

The Foreign Corrupt Practices Act:

Through the Lens of Azerbaijan and the Republic of Georgia

By Peter G. Strasser



It is virtually impossible to pick up a local newspaper anywhere in the world without seeing a headline about corruption. In the past year alone, more than one in four people (27 percent) reported having paid a bribe.¹ Revelations of widespread bribery of foreign officials by U.S. companies prompted Congress, back in 1977, to enact the Foreign Corrupt Practices Act (FCPA).² Through its various criminal and civil provisions, the Act was intended to halt corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace.

In general, it is no easy matter for U.S. companies operating overseas to comply with both U.S. and foreign laws while conducting business in cultures that do not view the rule of law through the lens of Western ideals. Such environments pose metaphorical minefields for many U.S. businesses. Accordingly, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) recently published a 130-page guide that explains the FCPA, its relevance to international business and corporate compliance programs, and the DOJ/SEC's joint enforcement approaches and priorities.³

Nevertheless, the DOJ and the SEC have been exponentially increasing their FCPA enforcement actions over the years.⁴ The DOJ now has attachés in more than 30 embassies around the world assigned to work closely with foreign law enforcement and international organizations. Beyond collaborating on specific cases, the attachés review foreign anti-corruption legislation and programs and train foreign prosecutors in combating corrupt activities.⁵ These efforts are yielding noticeable results: FCPA cases are arising out of high-risk countries where law enforcement historically looked the other way.

Three recent cases involving transactions in Azerbaijan and the Republic of Georgia illustrate the resolutions that have become typical in these types of criminal corruption

cases: deferred prosecution, trial or guilty plea. However, Azerbaijan and Georgia are two particularly complex countries located in one of the world's most complicated regions—the Caucasus, which also includes Armenia and the North Caucasus of the Russian Federation. This geographical region is rife with local, separatist, nationalist and global interests, cross-cutting diverse religions, ethnicities and cultures. Strategic transportation routes traverse one another; ethno-territorial conflicts persist unresolved; and even some national borders are still hotly contested. Each state struggles to overcome a daunting set of internal and external challenges, ranging from the need for economic and political reform to combating the constant threat of violent and destructive conflicts.⁶ Recent political and legal developments, however, offer cause for cautious optimism for foreign investors and corporate counsel seeking to facilitate U.S. business in this unique part of the world.

Corrupt Practices: Three Case Studies

Tidewater Marine

In November 2010, Tidewater Marine International, Inc., a Cayman Islands subsidiary of Tidewater, Inc., paid a combined \$15 million to the DOJ and the SEC to settle FCPA allegations. Tidewater, Inc., headquartered in New Orleans, is a global operator of offshore service and supply vessels for energy exploration. Over the course of time, Tidewater Marine employees had paid \$160,000 in bribes to tax inspectors in Azerbaijan to secure favorable tax assessments and also paid \$1.6 million in bribes to Nigerian customs officials relating to the importation of vessels into Nigerian waters. Upon learning of the DOJ/SEC investigation, Tidewater conducted an internal investigation and voluntarily reported its findings to federal prosecutors. As a result, Tidewater Marine received a deferred prosecution agreement from DOJ whereby it implemented an enhanced FCPA compli-

ance policy and revised its code of conduct for its worldwide employees. It also paid a penalty of \$7.35 million and made an additional settlement with the SEC by paying a disgorgement of \$8 million.⁷

Frederic Bourke

Frederic Bourke, co-founder of the luxury-handbag maker Dooney & Bourke, entered federal prison in May 2013 to begin serving a one-year sentence. He had unsuccessfully fought his FCPA charges at his jury trial and appeal. Bourke's problems stemmed from an investment venture in Azerbaijan to purchase the state-owned oil company, SOCAR. He was convicted despite his defense that he was unaware that his business partner, Victor "the Pirate of Prague" Kozeny, was bribing top-level officials, including the president of Azerbaijan. The 2nd Circuit affirmed the conviction in *United States v. Kozeny*, 667 F.3d 122 (2 Cir. 2011), holding that a defendant can indeed be found criminally liable under the FCPA if he is found to be "consciously avoiding" knowing that an intermediary is paying bribes to a foreign official. The court relied, *inter alia*, on testimony at trial demonstrating that Bourke "was aware of how pervasive corruption was in Azerbaijan."⁸

Daniel Alvarez

In March 2011, Daniel Alvarez, president of Arkansas military equipment company ALS Technologies, pleaded guilty to participating in a scheme to pay bribes to the Georgian Defense Ministry in exchange for obtaining an \$11-million contract selling ammunition and MREs to the Georgian military. However, a year later, this FCPA charge was dismissed "without prejudice."⁹ Alvarez, in a separate scheme, also had been part of the "SHOT Show" case (the FBI arrested the defendants at the Las Vegas Shooting, Hunting and Outdoor Trade Show). That investigation was the first of its kind to pursue FCPA violations using traditional undercover tactics such as informants, wiretaps and hidden cameras.

But after two consecutive mistrials, the DOJ dismissed with prejudice all FCPA charges against all 22 defendants.¹⁰ With respect to Alvarez's Georgian scheme, federal prosecutors explicitly stated they were continuing to investigate and would "determine whether to bring criminal charges relating to that conduct."¹¹

International Business Rankings and Assessments

In its handbook, "Business Principles for Countering Bribery," Berlin-based Transparency International (TI) states, "Bribery may be so much a part of a business culture in some places, that dealing with it can seem an overwhelming challenge and no one business can fight it alone."¹² According to TI's latest annual assessments of corrupt countries, Armenia and Azerbaijan rank 94th and 127th, respectively, out of 177 countries surveyed, although Georgia posted a better ranking of 55th.¹³ The TI ranking for Azerbaijan effectively confirms that it is difficult to do business in Azerbaijan, especially when it involves Azerbaijan's oil resources, without paying bribes and kickbacks. Yet even those figures obscure the realities of corruption in the region.

An Overview of Corruption in Azerbaijan

Today, Azerbaijan is a politically closed society with a dynastic presidency. The considerable revenues it has earned from its vast hydrocarbon reserves have, unfortunately, failed to produce greater openness or democracy. Instead, those same riches have made the country's rulers progressively more independent and self-confident. It is widely recognized that corruption is deeply institutionalized throughout Azerbaijani society and poses a major obstacle to both social and economic development in the country. In terms of specific areas of corruption, the State Customs Committee and the Ministry of Taxes are the institutions of greatest concern to both local and foreign companies operating in Azerbaijan.¹⁴

Nonetheless, Azerbaijan has imple-

mented efforts to clean up corruption at the mid-levels of government. Recent years have seen rising salaries for civil servants and special training offered to raise awareness within the bureaucracy about corruption. An Azerbaijani government service center (ASAN) was recently established in Baku to cut bureaucracy, strengthen transparency, and improve the ease of doing business. ASAN's mission is to open up and simplify all areas of government, including the issuance of forms, registration, workplace compliance and tax issues. Already the number of procedures involved in starting a business in Azerbaijan has been reduced from 30 to seven, and the overall cost has been halved.¹⁵

As seen in the *Kozeny* case, true corruption in Azerbaijan is at the elite level and based mostly on extracting rents from the energy sector (the country's primary national asset).¹⁶ It is well documented that, through hidden ownership structures, the first family has profited personally from massive construction projects throughout Baku.¹⁷ In its 2012 country progress report, the Organisation for Economic Co-operation and Development (OECD) noted that, although Azerbaijan has made progress in fighting corruption, efforts toward judicial independence and meritocracy have largely taken a back seat. Police investigators almost never open criminal cases against top government officials and, when they do, judges often decline to rule against them.¹⁸ No high-level government official has ever been prosecuted. Further, no judge has ever been prosecuted for any corruption-related charge, despite the fact that the judiciary is regarded as one of the country's most corrupt institutions.¹⁹

Even so, the OECD report praised the efforts of the Anti-Corruption Department (ACD) within Azerbaijan's Prosecutor General's Office. The ACD prosecuted 298 defendants in 2012 and 229 defendants in 2011 — all of them, unsurprisingly, mid-level officials.²⁰

Further, Azerbaijani law makes it difficult for prosecutors to gain access to a target's bank, financial or commercial records by requiring disclosure authorization from a

court. Such proceedings are time-consuming and subject to capricious judicial outcomes, which often produce no concrete results. But, to its merit, when judicial authorization is given, the ACD follows through to conclusion.²¹ In the Tidewater Marine investigation, the ACD cooperated fully with the U.S. Embassy. Pursuant to an official DOJ request, ACD sought and obtained judicial search warrant approval to retrieve documents from Tidewater's office in Baku. Those documents were then promptly delivered to the U.S. Embassy.

An Overview of the Corruption in Georgia

A decade ago, Georgia had an appalling reputation for corruption. But subsequent political changes have brought about substantial reform. By 2012, Georgia was ranked by the World Bank as the 12th most favorable country in the world for the ease of doing business.²² Nonetheless, many Georgians dispute that their new and ostensibly showcase system of transparency tells the whole story. Despite President Mikheil Saakashvili's vow in 2009 to bring about a "new wave of democratization," his government perpetuated the highly criticized Soviet practice of using the police to safeguard the security of the ruling regime rather than serving the larger community.²³

Immediately after being elected president in January 2004, Saakashvili made it clear that fighting corruption would be one of his top priorities. Capitalizing on his election mandate, he quickly implemented reforms, although often circumventing time-consuming democratic procedures to achieve his goals. He further ensured that Parliament adopted certain constitutional amendments that strengthened presidential powers at the expense of the legislative and judicial branches.²⁴

Saakashvili also hijacked the state's administrative resources — police, prosecutor's offices, courts, prisons, national banks, tax inspection and the media — to serve his own ends. It was not long before major commercial interests, such as telecommunications, broadcasting, advertising, oil,

pharmaceuticals and mining, were under the ownership of then-current members of the government, their allies and relatives, all via a complicated web of companies registered offshore. As evidenced by Daniel Alvirez's guilty plea, Saakashvili's top officials frequently used the government apparatus to control and extort money from businesses. Further, the administration often used the state's resources as tools for the persecution of political opponents, with the police freely engaging in the excessive use of force. Top officials also appropriated private land for investment projects, telling the owners they had to gift the land to the state or face prosecution.

In cynically fabricated cases, plea bargaining was abused to extract both land and money.²⁵ In fact, plea bargaining was viewed as an effective revenue-raising tool in criminal cases. If a defendant wanted a sentence reduced, he had to pay a specified amount for each year deducted from the maximum sentence. Under this scheme, a total of \$50 million was collected. As the new speaker of the Georgian Parliament told *The Economist*, "We had a system where the prosecutor was the chief economist in the country."²⁶

The Georgian judiciary, whose mandate it is to review each case for evidentiary sufficiency and sentence fairness, practically rubber-stamped every guilty plea. Monitoring groups reported that judges not only routinely sided with motions from the prosecution, they also based judgments on questionable evidence.²⁷ As a result, the judiciary today is viewed as "one of the least trusted institutions in the country."²⁸

However, democracy is still, at least in part, very much alive in Georgia. Less than two weeks before the October 2012 parliamentary elections, public outrage was ignited when leaked videos showing sexual torture and other egregious abuse of prison inmates were broadcast on national television. Those images triggered mass demonstrations and had a decisive impact on the elections. Saakashvili's party was voted out of office. Although Saakashvili himself still had a year remaining in his presidency, there was now a new government headed

by his rival, billionaire Bidzina Ivanishvili.

However, the history of this region is all about settling scores. Soon after the new government was seated, a string of Saakashvili's former ministers and party officials were under investigation. Reminiscent of what happened after Saakashvili's Rose Revolution ousted President Eduard Shevardnadze, officials who did not flee the country were arrested and prosecuted.²⁹ Commenting on this state of affairs, the chair of the Board of Transparency International Georgia stated:

Is it politically motivated? Yes. Is it a reasonable exercise in the rule of law? Yes, because there were so many laws broken. The thing to watch is the trend line — will this continue? Is this going to be a way of making sure there is no opposition?³⁰

Conclusion

The threshold consideration in deciding what, if any, FCPA enforcement action will be taken is, of course, the target's conduct. Regardless, the DOJ and the SEC place a high premium on self-reporting. As the different outcomes in the *Tidewater*, *Kozeny* and *Alvirez* cases indicate, cooperation and remedial efforts are major factors in determining the appropriate resolution of FCPA matters.³¹

Those efforts can and should start in the foreign country itself. Even though bribery is still a part of the culture of the Caucasus, the attitudes of the governments of Azerbaijan and Georgia have changed. Both are now parties to the United Nations Convention Against Corruption.³² As such, both have implemented specific anti-corruption measures to encourage disclosure. Bribers who are extorted and subsequently report the bribe are often "relieved of responsibility" because of their cooperation.³³

The director of the Azerbaijani ACD has been working closely with DOJ attachés and understands the legal dilemmas facing American companies operating there. He is committed to implementing the new Azerbaijan National Anti-Corruption Action Plan for 2012-15, which provides for better

legislation on the protection of witnesses and collaborators in corruption cases. He is steadfast and emphatic to the ideal that any American business that reports extortion and cooperates in ACD investigations will receive the Azerbaijani government's personal protection.

Likewise in Georgia, the new Deputy Minister of the Interior is adamant that any American business that reports extortion and cooperates with law enforcement will receive the government's gratitude and protection. The new Minister of Justice, a former lawyer at the European Court of Human Rights, faces the daunting task of overhauling the courts, the prosecutor's office and the prison system to restore faith in the much-maligned criminal justice system. He knows the eyes of the West are upon Georgia, and he is reversing many of his predecessor's predatory policies. Many senior policemen who were fired after objecting to Saakashvili's practices have been reappointed. In the spirit of the times, the Georgian Parliament has adopted a sweeping amnesty, releasing some 8,400 pre-trial and convicted inmates. The Parliamentary speaker told *The Economist*:

We have not emptied the prisons to fill them up again. The only way to serve justice is to make the process as transparent as possible by subjecting it to the scrutiny of the media and international watchdogs.³⁴

FOOTNOTES

1. Transparency International, *Global Corruption Barometer 2013*, 3, 14 (2013), available at www.transparency.org/gcb2013.

2. Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78dd-1 (West 2013).

3. Department of Justice and Securities and Exchange Commission (DOJ/SEC), *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), available at www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf (hereinafter, FCPA Resource Guide).

4. See Gibson Dunn, *2013 Mid-Year FCPA Update* (2012), available at www.gibsondunn.com/publications/pages/2013-Mid-Year-FCPA-Update.aspx (citing various cases brought by the DOJ/SEC under the FCPA).

5. See FCPA Resource Guide, *supra* note 3, at 6-7.

6. Alexandre Kukhianidze, George Mason University, Terrorism, Transnational Crime and Corruption Center, *Rethinking Organized Crime and*

Corruption (2012); see also Richard Giragosian, "Networks of Crime and Corruption in the South Caucasus," 9 *Caucasus Analytical Digest* (Sept. 17, 2009), available at www.css.ethz.ch/publications/pdfs/CAD-9-2-5.pdf.

7. United States v. Tidewater Marine International, Inc., Court Doc. No. 2010-CR-770 (S.D. Tex.).

8. United States v. Kozeny, 667 F.3d 122, 133 (2 Cir. 2011), cert. denied; see also, Bourke v. United States, 133 S.Ct. 1794 (2013).

9. United States v. Daniel Alvarez, Court Doc. No. 09-CR-335 (D.D.C. 2012).

10. *Id.*; see also, United States v. Amaro Goncalves, Court Doc. No. 09-CR-335 (D.D.C. 2012). At trial, the government's primary informant was repeatedly attacked by defense counsel as a cocaine addict, tax cheat and admitted thief of millions of dollars from his prior employer. In addition, defense counsel cited examples of "vulgar" and "unprofessional" text messages between FBI agents and the informant. See *id.*

11. United States v. Alvarez, Court Doc. No. 09-CR-348 (D.D.C. 2012).

12. Transparency International, *Business Principles for Countering Bribery*, 4 (2008), available at www.cgu.gov.br/conferenciabrocde/arquivos/English-Business-Principles-for-Countering-Bribery.pdf.

13. Transparency International, *Corruption Perceptions Index* (2013), available at <http://cpi.transparency.org/cpi2013/results/>.

14. European Commission, *Progress Report of the EU-Azerbaijan European Neighborhood Policy Action Plan* (2012), available at http://ec.europa.eu/world/enp/docs/2013_enp_pack/2013_progress_report_azerbaijan_en.pdf; see also, Amanda Paul, The German Marshall Fund of the United States, *How Do You Deal with an Autocratic and Energy-Rich Ally like Azerbaijan?* (2010), available at www.gmfus.org/wp-content/blogs.dir/1/files/mf/galleries/ct_publication_attachments/onwider_series_azerbaijan_jun10_final.pdf.

15. "Azerbaijan Cracks Down on Corruption, Cuts Bureaucracy and Improves Government Services with Wide-Ranging Initiative," *Wall St. J.*, April 22, 2013, <http://online.wsj.com/article/PR-CO-20130422-904254.html>.

16. "The government does not even bother itself to explain to the public recent well-sourced publications in foreign media (*The Washington Post*) about ownership by the president's family members of multimillion-dollar villas in Dubai, acquisitions of large shares in local banks, and one of the three cell phone operators, Azerfon." See Shahin Abbasov, "Azerbaijan Swimming in a Sea of Bribes, Despite an Anti-Corruption Tide," *Azeri Report* (2011), available at http://azerireport.com/index.php?option=com_content&task=view&id=3584.

17. "Azerbaijani President Aliyev Named Corruption's Person of the Year" (Radio Free Europe/Radio Liberty, radio broadcast, July 17, 2013), available at www.rferl.org/content/azerbaijan-ilham-aliyev-corruption-person-of-the-year/24814209.html.

18. Organisation for Economic Co-operation and Development, Anti-Corruption Network for Eastern Europe and Central Asia, Istanbul Anti-Corruption Action Plan: *Second Round of Monitoring: Azerbaijan Progress Report* (2012), available at www.oecd.org/corruption/acn/49910887.pdf (hereinafter OECD Report).

19. The judicial sector in Azerbaijan is weak, primarily because of the executive branch's excessive influence over the judiciary, due not only to the regulatory framework of the judicial system, but also to the historical, Soviet-based perception that judges are viewed as an extension of the state. In cases where the state is a party, regardless of the merits of the case, the expectation is that the interests of the state will prevail. Despite the highly structured written and oral examination process (instituted only within recent years as a result of Western pressure), appointments for judgeships allegedly are still either purchased or allocated to those who are acceptable to the Ministry of Justice. It is widely perceived that judges must abide by the government's explicit interests and implicit demands. See United States Agency for International Development, *Analytical Paper on Corruption in the Judicial Sector of Azerbaijan* (2005), available at http://pdf.usaid.gov/pdf_docs/PNADP873.pdf.

20. Those convicted include heads of regional education departments, regional labor and social protection departments, teachers, doctors, chairmen of small municipalities and mid-level employees of the Ministry of Defense, Interior Ministry, etc. See generally, Office of the Prosecutor, Azerbaijan, Anti-Corruption Department, *Guidebook* (2013) (copy of file with author).

21. OECD Report, *supra* note 18.

22. World Bank, *Doing Business 2012: Doing Business in a More Transparent World* (2011), available at www.doingbusiness.org/reports/global-reports/doing-business-2012.

23. Alexander Kupatadze, "Georgia's Fight Against Organized Crime: Success or Failure?," 9 *Caucasus Analytical Digest* 11 (Sept. 17, 2009), available at www.css.ethz.ch/publications/pdfs/CAD-9-9-12.pdf.

24. *Id.* at 10.

25. Paul Rimple, *Who Owned Georgia 2003-2012* (2013) (on file with author); see also, Steve Rosenberg, "Georgia: Are glass-walled police stations enough to tackle corruption?," BBC News, July 9, 2013, www.bbc.co.uk/news/world-europe-23231993 (hereinafter Rimple).

26. "Georgia's government: Caucasian circles," *The Economist*, May 11-17, 2013, at 54, available at www.economist.com/news/europe/21577399-squabbles-between-president-and-prime-minister-distract-attention-georgias-real (hereinafter *The Economist*).

27. Freedom House, Sylvana Habdank-Kolaczowska, *Nations in Transit 2013: Authoritarian Aggression and the Pressures of Austerity*, 218 (2013), available at www.freedomhouse.org/sites/default/files/inline_images/NIT-2011-Georgia.pdf.

28. Organisation for Economic Co-operation and Development, Anti-Corruption Network for Eastern Europe and Central Asia, Istanbul Anti-Corruption Action Plan: *Second Round of Monitoring: Georgia*, 44 (2010), available at www.oecd.org/countries/georgia/44997416.pdf.

29. Dimitri Avaliani, "The United National Movement and the Georgian Dream: The First Steps of Their Administrations," *Tabula Magazine*, June 2013, available at www.tabula.ge/en/story/72022-the-first-steps-of-their-administrations.

30. Rimple, *supra* note 25.

31. FCPA Resource Guide, *supra* note 3, at 54.

32. United Nations Convention Against Cor-

ruption (2000), available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. The convention, which went into force on Dec. 14, 2005, contains 71 Articles and requires States Parties to implement specific anti-corruption measures even if that may affect their laws, institutions and practices. To date there are 167 Parties, including the United States. See *id.*

33. This immunity can apply, at the prosecution's discretion, to a person who is either (1) extorted, or (2) after giving a bribe voluntarily, makes a report of the occurrence. In practicality, the immunity is given to those who are arguably extorted and then quickly report the payment. Even though the Azeri and Georgian authorities designed this loophole to encourage disclosure in exchange for amnesty, no parallel protection is afforded under U.S. law. Thus, even though the improper payment may be explicitly forgiven under foreign law, this forgiveness is not a bar to federal prosecution. See, United States v. Kozeny, No. 05-518 (SAS) (S.D.N.Y. Oct. 21, 2008). In a pre-trial motion, Bourke argued that the FCPA includes an affirmative defense that provides that if a payment to a foreign official was legal under the law of the country in which it was made (Bourke claimed Kozeny was extorted and thus was not a voluntary briber), then the person who paid the bribe is immune from prosecution under the FCPA. The district court ruled, however, that for the lawful payments exception to apply, the payment must have been specifically permitted under the foreign law at the time it was made. Azerbaijani (and Georgian) law, of course, specifically criminalizes all bribe payments (whether extorted or not), and thus the court held that the affirmative defense did not apply. Bourke never raised the extortion argument at trial, but, in a motion for a new trial, he complained that the court should have issued the FCPA lawful payments (*i.e.*, extortion payment) exception as an affirmative defense jury instruction. The district court again denied the motion. United States v. Kozeny, 664 F. Supp. 2d 369, 394 (S.D.N.Y. 2009).

34. *The Economist*, *supra* note 26.

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