1977) even goes as far as being applicable to any foreign businesses which make use of the US banking or commerce systems (DOJ, 2011).

The US Congress intended for the FCPA (1977) to be as widely applicable as it has become, and apply broadly to any payments intended to assist the payer in obtaining or retaining business, whether indirectly or directly (Biegelman & Biegelman, 2010:29).

Similar to the FCPA (1977), even the Bribery Act has a great impact on South African businesses. Vollgraaf (2011) warns that South African companies with operations in the UK will have to comply with both South African legislation, such as PRECCA (Act 12 of 2004), and the UK Bribery Act (2010).

A new provision instated by the UK Bribery Act (2010) will need to be adhered to going forward. The Bribery Act's (2010) section 7, namely the failure to prevent bribery by commercial organisations, may have grave consequences for companies operating in South Africa. This section applies to "any corporate or partnership, wherever it is registered, incorporated or conducts its main activities" (Eastwood, 2011:13) with the condition that business, or a part thereof, should be carried out in the UK.

Bribery carried out by an "associated person" on an entity's behalf can also result in the entity being considered guilty of the failure to prevent bribery under section 7 of the UK Bribery Act (2010) (Eastwood, 2011:13). An "associated person" of an entity "performs services for or on behalf of" said entity (section 8(1)). Compared to the UK Bribery Act (2010), no strict liability is applicable for the failure to prevent bribery in the FCPA (1977) (BBA, 2011) or in PRECCA (Act 12 of 2004).

Despite this, some South African companies may need to implement these adequate measures in their businesses to comply with the UK Bribery Act (2010). Vollgraaff (2011) expresses that a grey area still exists on the matter of "carrying on business or part of business" in the UK as the guidance on the Act holds that foreign companies with UK subsidiaries and simply being listed on the UK stock exchange does not automatically qualify a business under this definition. Although the UK legislation applies to all companies that benefit from the UK economy, the Ministry of Justice does not give much guidance on what it means to "carry on business" or "part of business" in the UK (Transparency International, 2010).

Transparency International (2010) warns that businesses should take care in implementing adequate procedures even if they are merely operating business in the UK and not registered there.

The Guidance provides, in paragraph 35 and 36, that when determining whether business or part of business is carried out in the UK, the "common sense approach" should be applied (Ministry of Justice, 2011). It explains in the Guidance that the organisation simply has to be

incorporated (in any way) and if engaging in commercial activities it will be liable under the Act, regardless of the purpose of rendered profits. The final arbiter in any dispute concerning this matter will be the courts (Ministry of Justice, 2011).

3.2 Jurisdiction

A court possesses power over certain matters and areas only to a certain extent. A court must have the appropriate authority to preside over a prosecution of cross-border bribery. This may be regulated through legislation, reflecting that a certain country can have some jurisdiction over crimes committed in other countries. Even so, cross-border corruption may occur within many jurisdictions while each jurisdiction may only experience a part of a more complex crime being committed. Jurisdiction of one country, in which the offence was committed, does not necessarily mean that another country does not have jurisdiction over the same offence (Meessen, 1995:1649).

In jurisdictional disputes, according to Meessen (1995:1649), the test of the general international law would be to examine whether there is a sufficient link to the other country or whether the additional exercise of jurisdiction could be considered as interference with the exercise of jurisdiction by the first country. Furthermore, it is important for companies to understand the legal environment of the jurisdiction in which they operate, especially in cross-border cases, if civil or criminal action should flow from the investigation (Ostwalt, 2007:32). Cultural and legal differences should be taken into account.

Fighting corruption only within the borders of an individual country is doomed to failure (Johnston, 1997:22). Therefore different legislations and agreements have established their own measures, and examination of these will follow.

3.2.1 Adhering to the United Nations Convention Against Corruption (2003)

The UNCAC (2003) addresses the issue of jurisdiction in article 42. It also addresses the matter of extradition in article 44.

Article 44 states that extradition of a person who has committed the offence in a foreign jurisdiction may occur, upon request, to his own country, provided the offence is punishable under both jurisdictions. The foreign country may also grant permission for the extradition if the offence is punishable according to the UNCAC (2003), even if no such provision exists in their domestic law.

The Article on jurisdiction (Article 42) provides that any state may implement its own measures on jurisdiction. It may establish its own jurisdiction over offences in its territory or either on a

vessel carrying the flag of that country or an aircraft registered under that states' laws. Article 42(2) reflects that a state may also establish jurisdiction over an offence committed against (or by) a national of that country if he or she holds habitual residence in its territory or when an offence is committed against the State Party. This is not only addressed in the FCPA (1977) and Bribery Act, but especially in Article 35 of PRECCA (Act 12 of 2004) which deals with extraterritorial jurisdiction.

While the UNCAC (2003) clearly states in subsection 42(6) that it shall not exclude any criminal jurisdiction established by a State's domestic law, it allows the coordination of actions by the applicable authorities when one country wanting to exercise its jurisdiction finds another country already investigating or prosecuting the same conduct (Article 42(5)). The two states should then consult with one another and work together in combating the offence.

The establishment of jurisdiction in article 42 (explained above), is limited by the provisions of article 4 of the UNCAC (2003). This article requires that the forum state may not exercise extraterritorial jurisdiction if the domestic law of a country containing territorial nexus to the offence claims exclusive jurisdiction (Lestelle, 2008:540).

3.2.2 Adhering to the OECD Convention (1997)

In the OECD Convention's (1997) Article 4 the matter of jurisdiction is addressed. Article 4(1) requires the party to establish territorial jurisdiction over the bribery of a foreign public official. This may also be why South Africa added the new offence in respect of corrupt activities relating to foreign public officials in section 5 of the PRECCA (Act 12 of 2004). The Commentary to the OECD Convention (1997) suggests in paragraph 25 that this "territorial jurisdiction" should be interpreted broadly so that no "extensive physical connection" to the act is required.

Article 4(2) of the OECD Convention (1997) provides for nationality-based jurisdiction. It reflects that each party, which holds jurisdiction over the prosecution of its nationals for offences committed abroad, shall establish such jurisdiction according to the same principles in all applicable bribery cases. The Commentary to the OECD Convention (1997) then provides that states should not selectively exercise nationality-based criminal jurisdiction, but are obliged to enlarge the jurisdiction to cover bribery of foreign officials (Watson, 1998). This obligation is adhered to within the FCPA (1977), PRECCA (Act 12 of 2004) and the UK Bribery Act (2010) as all three laws make provision for the bribery of foreign officials.

Article 4(4) requires that if a country has jurisdiction over a certain matter, the other parties to the Convention will, upon request of another signatory, consult to determine the most appropriate jurisdiction. Article 4(4) then further provides the requirement for a signatory nation

to determine whether its current basis for jurisdiction is effective in combating cross-border corruption and if not, to take remedial steps. The Corruption Act (Act 94 of 1992) was not satisfactory for combating cross-border corruption and so PRECCA (Act 12 of 2004) was implemented to adhere to especially this provision in international anti-corruption agreements (Snyman, 2006:383). This includes the UNCAC (2003) and OECD Convention (1997), specifically Article 4(4).

As discussed before, PRECCA (Act 12 of 2004) is modelled after the OECD Convention (1997). This becomes evident when examining the provisions contained in both, especially in terms of jurisdictional provisions. Article 4(2) of the OECD Convention (1997) provides for its parties to have the jurisdictional capability to prosecute its nationals for offences that are committed not only locally, but abroad as well. This provision corresponds with PRECCA's (Act 12 of 2004) section 5, the bribery of foreign public officials. The offence in this section is applicable to South African citizens, but by taking into account the principle of nationality, South Africa will be able to prosecute its nationals for crimes committed internationally, and hold the jurisdiction even though a crime was committed outside national territory (Sibanda, 2005:16).

3.2.3 Comparison of laws

Jurisdiction under the FCPA (1977) is not limited in any sense. Even unlawful payments that have passed through the US financial system have been sufficient to establish jurisdiction for the United States (Lestelle, 2008:537). Enforcement of the FCPA (1977) could not have been as rigorous if the US had a more restricted jurisdiction to rely on.

Compared to the FCPA (1977), the UK Bribery Act (2010) has a constrained jurisdictional reach in section 6: "Bribery of foreign public officials", whereas the Bribery Act (2010) has an extraordinary territorial reach in terms of section 7's "failure of commercial organisations to prevent bribery". Its jurisdiction on this matter even outreaches the FCPA's (1977) and relates to any "relevant commercial organisation" (section 7(1)). A relevant commercial organisation includes "a body which is incorporated under the law of any part of the UK"; "any other body corporate (wherever incorporated)"; "a partnership which is formed under the law of any part of the UK"; or "any other partnership (wherever formed) which carries on business (or part of a business) in the UK (section 7(5)).

The US's jurisdiction over corrupt payments to foreign officials depends on whether the violator is considered "an "issuer" or a "domestic concern", or a foreign national or business that is carrying out an act in furtherance of this type of payment in the US (Warin, *et al.*, 2010:9).

The UK's jurisdiction is extended in the UK Bribery Act (2010) to apply, in general, to any British national operating outside the country (similar to the FCPA's (1977) "act of furtherance").

An issuer can be defined as a corporation that has issued securities registered in the USA (DOJ, 2011) or an entity that is required to file periodic reports with the SEC (FCPA (1977) 15 USC § 78m(b)(2)). According to the US DOJ (2011) a domestic concern is an individual who is a citizen; national (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or resident of the United States. Additionally, a domestic concern includes any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship with its principal place of business in the USA or a commonwealth thereof (FCPA (1977) 15 USC § 78dd-2(h)).

In the case of Panalpina, an oil services company, the company admitted that they paid bribes to the amount of approximately \$27 million to customers deemed to be domestic concerns or US issuers (Hughes Hubbard, 2011:54). The company itself was not considered a US issuer, although it did qualify to be under DOJ jurisdiction to be regarded as a domestic concern (Hughes Hubbard, 2011:54).

The flexibility and range of the FCPA's (1977) jurisdiction is vast, a concept illustrated by FCPA (1977) case law. In the case of *United States of America v. Technip S.A*, a French company was targeted which was making unlawful payments from a Dutch bank account to Nigerian officials' Swiss bank account with the only connection to the US being that these funds were in US dollars (Thompson & Knight Attorneys and Counselors, 2011). From these cases, it is clear that a broad approach is taken when interpreting the jurisdictional element of the FCPA (1977).

Contrary to the FCPA (1977), PRECCA (Act 12 of 2004) does not entirely deal with extraterritorial corruption. This South African legislation establishes extraterritorial jurisdiction in a single section for offences committed outside South Africa, namely in chapter 7, section 35. This section prohibits any corrupt activities by South African businesses worldwide.

Despite this, PRECCA (Act 12 of 2004) reflects that even if the alleged act (regardless of being illegal in the foreign country) is committed outside South Africa, the Republic shall have jurisdiction in respect of that offence if the business belongs to a citizen; person normally residing in South Africa; or a foreign business incorporated or registered in South Africa (section 35(1)). This provision is similar to that of the FCPA (1977). The act has to affect a "public body, a business or any other person in the Republic" and the "person found to be in South Africa" (section 35(2)). Such an offence is also punishable and deemed to have been committed in the

Republic if a person is not extradited by South Africa or if no application for extradition has been received (section 35(2)(c)).

The question arises as to who will qualify to be considered a national of South Africa. This is answered by consulting section 35(1) (a) and (b) of PRECCA (Act 12 of 2004). In short, a person will be regarded as subject to PRECCA's (Act 12 of 2004) provisions if: they are resident or domiciled in South Africa; "a foreign juristic person incorporated or registered in South Africa"; or any other person who does not fall within either of the previous two categories, but committed the offence while they were in South Africa (Sibanda, 2005:17).

Therefore, according to Sibanda (2006:150), businesses that commit corruption in foreign countries may now be dealt with according to South African law; their business and property may be subject to South African investigations and legislation; and it keeps getting more complicated to hide in corruption "hot-spots" or rival jurisdictions.

Section 35(3) of PRECCA (Act 12 of 2004) aids in determining which courts have the jurisdiction to try an offence under PRECCA (Act 12 of 2004) if committed outside the Republic. When determining the jurisdiction the "offence is deemed to have been committed" at the same place as where the "accused person is ordinarily resident" (section 35(3)(a)) or at the "accused person's principal place of business" (section 35(3)(b)). When a person is charged with conspiracy, incitement or acting as an accessory of the offence (section 35(4)), the offence is deemed to have been committed at the place where the act took place and any other place where such a person acted or should have acted (in the case of an omission).

A practical example used by Chalom (2010:11) of how this affects South Africa is in the case of an American citizen paying a facilitation fee to help expedite a South African citizen's green card. Even though this action is legal under the FCPA (1977), as facilitation payments make out affirmative defences under this Act, it will not be a legitimate payment under PRECCA (Act 12 of 2004). Therefore, if arrested by the South African Police, he could be charged with an offence according to PRECCA (Act 12 of 2004) even though he is not guilty of any contravention against the FCPA (1977) in the USA.

3.3 Investigation and Enforcement

Investigation and enforcement are two major elements in combating corruption. Investigation processes have to be on par, otherwise they will not be regarded as satisfactory evidence in court. To investigate a corruption case thoroughly, adequate enforcement is needed in the form

of anti-corruption agencies, with the sufficient skills and knowledge, and endowed with the necessary means which are needed for them to sufficiently carry out their functions.

3.3.1 Adhering to the United Nations Convention Against Corruption (2003)

The UNCAC (2003) develops a theme of criminalisation and law enforcement in Chapter 3 thereof, which constitutes as another one of the basic pillars of the Convention, along with prevention (Argandona, 2007:489).

The Convention calls upon its signatories to establish a specific anti-corruption body (Article 6) and emphasizes that the prevention, investigation and prosecution requires international cooperation (Cleveland, *et al.* 2009:206).

Chapter 4 of the UNCAC (2003) deals with International cooperation between enforcement agencies worldwide. This is a great indication for the fight against cross-border corruption. Article 43 orders its states parties to cooperate in criminal matters and different states parties to aid each other in the enforcement processes.

A shortcoming in the Convention is the absence of the provision for any mechanism to punish states parties who do not fulfil their obligations as signatories of the UNCAC (2003) (Argandona, 2007:490). Argandona (2007:490) holds that this is related to the absence of monitoring and surveillance mechanisms that are integral to the success of an anti-corruption instrument and therefore long-term success cannot be guaranteed.

Ideally, the task of supervision and monitoring is to be carried out through the Conference of states parties to the Convention (Argandona, 2007:491). Article 63(2), reflects that the initial Conference will be held a maximum of one year following the Convention coming into force. Article 64(4) proceeds by providing that the Conference must periodically review the implementation of the UNCAC (2003) by its signatories. Ultimately, a long-term monitoring process, with extensive participation from states parties and a resourced Secretariat, will be needed that is adaptable to changing circumstances (Argandona, 2007:491).

In terms of investigation, the UNCAC (2003) makes provisions for extradition (article 44), mutual legal assistance (article 46) and joint investigations to allow guilty parties to be prosecuted in any country and prevent them from escaping justice (Argandona, 2007:489). As discussed, this corresponds with PRECCA's (Act 12 of 2004) section 35 provisions.

The Convention goes further in aiding investigations by creating an article dealing with the cooperation with law enforcement authorities (Article 37). Subsection one urges signatories to respond appropriately in encouraging those who have committed an offence under the UNCAC

(2003), to supply authorities with the needed information to help them conduct the investigations and recover any criminal proceeds. There is a chance that a person's substantial cooperation may be considered, to grant such person immunity from prosecution (subsection 3).

In many cases, perpetrators are able to escape prosecution because of the limited ability of law enforcement authorities to pursue them across national borders, or share information with other national agencies (Anon., 2003:101). The OECD Convention (1997) and the UNCAC (2003) have improved cooperation considerably since its ratification. It is vital for prosecution to be successful, that law enforcement agencies are allowed to act and prosecute across national boundaries. Anon. (2002:65) holds that in the pursuit of bribery and companies operating outside their home borders, a reappraisal of investigative techniques will be needed to gather integral information abroad.

3.3.2 Adhering to the OECD Convention (1997)

The OECD Convention (1997) is not regarded as self-executing, which means that it has no direct enforcement power, except for the requirement that its signatories adopt their own anti-bribery legislation (Cleveland, *et al.* 2009:205). To help this process along, a rigorous surveillance process was implemented in 1991, requiring the Convention to review country-specific legislation to see if it measures up to the OECD standards (phase 1), and phase 2 (2001), which assessed the enforcement processes and their effectiveness (Cleveland, *et al.* 2009:205). To date all three countries in question, the United States, South Africa and more recently the United Kingdom, have implemented their own anti-bribery legislation.

Article 5 of the Convention addresses enforcement procedures, such as investigation and prosecution procedures. This Article states that these two processes are subject to applicable rules and principles set by each Party. This Article then proceeds to caution:

They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

In South Africa, this may pose a problem, as a wholly independent enforcement agency, which is able to manage investigation and prosecution procedures, may still be lacking.

Article 6 of the OECD Convention (1997) proceeds by mandating all nations to provide that their statute of limitations allows for an "adequate period of time" for the investigation and prosecution of the bribery of a foreign public official.

Very similar to the UNCAC's (2003) Chapter 4 on International cooperation, the OECD Convention (1997) also addresses mutual legal assistance during criminal proceedings in article

18. Article 10(1) addresses extradition between signatory parties when a bribery offence is committed (this aspect is also addressed in the UNCAC's (2003) article 44). If no extradition treaty exists, the OECD Convention (1997) can supply the legal basis needed for extradition to take place (Article 10(2)). Section 35(2)(c) of PRECCA (Act 12 of 2004) reflects that an offence committed in another country is deemed to have been committed in the Republic if that "person is for one or other reason not extradited by South Africa or if there is no application to extradite that person".

The parties are required to provide legal assistance to one another during investigations of a criminal or non-criminal nature promptly and effectively, according to article 9(1) of the OECD Convention (1997). Sibanda (2005:22) contends that, during an investigation, any evidence which is considered to be material to the institution of criminal (and any other) proceedings, and which is located within the jurisdiction of another party, may be required to be submitted by such a party. The party of which it is required to submit the necessary evidence will not be allowed to plead bank secrecy to decline a request of cross-border assistance in criminal proceedings (Article 9(3)).

Unlike the OECD Convention (1997), PRECCA (Act 12 of 2004) does not provide for a section pertaining to bank secrecy or international cooperation, except when stating that "regional and international cooperation is essential" in its Preamble (Sibanda, 2005:23).

3.3.3 Comparison of laws

The DOJ and the SEC jointly enforce the FCPA's (1977) provisions. While the DOJ is responsible mainly for all the criminal investigations and prosecutions of both public and private companies (and civil prosecutions of private companies), the SEC takes responsibility in the civil investigations and prosecutions against publicly traded companies and their agents, their officers and employees (Schmidt, 2009:1125). The DOJ also has the responsibility for filing suits for monetary damages while the SEC is responsible for record-keeping provisions (Schmidt, 2009:1125).

These two agencies may conduct parallel investigations, which could include sharing evidence and coordination of enforcement activities and efforts not often found in other criminal areas (Cleveland, *et al.*, 2009:212).

In the past the SEC and DOJ struggled to enforce the legal mandates of the FCPA (1977). This is substantiated by the fact that the total number of FCPA (1977) criminal prosecutions by the DOJ were 56 in 2007 compared to 18 prior to 1998 and actions by the SEC were 41 in 2007 compared to 8 prior to 1998 (Cleveland, *et al.*, 2009: 211). FCPA (1977) investigations were

rare (conducted by general white-collar crime squads) until recently, in 2006, when the FBI established a dedicated FCPA (1977) squad in its Washington Metropolitan Field Office (Cleveland, *et al.*, 2009:213). This does show that enforcement of the FCPA (1977) is improving, which is a positive sign in the fight against corruption.

According to DOJ Policy, it is required that all FCPA (1977) investigations and prosecutions have to be handled by the Criminal Division's Fraud Section, which often collaborates with the US Attorney's Office (Cleveland, *et al.*, 2009: 210).

Investigations are even conducted when a company is sold. In such instances, the mergers and acquisitions review accountants may specifically look for any violations of the FCPA (1977), and they usually know where to look (Cleveland, *et al.*, 2009:216). The first step in conducting an FCPA (1977) investigation will be for the defence attorney to hire a professional service firm to review company records as well as to interview employees to produce a final report (Cleveland, *et al.*, 2009:219).

PRECCA (Act 12 of 2004) provides authorisation to the National Directorate of Public Prosecutions in section 22 to investigate any individual, who has any property suspected to be used in the commission of an offence in their possession, or an individual with unexpected wealth, which may be the proceeds of such an offence. According to Mandonsela (2010:10), the Auditor General can also conduct investigations and special audits upon the receipt of a request or complaint or when considered to be in the best public interest.

There are a number of key anti-corruption agencies in South Africa and one of these key agencies that help with the enforcement of PRECCA (Act 12 of 2004) is the National Prosecuting Authority (NPA) (Business Anti-Corruption Portal, 2011). The Asset Forfeiture Unit falls under the NPA. Other anti-corruption agencies in South Africa include the South African Police Service (SAPS) with a separate division under it called the Directorate for Priority Crime Investigation (hereafter referred to as the Hawks), a successor of the Scorpions (Mandonsela, 2010:9). According to Mandonsela (2010:9), other agencies include the Independent Complaints Directorate (ICD), established in terms of the South African Police Service Act (1995), the Auditor General, established in terms of the Constitution, and the Anti-corruption Coordinating Committee (ACCC). Furthermore, the Special Investigating Unit (SIU) has the mandate to investigate fraud, corruption and maladministration under the Special Investigating Units and Special Tribunals Act (Act 74 of 1996). The aforementioned act has a specific focus on civil recovery.

Western European and US investors want to see efficient law enforcement in terms of corruption with a view to eliminate their exposure to prosecution in South African and their own jurisdiction (Pickworth, 2012)

Compared to the positive enforcement trends in the US, it is concerning to see what is reflected in a recent Transparency International progress report of country enforcement of the OECD Anti-bribery Convention. This report reflects that South Africa shows no enforcement of foreign bribery and any cases or investigations as at the date of the report in 2012 (Transparency international, 2012).

According to the Business Anti-Corruption Portal (2011), South Africa does not have one anointed anti-corruption agency with “powers and mandate to investigate, arrest and prosecute” cases of corruption. Legislation in respect of the Hawks division, namely the South African Police Service Act 68 of 1995, has been ruled as unconstitutional, because of its lack of independence and the court presented Parliament with an eighteen month period to remedy this defect (*Glenister v. President of RSA and others*). Therefore the new Hawks legislation, the SAPS Amendment Act (Act 10 of 2012), has been passed and is currently operational but may face more constitutional challenges in future.

Regardless of this ruling, the establishment of a unit such as the DOJ and SEC in the United States will be needed with all the necessary powers and mandates to combat corruption and to particularly focus on combating cross-border corruption.

The SFO does the enforcement of the UK Bribery Act (2010) (Warin, *et al.*, 2010:45). The SFO was established in 1988 following the Criminal Justice Act (2003) and is responsible for “investigating and prosecuting the most serious and complex cases of fraud and corruption in England, Wales and Northern Ireland” (Warin, *et al.*, 2010:44).

Currently, the Director of Public Prosecutions and the SFO’s director are drafting a joint guidance for prosecutors in order to serve as a method of creating a consistent approach to the Act to be followed by the police, the SFO and the Crown Prosecution Service (Eastwood, 2011:14).

The first conviction under the Act occurred recently in 2011. According to Anon. (2012a), Munir Patel was sentenced to 3 years in prison for the bribery offence and six years (concurrently) for “misconduct in a public office”. He was charged for bribery for neglecting to record traffic fines on a court database (Anon., 2012a). It therefore seems that the UK are taking a no tolerance approach to any form of bribery, no matter the seriousness of the misconduct.

3.4 Penalties

Penalties are very important deterrents for potential offenders. As elaborated upon previously, the FCPA (1977) encourages rigorous enforcement, stemming from corporate scandals of the early 2000's, with the new UK Bribery Act (2010) bound to result in enforcement that is even more so. This rigorous worldwide enforcement leads to severe penalties and strict prosecution. All of the anti-corruption conventions and legislations contain either recommendations or regulations on the punishment that fits the crime and aids remedial actions. The penalties act as a deterrent and aid with the prevention of corruption.

3.4.1 Adhering to the United Nations Convention Against Corruption (2003)

The UNCAC (2003) requires its countries to establish criminal offences, covering a wide range of corrupt acts. Differences between the Convention's prescribed sanctions and the country's own domestic sanctions may have to be analysed and corrected (Anon., 2011c). They may be legally obliged to establish corrupt offences or, alternatively, urged to consider these (Anon., 2011c).

The behaviours that should be established as criminal offences are: The bribery of national public officials (article 15) and officials of public international organisations (article 16); embezzlement or misappropriation of property by public officials (article 17); money laundering (article 14 and 23); illicit enrichment (article 20) and the obstruction of justice (article 25). Some criminal offences that can be established optionally, according to Anon. (2011c), are those relating to bribery in the private sector (article 21) and embezzlement of property in the private sector (article 22).

Article 30 of the UNCAC (2003) reflects in subsection 1 that each signatory:

Shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

Therefore, in a way, the discretion of which penalties and sanctions will be imputed on offenders is left to that of the individual State Party and this is exactly what is done in South Africa, the UK and the USA.

Even though the UNCAC's (2003) focus is on prevention, this global Convention provides punitive measures in chapter 3. It criminalises public and private bribery, from both the supply and demand sides (Lestelle, 2008:539). Article 26 imposes the mandatory obligations of a nation to create the criminal liability of legal persons or participants in offences under the

Convention. A similar provision to that of the OECD Convention (1997) reflects in Article 26(4) that each State Party shall ensure that:

Legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

No exact amounts of monetary fines are prescribed in the UNCAC (2003), similar to the approach taken in PRECCA (Act 12 of 2004). The UNCAC (2003) also refrains from prescribing specific prison sentences.

Article 34 creates a mandatory obligation on all nations to take measures in addressing the consequences of corruption. Recommendations of such measures are to annul a contract or withdraw a concession, which is found on corrupt practices, or take “any other remedial action” (Article 34).

3.4.2 Adhering to the OECD Convention (1997)

The OECD creates mandatory measures in the hope that such measures will lead towards the criminalisation of fraudulent payments (Sibanda, 2005:8).

This Convention extends criminal liability to the offence of complicity in bribery, the conspiracy and attempt to commit bribery (Article 1(2)). Nevertheless, this article does not require these attempts and conspiracies to commit bribery to carry the same penalties as committing the actual offence. The Commentary, in Paragraph 11, also declares that a nation is not required to punish an offence, which does not “lead to further action”.

As discussed previously, the OECD Convention (1997) mandates sanctions that are “proportionate and dissuasive criminal or non-criminal sanctions” (article 3(1) and which will be comparable to penalties for bribery of the local public officials. Article 3(2) reflects that when criminal responsibility is not applicable to legal persons, non-criminal sanctions (including monetary sanctions) should be applicable. PRECCA (Act 12 of 2004) does not follow this approach and makes no provision for civil penalties in section 26.

Article 3(3) holds that proceeds of the bribery or property to the value of such proceeds are susceptible to seizure or confiscation, or alternatively, monetary sanctions to the same value should be applicable. Finally, Article 3(4) proposes that additional civil or administrative sanctions may be applicable to a person for the bribery of foreign public officials. The UK Bribery Act (2010) and FCPA (1977) have both created alternative forms of punishment apart from criminal penalties, but PRECCA (Act 12 of 2004) may be lacking in this provision as section 26, which deals with penalties, merely makes provision for criminal penalties.

However, the OECD does not prescribe specific amounts for the monetary claims or even the lengths of jail sentences in Article 3. This is unlike all the other legislations as PRECCA (Act 12 of 2004), FCPA (1977) and UK Bribery Act (2010) are all more specific in prescribing penalties. Sibanda (2005:17) explains that the Convention leaves the determination of these specific aspects of penalties to the parties, on condition that the punishment acts as a significant deterrent for the bribery payments. Therefore a discretion exists when it comes to setting the punishments, given that it is “effective, proportionate and dissuasive” as prescribed in Article 3(1).

It is important to note that, according to the Commentary to the OECD Convention (1997), the Convention seeks to “assure functional equivalence among measures taken by the Parties to sanction bribery of foreign public officials” (Cleveland, *et al.*, 2009:233). Therefore Parties should take heed to implement sufficient penalties in their local anti-corruption laws. The 1997 Revised OECD Recommendation does expand on the meaning of “functional equivalence” by emphasising that if the differences in sanctions and prosecution lead to effective sanctioning and prosecution of foreign bribery officials, these differences did not matter (Cleveland, *et al.*, 2009:233).

A shortcoming of PRECCA (Act 12 of 2004) might be that it does not include a provision for taking measures in relation to the proceeds of bribery being subject to seizures and confiscation. Opposed to this, the OECD contains the seizure and confiscation provision in Article 3(3). Sibanda (2005:18) explains that a reason for this is that other South African laws, such as the Prevention of Organised Crime Act (Act 121 of 1998), regulate the forfeiture and confiscation of said proceeds.

3.4.3 Comparison of laws

Severe penalties for violating the FCPA (1977) exist. Enterprises or individuals can receive monetary fines up to a maximum of twice the gains (or losses) recognised from an offence, in terms of the Alternative Fines Act (DOJ, 2011). More specifically fines for criminal violations prescribed are \$2million for each violation by a business entity or corporation and for individuals (including officers, directors, stockholders, employees and agents) the prospect of facing five years in prison as well as a \$100 000 fine per violation (15 USC § 78dd-2 (g)(1) & (2)).

Remarkably, these penalties are miniscule to those prescribed in the FCPA (1977) for violating the accounting provisions. If found guilty of criminal violation of the accounting provision, individuals can be fined up to \$5 million as well as imprisonment of up to 20 years (Biegelman & Biegelman, 2010:37). Corporations and business entities responsible for making wilful violations

of the FCPA (1977) accounting provisions or false and misleading statements may face up to \$25 million (15 USC § 78ff (a)).

Supplementary to these monetary penalties, the company can also be forced to abandon business won by bribery, face disgorgement of corrupt profits, be denied export licences, or be disqualified from any US government contracts (disbarment) (Biegelman & Biegelman, 2010:24). According to Prins (sa), the firm may be suspended or debarred from securities business or to participate in any procurement or non-procurement activities.

Except for the monetary fines, other punishments may include injunctive relief or the appointment of a monitor with broad powers over the business practices (Biegelman & Biegelman, 2010:37).

Civil penalties may arise from the accounting-provision, where the issuer parent may face strict civil liabilities for a subsidiary's failure to comply, when the subsidiary's books and records are incorporated in the parent company's group statements (Warin, *et al.*, 2010:34). Vice versa, a foreign subsidiary of a US parent company may also be held liable of knowingly causing an issuer's violation of the accounting provision in the FCPA (1977) (Warin, *et al.*, 2010:34).

According to the DOJ (2011), the Attorney General or SEC may give a fine of up to \$10 000 against any firm, individual at the firm, stockholder or agent of the firm that violated the anti-bribery provisions of the FCPA (1977). The DOJ holds that an additional fine may be imposed which cannot exceed the greater of the gain made as a result of the violation or a specified dollar amount, ranging from \$5 000 to \$10 000 for a natural person and \$50 000 to \$500 000 for any other person (DOJ, 2011). According to the FCPA (1977), an alternative civil penalty is that the Auditor General may bring in an action to enjoin an act or practice of a firm that appears to be in violation of the Act (DOJ, 2011).

Civil settlements have required companies to institute an FCPA (1977) compliance program, which includes a clear FCPA (1977) policy and standards. Periodic review is then required at least once every five years as well as rigorous FCPA (1977) audits from time to time (Biegelman & Biegelman, 2010:33). This compliance program also requires the establishment of a reporting system (Biegelman & Biegelman, 2010:33).

One of the best examples of a fine imposed on a company occurred in 2008. Siemens, a German manufacturing company, received the fine of \$800 million through the bribery of government officials and the falsifying of books and records to disguise these activities (Cassin, 2008).

Unlike the FCPA (1977), the UK Bribery Act (2010) only provides for penalties from criminal violations (major and minor criminal offences). The Bribery Act provides no civil enforcement. Additional to this the penalties provided for in these two Acts are largely similar penalties.

The UK Bribery Act (2010), grants regulators even broader discretion than the FCPA (1977). Section 11 of the UK Bribery Act (2010) prescribes penalties. An individual found guilty of a criminal offence in the Crown's Court (conviction on indictment) of bribing another person, being bribed or bribing a foreign public official under the UK Bribery Act (2010) is liable to ten years imprisonment or an unlimited fine if the conviction is on indictment, or both (section 11(1)(b)). Therefore the UK Bribery Act (2010) does not prescribe a maximum fine for major criminal offences and this is left to the discretion of the courts, such as in a conviction on indictment, much the same as in PRECCA (Act 12 of 2004).

If an individual is found guilty of these offences on summary conviction (i.e. minor offence tried in lower courts, such as the Magistrate's Court), they will be liable to imprisonment for a maximum term of 12 months in England, Wales and Scotland (6 months in Northern Ireland) or a statutory maximum fine which is currently £5 000 in England, Northern Ireland and Wales and £10 000 in Scotland (BBA, 2011).

A person found guilty of the new offence added to the UK Bribery Act (2010) contained in section 7, the failure to prevent bribery, will be liable to a fine or criminal proceedings in the Crown's Court (conviction on indictment).

PRECCA (Act 12 of 2004) has also followed international trends to a certain extent, specifically those set by the FCPA (1977), to create hefty criminal charges. PRECCA (Act 12 of 2004) imposes, amongst others, a penalty for the bribery of a foreign public official to obtain a contract, retain business or another advantage. This penalty is reflected in section 26(1) to be a fine or imprisonment. All offences identified in section 26 of PRECCA (Act 12 of 2004) will be liable to a fine or imprisonment. PRECCA (Act 12 of 2004) only follows international trends to a certain extent, because it does not make provision for civil penalties as the FCPA (1977) does.

The duration of this sentence or the amount of the fine will differ depending on which court imposes the specific penalty, similar to the penalties provided by the UK Bribery Act (2010). Section 26(1) specifies that a sentence imposed by a High Court should be for a fine or imprisonment for up to a life sentence. The High Court may impose a life sentence if a person is found guilty of an offence in Parts 1 to 4, including: The general corruption offence in part 2 which reflects the "corrupt activities related to specific persons". This part comprises "offences relating to foreign public officials" in section 5. A sentence imposed by a regional court would be

a fine or imprisonment for a period not exceeding 18 years and a sentence imposed by magistrate's office is limited to a fine or imprisonment for up to a 5 year period (section 26(1)(a)). The amounts of the fines are not prescribed as the specific maximum dollar amounts prescribed for fines in the FCPA(1977) and PRECCA (Act 12 of 2004) also specifies shorter prison sentences in section 26(1)(b) for more minor offences.

Section 26(3) provides that in addition to any fine imposed by a court in terms of section 26, the court may also impose a fine equal to five times the gratification involved in the offence. This provision corresponds with the FCPA (1977) provision of receiving fines of up to twice the gains generated by an offence. Monetary fines could therefore indeed result in very high prices to be paid for the corruption offence.

PRECCA (Act 12 of 2004) provides punishment in addition to sentences contained in section 26. These include the exclusion from public and government subsidies or the exclusion from public tenders (section 28). Other punishments may include the exclusion from procurement or even punishments to the extent of debarring or suspending of a juristic person (Sibanda, 2005:17). As these punishments are in addition to criminal sentences contained in section 26, PRECCA (Act 12 of 2004) does not specifically prescribe merely civil penalties.

Finally, if convicted of the failure to report corruption, contained in section 34 of PRECCA (Act 12 of 2004), the High Court may impose a fine or imprisonment for a maximum period of 10 years, or the Magistrate's Court could impose a fine or imprisonment for a maximum period of 3 years (section 26(b)(i) and(ii)). There will be further elaboration on section 34 in the next chapter.

International deterrents for corruption are definitely on the rise. The US State Department has called upon the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank) to employ a criterion which is to take corruption into account, when providing loans and other aid (Sibanda, 2005:17). This is a positive occurrence, which shows international cooperation to penalise corruption.

3.5 Exceptions and Defences Allowed

Allowed exceptions and defences are those actions which may be considered as bribery or corruption, but are regarded as exempt in the various anti-corruption legislations or, alternatively, can be used as defences in court. One of the most important examples of these exceptions is facilitation payments. While the demand for facilitation payments is customary in some countries, these payments may also be considered to be corruption. Facilitation payments

are addressed in most of the conventions and pieces of legislation that have been examined, but still cause reason for debates and differences in the manner they are dealt with.

Firstly, a definition of facilitation payments has to be established. Maton (2010:43) defines these payments as:

Payments made to induce a person to perform a duty which that person is obliged to perform, without resulting in preferred treatment and where the payment exceeds that which is properly due. Such payments are typically, but not necessarily, of low-value.

These payments are normally demanded by low-level or low-income public officials for routine, non-discretionary governmental services (Cleveland, *et al.*, 2009:213) to which people are legally entitled without such expediting payments. It is important to define and understand the legality of facilitation payments for auditors to determine whether or not a payment should be reported as corrupt.

3.5.1 Adhering to the United Nations Convention against Corruption (2003)

The UNCAC (2003), on the other hand, prohibits facilitation payments. The Convention contains no exception for making these payments and therefore it is considered similar to any other bribe paid to a public official.

It is also important to note that, according to Argandona (2007:490), it is not obligatory to make corruption in political party funding a corrupt offence. This may be seen as a shortcoming in the UNCAC (2003).

For many years, it used to be common business practice in South Africa to offer these “rewards” (including facilitation payments, gifts and corporate hospitality) during business transactions (Sibanda, 2006:150). Many Asian countries consider it an integral part of the business process (Sibanda, 2006:150).

Apart from making facilitation payments and its various regulations in different worldwide anti-corruption legislations, another exception, which is often puzzling to many business executives, politicians and similar groups, is the act of bestowing gifts and hospitality in business transactions. Differences in cultural practices and wealth levels can be vast; therefore a gifts and hospitality policy is essential to any business. In other words, it is essential to define the dividing line between what constitutes as a bribe and what constitutes as hospitality specifically.

3.5.2 Adhering to the OECD Convention (1997)

Much like the UK Bribery Act (2010) and PRECCA (Act 12 of 2004), the OECD Convention features no specific exception for facilitating or expediting payments. Article 1 of the OECD

Convention (1997) prohibits any act of bribing a foreign public official while conducting international business. The Convention itself does not majorly address the aspect of facilitation payments.

However, the Convention argues, in the official Commentary to the OECD (Paragraph 9), that facilitation payments should be addressed by “support for programmes of good governance” rather than criminal sanctions, which they do not regard as a “practical or effective” alternative.

Paragraph 9 of the Commentary does explicitly exclude the making of “small facilitation payments” in the hope of inducing public officials to perform their functions, such as issuing licenses or permits (Argandona, 2005:255). This paragraph specifically states that such small payments do not amount to payments that are made to obtain or retain business, and therefore “are also not an offence”. Paragraph 9 continues to suggest that the issue of facilitation payments can be addressed, for example through the implementation of good governance programs, but criminalisation thereof “does not seem a practical or effective complementary action”.

Consequently, facilitation payments may be considered legal according to the exemption of *de minimis* (Sibanda, 2005:18). Therefore, for the most part, the Convention supports the FCPA’s (1977) view on this exception. Even so, these payments may still be specifically regarded as illegal by the country’s domestic law, such as the UK Bribery Act (2010).

The OECD Convention (1997) was, however, amended in 1998 to refer to any payments aimed at “securing any improper advantage” and therefore some facilitating payments could fall within the new scope of the Convention (Argandona, 2005:255).

Even so, the OECD council issued a recommendation in 2009, which urges its signatories to reconsider the use of these payments and as an alternative, encourage each country’s local companies to prohibit the use of facilitating payments. On 18 February 2010, they also issued a recommendation to have provisions in an ethics and compliance program addressing the issue.

The Annex to the OECD Convention (1997), specifically paragraph 3, briefly addresses the issue of defences. It contends that the bribery of a foreign official will be regarded as an offence if it resulted in obtaining or retaining business “irrespective of the value or outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities”. Therefore it will not be seen as a bribery defence if the norm or general practice in a country indicates the customary payment of bribes.

3.5.3 Comparison of laws

Facilitation payments are not criminalised under the FCPA (1977). An exception is created for “facilitating or expediting” payments in FCPA (1977) § 78dd-1 (b). Two prerequisites for these payments are that they have to be paid regularly to obtain a regular service (Biegelman & Biegelman, 2010:29). They are considered small payments to low-level officials, for simple actions (Biegelman & Biegelman, 2010:29). According to the FCPA (1977), therefore, only payments made to obtain or retain business can be penalised (15 USC § 78dd-1(a)(1)(B)).

Contrary to this, Business Unity South Africa (BUSA, 2009) makes it very clear that facilitation payments are a criminal offence in South Africa. PRECCA (Act 12 of 2004) draws no distinction between facilitation payments and other forms of corruption and therefore that could be interpreted as these payments being as illegal and punishable as any other form of corruption according to the definition in section 3. Therefore, it is currently the practice in South Africa for local and international South African companies to limit the making of these payments strictly for important reasons (Sibanda, 2006:151). In contrast to the FCPA (1977) and similar to the UK Bribery Act (2010), facilitation payments are not allowed to be made.

Chalom (2010:7) makes an interesting observation by stating that a “government official” as defined by the FCPA (1977) is likely to fall under the definition of a “public official” under PRECCA (Act 12 of 2004). It is an offence to give a gratification to a public official (section 4(1) of PRECCA (Act 12 of 2004)) who will cause such an officer to act in a way that is illegal or dishonest, and amounts to “the abuse of a position of authority” (section 4(1)(b)(ii)(aa)). Alternatively it could also be an “improper inducement to do or not to do anything” (section 4(1)(b)(iv)). “To act”, according to PRECCA (Act 12 of 2004) is further defined as to limit the general essence thereof. Section 4(2) expands this by including 8 examples of acts which will be deemed as a corrupt act. Section 4(2)(c) specifically includes the “expediting, delaying, hindering or preventing the performance of an official act”. This part of the definition is in some ways very similar to the one contained in the FCPA (1977), and facilitation payments are often referred to as “expediting payments”.

In the 1988 amendment to the FCPA (1977), it holds that American companies are allowed to pay facilitation fees to expedite permits, licenses, papers, visas, mail, provide police protection, phone services, power and water supply, or to expedite the movement of perishable cargo, amongst others (15 USC § 78dd-3(f)(4)(A)). Nevertheless, consideration should be given to the legality of these payments in the country in which they occur. Sibanda (2006:150) warns that foreign businesses doing business in South Africa should take special care when offering facilitation- and hospitality rewards.

Even though the FCPA (1977) allows these payments, they are not considered as favourable business practices. Many companies in the US have banished such practices by instituting rules to prohibit them. Other companies, such as BP, Shell and Unilever, have tried to define a distinction between what constitutes as a bribe and which payments are defined as facilitating payments, but in practice this has not shown to be very successful (Bailes, 2006:297).

It is important to examine the difference between these facilitating payments and corrupt payments or bribery. In contrast to the making of bribes, facilitating payments are paid for “essentially ministerial actions” that “merely move a particular matter toward an eventual act or decision or which to not involve any discretionary action” (Warin, *et al.*, 2010:13). Facilitating payments should therefore not affect the outcome of a decision, but simply speed up a decision that has already been made on sufficient grounds. It makes sense that the limits of facilitation payments and the rapid growth of these payments may be difficult to define.

Despite this, it is important to keep up to date with the local customs and laws of foreign countries in which transnational firms may conduct their business (Cleveland, *et al.*, 2009:221).

In the FCPA (1977) case of Panalpina Inc, Nigeria made facilitation payments with the objective of expediting customer shipments and described as “special” on related invoices (Hughes & Hubbard, 2011:55). Panalpina Brazil also paid an excess of \$10 million in bribes to Brazilian officials in order to “expedite customs clearance and resolve customs and import-related issues on behalf of its customers”.

In South Africa, some opinions contend that *prima facie*, no defence for facilitation payments exist in PRECCA (Act 12 of 2004) (Sibanda, 2005:18). Sibanda (2005:18) states that, when taking into account international practices, it is suitable to say that South African courts’ interpretation of this aspect should permit the facilitation payment defence on the condition that no business, or other advantage, is improperly obtained or retained and the payment amounts to a small sum. This is not a very steadfast solution, as uncertainty arises as to what will constitute as a small payment and no control will be exercised over such payments becoming larger payments of bribes. It is a better approach to eliminate these payments and to avoid the uncertainty that it would cause if some payments are allowed and others not.

To employ the facilitation payment defence, according to Sibanda (2005:19), the intention of the transactional parties would have to be considered to determine whether the payment will be regarded as reasonable and legitimate for business purposes.

PRECCA (Act 12 of 2004) addresses defences in section 25, and specifically stipulates the situations that will not be seen as valid defences. These defences amount to the following three

instances reflected from section 25(a) to 25(c). The defences include that the accused did not have the “power, right or opportunity” to perform the act connected to the gratification; the accused accepted or gave the gratification without intending to perform (or not to perform) the act connected thereto; and the accused failed to perform the act for which the gratification was given or accepted. Therefore, an accused person cannot contend these rationalisations as defences in court, for they will not be accepted as such.

The UK Bribery Act (2010) follows suit with PRECCA (Act 12 of 2004) as it criminalises facilitation payments both under “General bribery offences” (section 1 to 5) and section 6’s specific offence of “Bribery of foreign public officials”. Similar to previous bribery laws, the 2010 Act makes no pertinent exemption for such payments (BBA, 2011). According to Transparency International (2010), this would in turn cause section 7’s offence of failing to prevent bribery to be applicable as well. The Act contains no exception for facilitation payments or any affirmative defences.

The only facilitating payments allowed under section 6 of the Act are those specifically allowed for by the written domestic law of the particular country in which the payments were made. The UK Bribery Act (2010) criminalises these common payments allowed under the FCPA (1977). This may leave UK businesses at a competitive disadvantage and many see this provision as merely an extra inhibition in obtaining contracts and running a successful business (Kirk, 2011:158).

Despite this there is still some uncertainty surrounding the new Act, especially in terms of the facilitation payments and corporate hospitality provision (Kirk, 2011:157).

The UK government has indicated that it would only rarely be appropriate to prosecute the making of isolated facilitation payments involving “such small amounts of money” (Maton, 2010:43). UK authorities may therefore use their own discretion in declining to prosecute facilitating payments, which would otherwise be deemed illegal under the very Act (Warin, *et al.*, 2010:21). The SFO supports the prosecutorial discretion, but still expect of countries to identify these payments and maintain a “zero tolerance” policy in relation to them (Transparency International, 2010).

The Director of the SFO offers some elaboration on facilitation payments in his response to the Joint Committee Questions of the Draft Bribery Bill. In his response, he contends that facilitation payments are unlawful and that the mere offering of such an advantage may be considered “improper conduct” (BBA, 2011). Furthermore, he mentions that such payments are not likely to be a concern to the SFO “unless they are part of a larger pattern”, but immediately adds that the

SFO considers any facilitation payments as “unjustifiable and should be removed because these payments cut across transparency and openness” while making a company more susceptible to larger bribes. This approach is very similar to that of PRECCA (Act 12 of 2004) in the way that it is illegal to make these payments, but that some consensus exists that it will not be prosecuted in isolated instances, or when it occurs as a result of a wider lack of the implementation of adequate procedures (Transparency International, 2010).

3.5.4 Comparison of laws: hospitality

The 1988 amendment of the FCPA (1977) does not consider it a bribe to reasonably reimburse a public official for expenses such as meals; travel; lodging while the company is promoting or demonstrating a product; or executing a contract (section § 78dd-1 (c)(2)(A) and (B)). These payments hold the restrictions of having to reflect reasonable and bona fide charges (15 USC § 78dd-1(c)(2)); not to be over excessive; and to be considered lawful under the domestic law of the country in which they were paid (15 USC § 78dd-1(c)(1)).

These payments, gifts or offers have to be properly recorded by the company, even if made in countries with no such law (Biegelman & Biegelman, 2010:30). These *bona fide* meal and lodging charges have to be considered reasonable to be deemed legal and are merely allowed to be incurred by or on behalf of foreign officials, provided, according to Biegelman and Biegelman (2010:30):

they were directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof.

If affirmative defences are not considered reasonable and *bona fide*, the US government could prosecute any such companies.

Compared to the FCPA (1977), the UK Bribery Act (2010) provides no “specific guidance, monetary limits, exemptions or defences in relation to gifts or any other kind of hospitality” (BBA, 2011). Maton (2010:43) declares that “unduly lavish hospitality or gifts could be considered bribes”. The government has stated that it does not wish to prevent or punish genuine hospitality (Maton, 2010:43). The UK Ministry of Justice has indicated publicly and in conversation that it is not inclined to prosecute *bona fide* promotional expenditures provided to foreign public officials (Warin, *et al.*, 2010:22).

However, the Act criminalises corporate hospitality that is given with the intention of winning a financial advantage (Syedain, 2011:25). What the intent was behind the payment is therefore the key question.

Lord Tunnicliffe, a Government minister responsible for drafting the legislation, holds that there is a reason for the absence of an exception of corporate hospitality (Warin, *et al.*, 2010:22). He declares that they did not seek to penalise any legitimate hospitality in the corporate world, which they acknowledge as common practice in the modern business world. Their position is that merely lavish corporate hospitality can be used as a bribe, but that still leaves the question as to where to draw the line in respect of hospitality. Without such provision, what can generally be acknowledged as being too welcoming?

Transparency International UK (2010) holds the view that:

Good practice permits such expenditures where they are transparent, proportionate, reasonable and bona fide.

According to Syedain (2011:25), the UK enforcement agencies will not be likely to go after smaller cases of hospitality, such as golf trips and lunches, but they will be more interested in a consistent pattern of paying bribes with the purpose of winning contracts.

Another affirmative defence which exists within the FCPA (1977), in section § 78dd-1(c)(1), is that a corrupt payment made was considered to be lawful under the “written laws and regulations of the foreign official’s-, political party’s-, party official’s- or candidate’s country”.

A good example of FCPA (1977) case law, in which travel and hospitality expenditure were paid, is that of Alcatel-Lucent. The company paid for trips by government telecommunications officials, which could principally be construed as being for leisure (Hughes Hubbard, 2011:51). Except for subsidising these “holidays”, Alcatel CIT provided the means for two Entinel officials to travel to Madrid and Paris, mainly for leisure and not work-related reasons (Hughes Hubbard, 2011:51).

PRECCA (Act 12 of 2004) makes no express provision in relation to any “hospitality” payments, such as provisions for lodging and meals (Sibanda, 2005:19). Entertainment, specifically, was always traditionally part of the South African business environment. The definition of “gratification” or “dealing” in section 1(ix) (b) does include any gifts, but the Act does not expand on whether hospitality payments are considered gifts. Section 1(ix) (d) specifically qualifies any habitual or holiday accommodation as a gratification. South Africans are becoming more careful in the offering of rewards or hospitality benefits (such as lodging and meals). Snyman (2006:388) contends that the definition of gratification is a very wide one and that the definition is not limited to what section 1(ix) prescribes. This is seen in section 1(ix) (g) which widens the scope to include “any other service or favour or advantage of any description”. Hence it is safe

to say that even though not named expressly in this definition, hospitality will be included as gratification within the definition of corruption.

Sibanda (2005:19) also explains that, because no express provision exists on these payments, it should not be considered an offence unless the payment was made to improperly obtain business or unfairly obtain other advantages (as with the FCPA (1977)). This again, much the same as with facilitation payments, could result in a very relative interpretation fraught with uncertainty and not much clarity.

3.6 Conclusion

By comparing international legislation with similar local South African legislation, an understanding is achieved of the similarities, differences and definitions of corruption. Applicability; jurisdiction; investigation and enforcement; penalties and exceptions prescribed by both UNCAC (2003) and OECD were compared. Furthermore, an analysis of the way in which the FCPA (1977), PRECCA (Act 12 of 2004) and the UK Bribery Act (2010) follow these prescriptions was analysed and compared to one another.

Especially in South Africa, corruption legislation is needed which elaborates more on cross-border corruption. PRECCA (Act 12 of 2004) may need to be elaborated to put foreign investors' concerns at rest regarding their investments in South Africa (Pickworth, 2012). Despite this, it was found that the applicability of the FCPA (1977) and the Bribery Act (2010) may be so wide that it is applicable to US and UK companies conducting businesses within South Africa.

According to section 35 of PRECCA (Act 12 of 2004), the jurisdiction will still belong to South Africa if a South African incorporated or registered business commits an illegal act (in terms of PRECCA (Act 12 of 2004)) outside the Republic. This section shows that PRECCA (Act 12 of 2004) does address extraterritorial jurisdiction, but it is not as extensive as the FCPA (1977) and the UK Bribery Act (2010) approach towards cross-border corruption.

Whereas the investigation and enforcement of the UK Bribery Act (2010) is done by the SFO and the DOJ and SEC enforces the FCPA (1977), South Africa has various enforcement agencies. Therefore, there may be a need for an independent enforcement agency in South Africa (Business Anti-Corruption Portal, 2011). Furthermore, PRECCA (Act 12 of 2004) also differs from its counterparts in the US and UK, by not prescribing civil penalties.

Despite this, PRECCA (Act 12 of 2004) follows a stricter approach towards facilitation payments, similar to the UK Bribery Act (2010), by classifying such payments under the definition of corruption and not providing exceptions for these expediting payments. On the

other hand, making an exception for facilitation payments is the approach followed by the FCPA (1977).

Now that different aspects of the FCPA (1977), UK Bribery Act (2010) and PRECCA (Act 12 of 2004) have been analysed and compared with one another, we have a better understanding of PRECCA's (Act 12 of 2004) position on cross-border corruption compared to international legislation. The following chapter will proceed by dealing with the reporting duties of the auditor, particularly in South Africa, in terms of corruption.

4. CHAPTER 4: THE AUDITOR: CORRUPTION REPORTING DUTIES

Now that a clearer understanding has been obtained regarding the different anti-corruption laws, their histories and how they compare in different aspects, the important question arises as to what the reporting duties of auditors constitutes to in the different pieces of legislation. The problem statement revolves around the reporting duties of an auditor that has found any of the irregularities associated with cross-border corruption, and the answer to this will be obtained in chapter four.

As a professional, an auditor has a duty of care concerning their clients and after scandals such as Enron, (discussed later in this chapter), a spotlight has been placed on the professional duties and accountability of auditors worldwide (Strauss, *et al.*, 2004:92). These corporate catastrophes have also lead to an improvement of auditing laws and regulations with one of these constituting as the APA (Act 26 of 2005).

In section 1 of the APA (Act 26 of 2005), a “registered auditor” is defined as “[a]n individual or firm registered as an auditor with the Regulatory Board” whereas the “Regulatory Board” refers to the Independent Regulatory Board for Auditors (IRBA).

An “audit” is also defined in section 1 of the APA (Act 26 of 2005) as the following:

The examination of, in accordance with prescribed or applicable accounting standards – (a) financial statements with the objective of expressing an opinion as to their fairness or compliance with an identified financial reporting framework and any applicable statutory requirements; or (b) financial and other information, prepared in accordance with suitable criteria, with the objective of expressing an opinion on the financial and other information’.

This chapter will deal with the reporting duties of an auditor once material misstatement, especially pertaining to corrupt activities and bribery, has already been discovered in the entity. It still serves to note that the duty of an auditor is to provide “reasonable assurance” that “financial statements are free from material misstatement” and therefore an auditor cannot be held accountable for the testing of all transactions (Cullinan, 2004:854).

Full and fair disclosure (Bourne, 2007:492) are therefore of utmost importance where an auditor’s duties are concerned. The reporting duties of a South African auditor will be the main focus and consequently a review of South African legislation regulating the auditor will be completed. Furthermore, PRECCA’s (Act 12 of 2004) reporting provisions regarding auditors will be analysed.

4.1. International standards regulating the reporting duties of a South African auditor

4.1.1. International Standards on Auditing 240

This particular auditing standard deals with the auditor's responsibility to consider fraud during the audit of financial statements. It also provides some guidance on an auditor's reporting duties if fraud is detected during the audit process.

The ISA 240 holds that it is the responsibility of the auditor to perform an audit and obtain reasonable, but not absolute assurance that material misstatements (i.e. from fraud) are detected and reported (Pacini, *et al.*, 2002:210). Pacini *et al.* (2002:210) contends that ISA do not require an auditor to examine every transaction, but that an audit is aimed at discovering "errors, omissions and irregularities that have material impact on financial statements". No materiality threshold is said to exist for a bribe to be reported (Pacini, *et al.*, 2002:210).

Furthermore, it is also the auditor's responsibility to promote the transparency, especially regarding bribes, through financial reporting and to present a "true and fair view" of an entity's activities (Pacini, *et al.*, 2002:210).

ISA 240 records that the auditor must communicate any factual findings regarding fraud that may potentially exist, "as soon as practicable" (paragraph A60) to the "appropriate level of management" (ISA 240: paragraph 40). These matters should be reported to management even when the effect may be immaterial on the financial statements (Pacini, *et al.*, 2002:210).

According to paragraph 41, if the auditor has identified fraud which involves management, employees which hold significant roles in internal control, and others where the result of the fraud leads to material financial misstatement, the auditor must communicate these matters with "those charged with governance" as soon as practicable.

According to paragraph A61 of ISA 240, this communication which is to occur to those charged with governance, can be written or orally and this matter is expanded on within ISA 260 which deals with the "Communication of Audit Matters to those charged with governance". Paragraph 41 of ISA 240 contends that if an auditor suspects that management may be involved with fraud, any such suspicions should also be communicated to those charged with governance. Furthermore, a discussion should be conducted with them stipulating the "nature, timing and extent of audit procedures necessary to complete the audit". Legal advice should be sought if the integrity and honesty of management as well as those charged with governance is in doubt (Paragraph A66).

Paragraph 43 proceeds to deal with reports to regulatory and enforcement agencies, which may often not be allowed as a result of the confidentiality of a specific client's information, except if an auditor's legal responsibilities are "overridden by statute, the law or courts of law" (Paragraph A65), as the case may be. In some countries this could be to report any fraudulent activity to supervisory authorities and in other countries this report should merely take place once management and those charged with governance "fail to take corrective action" (paragraph A65). In the end the auditor may need to withdraw from an engagement (paragraph 38).

It is important to note that ISA 240 does not make specific reference to corruption (including bribery), but only to fraud. As explained in chapter 2, fraud and corruption are considered two different offences. Therefore this may indicate an inadequacy in the scope of ISA which only regulates the auditor's reporting duties in terms of fraud and cannot be applied to reporting corruption as well. This leaves the question as to why merely reporting of the offence of fraud is addressed in ISA 240 but that it does not address the reporting of corruption.

4.2. An auditor's reporting duties in terms of the FCPA (1977) and the UK Bribery Act (2010)

The FCPA (1977) recommends self-reporting or voluntary disclosures of any violations of the Act (Biegelman & Biegelman, 2010:40). Similar to the FCPA (1977), the UK Bribery Act (2010) also actively encourages the self-reporting of any bribes or corrupt activities uncovered in the business (Maton, 2010:44). Despite this, a company will not be committing a criminal offence if it does not report corruption, which is discovered in the business, to the SFO (Eversheds, 2011).

Neither the FCPA (1977) nor the UK Bribery Act (2010) expressly provides for the reporting of corruption by an auditor. Nevertheless, some businesses in South Africa will be liable under the FCPA (1977) and the UK Bribery Act (2010), as discussed in chapter 3. It may be that a South African holding company has a foreign subsidiary in the UK or the USA. Apart from a South African auditor having the duty under the APA (Act 26 of 2005) to report corruption (as discussed below), the entity may be liable to adhere to the FCPA (1977) or the UK Bribery Act (2010) even if no particular reporting duty exists.

Additionally, a South African auditor may have the duty to report irregularities according to IRBA's Professional Code of Conduct (discussed later in the chapter). In such a situation, an auditor must be aware that if the entity being audited has to comply with the UK Bribery Act (2010) and FCPA (1977), irregularities may need to be reported. Especially in relation to cross-

border corruption, which is regulated by the FCPA (1977) and the UK Bribery Act (2010), an auditor may be required by South African law to report any contraventions of these two Acts.

4.3. South African legislation regulating the reporting duties of an auditor

4.3.1. The Auditing Profession Act (Act 26 of 2005)

The Public Accountants' and Auditors' Act (Act 80 of 1991) which regulated both accountants and auditors was repealed by the APA (Act 26 of 2005) (Bourne, 2007:496). The new Act's sole focus is on the regulation of auditors.

The APA (Act 26 of 2005) provides for the establishment of IRBA and, amongst other things, holds the objective of regulating the conduct of a registered auditor. In articles 44, 45 and 46 it addresses duties in relation to the audit, under which is included the duty to report irregularities. These duties will be further analysed to answer the question as to what an auditor's reporting duties are in terms of corruption.

Section 44 of the Act attends to the duties in relation to an auditor. Subsection 2 contends that an auditor may not express the opinion that the financial statements of a business "fairly presents in all material respects" the financial position of an entity and are "properly prepared in all material aspects" unless the auditor is satisfied with a set of criteria. This criteria is contained in subsection 3 and, amongst other criteria, the auditor should be satisfied with the fairness and correctness of financial statements (section (g)) and the auditor should not have had to send a report to the Regulatory Board under section 45 during the period of audit (section (e)).

Before proceeding to section 45's provisions, it is important to establish what exactly the definition of a reportable irregularity is. These provisions can be seen as the conditions which need to be satisfied to report an irregularity. It is defined under section 1 of the APA (Act 26 of 2005) to be:

Any unlawful act or omission committed by any person responsible for the management of an entity, which (a) has caused or is likely to cause material financial loss to the entity or to any partner, member shareholder, creditor or investor...(b) is fraudulent or amounts to theft; or (c) represents a material breach of any fiduciary duty owned by such person to the entity or any partner, member, shareholder, creditor or investor of the entity under any law applying to the entity or the conduct or management thereof.

Therefore, an unlawful act or omission committed by management must exist for an irregularity to be deemed reportable by an auditor. This definition contained in section 1 proves that an "irregularity" refers not only to fraud and errors, but to corruption as well. The act of corruption will often cause material financial loss to the entity, satisfying the condition reflected in section 1(a) of the APA (Act 26 of 2005). Under the APA (Act 26 of 2005) section 1(c), the reporting

duty also arises in terms of unlawful activities defined in PRECCA (Act 12 of 2004) (Labuschagne & Els, 2006:37). This is as a result of the definition of a reportable irregularity under the APA (Act 26 of 2005) being defined as “any unlawful act or omission” which is committed and “represents a material breach of any fiduciary duty” “under any law applying to the entity” and therefore activities defined in PRECCA (Act 12 of 2004) would constitute irregularities as envisaged by the APA (Act 26 of 2005) (Labuschagne & Els, 2006:38).

This means that, unlike the provisions reflected in ISA 240, the APA (Act 26 of 2005) addresses not only the offence of fraud, but the offence of corruption as well. When providing for the duty of an auditor to report an irregularity in section 45, the APA (Act 26 of 2005) therefore regulates the reporting of corruption as well which may be discovered during an audit. It is submitted that it is a shortcoming of the APA (Act 26 of 2005) that corruption is not expressly mentioned in the definition of an irregularity. Therefore, uncertainty may still arise whether corruption will have to be reported by an auditor in a case where it may not result in a “material financial loss”.

Section 45 addresses the duties of an auditor to report on these irregularities. Subsection 1 thereof mandates a registered auditor who has reason to believe that a reportable irregularity has either already taken place, or is taking place at the time, to immediately inform the Regulatory Board thereof in a written report. The said report should contain all particulars of the irregularity and any other appropriate information on the matter (section 45(1)(b)).

The registered auditor then has to notify the management board of the entity in writing along with a copy of the first report, within 3 days of the written report to the Regulatory Board has been sent (section 45(2)). Subsequently the auditor must, as soon as possible or no later than 30 days after the first report was sent to the Regulatory Board, take “reasonable measures” to discuss the report with entity’s members of management, afford them an opportunity to make representations in respect of the report and then send an additional report to the Regulatory Board (section 45(3)(a)-(c)).

This successive report to the Regulatory Board must include a statement in the form of the auditor’s opinion that either no reportable irregularity has taken or is taking place, or the irregularity is no longer taking place and that adequate steps in relation thereto has been taken (i.e. the recovery of any loss as a result of the irregularity), or the reported issue is still persisting (section 45(3)(c)).

Subsequently, it is the Regulatory Board’s responsibility to report the matter that was brought to their attention to any “appropriate regulator” (section 45(4)). The definition of “an appropriate regulator” is contained in section 1 of the APA (Act 26 of 2005) and includes, amongst others,

the national government department, regulator, authority or a board or institution established under any law to regulate compliance with any legislation (i.e. the South African Revenue Service). The regulators which a report can be made to in relation to corrupt activities include the SAPS as well as the NPA (Labuschagne & Els, 2006:36).

The process following a report by IRBA to the Director of Public Prosecutions is explained in the Guide on Reportable Irregularities (SAICA, 2007). The procedures that will follow on this, according to part 13.2.1, is that the Commercial Branch of the SAPS may be requested to investigate the issue, as well as opening a docket and obtaining a statement from the auditor that a criminal offence might have been committed (SAICA, 2007).

It is important to note that no privilege exists between an auditor and his or her client (part 13.2.2) and therefore when an auditor is called upon by the SAPS to provide any relevant documents, the said auditor may not lawfully refuse the request (SAICA, 2007).

Furthermore, section 52 of the APA (Act 26 of 2005) addresses the procedures when an auditor fails to report a reportable irregularity in terms of section 45 discussed above. This section warns that if an auditor “knowingly or recklessly expresses an opinion” or makes a false statement which could be considered material, such an auditor will be guilty of an offence. In addition to these provisions, section 52(3) imposes a liability to a fine or an imprisonment period for a maximum of 10 years, or both, if an auditor is found guilty of the criminal offence established in this section.

An auditor may also face a civil claim for damages, according to section 46(7) of the APA (Act 26 of 2005), by “parties aggrieved by the reportable irregularity” if the matter was not reported when it should have been. Other consequences which an auditor may face when failing to report a reportable irregularity under sections 48, 49 and 50 of the APA (Act 26 of 2005) are investigations, disciplinary sanctions by IRBA, suspension, deregistration as auditor or a fine not exceeding an amount equal to 5 years’ imprisonment. It is therefore a very serious matter and the auditor holds a great responsibility in terms of the reporting as well as reporting the correct facts when making an opinion about the financial statements of an entity.

IRBA released an auditing guide on Reportable irregularities on 30 June 2006 (IRBA, 2006). It elaborates on the section 45 responsibilities of an auditor and deals with issues such as when the duty to report irregularities is applicable and specific situations which call for a cause of action in terms of section 45.

The final decision on whether an act is deemed to be non-compliance to laws and regulations is based on that of a legal expert, according to part 2.8 (IRBA, 2006). The auditor’s duty is to

report a reportable irregularity, as defined, in good faith “based on the professional judgement of the auditor” and if the auditor has “*prima facie* evidence” that causes the auditor to have reason to believe that such an irregularity is taking place or has taken place (part 2.8) (IRBA, 2006). Labuschagne and Els (2006:40) also contends that an auditor may be satisfied that a corrupt activity has occurred, if “there is sufficient and *prima facie* reliable information” obtained from a variety of sources.

If more than one auditor is responsible for the audit of an entity, the onus to report a section 45 irregularity lies with each individual auditor, but they can also send a combined section 45 report (Part 2.9) (IRBA, 2006).

The guide on reportable irregularities proceeds to deal with cross-border audits in part 2.10. It contends that it is important to note that the APA (Act 26 of 2005) is not applicable in jurisdictions beyond South African borders. A scenario is provided of when an auditor must report in cross-border circumstances (IRBA, 2006). Part 2.10 contends that this may be when the South African holding company has a foreign subsidiary in which an auditor identifies a reportable irregularity, as a result of either the contravention of South African or foreign law, with local management’s involvement (IRBA, 2006). In such circumstances, the responsibility lies with the auditor to report a contravention of section 45 of the APA (Act 26 of 2005) in terms of the South African holding company (IRBA, 2006).

In some cases the auditor may not be deemed responsible to report an irregularity. It is important to refer to the conditions (defined in section 1 of the APA (Act 26 of 2005)). Section 1(a) holds that a “material financial loss” has to be caused or likely to be caused. Therefore part 4.2.2 of the Guide on Reportable Irregularities (SAICA, 2007) reflects that if an unlawful act or omission does not comply with this prerequisite, it will not be reportable under section 1(a) of the APA (Act 26 of 2005). Thereafter, the other two conditions should also be considered as well as the auditor’s reporting duty in terms of other laws such as PRECCA (Act 12 of 2004) and the Financial Intelligence Centre Act (Act 38 of 2001) (SAICA, 2007).

According to section 10.1.12 of the Guide on Reportable Irregularities (SAICA, 2007), if an audit is performed on behalf of the Auditor General, it is not the responsibility of such an auditor to report to IRBA, but alternatively to report directly to the Auditor General.

4.3.2. The Companies Act (Act 71 of 2008)

The Companies Act (Act 71 of 2008) does not specifically address the reporting duties of the auditor in terms of corruption. However, it does make provisions regarding annual financial statements in section 30(1) and (2) of the Companies Act (Act 71 of 2008).

This section reflects that annual financial statements must be made which have to be audited and include an auditor's report (section 30(3)(a)). It is the responsibility of the director of a company to disclose any information which may be considered material to the shareholders regarding the company's affairs (section 30(3)(b)).

In 2011, a few years after the implementation of the Companies Act (Act 71 of 2008), the Companies Regulations were issued in terms of section 223 of the Companies Act (2008). This may have been as a result of the lack of provisions pertaining to auditors' reporting duties in terms of corruption in the Companies Act (Act 71 of 2008).

An independent reviewer who becomes aware of a reportable irregularity taking place (or which has taken place) should send a written report to the Companies Commission in terms of Regulation 29(6)(a) of the Companies Regulations (2011). The written report must include any particulars in respect of the irregularity as well as other information which may be deemed appropriate (Regulation 29(6)(b)). In the Companies Regulations, an "independent reviewer" is a person appointed to perform an independent review (Regulation 29(1)), which also includes an auditor. A reportable irregularity can be any act or omission which "unlawfully has caused or is likely to cause material financial loss" to the company (Regulation 29(1)) and which therefore could include acts of corruption.

Within three days of sending the written report to the Commission, the independent reviewer must notify the board of the company in writing of the sent report in terms of this regulation, accompanied with a copy of the report (Regulation 29(7)).

Subsequent to this and as soon as reasonably possible, but no later than 20 business days from which the report was sent to the Commission, reasonable measures should be taken to discuss the irregularity with the board members of the company (Regulation 29(8)(a)). Additionally, board members should be offered the opportunity to make representations pertaining to the report (Regulation 29(8)(b)). Finally, a second report must be sent to the Commission which includes a statement contending that: no reportable irregularities has taken place or is taking place; that adequate steps have been taken to prevent the irregularity or recover any loss and the irregularity has ceased to take place; or that the reportable irregularity

is still continuing (Regulation 29(8)(c)). It is important to note that this provision is very similar to that of the APA's (Act 26 of 2005) section 45(3)(c).

The Companies Regulations (2011) therefore does fill in the gap regarding the issue of auditors' reporting duties in terms of corruption which existed with merely having the Companies Act (Act 71 of 2008) implemented.

4.3.3. The Prevention and Combating of Corrupt Activities Act (Act 12 of 2004)

The reporting duties in terms of corrupt transactions are mainly addressed in section 34 of Chapter 7 in PRECCA (Act 12 of 2004).

Said duties apply to any person holding a "position of authority" and who "knows or ought reasonably to have known or suspected" that any offence of corruption was committed or a person was an accessory to the offence or attempted, conspired or induced another person to commit such an offence (section 34(1)(a)). Other offences under this provision include that of "theft, fraud, extortion, forgery or uttering a forged document (section 34(1)(b)). Both bribery and corruption offences are therefore required under PRECCA (Act 12 of 2004) to be reported.

Sibanda (2006:149) contends that a parent company's manager, director or secretary also hold this position of authority and ought to report any knowledge or suspicion of corruption provided by PRECCA (Act 12 of 2004). No parent company should wilfully ignore the signs of their foreign subsidiaries' involvement in corrupt activities, especially when the parent holds a major interest in their subsidiary and is responsible for any resources associated with the corrupt activities (Sibanda, 2006:149).

The provision of having to know or reasonably ought to have known, will result in the burden of proof for being liable of a corruption offence to include the element of either intention or negligence. These cases (or suspicions) can be reported to any police official if it involves an amount of R100 000 or more (section 34(1)).

Therefore, PRECCA (Act 12 of 2004) does not explicitly contain the same provisions as the OECD to address accounting and financial reporting (Sibanda, 2005:21). A person holding a "position of authority" is explained to include various parties, none of which specifically mentions such a person to be an auditor. Furthermore, guidelines have not subsequently been issued on PRECCA (Act 12 of 2004) with regards to the auditor and how it affects their professional duties (Labuschagne & Els, 2006:30).

Section 34(4) specifies these persons to be: the Director-General; a municipality manager; a public officer holding the position of senior manager in a public body; the head of a tertiary institution; the manager, secretary or director of a Company; the executive manager of a financial institution; a partner in a partnership; or a person in control of an employer's business. The question therefore arises as to whether an auditor can be included in the definition of any of these named parties.

Labuschagne & Els (2006:29) contends that auditors are not included within the definition of holding a "position of authority" contained in PRECCA (Act 12 of 2004) and this therefore implies that the reporting duty does not fall upon the auditor according to said legislation. The reason for not including the auditor in this definition is that an auditor is considered independent of the entity and management of the entity on which it performs auditing duties and therefore an auditor cannot hold a position of authority in such an entity (Labuschagne & Els, 2006:34).

This could constitute as a limitation in PRECCA (Act 12 of 2004), especially regarding the "expectation gap" which may result when it comes to audits where auditors are in actual fact in an ideal position to detect and report corruption (Labuschagne & Els, 2006:30).

Despite this shortcoming, people other than those holding such a position of authority may still be implicated by the duty to report any corrupt or fraudulent actions deemed to be in conflict with the provisions of PRECCA (Act 12 of 2004) under alternative laws such as the Proceeds of Organised Crime Act (Act 121 of 1998) (Sibanda, 2005:21).

Any contravention to the duty of reporting in this article will be deemed as an offence (section 34(2)). This offence has been in operation since 31 July 2004 (section 37(2)). This is an integral part of combating corruption, as reporting by persons holding such positions is needed to fight corruption, especially across borders. The criminal law then punishes the "negligent failure" to know that this offence was committed (Pragal, 2006:24).

Pragal (2006:24) holds that criticism to this section may be that it does not offer any protection to the person in the authority position and furthermore it does not cause such a person to be exempt of civil or criminal action once they have reported, which may deduct from its effectiveness.

Ultimately, it is in the best interest of a company to report bribery and corruption, especially cases with a cross-border element to it. This will in turn cause prosecutors to look to the company in a more favourable light as would have been the case if such offences were discovered through resources.

4.4. Auditor independence

According to Malagueño *et al.* (2010:372), accounting and auditing standards make financial information transparent and a lack of such standards hinder sufficient accountability to stakeholders. A fundamental reason for keeping transactions undisclosed is to avoid transparency of any suspect activities and the prying eyes that comes with it (Malagueño, *et al.*, 2010:373). It is therefore important for legislation that regulates an auditor's duties in terms of transparency to be in place for cases where corruption is discovered in a business.

It is very important that the auditor remains transparent in any reports, including audit reports where he or she may express opinions on the entity and Rossouw *et al.* (2006:207) holds that:

The true nature of business transactions and balances should be described clearly and timeously and the financial information presented fully, honestly, and professionally, so that it may be understood clearly in its context.

Plender (2005:38) contends that the problem is particularly encountered when the independence of the auditor is being influenced. An example may be as an auditor starts to obey the interests of a client instead of reporting the facts, especially for the benefit of shareholders. Vinten (2003:452) holds that these stakeholders want to become aware of events as they happen, but the present reporting model "appears to be partial and problematic". This results in a gap existing in respect of business reporting expectations (Vinten, 2003:452).

A conflict of interest results when the auditor is orientated towards management instead of the public's interests. This increases the risk of an auditor signing off misstated financial statements (Cullinan, 2004:857) especially while knowing otherwise.

An auditor and his client hold a contractual relationship in which he may make an intentional misrepresentation, resulting in a third party being misled or have their economic interests influenced negatively (Strauss, *et al.*, 2004:92). A third party is any party that holds an economic interest in the business and include, amongst others, creditors, shareholders or potential shareholders (Strauss, *et al.*, 2004:92). Reporting corruption and maintaining the proper disclosure procedures, especially regarding irregularities found in the business, must be done to protect third parties.

Various possible interpretations also exist in terms of corruption discovered in the business. According to Vinten (2003:452), it is currently very easy to manipulate the financial situation within the entity in order to "obtain the audit outcome which the company desires". This will in turn not be to the benefit of public interest (Vinten, 2003:452) and should be discouraged in external audits.

Internationally an opinion existed, according to Vanasco (1998:17) that an independent auditor should:

Accept the responsibility for the discovery and disclosure of those irregularities which the exercise of due audit care by a prudent practitioner would normally uncover.

Despite this opinion, over the years it was altered to that of it not being possible for an auditor to investigate and discover all irregularities or falsifications during an audit, although their “discovery frequently results” (Vanasco, 1998:17). When this discovery does occur, it is important for an auditor to be well aware of his duties in terms of legislation discussed earlier, as well as in terms of ethical codes.

Many of these fundamental principles, such as audit integrity which became evident during the Enron scandal and confidentiality regarding reporting duties are addressed by ethical codes of conduct for registered auditors. This will be discussed further in the following section.

4.4.1. Code of professional conduct for registered auditors and accountants

IFAC provides for ethical standards of conduct for accountants and registered auditors in its Code of professional conduct for registered auditors (hereafter referred to as the IFAC Code) (2009). IRBA's Rules regarding improper conduct and code of professional conduct for registered auditors (hereafter referred to as the IRBA Code) (2010) provides more stringent guidance and additional sections specifically in relation to South African registered auditors (IFAC, 2009).

According to the IRBA Code (2010) of professional conduct, there are six fundamental principles to which professional registered auditors should adhere. These are integrity; objectivity; professional competence and due care; confidentiality and professional behaviour and independence is added to the list of principles by Rossouw *et al.* (2006: 198). The IRBA Code (2010) makes provision for the first five fundamental principles. These fundamental principles all need to be adhered to upon the discovery and subsequent reporting of corruption.

Apart from the principle of confidentiality, which will be discussed below, it is also important for auditors to consider the remaining fundamental principles when considering reporting corruption discovered in a business. This especially includes the principles of integrity, i.e. being honest in business relationships; objectivity, i.e. not allowing conflicts of interest to overshadow professional judgements; and professional behaviour, i.e. complying with relevant laws and not discrediting the audit profession (paragraph 100.5 of the IRBA Code (2010)). The latter principle will be adhered to when the primary legislation for a South African registered auditor, the APA

(Act 26 of 2005), is adhered to and in particular section 45 regarding the reporting of irregularities.

It may be the case that South African auditors are not always carrying out their professional duties within South African territory. In such a case, they should carry out these professional audit duties according to applicable technical standards or ethical requirements of said country (Rossouw, *et al.*, 2006:207).

If the foreign country has less stringent requirements than those provided under the IFAC Code (2009), the latter should be applied as being adequately prudent when exercising any audit duties by the registered auditor (Rossouw, *et al.*, 2006:207). *Vice versa*, if ethical requirements are stricter in the foreign country than the IFAC Code (2009), the auditor should adhere to the country's ethical requirements (Rossouw, *et al.*, 2006:207), especially during the consideration of reporting corruption.

4.4.2. Confidentiality

One of the fundamental principles stipulated in the IRBA Code (2010) and the IFAC Code (2009) is the principle of confidentiality.

This may hold a tough predicament for an auditor who has to report any corrupt activities by their client. An example reflected in the IFAC Code (2009) (paragraph 100.21) states that when an auditor faces having to report fraud, which was discovered in the business, the reporting could breach the registered auditor's responsibility regarding confidentiality. The same example could be used for corruption, which has been discovered in the business. The question therefore arises as to what should be primarily taken into consideration: an auditor's ethical duty of confidentiality towards an audit client; or an auditor's duty in terms of the law and the fight against corruption.

The suggested solution, according to the IFAC Code (2009), is to obtain legal advice to make a determination on whether a reporting duty exists (paragraph 100.21). In a case where no advice can be sought from legal advisors, the Board or a relevant professional body, the auditor should not remain associated with the issue creating the ethical conflict (IFAC Code (2009), paragraph 100.22). This could be done by either withdrawing from the engagement or, alternatively, resigning from the firm (IFAC Code (2009), paragraph 100.22). This matter illustrates how the client confidentiality principle may deter an auditor from reporting corruption, which could be detrimental to the fight against local and cross-border corruption.

The IRBA Code (2010) addresses the fundamental principle of confidentiality much like the IFAC Code (2009) does. The principle of confidentiality is defined in the IRBA Code (2010), paragraph 100.5 (d), as:

[to] respect the confidentiality of information acquired as a result of professional and business relationships.

Furthermore, this principle entails that no information may be disclosed to third parties without sufficient authority except when a legal or professional duty exists to disclose such information. This answers the question put forth earlier regarding an auditor's conflict of interest when it comes to reporting corruption in the business. Specifically for the South African auditor, IRBA suggests that a legal or professional duty, such as reporting irregularities in terms of the APA (Act 26 of 2005), will be preferred over an ethical duty of confidentiality in respect of a client when it comes to reporting corruption.

Section 140 of the IRBA Code (2010) also addresses the confidentiality principle. Section 140.1 (a) reflects that it is a registered auditor's responsibility to refrain from:

Disclosing outside the firm's confidential information required as a result of professional and business relationships without proper and specific authority or unless there is a legal or professional right or duty to disclose

This legal duty to disclose is elaborated in section 140.7 where circumstances are provided where disclosure may be appropriate. An example of a disclosure required by law is a situation where disclosure is made to the "appropriate public authorities of infringements of the law" including the disclosure of reportable irregularities according to section 45 of the APA (Act 26 of 2005) (section 140.7 (b)).

Disclosure of confidential client information will also be required in the production of documents or evidence in legal proceedings (section 140.7(b)) and even in cases where disclosure is not required by law. Examples of such disclosure is where it is a requirement according to an auditor's professional duty under the IRBA Code (2010), or disclosure in response to an inquiry or investigation by the Regulatory Board (section 140.7(c)).

The applicable sections of the IRBA Code (2010) serve to answer the question of whether an auditor's duty of confidentiality outweighs their duty to disclose corruption. The duty of confidentiality is outweighed by disclosures required by law, especially disclosures of irregularities under the APA (Act 26 of 2005).

4.4.3. Corporate governance

Following many corporate downfalls, such as Enron, the focus on corporate governance has become an increasingly popular aspect in the accounting and auditing fields. In South Africa, the King Code governs corporate governance and sustainability aspects, with the latest being the King III Report on Corporate Governance issued in September 2009 and effective on 1 March 2010 (Visser, 2009:2).

According to Visser (2009:1) corporate governance can be described as “the system by which organisations are directed and controlled”. It is about the impact a company’s activities can have on the society and allowing all actions (such as corrupt actions) to be put under “public scrutiny” and responding to parties holding an interest in the business in an open and accountable way (Visser, 2009:1). To act in an open and accountable way will presumably also be the responsibility of an auditor and his responsibility to third parties in disclosing and reporting fraudulent or corrupt activities.

By reporting on the financial statements, auditors lend credibility to corporate governance disclosures which management make (Van Esch & Kelly, 2002: 274) and these audits are essential in corporate governance. One of the most important principles of corporate governance, namely integrity, is focused on as auditors exercise the principal external verification regarding financial statements’ integrity (Van Esch & Kelly, 2002: 274).

4.4.4. Enron

Fortune magazine rated Enron as the most innovative large company within America (Healy & Palepu, 2003:3). How can such a large conglomerate and the biggest operator of natural gas in North America (Healy & Palepu, 2003:7) suddenly find itself collapsing and filing for bankruptcy? Accompanied with this downfall also came the collapse of Big 5 auditing firm, Arthur Andersen. It is therefore evident that numerous lessons can be learnt from this scandal, especially pertaining to South African auditors, which will be discussed in this section.

In the light of the Enron corporate scandal, it became imperative for adequate reporting and disclosure to be provided. Plender (2005:38) makes the observation that central to most corporate scandals, such as Enron and Worldcom, have been a “lack of integrity in financial reporting”.

A brief overview of the events leading up to the Enron collapse shows that a complex organisational structure was used to obscure complex transactions, causing financial statement misstatements of approximately US \$24 billion (Cullinan, 2004:859). It appears as though

Enron's auditors, Arthur Andersen, were aware of these transactions, but remained untainted in their position that the transactions were inconsistent with Generally Accepted Accounting Principles (GAAP) (Cullinan, 2004: 859). Enron obtained large capital sums in order to fund dubious business models while covering up true performance with accounting manoeuvres (Healy & Palepu, 2003:4).

Cross-border accounting was a fairly new concept at that time and this caused for some of the confusion. This is because Enron had a complex business model, which included not only many products, but also crossing national borders, which stretched the limits of accounting (Healy & Palepu, 2003:9). The problem stepped in as Enron used this to their advantage by altering earnings and balance sheet items to paint a "rosy picture" of its performance and hide the reality for years (Healy & Palepu, 2003:9).

Ultimately, Arthur Andersen released an unqualified audit opinion pertaining to the financial statements, which stated that they were disinclined to "force disclosure of the problems" or alter their audit report in order to disclose the nature of misstatements (Cullinan, 2004:859). Arthur Andersen expressed no accounting concerns to Enron's board of directors (Chaney & Philipich, 2002:1224) even though it constitutes as a duty of the auditor regarding irregularities today. As the auditors, Arthur Andersen, reported no irregularities, investors believed in the reported growth and profitability which showed sustainability well into the future (Healy & Palepu, 2003:12)

Subsequently, an initiative commenced on 30 June 2002 in response to the corporate scandal of Enron to address corporate accountability (Bazerman, *et al.*, 2002:1). This initiative was the implementation of the Sarbanes-Oxley Act (2002). A practice exercised in South Africa and installed by Sarbanes-Oxley (2002) contend that audit firms must refrain from providing consulting services to companies which they also audit, as to remain impartial (Bazerman, *et al.*, 2002:8).

Many reasons exist in the attempt to explain the downfall of one of the biggest accounting firms to date. Bazerman *et al.* (2002:1) offer the explanation that the audits done by Arthur Andersen were centralised around a succession of "unconsciously biased decisions". In turn, the reason for these decisions can be put down to the fact that people tend to reach decisions which furthers their own interests which should be monitored, especially in the auditing profession (Bazerman, *et al.*, 2002:2).

Arthur Andersen protecting their own interests may have formed a large part of the dubious auditing procedures which were followed. This is shown by the fact that approximately 27

percent of public clients' audit fees for Arthur Andersen's Houston office came from Enron, which included an amount of \$25 million in audit fees in 2000 as well as \$27 million in consulting fees (Healy & Palepu, 2003:15). A conflict of interest may have arisen, as losing this client and these fees would have been very damaging for the business and this could have motivated the sanctioning of their accounting practices (Grey, 2003:574).

In respect of the auditing profession, there are a number of elements, which cause an auditor's judgement to be influenced and possibly decide not to report corruption. These are: ambiguity (when there is the option of interpreting financial information in different ways, such as with audits); attachment (when auditors are motivated to provide favourable audits in order to remain in the client's good graces); approval (an audit is more likely to endorse biased judgements which its clients have already made); and familiarity (an auditor which decides not to harm the client they already know versus causing harm to a "faceless" third party) (Bazerman, *et al.*, 2002:2).

A very important aspect, which was not adhered to in the Enron debacle, is that an auditor must go beyond the four elements stated above. An auditor must be open to express a qualified or adverse audit opinion to prevent misstated financial statements from affecting third parties (Cullinan, 2004:856). This could have the consequence of management properly reflecting the irregular transaction in the financial statements or, alternatively, it being disclosed in the auditor's report (Cullinan, 2004:856) which must form part of the financial statements.

4.5 Conclusion

In this chapter, the ultimate problem statement was answered. The reporting duties of, particularly, the South African auditor were discussed. Chapter 4 commenced by providing a definition of the terms "registered auditor" and "audit".

Subsequently, the chapter endeavoured to establish the auditor's duties in terms of ISA 240, the auditor's duty in terms of fraud during an audit. It was found that, although this standard does not specifically address corruption, the regulations of this standard provides that an auditor should communicate findings regarding fraud "as soon as practicable" (Paragraph A60). The disclosure should also be to management (paragraph 40) and can take place in a written or oral manner (paragraph A61). Legal advice may be obtained (paragraph A66) and ultimately the auditor may need to withdraw from the assignment (paragraph 38).

Furthermore, it was found that the FCPA (1977) and UK Bribery Act (2010) both have limited regulations regarding the auditor and his reporting duties.

The APA (Act 26 of 2005) may be the most relevant South African law in regulating the reporting duty of an auditor in South Africa according to its section 45. The APA (Act 26 of 2005) provides for a systematic response upon the discovery of a reportable irregularity, which also includes corruption.

The Companies Act (Act 71 of 2008) itself provides little regulation on an auditor's reporting duty in terms of corruption. This may be why they Companies Regulations were issued in 2011. The Company Regulations reflect that an independent reviewer, which becomes aware of a reportable irregularity, should send a written report to the Companies Commission in terms of Regulation 29(6)(a) of the Companies Regulations (2011). Similar to the APA (Act 26 of 2005), a systematic response is then addressed, which should be followed upon such a discovery.

PRECCA (Act 12 of 2004) also regulates the reporting duties in section 34, but only of a person holding a "position of authority". A definition of a "person of authority" does not specifically include an auditor, as an auditor is considered independent of the entity and management of the entity on which it performs auditing duties (Labuschagne & Els, 2006:34). Despite this reason, the lack of regulating an auditor's reporting duties in terms of corruption may be a limitation in terms of PRECCA (Act 12 of 2004). Other opinions include that, despite this lack in PRECCA (Act 12 of 2004), the auditor is still required to report corrupt actions in violation of PRECCA (Act 12 of 2004) under alternative laws such as the Proceeds of Organised Crime Act (Act 121 of 1998) (Sibanda, 2005:21) or the APA (Act 26 of 2005).

Finally, this chapter discussed auditor independence, which included the auditor's duties according to fundamental principles prescribed by the IFAC Code (2009) and the IRBA Code (2010). The chapter found that, according to the IRBA Code (2010), the duty of confidentiality is outweighed by disclosures required by law, especially disclosures of irregularities under the APA (Act 26 of 2005).

Corporate governance under the King III report (2010) was also addressed in this chapter, in which was found that the duty of acting in an open and accountable way will be the responsibility of an auditor and his responsibility to third parties in disclosing and reporting fraudulent or corrupt activities.

Additionally, one of the largest corporate scandals in history, Enron's downfall, was discussed in illustration of an auditor's reporting duty and the consequences of non-adherence.

As a result of an auditor's duty as a professional we can see that being ethical and independent as well as considering corporate governance plays a large role in the duties held by an auditor.

Reporting corruption is in not only the best interest of society and third parties, but also legally the best way to combat cross-border corruption.

5. CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

In relation to cross-border corruption, what are the reporting duties of an auditor according to local and international legislation? This was the problem statement raised in chapter 1 at the commencement of this study and a response was obtained throughout chapters 2 to 4.

5.1 History and development of selected international anti-corruption legislation

To arrive at the ultimate objective and respond to the problem statement, an understanding of what corruption entails had to be achieved. In order to do so, the history and development of international anti-corruption Conventions, the FCPA (1977), the UK Bribery Act (2010) and, most importantly, PRECCA (Act 12 of 2004) were perused in chapter 2.

Chapter 2 discovered the way in which both national and international current anti-corruption legislation had come into existence and developed over the years.

This chapter elaborated on the realisation that a global solution for corruption as well as international cooperation had to be obtained. As the FCPA (1977) was the only anti-corruption legislation, which governed cross-border corruption for many years, the rest of the world slowly began to realise that they had to join this initiative.

This included the ratification of many international anti-corruption conventions by America, the European Union and the African Union. Representatives of 34 countries signed the OECD Convention on 17 December 1997 (Interpol, 2010). The OECD Convention (1997) requires that each member who undersigned the agreement prohibits the bribing of foreign officials and set criminal and civil penalties for violations (Schmidt, 2009:1126). Despite the initiative taken by the OECD, the OECD Convention (1997) still received some criticism. This includes the fact that the OECD Convention (1997) addresses the issue of the bribe-giver, but fails to address concerns relating to the bribe taker (George, *et al.*, 2000:486).

Following this, the United Nations General Assembly subsequently adopted the UNCAC on 31 October 2003 (Argandona, 2007:482). This occurrence came in the wake of America's realisation that it was losing its competitive advantage in business transactions, as it was the only nation to implement cross-border corruption legislation through the FCPA (1977) (Schmidt, 2009:1126). To set countries on a more level playing field, the ratification of the UNCAC (2003) was therefore needed. This Convention was even more extensive than the OECD Convention (1997) when taking into account the fact that in February 2011, there were 148 countries bound to it (Anon., 2011c).

Despite this, the UNCAC (2003) legally obliges its signatories to establish these offences only in some cases, while in other cases the signatories should consider the establishment of these offences (Anon., 2011c).

The enactment of the UNCAC (2003) contributed to the implementation of PRECCA (Act 12 of 2004), as it was South Africa's aspiration to adhere to certain obligations resulting from international anti-corruption agreements (Snyman, 2006:383). PRECCA (Act 12 of 2004) came into force on 27 April 2004 (Loxton, *et al.*, 2010). Even though this was not South Africa's first anti-corruption law, it was the first anti-corruption legislation in South Africa to govern extraterritorial jurisdiction in section 35. After the crime of bribery originated in South Africa's common law, which was based on Roman-Dutch law (Henning, 2009:295), it led to numerous anti-corruption laws being implemented in the country. Following the Act on Prevention of Corruption being implemented in 1958 (Snyman, 2006:383), it was repealed, along with the common law of bribery, with the Corruption Act (Act 94 of 1992). This law still did not take into account the international fight against corruption (Snyman, 2006:383) and this void finally led to the replacement of the Corruption Act (Act 94 of 1992) with PRECCA (Act 12 of 2004) and the reinstatement of the common law of bribery (Pragal, 2006:20).

Chapter 2 also held an objective of defining corruption. The definition of corruption was found in section 1 of PRECCA (Act 12 of 2004) which regulated both the giving and receiving of corrupt payments. The definition of "a gratification" received or given as a corrupt payment was also found to be extensive and not merely limited to monetary gains (section 1).

To abide by the UNCAC (2003) and the international fight against corruption, PRECCA (Act 12 of 2004) specifically added section 5: "Offences in respect of corrupt activities relating to foreign public officials" as well as section 35, which addresses extraterritorial jurisdiction. Merely corruption committed by the giver is punished in the definition of section 5, unlike the general definition of corruption which punishes both the giver and acceptor, which means that the foreign public official cannot be charged for accepting or receiving a corrupt payment under PRECCA (Act 12 of 2004) (Snyman, 2006:398).

Chapter 2 proceeded to analyse the FCPA (1977), which led the approach on the concept of cross-border corruption. Through analysis of the history and development of the FCPA (1977), it became evident that the Act originated because of large multinational corporations, which were using their great wealth to bribe foreign governments during the Watergate scandal (Schmidt, 2009:1123). It was also uncovered that 400 companies each paid some \$300 million to officials, politicians as well as political parties (Gibeaut, 2007:50). The realisation to combat cross-border corruption came as a result of these dealings and therefore, the FCPA (1977) was approved in

1977 by the United States Congress. The focus of this Act is to make it unlawful for persons or entities to make payments to foreign government officials to assist in obtaining or retaining business (Lestelle, 2008:530).

The UK Bribery Act (2010) finally followed international trends by officially coming into force on 1 July 2011 (Kirk, 2011:157) after it became law the previous year on 8 April (Warin, *et al.*, 2010:6). Upon implementation, it repealed the common law offence that existed on bribery as well as ancient pieces of legislation such as the Public Bodies Corrupt Practices Act (1889); the Prevention of Corruption Act (1906) and the Prevention of Corruption Act (1916) (Kirk, 2011:157). The delay in implementation was due to the fact that guidance needed to be published, especially on section 7(1) that addresses the failure of commercial organisations to prevent bribery and which has been the source of a great deal of uncertainty (Kirk, 2011:157). Despite this, the UK Bribery Act (2010) contains rigorous measures, which are even applicable to companies that carry on businesses in the UK without a connection to the bribe (Eastwood, 2011:13).

From Chapter 2, it becomes apparent that PRECCA (Act 12 of 2004) has joined the international fight against corruption even before the UK's final effort in this regard. This is commendable and, as seen from this chapter, anti-corruption legislation has come a long way in South Africa. Despite this, the need for more than a few sections dealing with extraterritorial corruption in PRECCA (Act 12 of 2004) is acknowledged subsequent to the analysis of the FCPA (1977) and the UK Bribery Act (2010).

5.2 A comparison of corruption laws

Chapter 3 proceeded by comparing South African anti-corruption legislation to similar worldwide legislation and conventions. South African corruption regulation has become a focal point as Marikana protests have UK and US investors looking for corruption regulation in South Africa which is strong enough to protect their investments (Pickworth, 2012).

Therefore chapter 3 endeavoured to compare the applicability, jurisdiction, investigation, enforcement, penalties, exceptions, and defences contained in PRECCA (Act 12 of 2004) to international conventions and foreign laws governing cross-border corruption.

Applicability was discussed initially, where it was found that even though the UNCAC (2003) is applicable to the country that signs it, it only contains some provisions which are considered mandatory while others are optional to implement by the countries' government discretion (Anon., 2011c). South Africa, the UK and the USA have all ratified the UNCAC (2003) as well as

the OECD and therefore both Conventions are applicable to the three countries within this study.

The FCPA (1977) is widely applicable to all US persons, US companies and business entities, their foreign subsidiaries (Biegelman & Biegelman, 2010:25) and companies listed on the US stock exchange (Stander, 2005:30). PRECCA (Act 12 of 2004) does not include a provision for foreign incorporated subsidiaries of South African parent companies, especially where the officials of the subsidiary cannot be considered South African citizens (Sibanda, 2006:149). This does not necessarily mean that the parent company will not be held liable for the actions of its foreign subsidiaries. Nevertheless, this constitutes as a void in PRECCA (Act 12 of 2004) when compared to the FCPA (1977).

The UK Bribery Act (2010) follows suit by following a strict approach in providing that even if a person or group has no jurisdictional nexus with the UK, as long as the person paying the bribe or the person being bribed has a “close connection” with the United Kingdom, they will be liable under the Act (Warin, *et al.*, 2010:23). The new provision in section 7 instated by the UK Bribery Act (2010), namely the failure to prevent bribery by commercial organisations, may have consequences to companies operating in South Africa, especially if any business, or a part thereof, is carried out in the UK. This means that the organisation simply has to be incorporated (in any way) and if engaging in commercial activities in the UK, it will be liable under the UK Bribery Act (2010) (Ministry of Justice, 2011: www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf).

PRECCA (Act 12 of 2004) mainly covers South Africans and South African businesses, but it also has a section covering foreign businesses registered or incorporated in South Africa, under any law, in section 35(1)(d). Any business in the Republic (section 35(1) (e)), any person arrested for the offence in the Republic (section 35(1) (c)) and any business domiciled in the country will be liable under PRECCA (Act 12 of 2004). In chapter 3, it was found that South African companies might be liable under both the FCPA (1977) and PRECCA (Act 12 of 2004). Similarly, South African companies with operations in the UK will have to comply with both South African legislation, such as PRECCA (Act 12 of 2004), and the UK Bribery Act (2010) Vollgraaff (2011). South African businesses should take care in implementing adequate procedures even if they are merely operating business in the UK and not registered there.

Secondly, the aspect of jurisdiction was discussed in chapter 3. The UNCAC (2003) provides that any state may implement its own measures on jurisdiction (article 42), including the establishment of jurisdiction if an offence was committed against (or by) a national of that country if he or she holds habitual residence in its territory or when an offence is committed

against the State Party (Article 42(2)). The OECD Convention (1997) requires the party to establish territorial jurisdiction over the bribery of a foreign public official (Article 4(1)). Article 4(2) of the OECD Convention (1997) provides for its parties to have the jurisdictional capability to prosecute its nationals for offences committed not only locally, but also abroad. This provision corresponds with section 5 of PRECCA (Act 12 of 2004) - the bribery of foreign public officials.

The FCPA's (1977) jurisdiction over corrupt payments to foreign officials depends on whether the violator is considered "an "issuer" or a "domestic concern", or a foreign national or business that is carrying out an act "in furtherance" of this type of payment in the US (Warin, *et al.*, 2010:9). The UK Bribery Act's (2010) jurisdiction applies to any British national operating outside the country.

Contrary to the FCPA (1977), PRECCA (Act 12 of 2004) does not entirely deal with extraterritorial corruption, with this aspect being established in section 35. This section prohibits any corrupt activities by South African businesses worldwide. Regardless of an act being illegal in the foreign country, if it is committed outside South Africa, the Republic shall have jurisdiction in respect of that offence if the business belongs to a citizen; person normally residing in South Africa; or a foreign business incorporated or registered in South Africa (section 35(1)).

Investigation and enforcement were discussed thirdly. The UNCAC (2003) calls upon its signatories to establish a specific anti-corruption body (Article 6). The UNCAC (2003) also addresses joint investigations to allow guilty parties to be prosecuted in any country and prevent them from escaping justice (Argandona, 2007:489). The OECD Convention (1997) has no direct enforcement power, except for the requirement that its signatories adopt their own anti-bribery legislation (Cleveland, *et al.*, 2009:205). In order to enforce this, a rigorous surveillance process was implemented in 1991, requiring the Convention to review country-specific legislation (Cleveland, *et al.*, 2009:205). The OECD Convention (1997) provides that investigations and prosecution procedures shall not be influenced by several factors (Article 5).

This may create a problem in South Africa, as a wholly independent enforcement agency, which is able to manage investigation and prosecution procedures, may still be lacking. This is due to the fact that there are a number of key anti-corruption agencies in South Africa, including the NPA, SAPS and the Hawks, but South Africa does not have one anointed anti-corruption agency with "powers and mandate to investigate, arrest and prosecute" cases of corruption (Business Anti-Corruption Portal, 2011) Over time, the establishment of an independent unit, such as the DOJ and SEC in the USA, will be needed with all the necessary powers and mandates to combat corruption and to particularly focus on combating cross-border corruption.

Enforcement of the FCPA (1977) and FCPA (1977) investigations by the SEC or DOJ were rare (Cleveland, *et al.*, 2009:213). This trend has shown a positive increase, substantiated by the fact that the total number of FCPA (1977) criminal prosecutions by the DOJ were 56 in 2007 compared to 18 prior to 1998 and actions by the SEC were 41 in 2007 compared to 8 prior to 1998 (Cleveland, *et al.*, 2009:211). The SFO, which enforces the UK Bribery Act (2010), has not had much time to enforce the UK Bribery Act (2010) since its implementation in July 2011, but they seem to be taking a no tolerance approach so far (Anon., 2012a).

Chapter 3 proceeded by discussing penalties applicable to the various anti-corruption legislation. The UNCAC (2003) provides that each signatory shall make an offence according the Convention liable to sanctions, which take into account the severity of the offence (Article 30(1)). The OECD Convention (1997) provides that “effective, proportionate and dissuasive criminal penalties” should be applied (Article 3(1)). The OECD Convention (1997) provides that non-criminal sanctions (including monetary sanctions) should be applicable (Article 3(2)).

No exact amounts of monetary fines or prison sentences are prescribed in the UNCAC (2003) and the OECD. The FCPA (1977) prescribes severe penalties, including that enterprises or individuals can receive monetary fines up to a maximum of twice the gains (or losses) recognised from an offence (DOJ, 2011). Civil penalties may also arise from the accounting provision (Warin, *et al.*, 2010:34). Unlike the FCPA (1977), the UK Bribery Act (2010) only provides for penalties from major and minor criminal violations and no civil enforcement.

Similar to this approach, PRECCA (Act 12 of 2004) creates hefty criminal charges in section 26, although it does not make provision for civil penalties as the FCPA (1977) does. This may be a void that could be addressed within the Act. Section 26(3) of PRECCA (Act 12 of 2004) does provide that, in addition to any fine imposed by a court in terms of section 26, the court may also impose a fine equal to five times the gratification involved in the offence.

Finally, the exceptions and defences allowed according to international anti-corruption legislation were addressed in chapter 3. The definition of a facilitation payment was obtained in this chapter. These are regular payments and considered small payments to low-level officials, for simple actions (Biegelman & Biegelman, 2010:29).

The UNCAC (2003) prohibits facilitation payments, as no exception is made for these payments; therefore it is considered similar to any other bribe paid to a public official. The OECD Convention (1997) also features no specific exception for facilitating or expediting payments. Despite this, Paragraph 9 of the Commentary to the OECD Convention (1997) does

explicitly exclude the making of “small facilitation payments” in the hope of inducing public officials to perform their functions, such as issuing licenses or permits (Argandona, 2005:255).

Contrary to this, facilitation payments are not criminalised under the FCPA (1977) and an exception is created for “facilitating or expediting” payments in FCPA (1977) § 78dd-1(b). Despite this, making facilitation payments is a criminal offence in South Africa, as PRECCA (Act 12 of 2004) draws no distinction between facilitation payments and other forms of corruption; therefore these payments could be interpreted as being illegal and punishable according to the definition of corruption in section 3. This is also substantiated by the fact that section 4(2) of PRECCA (Act 12 of 2004) includes eight examples of acts, which will be deemed as a corrupt act. The “expediting, delaying, hindering or preventing the performance of an official act” is specifically included in section 4(2)(c).

Similar to PRECCA (Act 12 of 2004), the UK Bribery Act (2010) criminalises facilitation payments under both “General bribery offences” (section 1 to 5) and section 6’s specific offence of “Bribery of foreign public officials”. Despite this, the UK government has indicated that it would only rarely prosecute the making of isolated facilitation payments involving “such small amounts of money” (Maton, 2010:43).

Furthermore, the matter of hospitality was discussed where the FCPA (1977) does not consider it a bribe to reasonably reimburse a public official for expenses such as meals; travel; lodging while the company is promoting or demonstrating a product; or executing a contract (section § 78dd-1 (c)(2)(A) and (B)). Despite this, these amounts must not be over excessive or unlawful in the country where they are paid (15 USC § 78dd-1(c)(1)). The UK Bribery Act (2010) provides no monetary limits, exemptions or defences in relation to gifts or hospitality (BBA, 2011). Nevertheless, excessively generous hospitality or gifts could be considered bribes (Maton, 2010:43), although *bona fide* promotional expenditures are unlikely to be prosecuted (Warin, *et al.*, 2010:22).

PRECCA (Act 12 of 2004) makes no express provision in relation to any “hospitality” payments, such as provisions for lodging and meals (Sibanda, 2005:19). The definition of “gratification” or “dealing” in section 1(ix) (b) does include any gifts, but the Act does not expand on whether hospitality payments are considered gifts. Section 1(ix)(d) specifically qualifies any habitual or holiday accommodation as a gratification. As no express provision exists in this regard, it should not be considered an offence unless the payment was made to improperly obtain business or unfairly obtain other advantages (Sibanda, 2005:19).

5.3 The auditor: corruption reporting duties

In chapter 4, it was important to establish a South African auditor's reporting duties in terms of reporting cross-border corruption according to legislation such as the APA (Act 26 of 2005) or PRECCA (Act 12 of 2004). An auditor is defined as "[a]n individual or firm registered as an auditor with the Regulatory Board" (section 1 of the APA (Act 26 of 2005)).

With the establishment of a South African auditor's duties came the discovery whether South African principles on corruption and reporting thereof are on par with international anti-corruption legislation and international convention agreements. An auditor's reporting duties in terms of the FCPA (1977) and the UK Bribery Act (2010) are very limited in the sense that both acts merely prescribe self-reporting of violations under each Act ((Biegelman & Biegelman, 2010:40) and (Maton, 2010:44)).

International standards to which the South African auditor must adhere were discussed in the form of ISA 240. A systematic approach was provided for an auditor who discovers fraud within an entity. Paragraphs A60 and 40 provide that the auditor must communicate any factual findings regarding fraud that may potentially exist, "as soon as practicable" to the "appropriate level of management". Fraud, which possibly includes management, is discussed in paragraph 41.

A shortcoming was found in ISA 240 in that it does not make specific reference to corruption (including bribery), but only to fraud. This indicates an inadequacy in the scope of ISA, which only regulates the auditor's reporting duties in terms of fraud and cannot be applied to reporting corruption as well.

Specific South African legislation that regulates the reporting duties of an auditor was also examined. The APA (Act 26 of 2005) provides a definition of a reportable irregularity in section 1 and this includes "any unlawful act or omission" which is committed and "represents a material breach" of duty "under any law applying to the entity", which would include PRECCA (Act 12 of 2004). Therefore, it was found that, along with PRECCA (Act 12 of 2004); the APA (Act 26 of 2005) regulates the reporting of corruption discovered in an entity according to its section 45. Despite this, it was found that a shortcoming exists under the APA (Act 26 of 2005) as well as other legislation, such as ISA 240, that it does not expressly reflect that an auditor has a legal duty to report corruption.

It was discovered that section 45 regulates the duties of an auditor to report on these irregularities. Subsection 1 thereof mandates a registered auditor who has reason to believe that a reportable irregularity has either already taken place, or is taking place at the time, to

inform the Regulatory Board thereof immediately in a written report. A systematic approach of various procedures, which must subsequently be followed, is also provided in section 45. This includes that the auditor must notify the management board of the entity in writing within 3 days of which the written report has been sent to the Regulatory Board (section 45(2)). A successive report which concludes on the status of the reportable irregularity should then be sent to the Regulatory Board (section 45(3)(c)).

Section 52 of the APA (Act 26 of 2005) addresses a situation where an auditor fails to report a reportable irregularity in terms of section 45. Consequences to the failure of reporting a reportable irregularity are prescribed in sections 46, and 48 to 50. An auditor may be satisfied that a corrupt activity has occurred if “there is sufficient and *prima facie* reliable information” obtained from a variety of sources (Labuschagne & Els, 2006:40).

It was found that the APA (Act 26 of 2005) is not applicable in jurisdictions beyond South African borders (the guide on reportable irregularities part 2.10). This guide held that an auditor must report cross-border corruption when the South African holding company has a foreign subsidiary in which an auditor identifies a reportable irregularity, as a result of the contravention of South African or foreign law, with local management’s involvement. In some cases the auditor may not be deemed responsible to report an irregularity, such as when no material financial loss is caused by an unlawful act or omission according to section 1(a) of APA (Act 26 of 2005) (the guide on reportable irregularities, part 4.2.2).

Despite the Companies Act (Act 71 of 2008) not specifically addressing the reporting duties of the auditor in terms of corruption, the Companies Regulations (2011) which were issued in terms of section 223 of the Companies Act (Act 71 of 2008) does. It contends that an independent reviewer who becomes aware of a reportable irregularity taking place should send a written report to the Companies Commission in terms of Regulation 29(6)(a) of the Companies Regulations (2011).

Chapter 4 proceeded by addressing the reporting duties of an auditor according to section 34 of PRECCA (Act 12 of 2004). It applies to any person holding a position of authority and who “knows or ought reasonably to have known or suspected” that any offence of corruption was committed or a person was an accessory to the offence or attempted, conspired or induced another person to commit such an offence (section 34(1)(a)). These suspicions can be reported to any police official if it involves an amount of R100 000 or more (section 34(1)). It was discovered that the definition of a “position of authority” does not include an auditor, and PRECCA (Act 12 of 2004) may need to issue guidance with regard to the auditor’s duties in reporting corruption. The reason for an auditor not being included within the definition of holding

a “position of authority” may be that an auditor is considered independent of the entity and management of the entity on which it performs auditing duties and therefore an auditor cannot hold a position of authority in such an entity (Labuschagne & Els, 2006:34). Despite this, the lack of addressing the auditor’s duties in PRECCA (Act 12 of 2004) is a shortcoming, which should be addressed in future.

The auditor therefore has a legal duty to inform the management board of an entity if he becomes aware of irregularities within the entity. Under PRECCA (Act 12 of 2004) section 34, it will then become the responsibility of the management board (as persons holding a position of authority) to report these suspicions to any police official if it involves an amount of R100 000 or more (section 34(1)). If an auditor fails to report such suspicions to management, consequences contained in Section 52 of the APA (Act 26 of 2005) will be applicable on the auditor. In such an event, the auditor shall be guilty of an offence and be liable to a “fine or imprisonment for a term not exceeding 10 years or both a fine and such imprisonment” (section 52(3) of the APA (Act 26 of 2005)).

The importance of auditor independence and transparency of audit reports was furthermore established in chapter 4. It was found that corruption had to be reported and proper disclosure procedures kept in order to protect third parties.

Following the Enron scandal and the collapse of Big 5 auditing firm, Arthur Andersen, it was found that it is imperative to provide adequate reporting and disclosure. During the downfall of Enron and Worldcom, a “lack of integrity in financial reporting” was prominent (Plender, 2005:38). This situation serves to show to which extent the lack of transparency in questionable transactions could affect a company.

It was discovered that the IFAC Code (2009) as well as the IRBA Code (2010) provides guidance specifically in relation to South African registered auditors. The fundamental principles were discussed and in particular the fundamental principle of confidentiality.

As the principle of confidentiality may have held a tough predicament for an auditor who has to report any corrupt activities by their client, this aspect was further investigated. Therefore, it was found that, according to the IFAC Code (2009), an auditor could obtain legal advice to make a determination on whether a reporting duty exists (paragraph 100.21). If this is not possible, the auditor should not remain associated with the issue creating the ethical conflict and the auditor may need to withdraw from the engagement (IFAC Code (2009), paragraph 100.22). This showed that the client confidentiality principle might deter an auditor from reporting corruption.

Despite this, it was discovered that, under section 140.7 of the IRBA Code (2010), confidential information of the firm may be disclosed with proper authority or if a legal or professional right or duty to disclose information exists. An example of a disclosure required by law is a situation where disclosure is made to the “appropriate public authorities of infringements of the law” including the disclosure of reportable irregularities according to section 45 of the APA (Act 26 of 2005) (section 140.7 (b)). Hence, the duty of confidentiality is outweighed by disclosures required by law, especially disclosures of irregularities under the APA (Act 26 of 2005).

The matter of reporting corruption and corporate governance was also addressed in this chapter. It was found that it is the duty of the auditor to act in an open and accountable manner and his responsibility to third parties in disclosing and reporting fraudulent or corrupt activities.

Ultimately, the problem statement regarding the reporting duties of the auditor, locally and internationally, in terms of corruption was answered throughout this study and especially in chapter 4.

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