Article

OLD DOG, NEW TRICKS: FIGHTING CORRUPTION IN THE AFRICAN NATURAL RESOURCE SPACE WITH THE MONEY LAUNDERING CONTROL ACT

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I. Introduction

The Foreign Corrupt Practices Act (FCPA), the U.S.'s primary tool in its corruption fighting arsenal, aims its anti-bribery components at American business transactions abroad.[1] Driven by a respect for the democratic process of foreign nations, the advantages for American businesses in a commercial climate with less bribery, and the effects of bribery on the free enterprise system, the FCPA has been vigorously enforced by the Obama Administration.[2] However, like the corruption fight in general, the FCPA is limited: the statute reaches only the bribe-maker rather than the recipient of the bribe. [3]

Top oil producing African countries, though benefiting greatly from the extractive industries, are crippled by corruption.[4] Corruption is a unique threat in the oil and gas industry: state permitting requirements, exposure to state officials, and an accepted culture of corruption create a commercial landscape in which bribery is merely a cost of doing business.[5] At its core, corruption siphons funds owed to the citizenry and transfers them to the pockets of entrenched state actors who use the proceeds of corruption to both perpetuate their power and dodge prosecution.[6] However, the effects of

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[1] Heather Diefenbach, *FCPA Enforcement Against Foreign Companies: Does America Know Best?*, 2 CORNELL INT'L L.J. ONLINE 47, 47-48 (2014), http://cornellilj.org/fcpa-enforcement-against-foreign-companies-does-america-know-best/.

[2] Mark Brzezinski, *Obama Administration Gets Tough on Business Corruption Overseas*, WASH. POST (May 28, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052704154.html.

[3] *Foreign Corrupt Practices Act*, DOJ (July 20, 2016), https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

[4] *Can Nigeria's President Defeat Oil Industry Corruption?*, BBC NEWS (Oct. 21, 2015), http://www.bbc.com/news/world-africa-34580862.

[5] EY, *Managing Bribery and Corruption Risks in The Oil and Gas Industry*, at* 5 2014, http://www.ey.com/Publication/vwLUAssets/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry/$FILE/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry.pdf

[6] *Id.*

corruption are even more damaging than the economic framework suggests, and viewing corruption through a rights-sensitive framework uncovers the full array of harm corruption engenders.[7] Corruption limits access to food, water, healthcare, and justice.[8] Corruption also warps the political process, saddles efforts at distributing foreign aid, and facilitates criminal activity within and across borders, including trafficking and terrorism.[9] The costs of corruption on human rights and democracy are too high to ignore.

Unfortunately, the tried-and-true FCPA is losing its teeth in African oil producing countries due to its jurisdictional limitations.[10] As African oil producing countries increasingly look to China for trade, concessional loans, and foreign aid, state leaders can now look past the cumbersome demands attached to Western aid.[11] Under China's "no-strings attached" trade and aid philosophy, money and morals occupy facially separate spheres: no longer do African leaders have to implement anti-corruption measures or commit to safeguarding human rights when accepting foreign aid or sealing trade deals.[12] Moreover, China's "petro-diplomacy" allows bribes flowing from Chinese state-owned oil companies to entrenched state actors adequate cover to dodge censure by sparsely enforced Chinese anti-corruption laws.[13] "No-strings," competitive by design, harms domestic and international efforts to fight corruption and its consequences. [14]

Recognizing the FCPA's corruption-fighting limitations in the face of the "no-strings" philosophy, this Note argues that the U.S. should use the Money Laundering Control Act (MLCA) to fight corruption in the African oil and gas space. Corruption and money laundering are inextricable: the proceeds of corruption are laundered to allow the bribe-seeker to retain funds that may be otherwise unsecure in the bribe-seeker's home country.[15] That money then flows through banks that the U.S. regulates and

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[7] Ashley Jones, *A Bitter Pill That Must Be Swallowed: An Ethics Based View of Corruption*, ARK. J. OF SOC. CHANGE AND PUB. SERV. (Oct. 26, 2013), http://ualr.edu/socialchange/2013/10/26/a-bitter-pill-that-must-be-swallowed-an-ethics-based-view-of-corruption/.

[8] *Id.*

[9] *Id.*

[10] Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-corruption Initiatives*, 26 AM. U. INT'L L. REV. 315, 336–37 (2011), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1702&context=auilr.

[11] Cindy Hurst, *China's Oil Rush in Africa*, IAGS 4, 14 (July 2006), http://www.iags.org/chinainafrica.pdf.

[12] Tom Murphy, *China's Aid to Africa: No Strings, More Problems*, HUMANOSPHERE (Dec. 8, 2015), http://www.humanosphere.org/world-politics/2015/12/chinas-aid-africa-no-strings-problems/.

[13] FINANCIAL ACTION TASK FORCE, LAUNDERING THE PROCEEDS OF CORRUPTION, (July 2011), http://www.fatfgafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf.

[14] *Supra* note 12.

[15] Miriam Wasserman, *Dirty Money*, 12 FED. RESERVE BANK OF BOSTON, (Jan. 1, 2002), https://www.bostonfed.org/publications/regional-review/2002/quarter-1/dirty-money.aspx

facilitates.[16] The MLCA, unlike the FCPA, is unique in its capability to reach the foreign official who takes a bribe and sends that money to a bank under U.S. jurisdiction.[17]

The U.S. has a strong federal interest in fighting corruption using the MLCA even when the FCPA is limited from doing so in certain instances.[18] The presence of demand-side corruption undermines the high-level goals of the FPCA and international agreements to which the U.S. is a party.[19] Furthermore, Congress intended the MLCA to reach the engine of continued criminal activity—by choking corruption's proceeds, the MCLA also retards the ability of the bribe-taking state actor to funnel funds into criminal activity. Thus, this Note argues that the Department of Justice (DOJ) should energetically prosecute foreign officials using the MLCA and tailored asset forfeiture initiatives to fulfill both the intent of the MLCA and the goals of the FCPA. To reach this conclusion, this Note analyzes recent MLCA cases against foreign officials, including a controversial ruling, which raises concerns about the MLCA's application in historically FCPA territory.[20] This Note argues that concerns about the MLCA's use to prosecute bribery are off the mark, and that the U.S. has both a moral obligation towards, and a strong federal interest in, prosecuting corruption by using the existing, compatible MLCA framework.

II. Background on the Foreign Corrupt Practices Act

The enactment of the FCPA was the first time a government made bribery payments to foreign officials a criminal offense.[21] Passed in the aftermath of the Watergate scandals,[22] at its core, the FCPA is an anti-bribery statute.[23] To effectuate its goals, the FCPA includes anti-bribery provisions[24] and accounting provisions[25] aimed at deterring grease payments to "foreign officials." Under the statute, a "foreign official" is defined as

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[16] *Id*.

[17] Miwa Shoda & Andrew G. Sullivan, *Attacking Corruption at its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L L.J. 1 (2015), https://jenner.com/system/assets/publications/14373/original/Shoda_Sullivan_California_Int_Law_Journal.pdf?1440539681.

[18] *Id.*

[19] Lucinda A. Low, Sarah R. Lamoree, & John London, *The "Demand Side" of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563 (2015), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5145&context=flr.

[20] Shoda, *Supra* note 17.

[21] Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 930 (2012), http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Koehler.pdf.

[22] Linda Chatman Thomsen, Director, SEC Division of Enforcement, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (Mar. 27, 2008) (https://www.sec.gov/news/speech/2008/spch032708lct.htm) (revealing payments by U.S. firms to obtain and retain business abroad).

[23] THE CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE & THE ENF'T DIVISION OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11-12 (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter 2012 DOJ-SEC FCPA GUIDE].

[24] 15 U.S.C. § 78dd-1 (2012).

[25] *Id.* § 78m.

"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 [the same]."[26]

The promotion of democracy across the globe is a principle ingrained into the U.S. national fabric and naturally serves as a key driver for U.S. foreign policy.[27] The FCPA was born out of a similar interest.[28] Congress was primarily motivated to deter U.S. political contributions to foreign governments, specifically to prevent private U.S. interference with democratic elections.[29] Discussing the impact of corporate donations on foreign governments, Representative Robert Nix (D-PA) commented that "[t]he interference in democratic elections with corporate gifts undermines everything [the U.S.] is trying to do as a leader of the free world."[30] However, foreign policy was not the only consideration behind the FCPA.[31] Congress was also concerned that the impact of bribes on the free enterprise system (long-term economic landscape), the advantages for American businesses of a business climate with less bribery, and global leadership in the anti-corruption space.[32]

The FCPA boasts a broad jurisdiction. First, the statute applies to companies that are issuers, or domestic and foreign companies traded on U.S. exchanges or that are traded over-the-counter (OTC) and are required to file reports with the SEC.[33] These companies are required to maintain books, records, and controls to help the SEC monitor assets that could be used in bribery schemes.[34] Second, the FCPA applies to "domestic concerns," or any citizen, national, or resident of the United States, and any corporation and business entity organized under the laws of the United States or any individual U.S. state, or having its principal place of business

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[26] *Id.* § 78(f)(1)(A). Though beyond the scope of this note, the definition of foreign official leaves much to be desired clarity-wise. *See generally* Alexander G. Hughes, Note, *Drawing Sensible Borders for the Definition of "Foreign Official" Under the FCPA*, 40 AM. J. OF CRIM. L. 253 (2013), *available at* http://ajclonline.org/wp-content/uploads/2013/08/40-3-Hughes.pdf (discussing the limitations of the statutory definition of "foreign official").

[27] U.S. DEP'T OF STATE, *Democracy*, http://www.state.gov/j/drl/democ/index.htm, (last visited Oct. 17, 2016).

[28] Cyavash Nasir Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 14 J. INT'L BUS. & L. 351, 353 (July 10, 2012), http://law.hofstra.edu/pdf/academics/journals/jibl/jibl_volxii_regulating_the_regulators_ahmadi.pdf. ("The FCPA was enacted because corruption and its concomitant effect threatened foreign policy interests. The very payments that were diminishing shareholder value were also destabilizing the governments of Japan, the Netherlands, and Italy.")

[29] Koehler, *supra* note 21, at 934.

[30] *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 2 (1975) (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations). Notably, Rep. Nix was the first African American to represent Pennsylvania in the House of Representatives. *Biography of Robert Nix*, U.S. House of Rep. History, Art & Archives, http://history.house.gov/People/Detail?id=18971 (last visited May 3, 2016).

[31] *See generally* Koehler, *supra* note 21, at 939–943.

[32] *Id.* at 943.

[33] 15 U.S.C § 78dd-1 (2012).

[34] 2012 DOJ-SEC FCPA GUIDE, *supra* note at 23.

in the United States.[35] Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.[36] Third, the statute extends to any person (foreign person and foreign entity) that is not a U.S. issuer or organized in the U.S. who commits any act in furtherance of an FCPA violation while in U.S. territory,[37] either directly or through any agent.[38]

The anti-bribery provisions of the FCPA prohibit (i) corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value; "(ii) to a foreign official; (iii) in order to obtain or retain business."[39] The statute carries both criminal and civil penalties. [40] Individuals can face up to five years in prison for violating the anti-bribery provisions of the FCPA and are also subject to fines of up to $250,000.[41] Businesses can be fined up to $2 million for bribery violations and up to $25 million for each violation of the FCPA's accounting provisions.[42] Criminal fines may also be increased to up to twice the benefit the defendant obtained by the corrupt payment under the Alternative Fines Act.[43] The DOJ has authority to pursue civil penalties up to $16,000 (inflation adjusted) per violation for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders),[44] foreign nationals, and companies for violations committed in the U.S.[45] The penalty, if levied on an individual, may not be paid by the employer or principal.[46] The SEC may also obtain civil penalties in federal court or in administrative proceedings[47] against issuers (and their officers, directors, employees, agents, or stockholders) not to exceed the greater of (a) gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation ranging from $7,500 to $150,000 for an individual and from $75,000 to $725,000 for a company (inflation adjusted values).[48]

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[35] 15 U.S.C. § 78dd-2 (2012).

[36] *Id.* § 78dd-2(h)(1).

[37] For a list of current U.S. territories, *Persons Employed in a U.S. Possession / Territory – FIT*, , IRS (Oct. 31 2016), https://www.irs.gov/Individuals/International-Taxpayers/Persons-Employed-In-U.S.-Possessions.

[38] 15 U.S.C. § 78dd-3(a); *see also* U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL § 9-1018 (Nov. 2000) (the Department "interprets [Section 78dd-3(a)] to confer jurisdiction whenever a foreign company or national *causes* an act to be done within the territory of the United States by any person acting as that company's or national's agent.").

[39] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 390 (2010) (paraphrasing the language of the FCPA, 15 U.S.C. 78dd-1).

[40] Criminal penalties are calculated according to the U.S. Sentencing Guidelines. S*ee* 2012 DOJ-SEC FCPA GUIDE, *supra* note 23 , at 68–69 (an overview of the Guidelines as applied to the FCPA).

[41] *Id.*

[42] *Id.*

[43] 18 U.S.C. § 3571(d) (2012)

[44] 15 U.S.C. §§ 78dd-2(g)(2)(B), 78dd-3(e)(2)(B), 78ff(c)(2)(B) (2012); *see also* 17 C.F.R. § 201.1004 (providing adjustments for inflation pushing civil penalties from $10,000 to $16,000).

[45] *Id.* §§ 78dd-2(g)(1)(B), 78dd-3(e)(1)(B), 78ff(c)(1)(B).

[46] *Id.* §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).

[47] *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, 15 U.S.C. §§ 202, 301, 401, and 402 (2012) (codified in scattered sections of Title 15 of the United States Code).

[48] 15 U.S.C. § 78u(d)(3); *see also* 17 C.F.R. § 201.1004 (providing adjustments pushing civil penalties from $5,000 to $7,500 and $50,000 to $75,000 for individuals, and from $50,000 $75,000 and $500,000 to $725,000 for companies).

The FCPA's accounting provisions impose two major obligations on issuers. First, issuers must make and keep books, records and accounts that, in reasonable detail, accurately and fairly reflect an issuer's transactions and dispositions of an issuer's assets ("books and records" provision).[49] Second, issuers must devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over a firm's assets ("internal controls" provision).[50] Individuals violating accounting provisions are subject to fines of up to $5 million and imprisonment up to 20 years, while corporations and other business entities violating such provisions are subject to a fine of up to $25 million.[51] The FCPA is enforced against both U.S. and non-U.S. citizens.[52] Many of these cases involve actions against non-U.S. agents of U.S. companies.[53] For example, in 2009 the DOJ took action against Ousama Naaman, a Canadian citizen, because he was considered to have been acting "on behalf of a publicly traded U.S. chemical company and its subsidiary."[54] Notably, the FCPA does not apply to the demand-side of the bribe, or the foreign official originating the bribe.[55] These foreign officials are exempt from the statute's otherwise broad reach. [56]

Courts have paid particular attention to the FCPA's jurisdictional limits.[57] The statute has been strictly interpreted as a supply-side anti-corruption statute (covering the entity supplying the bribe).[58] Courts have ruled that Congress's specific focus under the FCPA was on American businesses operating in foreign spaces rather than the foreign state officials or citizens of foreign nations demanding the bribe (demand-side enforcement).[59] For example, in *U.S. v. Castle*, the DOJ charged Canadian

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[49] *Id.* § 78m(b)(2)(A).

[50] *Id.* § 78m(b)(2)(B).

[51] *Id.* § 78ff(a).

[52] Susan Rose-Ackerman, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest,* 67 N.Y.U ANN. SURV. AM. L. 433, 447 (2012).

[53] *Id.*

[54] Amy D. Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 552 (2011) (quoting Office of Public Affairs, *Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Program*, U.S. DEP'T OF JUSTICE, (Sept. 15, 2014), https://www.justice.gov/opa/pr/canadian-national-charged-foreign-bribery-and-paying-kickbacks-under-oil-food-program).

[55] *Id.* at 504–05.

[56] *Id.*

[57] Miwa Shoda and Andrew G. Sullivan, *Attacking Corruption at its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L L.J. 1 (2015), https://jenner.com/system/assets/publications/14373/original/Shoda_Sullivan_California_Int_Law_Journal.pdf?1440539681.

[58] *Id.*

[59] The Sixth Circuit was the first court to articulate the FCPA's purpose, holding that the "[the FCPA was] primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs." Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).

officials and bribe recipients with conspiracy to violate the FCPA.[60] The Fifth Circuit dismissed the government's indictment.[61] Reviewing the legislative history leading to the enactment of the FCPA, the court determined that Congress purposefully chose to exempt foreign officials from prosecution.[62] The court noted that this decision was policy-based, reflecting a product of Congress's concern with the "inherent jurisdictional, enforcement, and diplomatic difficulties" raised by the application of the statute to noncitizens of the United States."[63]

A. Enforcement

Both the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) have enforcement authority under the FCPA.[64] While the SEC can only pursue civil actions against issuers, the DOJ can enforce criminal penalties against issuers and non-issuers.[65] The DOJ also has both criminal and civil enforcement responsibility for the FCPA's anti-bribery provisions over domestic concerns.[66] The statute's enforcement has been a priority for the Obama Administration.[67] From 2003 to 2006, there were only 38 enforcement actions brought under the statute.[68] In 2010 alone, authorities brought 74 enforcement actions.[69] 2014 boasted the second highest corporate enforcement action settlement amounts in dollars on record.[70] 2014 also showed a focus on large corporate enforcement actions—individual actions have fallen nearly 64% since 2009 (though the number of corporate actions were still low compared to 2010).[71] This suggests that the DOJ and SEC are shifting their capabilities to high profile cases. However, FCPA prosecution has slowed in 2015: enforcement actions from DOJ and SEC are down 23% from 2014, and 77% from the high in

[60] United States v. Castle, 925 F.2d 832, 834 (5th Cir. 1991).
[61] *Id*. at 836.
[62] *Id.* at 834.
[63] *Id.* at 835 (citing H.R. Conf. Rep. No. 831, 95th Cong. (1st Sess. 14), as reprinted in 1977 U.S.C.C.A. N. 4121, 4126).
[64] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 2
[65] *Id.* at 4.
[66] *Id.*
[67] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 38 (2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.
[68] *See* PHILIP UROFSKY & DANFORTH NEWCOMB, SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 1 Total SEC/DOJ Matters Initiated: 2002-2010 (2011), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2011/01/Shearman--Sterlings-Recent-Trends-and-Patterns-i__/Files/View-January-2011-Recent-Trends-and-Patterns-in-__/FileAttachment/January-2011-Trends--Patterns.pdf.
[69] *See* Paul T. Friedman, Ruti Smithline & Angela E. Kleine, *Client Alert 2010: Another Record-Breaking Year for FCPA Enforcement, Confirming "New ERA",* MORRISON & FOERSTER LLP (2011), http://media.mofo.com/files/Uploads/Images/110112-FCPA-Enforcement.pdf.
[70] *Corporate FCPA Enforcement in 2014 Compared to Prior Years*, FCPA PROFESSOR (Jan. 13, 2015), http://fcpaprofessor.com/corporate-fcpa-enforcement-in-2014-compared-to-prior-years/.
[71] *Id.*

2010.[72] The DOJ also shifted its focus from corporations to individuals in 2015 (the SEC showed no such shift).[73]

Bribe paying firms are usually large firms that have high profit margins, operate in research-intensive industries perceived to be relatively corrupt, and do business in many geographic markets that are known for corruption.[74] Often, these firms operate in the natural resource space, such as multinational oil and gas companies.[75] The mean bribe amounts firms pay is $23.43 million, while the median bribe amount is $1.05 million, indicating that bribe payments are skewed toward big players. [76] The mean monetary penalty imposed on bribe paying firms is $93.5 million.[77] Nigeria, Iraq, Saudi Arabia, and Brazil, oil rich nations, are among the top eight countries with the most FCPA bribery enforcement actions.[78]

The FCPA is particularly relevant in the natural resource space, specifically due to the prevalence of state-owned oil and gas companies which qualify key employees as foreign officials.[79] 11 out of the 20 largest FPCA settlements involved oil and gas companies or oil and gas transactions.[80] Many companies operate joint ventures in which foreign government officials hold leadership positions, increasing the probability of bribery. Bribery in the resource space may just be a cost of doing businesses. In an Organization for Economic Co-Operation and Development (OECD) analysis of 427 cases of bribery in international business, extractive industries (oil and minerals) topped the list with the most cases of bribery.[81] Like garbage accumulating on a city street, perception has the power to perpetuate the status quo. Transparency International identified companies in the oil and gas sector as being

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[72] Gibson, Dunn & Crutcher, *2015 Year-End FCPA* (2016), http://www.gibsondunn.com/publications/documents/2015-Year-End-FCPA-Update.pdf.

[73] *See id.*at 3 (discussing the "Yates Memorandum" penned by U.S. Deputy Attorney General Sally Yates issued to all federal prosecutors announcing a focus on individual corporate officer responsibility in investigations of misconduct).

[74] Jonathon M. Karpoff et al., *The Economics of Foreign Bribery: Evidence from FCPA Enforcement Actions 20* (June 16, 2016) (unpublished manuscript) (on file with Social Science Research Network), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222.

[75] *Id.* at 12.

[76] *Id.* at 15.

[77] *Id.*

[78] *Id.* at 4.

[79] Clinton R. Long, *Navigating the FCPA's Ambiguous "Instrumentality" Provision: Lessons for the Energy Industry*, 12 RICH. J. GLOBAL L. & BUS. 393, 400 (2013) (noting that in 2007 "77 percent of the world's oil reserves [were] held by national oil companies with no private equity, and there [were] 13 state-owned oil companies with more reserves than ExxonMobil, the largest multinational oil company") (internal quotation marks omitted).

[80] Baker & McKenzie, *Globalization of the Supply Chain* 6 (June 18, 2013), http://www.bakermckenzie.com/files/webinars/wbtradefcpaantibriberytrendsjun13/Final%20Presentation%20-%20June%2018%202013.pdf.

[81] *See* OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS, OECD PUB. 8 (2014),http://www.oecdilibrary.org/docserver/download/2814011e.pdf?expires=1462388364&id=id&accname=guest&checksum=FABE51C35B9F0D2EB0FBD522C20A9E0E (two-thirds of cases occurred in just four industries: extractive (19%); construction (15%); transportation and storage (15%), and information and communication (10%)).

perceived to bribe more than companies in other sectors.[82] As developed countries dry up domestic reserves, they find it necessary to look beyond their borders to developing countries where levels of corruption remain high.[83] Africa, Latin America, and the Middle East, high-growth markets for international investors and source markets for natural resources imports,[84] tend to have lower rankings in Transparency International's Corruption Perception Index.[85] Oil producing countries in Africa are particularly susceptible to corruption.[86] Two of the top five oil producing nations in Africa all rank near the bottom of Transparency International rankings. [87]

Top Oil Producing African Nations, Production, and Transparency International Ranking

Country	**Production (millions of barrels per day)**	**Transparency International Corruption Ranking[88]**
Nigeria	1.8 M B/D (2015)[89]	136/167
Angola	1.7 M B/D (2015)[90]	163/167
Algeria	1.2 M B/D (2015)[91]	88/167
Egypt	0.7 M B/D (2014)[92]	88/167
Libya	04. M B/D (2015)[93]	161/167

The oil and gas business is high-risk, high-reward, and the enormous payoffs can be limited by delays or downtime, creating perverse incentives between operations on the ground and corporate policy at headquarters.[94]

[82] *Bribe Payers Index*, TRANSPARENCY INT'L, https://www.transparency.org/bpi2011/results (last visited May. 3, 2016).

[83] Ernst & Young, *Managing Bribery and Corruption Risks in the Oil and Gas* Industry 4 (2014), http://www.ey.com/Publication/vwLUAssets/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry/$FILE/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry.pdf.

[84] *Id.* at 5.

[85] TRANSPARENCY INT'L INDEX, *supra* note 82. A lower ranking in Transparency International's Corruption Perception Index indicates a higher level of corruption.

[86] TRANSPARENCY INT'L INDEX, *supra* note 82 (Angola, Libya, Sudan, and South Sudan are all ranked as 16 or less)

[87] *Id*. (Angola and Libya).

[88] TRANSPARENCY INT'L INDEX, *supra* note 82.

[89] OPEC, *Nigeria Facts and Figures*, OPEC, http://www.opec.org/opec_web/en/about_us/167.htm (last visited May 4, 2016) [hereinafter OPEC Nigeria].

[90] OPEC, *Angola Facts and Figures*, OPEC, http://www.opec.org/opec_web/en/about_us/147.htm (last visited May 4, 2016).

[91]OPEC, *Algeria Facts and Figures*, OPEC, http://www.opec.org/opec_web/en/about_us/146.htm (last visited May 4, 2016).

[92] EIA Beta, *EIA Analysis: Egypt*, EIA (June 2, 2015), https://www.eia.gov/beta/international/analysis.cfm?iso=EGY.

[93] EIA Beta, *EIA Analysis: Libya*, EIA (Nov. 19, 2015), https://www.eia.gov/beta/international/analysis.cfm?iso=LBY.

[94] Ernst & Young, *supra* note 83 at 7.

Resource extraction is also highly regulated and involves significant interaction with politically exposed persons (PEPs) due to license and permitting requirements.[95] This dynamic allows PEPs to demand grease payments for supplying permits and licenses, and additionally to help companies avoid state sanctions after permitting is allowed (for example, to dodge environmental or safety regulations).[96]

Congress has paid close attention to the unique corruption risks presented by the oil and gas space. The Extractive Industries Disclosure Provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires the SEC to issue regulations requiring issuers engaged in the development of oil, natural gas, or minerals to file an annual report of payments made to the US government or a foreign government.[97] The SEC's rulemaking, however, has faced numerous barriers. In 2013, U.S. District Judge John Bates tossed the SEC's extractive industries disclosure rule, labeling the rule "arbitrary and capricious."[98] Specifically, the court was concerned with the SEC's interpretation that Congress required disclosure to be public, and the SEC's refusal to exempt those countries which prohibited payment disclosures from the rule's requirements.[99] In February of 2016, the SEC re-proposed rules under Section 1504 addressing the issues raised in the 2013 litigation.[100] After nearly seven years of severe pushback the SEC has seen from industry groups critical of Section 1504,[101] the SEC released final rules in June 2016.[102] In February of 2017, Congress passed a joint resolution disapproving of Section 1504,[103] and repealed the SEC's final rule under Section 1504.[104] Though Section 1504 still remains in effect, given the significant political and industry censure, Section 1504's future is unclear. Whatever its fate may be, Section 1504's passage represented another example of America's leadership in the global corruption fight: since

[95] *Id.* at 8.

[96] *Id.* at 9.

[97] *Specialized Corporate Disclosure*, SEC, https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml (last visited May 4, 2016).

[98] *Am. Petroleum Inst. v. S.E.C.*, 953 F. Supp. 2d 5, 11 (D.D.C. 2013).

[99] *Id.* at 16, 21.

[100] Michael L. Littenberg, *A Deep Dive into SEC's Latest Mining Proposals*, LAW 360 (Feb. 10, 2016, 11:50 AM), http://www.law360.com/articles/757101/a-deep-dive-into-sec-s-latest-mining-disclosure-proposal.

[101] WOLTERS KLUWER LEGAL & REGULATORY SOLUTIONS U.S. WHITE PAPER, DODD-FRANK FIVE YEARS LATER: THE WEIGHT ON THE FINANCIAL SERVICES INDUSTRY 14 (Amy Leisinger, et al. eds., 2015).

[102] U.S SEC. AND EXCH. COMM'N, ADOPTS RULES FOR RESOURCE EXTRACTION ISSUERS UNDER DODD-FRANK ACT (June 27, 2016), https://www.sec.gov/news/pressrelease/2016-132.html.

[103] Samuel Rubenfeld, *U.S. House Passes Resolution to Kill Extractive Anti-Graft Rule* (Feb. 1, 2017), WALL ST. J., http://blogs.wsj.com/riskandcompliance/2017/02/01/u-s-house-passes-resolution-to-kill-extractive-anti-graft-rule/.

[104] Kate Bateman, *Trump's Repeal of Section 1504 of Dodd-Frank Will Hurt U.S. National Security*, FOREIGN AFFAIRS (Feb. 7, 2017), https://www.foreignaffairs.com/articles/2017-02-07/corrupt-practice.

Section 1504 became law, 30 countries have passed similar rules for the extractive sector.[105]

B. "Resource Curse"

The "resource curse" denotes the connection between national mineral dependence and the risks of violent conflict, economic inequality, limitations on democracy, and increased corruption.[106] Empirically rooted in an influential study by economists Jeffery Sachs and Andrew Warner,[107] three different attributes define the "curse": (1) currency appreciation and its negative effect on the competitiveness of other industries, (2) fluctuation in commodity prices and disruptive effects, and (3) effect on political conditions.[108] Take Nigeria for example. State-owned Nigerian National Petroleum Company (NNPC) partners with international oil companies (IOCs).[109] Through these international partnerships, oil rich Nigeria earned $350 billion between 1970 and 2000 during its oil boom, but income per capita fell and inequality increased significantly.[110] Nigeria is a victim to perpetual corruption in the oil and gas industry, and state actors are slow to investigate corruption in the oil industry versus other industries (like the financial services sector).[111] The "resource curse" presents a consistent trend in oil producing nations: citizens of nations with poor governance but abundant stores of natural resources often do not gain the value to which they are entitled from state actors. Far from being contained, the "resource curse" has spillover effects to resource-demanding nations. Two are particularly immediate. First is the effect on the cost of extracted materials (though due to shale boom, not as of late for the U.S.).[112] Second is the risk borne by investors who provide the capital necessary for extraction. In fact, Section 1504 of Dodd-Frank was the end product of Congress's particular concern with the "resource curse."[113]

There are indicators that African countries are diversifying their national industries through services and manufacturing, even those countries whose

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[105] Kate Bateman, *Trump's Repeal of Transparency Measure Will Hurt U.S. National Security*, FOREIGN AFFAIRS (Feb. 17, 2017), https://www.foreignaffairs.com/articles/2017-02-07/corrupt-practice

[106] Littenberg, *supra* note 100.

[107] *See generally* Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 5398, 1995) (discussing the strong correlation between natural resource abundance and poor economic growth).

[108] Nicholas Shaxson, *Oil, Corruption, and the Resource Course*, 83 INT'L AFFAIRS 1123, 1124 (2007), http://projects.iq.harvard.edu/sites/projects.iq.harvard.edu/files/gov2126/files/shaxson_2007.pdf.

[109] Joint Venture Operation, *Nigerian National Petroleum Corporation*, *http://www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx* (last visited Nov. 14, 2016).

[110] Nicholas Shaxson, *supra* note 108, at 1123–24

[111] G. UGO NWOKEJI, THE NIGERIAN NATIONAL PETROLEUM CORPORATION AND THE DEVELOPMENT OF THE NIGERIAN OIL AND GAS INDUSTRY: HISTORY, STRATEGIES AND CURRENT DIRECTIONS 3, 56 (2007), http://www.bakerinstitute.org/media/files/page/9b067dc6/noc_nnpc_ugo.pdf

[112] *Id*.

[113] Imran Rahman, *Drilling for Disclosure After Api v. Sec: Incentivizing Voluntary Payment Transparency in the Resource Extraction Industry Through Exemptions to Section 1504 of the Dodd-Frank Act*, 21 SW. J. INT'L L. 479, 482–83 (2015).

economies have been historically driven by natural resources.[114] For example, oil represents 95% of Nigeria's exports, yet services now represent 60% of GDP.[115] However, oil still represents a significant percentage of Nigeria's output (35%).[116] Nigerian citizens, like the citizens of other African oil producing nations, still have to grapple with the "resource curse" and the effects of corruption in the resource space for the near future.[117] Corruption had a limited impact on the state-building enterprise of the United States: much of the country's national political framework was entrenched after the Mexican-American War and Civil War, providing needed cushion for the era of "Boss Tweed" and related political rent-seekers.[118] Thus, given that many countries in Africa are still in their earlier trials as political states in search of stability, corruption has significantly higher costs.[119]

III. Is FCPA Enforcement Worth It?

Some estimates suggest that $1 trillion is paid in bribes annually, nearly 3% of global GDP.[120] Bribery has hit Africa especially hard.[121] From 1980-2009, Africa lost more than $1.2 trillion in illicit financial outflows.[122] Clearly, corruption is a problem in +developing countries, especially those in Africa. The question that policymakers must confront is whether the FCPA is worth its salt in fighting corruption.

A. Costs of the FCPA

The principal effect of the FCPA is to divert U.S. FDI to less corrupt countries, and encourage substitution between U.S. and foreign investors in more corrupt countries.[123] Firms that are targeted for anti-bribery enforcement face large direct costs in the form of penalties, investigation and legal expenses, and monitoring costs that average 5.1% of market

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[114] *The Twilight of the Resource Curse*? ECONOMIST (Jan. 10, 2015), http://www.economist.com/news/middle-east-and-africa/21638141-africas-growth-being-powered-things-other-commodities-twilight.

[115] *Id.*

[116] OPEC Nigeria, *supra* note 89.

[117] *The Twilight of the Resource Curse? supra* note 114.

[118] Ian Shapiro & Adira Levine, *Corruption in Africa: Shifting Standards and Challenges in* AFRICA AT A FORK IN THE ROAD: TAKING OFF OR DISAPPOINTMENT ONCE AGAIN? 263, 262–63 (Ernesto Zedillo et al. eds., 2015), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.694.4907&rep=rep1&type=pdf#page=261.

[119] *Id.*

[120] *The Costs of Corruption,* WORLD BANK, (Apr. 8, 2004), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[121] Shapiro & Levine, *supra* note 118, at 261.

[122] *Id.*

[123] Ames R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977* 19–21 (1995), (Nat'l Bureau of Econ. Research, Working Paper No. 5266), http://www.nber.org/papers/w5266.

capitalization, including 3.3% in direct costs and 1.0% in reputation loses.[124] FCPA investigations have a negative effect on firm share price, regardless of the firm's culpability, reflecting investors' expectations of future government sanctions or the loss of future business.[125] Nevertheless, there is evidence that the FCPA in its current form is limited in its ability to change the incentives of bribe paying firms both in its imposition of a civil penalty and its enforceability.[126] Using FCPA enforcement data from 1978 to May 2013, researchers determined that the optimal civil penalties under the FCPA to deter bribery (reducing the net present value of a bribe from a company's perspective to zero) need to increase significantly for the FCPA to have a deterrent effect, or alternatively, the probability of being caught needs to increase nearly 59% to reduce the company's ex-ante net present value to zero.[127] Surprisingly, bribe recipients only capture 16.3% of the value of contracts for which bribes are paid (contrary to arguments that bribe recipients extract the most surplus from bribe contracts).[128] The authors thus conclude that bribe-paying firms avoid transferring most of the contract value to the bribe recipients.[129] Stated another way, measured by its ability to mold ex-ante incentives, the FCPA may not be worth its costs in its current form simply due to its inefficacy.[130]

Additionally, looking to corruption specifically, corruption may facilitate growth when people are not free.[131] In relatively poor, un-free countries, corruption can overcome some of the barriers presented by formal and informal institutions that act to restrict commerce.[132] Bureaucracies and regulators can arbitrarily limit beneficial trades, and in such cases, corruption can increase economic growth by allowing trade.[133] Where an over-centralized bureaucracy may constrain growth, corruption may be a "welcome lubricant easing the path to modernization."[134] Finally, the FCPA may have a preclusive effect in regards to investment in developing countries, especially at times when the country may need it the most.[135] For example, one commentator recommended passing an exemption to the FCPA for Haiti after the country's devastating earthquake in 2010 as

[124] Karpoff, *supra* note 74, at 3.
[125] *Id.*
[126] *Id.* at 29.
[127] *Id.* at 5
[128] *Id.* at 4.
[129] *Id.* at 5.
[130] Karpoff, *supra* note 74, at 1–2, 29.
[131] Anna Kochanova, *How Does Corruption Affect Economic Growth*?, WORLD ECONOMIC FORUM, (May 6, 2015), https://www.weforum.org/agenda/2015/05/how-does-corruption-affect-economic-growth/.
[132] *Id.*
[133] Richard L. Cassin, *Graft is Good, Sometimes*, FCPA BLOG, (Jan 25, 2010, 5:47 PM), http://www.fcpablog.com/blog/2010/1/26/graft-is-good-sometimes.html#sthash.Wv4EMzl9.dpuf.
[134] SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 69 (New Haven and London, Yale University Press 7th ed. 1973).
[135] Ashby Jones*, Is the FCPA Standing in the Way of Haiti's Recovery?,* WALL ST. J., (Mar. 16, 2010, 4:10 PM), http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery/

American business owners shied away from investing in the country due to FCPA liability.[136]

B. Benefits of the FCPA

However, a powerful defense of the FCPA focuses on attacking FCPA critics' simplistic characterization of lost business for FCPA compliant companies, or lost contracts due to a competitor's submittance to a bribe.[137] First, the "loss" for a lost contract is not the profits that would have been earned from a corrupt deal.[138] Instead, the firm can usually shift its business elsewhere, and resources from fixed locations can enter the international market where they can be purchased by American business.[139] Second, there are long-term benefits to the United States enforcing the FCPA rigorously.[140] A unified front against international corruption is one way to encourage global compliance, improving the fairness and efficiency of global trade, facilitating investment, and enhancing the welfare of citizens in countries crippled by corruption.[141] According to this argument, in the long run, the benefits of fighting corruption to the U.S. and its standing to the world outweigh the cost of lost contracts to U.S. companies presently.[142]

The FCPA, though burdensome in regards to control costs for businesses under its jurisdiction, is less burdensome than analogous anti-corruption statutes.[143] For example, the requirement that bribery be accompanied with knowledge narrows the FCPA relative to the U.K. Bribery Act. [144] The FCPA certainly is not the most restrictive anti-corruption statute on the books.[145] Finally, the FCPA does not stand alone in penalizing overseas bribery.[146] The OECD Anti-Bribery Convention[147]

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[136] *Id.;* Tyler Cowen, *One of the Beset Ways to Help Haiti: Modify FCPA*, MARGINAL REVOLUTION (March 15, 2010, 9:24 AM), http://marginalrevolution.com/marginalrevolution/2010/03/one-of-the-best-ways-to-help-haiti.html.

[137] Rose-Ackerman, supra note 52, at 435.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 461–63.

[141] *Id.*

[142] SUSAN ROSE-ACKERMAN & RONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT, CASES CONSEQUENCES AND REFORM 477 (2016).

[143] Geoffrey Gauci & Jessica Fisher, T*he UK Bribery Act and the US FCPA: The Key Differences*, ASSOCIATION OF CORPORATE COUNSEL, (June 1, 2011), http://www.acc.com/legalresources/quickcounsel/UKBAFCPA.cfm?makepdf=1.

[144] *Compare* Bribery Act (2010) §7, c.23 *with* 15 U.S.C. 78dd-1(a)(3)).

[145] For example, the U.K. Bribery Act prohibits receiving and giving bribes and also criminalizes bribes directed at private parties. DAN DANIELSON & DAVID KENNEDY, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 23-4 (Open Society Found., 2011), http://www.law.harvard.edu/faculty/dkennedy/publications/BustingBribery.pdf.

[146] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Oct. 30, 2016).

[147] *See* OECD Convention on Combating Bribery of Foreign Public Officials: Ratification Status as of 21 May 2014, OECD (2014),

http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf, [hereinafter RATIFICATION STATUS] (listing the signatories to the OECD Anti-Corruption Treaty).

imposes the principles behind the FCPA to multinationals around the world.[148] The list includes some of the U.S.'s closest allies and commercial competitors.[149] The FCPA was actually modified in 1998 to bring the statute in line with the OECD Anti-Bribery Convention's stricter requirements,[150] and other regional anti-bribery frameworks also impose requirements of varying strength on their signatories.[151] Rigorous enforcement of the FCPA therefore has a lower cost to the United States when there is some statutory parity between nations which invest in corruption heavy areas,[152] a trend that should continue as globalization advances.[153] Thus, the argument that the FCPA places the U.S. at a significant competitive disadvantage is at least tempered by broad international agreement to fight bribery and corruption through frameworks similar to the FCPA—companies operating transnationally (like those in extractive industries) already face a significant possibility of liability under a variety of statutes through other jurisdictions.[154]

Besides, the FCPA is legislation which Congress can amend.[155] Noteworthy recommendations include temporary exemptions for certain countries, creating a statutory affirmative defense for FCPA violations, or clarifying key definitions ("foreign official") to help companies improve their compliance efforts.[156] Finally, in a practical sense, the FCPA is not going anywhere. Since its enactment, the statute has only been amended two times. It was first amended in 1988 to add two affirmative defenses,[157] and then in 1998 to conform to the requirements of the Anti-Bribery Convention (of which the U.S. was a founding party).[158] Scholars and industry groups have pushed FCPA amendments to no avail. As one commentator provides, FCPA reform is in "sleep mode."[159]

IV. Costs of Corruption: Too High to Ignore

Although the debate about the burdens and benefits of the FCPA continues, the bottom line is that corruption has costs that are too high to ignore. Tipping the FCPA cost-benefit analysis is the impact of corruption

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[148] Rose-Ackerman, *supra* note 52, at 440.

[149] DANIELSON & KENNEDY, *supra* note 145, at 20.

[150] Rose-Ackerman, *supra* note 52, at 440.

[151] Lucinda A. Low, et al., Ethics, Extraterritorial Anticorruption Laws, and Anti-Money Laundering Laws, 51 RMMLF-INST 3 §3,01, ¶3.02 (2005).

[152] DANIELSON & KENNEDY, *supra* note 145, at 22-23.

[153] *Id.* at 24.

[154] *Id.* at 5–6, 7–8.

[155] DANIELSON & KENNEDY, *supra* note 145, at 19.

[156] *See generally* Brady Dennis & Tom Hamburger, *5 Proposed Amendments to the Foreign Corrupt Practices Act*, WASH. POST. (April 25, 2012), https://www.washingtonpost.com/business/economy/5-proposed-amendments-to-the-foreign-corrupt-practices-act/2012/04/25/gIQAXbuVhT_story.html; *see also Amendments to Simplify the FCPA for U.S. Businesses*, FCPA PROFESSOR (Sep. 24, 2012), http://fcpaprofessor.com/amendments-to-simplify-the-fcpa-for-u-s-businesses/, [hereinafter *Amendments to Simplify*].

[157] Congress added two affirmative defenses: (1) the local law defense; and the (2) reasonable and bonafide promotional defense. 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[158] *Id.* at 4.

[159] *Amendments to Simplify*, *supra* note 156.

on growth, corporate behavior and most importantly, human rights and democracy.

Corruption damages economic growth, reduces domestic and foreign investment, retards business development, and promotes informal economies.[160] Corruption leads to distorted prices and inflates the cost of government contracts in developing countries,[161] hinders both developing and mature economies, and increases the costs of doing business and the stability of the global market. Corruption is especially impactful on small to medium sized businesses.[162] Because bribes are usually paid without a written contract, corruption comes without guarantees and cost projections (bribe amounts may be raised in the next instance).[163] Also, contracts secured through bribery may be legally unenforceable.[164] At the company level, failure to actively avoid corruption leads to cultures where employees and third parties can rationalize stealing from the company, leading to reputational losses and a flight of employees, shareholders, and customers.[165] Bribery not only hurts a company's bottom line, but places the company's reputation in jeopardy. [166]

Corruption shapes culture. It is not a coincidence that the U.S. does not have a high degree of corruption, either historically or presently.[167] Corruption, when entrenched in a society, is self-perpetuating.[168] Reducing corruption becomes difficult because of a lack of trust between the citizenry and its political leaders, many of whom rise inevitably due to corruption's propelling force.[169] Thus, the argument that corruption may be beneficial in the short-term or under certain conditions (highly inefficient or bloated bureaucracy) falls short.[170] As economists Daniel Kaufmann and Shang-Jin Wei have shown, bribes beget more bribes: far from cutting through the red tape, they give bureaucrats a reason to produce more of it.[171]

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[160] DANIELSON & KENNEDY, *supra* note 145, at 17.

[161] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[162] DANIELSON & KENNEDY, *supra* note 145, at 18.

[163] PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme* at *6 (2008), http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.

[164] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[165] DANIELSON & KENNEDY, *supra* note 145, at 18.

[166] 2012 DOJ-SEC FCPA GUIDE, *supra* note 12, at 3.

[167] *Corruption by Country: U.S.*, TRANSPARENCY INT'L, https://www.transparency.org/country/#USA (last visited Oct. 30, 2016).

[168] James T Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 15 THIRD WORLD L. STUD. 65, 68–69 (1999).

[169] *Id.* at 70.

[170] *Id.* at 98.

[171] James Surowiecki, *Invisible Hand, Greased Palm*, NEW YORKER (May 14, 2012), http://www.newyorker.com/magazine/2012/05/14/invisible-hand-greased-palm.

A. Tipping the Balance: Viewing Corruption through a Rights-Sensitive Framework

Many scholars have focused on the relationship between corruption and economic factors, but comparatively little has been devoted to the intersection of corruption and human rights.[172] In liberal, rights-based societies, commitments to the rule of law and protecting individual rights take political and societal primacy.[173] Corruption is fundamentally at tension with the goals of rights-based societies as corruption carries an impact that cannot be framed as an economic cost alone. Corruption's moral failings do not stem simply from bureaucrats taking a piece of the economic pie owed to the citizenry, but for corruption's perverse effect on human rights and democracy. Corruption remains one the leading causes of poverty, violence, and even terrorism.[174] Corruption facilitates criminal activity within and across borders, including human, weapons, and drug trafficking.[175] The impact of corruption can be seen as affecting the most basic human needs: food, water, education, health, and access to justice can be violated if a bribe is necessary to obtain them.[176] For this reason, the UN endorses a human rights-sensitive approach to corruption to better uncover corruption's true harms.[177]

Corruption also limits one of the most conventionally accepted methods of providing African countries with development assistance: foreign aid. Though impact of foreign aid is itself questionable in the context of African aid for reasons aside from corruption,[178] foreign aid targeting the citizen-in-need often ends up "supporting bloated bureaucracies in the form of the poor-country governments and donor-funded non-governmental organizations."[179] In fact, the World Bank has participated in the corruption of nearly $100 billion of its loans intended for development.[180] Foreign aid

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[172] James T. Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 125-26 (2009).

[173] Rights-based societies are societies that draw a strong distinction between moral-rights and moral-oughts, and put primacy on the just over the good. Liberal rights-based societies are those committed to giving lexical having and seizing the opportunity to lead a life of moral integrity. Richard S. Markovits, *Liberalism and Tort Law: On the Content of the Corrective-Justice-Securing Tort Law of a Liberal, Rights-Based Society*, 2 UNIV. OF ILL. L. REV 243, 244 (2006).

[174] Dr. Peter Eigen, *Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry*. 29 HOUS. J. INT'L L. 327, 330 (2006-2007).

[175] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[176] Gathii, *supra* note 118, at 172.

[177] THE HUMAN RIGHTS CASE AGAINST CORRUPTION, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER 4, (2013), http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf.

[178] Numerous commentators have argued that foreign aid is actually detrimental for African countries. According to economist Dambisa Moyo, "[a]id is an unmitigated political, economic and humanitarian disaster." Dambisa Moyo, *Why Foreign Aid is Hurting Africa*, WALL ST. J., http://www.wsj.com/articles/SB123758895999200083 (last visited May, 5, 2016). For a more thorough analysis of the failings of conventional foreign aid in Africa, *see generally* DAMBISA MOYO, DEAD AID: WHY AID ISN'T WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA (1st Reprint ed., 2010) (arguing that African leaders should stop accepting foreign aid).

[179] *Id.*

[180] *Id.*

combined with corruption has a displacement effect on the voice of citizens: leaders no longer have to please citizens but instead must satisfy donors who often have interests in tension with the public.[181] It is telling that across Africa, over 70% of the public purse comes from foreign aid.[182] For this reason, economists have suggested that instead of relying on foreign aid, African governments need to focus on fighting corruption.[183]

Corruption has a particularly sizable impact on the African resource space.[184] Oil revenue meant for citizens in oil rich nations is siphoned off for government officials, leading to unrest among citizens and warping the political process.[185] Corruption allows officials the opportunity to gain political power and dodge prosecution while dipping into the state's coffers.[186] If the level of corruption in Nigeria was closer to Ghana, Nigeria, which had an output of $513 billion in 2014, might be 22% bigger.[187] If Nigeria does nothing to police corruption, by 2030, the cost of corruption could rise to nearly $2,000 per person.[188] This is in spite of Nigeria's significant oil wealth. Instead, Nigeria's wealth is siphoned off, damaging investment in public health, education, and basic transportation.[189] Corruption also breeds more nefarious activities in the resource space. The State Department identified the Niger Delta (the "ground zero" of Nigerian oil production)[190] as a breeding ground for militant ethnic groups engaging in terrorist acts.[191]

Perhaps most damaging is corruption's influence on governments' ability to protect human rights.[192] Corruption undermines democracy, a tested safeguard for human rights protection.[193] Without a voice in government, groups without political power are preyed on and ignored by state actors who use government as a vehicle for monetary and political enrichment.[194] Entrenched corruption deflates the will of the citizenry to use

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[181] *Id.*

[182] *Id.*

[183] Stephanie Hanson, *Corruption in Sub-Saharan Africa*, COUNCIL ON FOREIGN RELATIONS (Aug. 6, 2009), http://www.cfr.org/africa-sub-saharan/corruption-sub-saharan-africa/p19984.

[184] Terra Lawson-Remer & Joshua Greenstein, *Beating the Resource Curse in Africa: A Global Effort*, COUNCIL ON FOREIGN RELATIONS (Aug. 2012), http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780/.

[185] *Id.*

[186] *Id.*

[187] *The $20-Billion Hole in Africa's Largest Economy*, ECONOMIST (Feb. 2, 2016), http://www.economist.com/news/middle-east-and-africa/21689905-most-nigerians-live-poverty-millions-would-be-spared-if-officials-stopped.

[188] *Id.*

[189] *Id.*

[190] Michael Watts, *Resource Curse? Governmentality, Oil and Power in the Niger Delta*, NIGERIA, 9 GEOPOLITICS 50, 50 (2004), http://www.tandfonline.com/doi/pdf/10.1080/14650040412331307832.

[191] *Id.*

[192] HUMAN RIGHTS CASE AGAINST CORRUPTION, *supra* note 177.

[193] Democracy provides "the natural environment for the protection and effective realization of human rights." *Democracy: The Human Rights Normative Framework*, UN, http://www.un.org/en/sections/issues-depth/democracy/index.html#DHR (last visited May 4, 2016); *and see* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at Art. 21(3) (1948) (the will of the people should be expressed by universal and equal suffrage).

[194] DANIELSON & KENNEDY, *supra* note 145, at 18.

the political system to effectuate lasting change, and the ability of those citizens to access the levers of power to better their collective condition. Corruption can even lead to ethnic violence or tip a stable country into a political crisis.[195] Kenyan analysts widely agree that the violence following the December 2007 elections was motivated by corruption in the political process.[196]

In short, corruption hurts more than the public fisc: corruption takes lives, cripples democracy, and impairs the rule of law.[197] Factoring the congressional imperative to fight corruption and the benefit to U.S. businesses from operating in a global environment where anti-corruption efforts are only increasing, using the FCPA to combat corruption makes sense for the U.S. and its citizens. For the citizens of developing countries like those in Africa where corruption is commonplace, rigorous enforcement of anti-corruption laws has a positive effect towards securing basic human rights, creating a healthy political environment where democracy has a greater chance to flourish, and limiting the litany of illegal activities that corruption helps finance. Thus, fighting corruption should be seen as a shared goal for the U.S. and for the demand-side country, whether it is Nigeria, India, or Russia.

V. The FCPA is Losing Teeth in Africa

Unfortunately, the FCPA is losing teeth in Africa due to China's growing commercial presence in the oil and gas space, in addition to the U.S.'s increased ability to meet much of its energy needs with local supply. The U.S. must look to alternative jurisdictional and statutory frameworks to adequately fight corruption in those African countries.

A. China's Commercial Presence in Africa

Africa is among the fastest growing regions in the world.[198] However, economic growth has faltered as the global commodity super-cycle has culminated, lowering the price of oil, gas, metals, and minerals.[199] As a net-

[195] Hanson, *supra* note 183.

[196] Hanson, *supra* note 183.

[197] It is important to note that the balance of rights and corruption isn't purely distributive bargaining: the two can get easily tangled. Procedural rights like due process are often used to perpetuate corruption (for example, the right not to have a burdensome delay in legal proceedings can be abused by corrupt officials). Take for example the Ng'eny and Saitoti cases from the Kenyan high court. According to one commentator, these cases present a clear example of how the judiciary used Kenya's Bill of Rights to shield government ministers from any prosecutions for engaging in corruption. In both decisions, the Kenyan court ignored criminal law precedent and artificially narrowed its inquiry to due process and natural justice rights, going against well-settled Kenyan criminal law jurisprudential concepts. *See, e.g.*, Republic v. Jud. Comm'n of Inquiry into the Goldenberg Affair *ex parte* George Saitoti, petition 102 of 2006 (High Ct. of Kenya at Nairobi July 31, 2006) (finding that prosecuting Saitoti would be contrary to the Constitution of Kenya); Republic v. Attorney Gen. *ex parte* Kipng'eno Arap Ng'eny (Ng'eny Case), petition 406 of 2001 (High Ct. of Kenya at Nairobi Nov. 13, 2001) (Elec. Kenyan L. Rep., Case Search) (finding that prosecuting Cabinet Minister Kipng'eno Arap Ng' eny was barred due to a constitutional protections enforcing a reasonable time hearing).

[198] *World Bank Africa Overview*, WORLD BANK, http://www.worldbank.org/en/region/afr/overview (last updated Sept. 21 2016).

[199] *Id.*

exporter, Africa is significantly affected by falling commodity prices.[200] Growth has slowed to 3.4% in 2015 (versus 3.1% for global growth in 2015 and matching projected global growth in 2016), down from 4.6% in 2014, representing the weakest pace since 2009.[201]

A key part of Africa's growth is China. Since 2000, China has been Africa's largest trading partner.[202] From 2005–2010, almost 14% of Chinese investment abroad, representing approximately $44 billion, found its way to sub-Saharan Africa.[203] For Africa as a whole, China accounts for about 3% (2012) of the stock of direct investment in Africa. [204] However, this percentage masks the impact that China has on African economies.[205] Generally, most FDI flows to advanced economies (looking at world FDI, the U.S. receives six times as much direct investment than in Africa).[206] In this manner, Chinese and Western investment are very similar.[207] However, there is a key difference: Western investment tends to stay away from countries with poor governance in regards to property rights and rule of law.[208] Chinese investment is blind to those attributes, and the countries where China's investment share is large are usually countries with weak governance.[209]

Africa enjoyed a period of vibrant economic growth through its trading activity with China but Africa's trade relationship with China cooled significantly during the commodities downturn in 2015.[210] In the first half of 2015, Africa's exports to China fell 38% year-over-year.[211] Direct investment from China fell nearly 40% for the same period.[212] Clearly, the commodities downturn has affected Sino-African trading relations. However, China is still expected to drive over one-third of global oil demand until at least 2035, according to projections by the Energy Information Administration and the International Energy Agency.[213] Thus,

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[200] *Africa's Pulse*, 11 WORLD BANK, Apr. 2015, at 2, https://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol11.pdf.

[201] WORLD ECONOMIC OUTLOOK UPDATE 1 (INTL. MONETARY FUND 2016), https://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf

[202] Wenjie Chen et al., *Why is China Investing in Africa? Evidence From the Firm Level*, (2015), http://www.brookings.edu/~/media/research/files/papers/2015/08/why-china-is-investing-in-africa/why-is-china-investing-in-africa.pdf.

[203] *Trying to Pull Together; The Chinese in Africa*, ECONOMIST, (Apr. 23, 2011, 11:06) http://www.economist.com/node/18586448.

[204] Chen et al., *supra* note 202, at 3.

[205] *Id.*

[206] *Id.* at 6.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 6–7.

[210] *Africa-China Exports Fall by 40% After China Slowdown*, BBC NEWS (Jan. 13, 2016), http://www.bbc.com/news/world-africa-35303981.

[211] *Id.*

[212] *Id.*

[213] Luke Kawa, *Deutsche Bank: China's Oil Demand Growth Could be Cut in Half by the End of the Decade*, BLOOMBERG (Mar. 9, 2016, 9:15 AM), http://www.bloomberg.com/news/articles/2016-03-09/deutsche-bank-china-s-oil-demand-growth-could-be-cut-in-half-by-the-end-of-the-decade.

even if China's thirst for oil slows down significantly, African oil will play a key role in China's resource portfolio for at least the next decade.

China's thirst for international sources of crude has come at a time when U.S. appetite has slowed, largely due to growing domestic sources of crude.[214] U.S. crude imports declined 20% between 2010 and 2014 amid the domestic energy boom. [215] U.S. imports of crude oil from Africa fell by more than 90% between 2010 and early 2014.[216] In contrast, China moved to the largest importer of oil for the first time in 2014,[217] and gets 22% of oil from Africa (2014).[218] China's commercial ties to Africa have been accompanied by favorable views of China by citizens of African countries—majorities and pluralities in all African countries surveyed by Pew Global had a positive view of China.[219] 60% of the people in nine African countries surveyed by Pew stated that the Chinese Government respects its peoples' individual freedoms.[220] By contrast, no more than 11% of those surveyed in France, Germany, Spain, Canada, and the U.S. responded that China respects individual liberty.[221]

Unlike the U.S., corruption may just be a business expense for Chinese firms. China is not a signee to the OECD Anti-Corruption Convention.[222] Although China has ratified the UN Convention Against Corruption (UNCAC),[223] the UNCAC is largely a dead letter without the necessary and currently absent robust enforcement.[224] China has very recently adopted its own FCPA-type laws,[225] yet has conspicuously failed to systematically them.[226] The culture of corruption in China also ensnares American businesses: almost 1/3 of cases brought under the FCPA involve bribery in China.[227] This is not to say that China hasn't enforced any anticorruption measures—China has investigated and prosecuted high-level businessmen

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[214] Eric Yep, *Why China's Thirst for Oil Can't Lift Prices*, WALL ST. J. (Aug. 26, 2015, 10:59 AM), http://www.wsj.com/articles/why-chinas-thirst-for-oil-cant-lift-prices-1440574814.

[215] Nicole Friedman, *After Years of Decline, U.S. Oil Imports Rise*, WALL ST. J., http://www.wsj.com/articles/after-years-of-decline-u-s-oil-imports-rise-1445851800 (updated Oct. 26, 2015, 7:24 PM).

[216] *This Week in Petroleum*, EIA (Mar. 21, 2014), http://www.eia.gov/petroleum/weekly/archive/2014/140521/twipprint.html

[217] Christopher Alessi & Beina Xu, *CFR Backgrounders: China in Africa*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/china/china-africa/p9557, (updated Apr. 27, 2015).

[218] *Id.*

[219] Richard Wike et al., *Views of China and the Global Balance of Power*, PEW RESEARCH CTR. (JUNE 23, 2015), http://www.pewglobal.org/2015/06/23/2-views-of-china-and-the-global-balance-of-power/.

[220] *Id.* (surveying South Africa, Tanzania, Kenya, Senegal, Burkina Faso, Ghana, Uganda, Nigeria, Ethiopia).

[221] *Id.*

[222] RATIFICATION STATUS, *supra* note 147.

[223] United Nations Convention Against Corruption, arts. 15–16, Oct. 31, 2003, 43 I.L.M. 37, [hereinafter "UNCAC"].

[224] *See* Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?* 8 J. INT'L ECON. L. 191, 205 (2005) (lack of robust monitoring for the UNCAC means enforcement will be low and it remains to be seen whether the UNCAC is any more than rhetoric).

[225] *China Amends Criminal Law to Cover Foreign Bribery*, COVINGTON AND BURLING 1 (2015), https://www.cov.com/media/files/corporate/publications/2015/09/alert_china_criminal_law_amendments_en.pdf.

[226] *Id.*

[227] Michael Volkov, *China: The Corruption Problem Child*, CORRUPTION, CRIME & COMPLIANCE (Jan. 24, 2012), http://blog.volkovlaw.com/2012/01/china-the-corruption-problem-child/.

active in the Africa-China oil trade. Recently, China began probing into the offshore deals made by province governor Su Shalin, the former chairman of state-owned Sinopec Group, investigating whether Shalin led the company to overpay for drilling rights in Angola between 2007–2011.[228] This increased scrutiny may however derive from the nature of investments and deals made earlier in the decade, moves which now seem risky due to plummeting oil prices.[229] Anti-corruption enforcement in China, though plausible, is in practice more likely to be aimed at punishing state leaders or political rivals than a reflection of state policy to fight corruption globally.[230]

B. The Costs of "No-Strings Attached" on Africa

China's foray into Africa, though highlighted in recency, isn't new.[231] China's government strengthened its influence in Africa from the 1950s to the 1970s by exporting its ideology, building formal relationships with African countries in that time.[232] China's then primary motivation was strategic diplomacy rather than resource extraction, "wrestling diplomatic recognition away from Taiwan … and countering the influences of both the West and, in particular, the Soviet Union."[233] This focus changed from ideological to economic as China began to shift to a market economy in the 1990s, forming a relationship based on mutual economic benefit, a policy position officially coroneted at the China-Africa summit in Beijing in 2008.[234] However, China's status as an economic superpower has given China the opportunity to push its unique trade and aid philosophy (commercial trade agreements, development assistance, loans, and investment), one that continues to clash with Western convention. China's trade and aid relationship with Africa has been labeled, pejoratively, as "no-strings attached."[235]

Under the "no-strings" policy, China's official state stance eschews human rights and anti-corruption goals, standing in contrast to Western aid and trade policies.[236] Describing "no-strings," Sierra Leone's Ambassador to

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[228] Brian Spegele, *China Probes Graft in Angola Oil Deals*, WALL ST. J. (Oct. 20, 2015, 10:44 PM), http://www.wsj.com/articles/china-probes-graft-in-angola-oil-deals-1445339130.

[229] *Id.*

[230] Macabe Wu & Hsinchao Wu, *How to Discipline 90 Million People*, ATLANTIC (Apr. 7, 2015), http://www.theatlantic.com/international/archive/2015/04/xi-jinping-china-corruption-political-culture/389787/.

[231] Yun Sun, *Africa in China's Foreign Policy*, BROOKINGS INST. 1,5, 7 (2014), http://www.brookings.edu/~/media/research/files/papers/2014/04/africa-china-policy-sun/africa-in-china-web_cmg7.pdf.

[232] *Id.*

[233] DEBORAH BRAUTIGAM , THE DRAGON'S GIFT 34 (Oxford University Press 2009).

[234] Sanders Moody, China in Sub-Saharan Africa: Demand Extracting Supply, 20 INT'L AFFAIRS REV. 3–4 (2011), http://womin.org.za/images/regional-and-global-perspectives/brics/Sanders%20Moody%20-%20China%20in%20Sub%20Saharan%20Africa.pdf.

[235] Madison Condon, *China in Africa: What the Policy of Nonintervention Adds to the Western Development Dilemma*, 27 FLETCHER J. OF HUMAN SEC. 5, 7 (2012), http://fletcher.tufts.edu/Praxis/~/media/Fletcher/Microsites/praxis/xxvii/2CondonChinaAfrica.pdf.

[236] *Id.*

China commented that the "Chinese just come and do it … [t]hey don't hold meetings about environmental impact assessments, human rights, bad governance, and good governance … Chinese investment is succeeding because they don't set high benchmarks."[237] "No-strings attached" is forcing Western companies to compete outside of the usual measures of cost, technology, and investment—now battling on an ideological front that straddles issues entangling sovereignty, paternalism, and hegemony. At the 2015 African-China summit in Johannesburg, African leaders praised China and Chinese President Xi Jinping for treating their nations as equal trading partners, as opposed to Western nations who seem to dictate more than cooperate.[238] Zimbabwe President Robert Mugabe, chairman of the African Union, said that Mr. Xi "is doing to us what we expected those who colonized us yesterday to do."[239] Even the theme of the summit, "Africa-China Progressing Together: Win-Win Cooperation for Common Development," reflected a commitment to a partnership between presumptive equals. Mr. Xi, framing the relationship, stated that "African affairs should be decided by the African people."[240] Aside from allowing decision makers to shop around offers, African leaders have welcomed China's model as an alternative to the West, preferring the flexibility[241] of the "Beijing Consensus" to that of the "Washington Consensus."[242]

The extraction space is again suspect. Many Chinese companies operating in the oil and gas industry in foreign jurisdictions are state-owned companies that are not listed on U.S. exchanges.[243] All five of the largest Chinese crude oil companies are state-owned. Of the five largest companies, only one is listed on the NYSE directly (Sinopec), while another is listed through a subsidiary (China National Petroleum).[244] The FCPA is limited in its ability to reach the parent corporation of a subsidiary unless the subsidiary can be labeled the "alter ego" of the parent corporation.[245]

Given China's aggressive and successful courting of business in African oil producing states, there is evidence that on the margins, "no-strings

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[237] Ian Taylor, *China's Oil Diplomacy in Africa*, 82 INT'L AFFAIRS 937, 946 (2006).

[238] Norimitsu Onishi, *China Pledges $60 Billion to Aid Africa's Development*, N.Y. TIMES (Dec. 4, 2015), http://www.nytimes.com/2015/12/05/world/africa/china-pledges-60-billion-to-aid-africas-development.html.

[239] Onishi, *supra* note 238.

[240] *Id.*

[241] Some have argued that the flexibility that "no-strings" offers promotes good will, allowing conflicts to be scaled back quickly through diplomatic means. David Cohen, *China and Non-Intervention*, DIPLOMAT (Dec. 3, 2011), http://thediplomat.com/2011/12/china-and-non-intervention/. Others have pointed out that "no-strings" is conducive to transformation, and that China is evolving on "no-strings" as its ties with Africa deepen. Emily Rauhala, *Libya, China and the Myth of 'No-Strings" Investment*, TIME (Feb. 25, 2011), http://world.time.com/2011/02/25/libya-china-and-the-myth-of-no-strings-investment/. (arguing that the costs of "no-strings" are too high to justify any benefits stemming from its perceived flexibility or transformability).

[242] Ronald I. McKinnon, *China in Africa: The Washington Consensus*, 13 INT'L FIN. 495, 501 (2010).

[243] PÉTER HARDI ET AL., DEBATES OF CORRUPTION AND INTEGRITY 39 (Palgrave Macmillan 2015)

[244] J. William Carpenter, *The 5 Biggest Chinese Oil Companies (SNP)*, INVESTOPEDIA (Sept. 15, 2015, 11:15 AM), http://www.investopedia.com/articles/markets/091515/5-biggest-chinese-oil-companies.asp.

[245] Mike Koehler, *The SEC's Recent Alter Ego Theories*, FCPA PROFESSOR (Feb. 29, 2016), http://fcpaprofessor.com/the-secs-recent-alter-ego-theories/#more-18415.

attached" makes a difference: state-owned Chinese firms can outbid western firms, Chinese business is accompanied by aid with few conditions, and Chinese firms do not have to accommodate legal liability for human rights violations in domestic courts or anti-bribery prosecutions.[246] Even Chinese concessional loans are often explicitly or implicitly tied to guarantees to market access of African resources, largely oil.[247] "No-strings attached," is competitive by design.

"No-strings attached" can have destructive implications. In the late 1990s, American and Canadian companies abandoned South Sudanese oil fields due to consumer and investor pressure stemming from human rights concerns, and China took their place.[248] Chinese media described the state-owned oil enterprise CNPC and Sudanese joint venture as the largest overseas project to date.[249] The Sudanese government in turn used Chinese oil money for the ethnic cleansing of the south Sudanese, even using arms that China supplied to do it.[250]

Aside from its commercial activities in Africa in the natural resource sector, China is a growing source of foreign aid for the continent. Unlike members of the OECD, China does not regularly publish figures detailing loans and aid flowing to Africa.[251] Therefore, estimates of Chinese aid vary is wildly as $189.3 billion for 2011 alone to $14.4 billion between 2010 and 2012.[252] Additionally, Chinese aid also differs from OECD-defined official development assistance (aid is often bundled with other financial commitments).[253] Regardless of the exact number, in late 2015 China promised to invest $60 billion in development aid (including grants, loans, and export credits) towards Africa.[254]

Chinese competitors have complained about the aid-exploration link, aptly labeled the "Oil Diplomacy." Aside from signing traditional contracts (like PetroChina's $800 million 30,000 barrel per day supply agreement with Nigerian National Petroleum Corporation in 2005),[255] or loans (in 2005 Angola took a $2 billion dollar loan in exchange for oil deals),[256] it is clear

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[246] STEPHEN BROWN & CHANDRA LEKHA SRIRAM, CHINA'S ROLE IN HUMAN RIGHTS ABUSES IN AFRICA: CLARIFYING ISSUES OF CULPABILITY IN CHINA, IN ROBERT ROTBERG, ED., CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 259 (Brookings Instit. Press 2008).

[247] Chris Alden & Martyn Davies, *A Profile of the Operations of Chinese Multinationals in Africa*, 13 SOUTH AFRICAN J. OF INT'L AFFAIRS 83, 86 (2006).

[248] Condon, *supra* note 235, at 9.

[249] *China's Involvement In Sudan, Arms and Oil*, HUMAN RIGHTS WATCH (2003), https://www.hrw.org/reports/2003/sudan1103/26.htm.

[250] Condon, *supra* note 235, at 9.

[251] Deborah Brautigam, *5 Myths About Chinese Investment in Africa*, FOREIGN POLICY (Dec. 4, 2015), http://foreignpolicy.com/2015/12/04/5-myths-about-chinese-investment-in-africa/.

[252] Winslow Robertson & Lina Benabdallah, *Monkey Cage: China Pledged to Invest $60 Billion in Africa, Here's What That Means*, WASH. POST (Jan. 7, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/07/china-pledged-to-invest-60-billion-in-africa-heres-what-that-means/.

[253] *Id.*

[254] Onishi, *supra* note 238.

[255] Taylor, *supra* note 237, at 945.

[256] *Id.*

that African leaders accept Chinese foreign aid in exchange for access to natural resources. The Indian petroleum secretary reported that both Nigeria and Angola, oil producing countries, have conveyed that preferences for exploration and extraction will be given to those nations with the best aid packages.[257] India has since followed suit in offering multi-billion dollar oil-for-infrastructure deals in China.[258] May have characterized Chinese aid commitments as *solely* a vehicle for securing oil concessions and mining rights.[259] However, this "sole reason" argument has been challenged by empirical studies measuring the flow of Chinese aid.[260] Still it is notable that most of China's foreign aid is distributed by the Ministry of Commerce and the China Export-Import Bank, whose central mandate is to strengthen the Chinese economy.[261] This lends some credence to the argument that aid policy is closely tied to the national objective of securing commodities for consumption in China. [262]

Like Chinese trade policy, "no-strings attached" in the aid space has consequences which are equally dire. Consider Uganda. When Western donors showed disfavor towards the country on part of the Uganda's draconian homosexuality laws, Uganda began to focus on drawing in more Chinese aid.[263] Chinese aid also perpetuates ethnic favoritism—aid flows directly to state leaders who are almost three times more likely to spend Chinese aid in in areas where the leaders have some ethnic ties, not necessarily where the aid is needed the most.[264] State actors also use Chinese aid to control the political process and repress political rivals,[265] distorting the democratic process (if available). Worse still, some commentators have linked the receipt of Chinese aid, which does not disproportionately go to countries with high rates of civilian repression (dictatorships or resource rich nations), to increasing police and military violence against civilians.[266] Western aid is not followed by any comparable increase in violence.[267]

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[257] Condon, *supra* note 235, at 19.

[258] *Id.*

[259] Charles Wolf, Jr., *The Strategy Behind China's Aid Expansion*, RAND (Oct. 9, 2013), http://www.rand.org/blog/2013/10/the-strategy-behind-chinas-aid-expansion.html.

[260] One study compiling official development assistance flows from 2000 to 2013 found that aid flows are linked to Chinese foreign policy interests (for example, aid does not flow to countries which recognize Taiwan as a state), and are not predominantly motivated by natural resource acquisition interests. Alex Dreher et al., *Apples and Dragon Fruits: The Determinants of Aid and Other Forms of State Financing From China to Africa*, AID DATA 16, 19 (Aid Data, Working Paper No. 15, 2015), http://aiddata.org/sites/default/files/wps15_apples_and_dragon_fruits.pdf.

[261] BRAUTIGAM, *supra* note 233, at 31.

[262] Condon, *supra* note 235, at 6.

[263] Clint Richards, *Uganda Looks to China*, DIPLOMAT (Mar. 4, 2014), http://thediplomat.com/2014/03/uganda-looks-to-china/.

[264] Alex Dreher et al., *Aid on Demand, African Leaders and the Geography of China's Foreign Assistance*, AID DATA 8 (Aid Data, Working Paper No. 3, 2014), http://www.andreas-fuchs.net/uploads/1/9/8/9/19897453/chinese_aid.pdf.

[265] Robertson & Benabdallah, *supra* note 252.

[266] *Id.*

[267] *Id.*

C. "No Strings" and Corruption

What is clear is that Chinese aid and Chinese trade policy share the same philosophical nexus: separate the money from the morals. This philosophy poses significant problems towards fighting corruption. Under "no-strings attached," China, unlike the West, avoids imposing anti-corruption measures in both its aid distribution and through domestic anti-corruption statutes.[268] Given China's particular national interest in securing natural resources globally, the primacy that Chinese trade and aid policy places on natural resources is problematic for African nations seeking to avoid the "resource curse," and a temptation for African leaders not to diversify their economies as revenue continues to flow from exports to China.[269] Aid thus finds itself in a "race to the bottom," and as noted, corruption handicaps the already questionable efficacy of foreign aid.

Take Angola for example. Angola has enormous oil reserves, yet is saddled with corruption and poverty.[270] Within a three year period, $4.2 billion dollars of oil revenue was extracted from Angola's public accounts.[271] Seeing a need for increased transparency, the International Monetary Fund began to attach transparency requirements to the loans it provided to Angola for post-war reconstruction.[272] Instead, Angola took $2 billion in loans from China's Export-Import Bank without conditions regarding corruption or transparency.[273] In return, Angola would provide China with 40,000 barrels of oil per day.[274] Although China may realize that perpetuating corruption is at some point against their self-interest (again, China has significant problems with corruption domestically), donors and critics have suggested that "no-strings attached" undermines anti-corruption efforts,[275] and that China will continue to make deals with corrupt governments insofar as it obtains access to natural resources.

VI. Fighting "No-Strings" With the MLCA

In regards to the FCPA, when the United States uses anti-corruption tools and China does not, it leads to a competitive disadvantage for

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[268] Taylor, *supra* note 237, at 958.

[269] *Id.* at 951.

[270] *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and its Impact on Human Rights*, HUMAN RIGHTS WATCH 36, tbl. 8 (Jan. 12, 2004). https://www.hrw.org/report/2004/01/12/some-transparency-no-accountability/use-oil-revenue-angola-and-its-impact-human.

[271] *Id.*

[272] Condon, *supra* note 173, at 8.

[273] Patrick J. Keenan et al., *Curse or Cure? China, Africa, and The Effects of Unconditioned Wealth*, BERKELEY J. OF INT'L LAW (2009) (*citing* John Reed, *Angolan Oil Loan Likely to Raise Transparency Issues*, FIN. TIMES (Oct. 10, 2005), https://www.ft.com/content/a70afe4e-39b4-11da-806e-00000e2511c8).

[274] Taylor, *supra* note 237, at 958.

[275] Andy Spalding, *Creating an African Alliance, Enforcing our Bribery Laws*, FCPA BLOG (Aug. 6, 2014, 5:48 AM), http://www.fcpablog.com/blog/2014/8/6/creating-an-african-alliance-enforcing-our-bribery-laws.html.

American firms and to a dominant market position for Chinese firms.[276] The Obama Administration has expressed these concerns to African leaders.[277] But given African leaders' positive attitudes to both Chinese aid and trade practices, the potential for political gain from Chinese aid, and the flexibility of the "no-strings attached" policies and limited anti-corruption enforcement from China, China will continue to exert a large influence over African countries rich in natural resources, and implement policies (or allow policies to be implemented) which are antithetical to Western notions of fairness and progress.

The FCPA cannot keep up with "no strings attached." The limitations of the FCPA in current form lead to (1) decreased American competitiveness abroad and as a corollary, (2) the perpetuation of corruption due to non-prosecution from countries like China. Chinese facilitation of corruption leads to a "windfall for African officials—but exploitation for the African people."[278] Although this Note has focused on the Chinese impact in African oil producing nations, other nations like India and Malaysia, known for being equally soft on corruption, are ramping up their commercial presence in Africa as well. Their increasing presence will lead to the same corruption related problems even if China were to dramatically scale back their operations or change their tune on corruption. India, for example, has a relatively small domestic hydrocarbon resource base, importing 80% of its crude needs.[279] IEA projections predict India will export 90% of its oil by 2020.[280] India is increasingly looking to African oil: in 2015, India boosted imports of African crude in 2015 to the highest in at least five years, or nearly 20% of India's overall crude imports (up from 16.7% in 2014).[281] India plans on increasing imports from Nigeria specifically, one of the most corrupt nations as measured by Transparency International's Corruption Index.[282] India is notorious for corruption domestically, especially for the pervasive impact of corruption on day-to-day lives of Indians: 30% of households surveyed in Delhi reported paying a bribe within the last twelve months for basic government services in 2015.[283] The Indian analogue to the FCPA utilizes a weak enforcement mechanism,[284] and the agency responsible for investigating violations of corruption laws is crippled by a lack of resources.[285] It is clear that India's growing commercial presence in

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[276] *Id.*

[277] *Id.*

[278] Demas, supra note 10, at 348.

[279] Nidhi Verma, *India's 2015 Imports of African Oil Highest in at Least 5 Years – Trade Data*, RUETERS (Jan. 15, 2016, 7:24 AM), http://www.reuters.com/article/india-oil-imports-idUSKCN0UT1D2.

[280] *Id.*

[281] Verma, *supra* note 279.

[282] TRANSPARENCY INT'L INDEX, *supra* note 82.

[283] Aditi Malhotra, *Everyday Corruption in India's Capital*, WALL ST. J (Oct. 20, 2015), http://blogs.wsj.com/briefly/2015/10/20/everyday-corruption-in-indias-capital-the-numbers/.

[284] Sherbir Panag, *Misconceptions About India's Anti-Corruption Framework* FCPA PROFESSOR (June 10, 2014), http://fcpaprofessor.com/misconceptions-about-indias-anti-corruption-framework.

[285] *See* Interview by Ajay Vaishnav with Joginder Singh, Former Director of the CBI, TIMES OF INDIA (Jan. 11, 2012, 12:00AM), http://articles.timesofindia.indiatimes.com/2012-01-11/edit-page/30612267_1_cbi-case-cbidirector-central-bureau (supporting an independent CBI and complaining of the lengthy government sanction process and CBI's backlog).

Africa will be plagued with many of the same problems posed by Chinese investment. Thus, even if China changes its philosophy towards corruption, other countries with weak commitments to rule of law and fighting corruption are ready to step in China's shoes.

The key limitation on the FCPA's ability to fight corruption is jurisdictional: the FCPA does not reach foreign officials.[286] If Chinese companies (or companies from India or elsewhere with similarly lax attitudes toward corruption domestically) are increasingly working with state officials in the African resource space, then both groups are outside the reach of the FCPA unless they are listed on U.S. exchanges.[287] As discussed, a global marketplace where corruption thrives is bad for American businesses and investors in the long run. Second, corruption is bad for the citizens of African countries, hurting more than just their domestic economies, but leading to violations of human rights and limiting the possibility of effective democracies. Corruption undermines foreign aid injections, and defeating corruption is one of the best ways to attack poverty.[288] Alternative statutory or jurisdictional frameworks could reach the same corruption the FCPA is jurisdictionally barred from attacking without the need for unlikely congressional revision.

However, the question that must be asked is why alternative frameworks, which would also require the allocation of state resources, should be undertaken. Before even reaching the jurisdictional and federal interest analysis of using alternative statutory or jurisdictional frameworks, the moral question must be addressed. Although the effects of corruption in Africa seen through a human-rights lens are disastrous, why should the U.S. use other frameworks than the FCPA, engaging in expensive prosecutions and flirting dangerously with paternalism, all while potentially offending a foreign nation's notions of sovereignty? Enveloping this question are two main objections.

First is the argument that the resources spent on alternative frameworks could be better spent domestically. This is a facially legitimate argument. The high expense of foreign prosecutions may be better used to advance domestic interests. However, corruption is not just an economic malady, but implicates human rights, affecting access to food, healthcare, and education. Corruption also facilitates violence, trafficking, and terrorism. To argue against resource allocation to corruption fighting frameworks on this basis is overbroad: disaster aid, military expenses directed at overthrowing rights abusers, and foreign aid would be prima facie unfavorable as well. This argument could be levied against the FCPA itself, and if recent energetic

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[286] *A "Foreign Official" Fights Back,* FCPA PROFESSOR (Aug. 25, 2011), http://fcpaprofessor.com/a-foreign-official-fights-back/.

[287] JAMES T. PARKINSON & CLANCY GALGAY, UNDERSTANDING THE REACH OF U.S. JURISDICTION UNDER THE FOREIGN CORRUPT PRACTICES ACT (Bloomberg Finance L.P. 2009).

[288] Hanson, *supra* note 183.

enforcement is to be factored, the FCPA is a priority for the current Administration and approved by those who are responsible for their election.

The second is whether resources could be better spent aiding sovereigns in their efforts to fight corruption in their home countries. This argument, the proverbial "teach a man to fish" angle, certainly makes intuitive sense. However, allocating resources to fight corruption to nations rife with corruption is inefficient. An analogous situation is presented by foreign aid: money directed towards the citizens of poor nations goes through corrupt middlemen. Thus, foreign aid is often wasted, and does not even reach the intended recipients. Though this Note takes no stance on the continued use of foreign aid, hard empirical data informs that it is not as effective as conventional wisdom would suggest,[289] an outcome that investment in sovereign corruption fighting efforts would likely emulate. Given the criticism surrounding foreign aid, some commentators have suggested that the U.S. should invest in medicines and goods that would improve the lives of people in need of aid instead of delivering the aid itself (which again, could be wasted or misused).[290] In this light, allocating resources to an alternative statutory or jurisdictional framework to fight corruption can and should be seen as an export of anti-corruption "medicine." Though this medicine exists only in the abstract, fighting corruption is a partial cure for the human rights and governance problems which cripple developing countries in Africa. The value of a successful prosecution and extradition doesn't expire after the process is completed, but injects a symbolic message which has the power to transform behavior. Though the cost-benefit incorporates a fair amount of guesswork, given the difficulties of prosecuting corruption cases against entrenched state actors in countries with longstanding cultures of corruption, providing resources for sovereign prosecution is likely inefficacious and therefore unwise.

Addressing the two resource-based objections still leaves the final question: where does the *imperative* to use alternative frameworks actually come from? The first response is that using alternative legal frameworks to fight corruption outside the jurisdictional limits of the FCPA still fulfills the policy goals Congress was seeking to advance through the FPCA. At least one policy concern motivating the FCPA is unimportant for demand-side prosecutions (deterring political contributions by *American* businesses to foreign governments). However, limiting the impact of bribes on the free-enterprise system, the advantages of a global business climate with less bribery, and American leadership in the anti-corruption space are all objectives that can be furthered by using alternative frameworks to the FCPA. As long as these frameworks have broad application and no specifically designated purpose which conflicts with the intent of the FCPA,

[289] Fred Andrews, *A Surprising Case Against Foreign Aid*, N.Y. TIMES (Oct. 12, 2013), *http://www.nytimes.com/2013/10/13/business/a-surprising-case-against-foreign-aid.html*.

[290] *Id.*

U.S. prosecutors can advance the important policy aims Congress identified when the FCPA was enacted through these alternative frameworks.[291]

A commitment to fight corruption is a moral stance not unlike other state action woven into our national conscious. When the U.S. provides foreign aid, promotes democracy abroad, or unseats rights abusers, state action is viewed as arising from moral obligation. Under a rights-sensitive view of corruption, corruption and human rights harms are inextricable. Fighting corruption confronts terrorism, human trafficking, poverty and human rights abuses while promoting the rule of law and democracy.

A. Parameters for Alternative Frameworks to fight Corruption in the Africa Resource Space

An alternative framework should balance four separate interests. First, is the interest in immediacy. The framework should ideally not be "pie-in-the-sky"—its substantiation limited to the confines of law review note—but rather implementable under the current state of the law, or without significant delay if global action is required. Second is the interest in efficacy. The framework must be able to bypass the status quo of corruption, keeping power and decision-making away from entrenched political actors who have an interest in perpetuating corruption. Third, the framework must do its best to respect sovereignty least it be rejected or thwarted by the sovereign it touches and offends. Lastly, though this Note attempted to present a moral argument for why the U.S. should fight corruption through an alternative mechanism given the FCPA's limitations, the mechanism should invoke a federal enforcement interest.

Some commentators have proposed fashioning an international anti-corruption court to combat bribery.[292] Modeled after the International Criminal Court, an international anti-corruption court certainly has its advantages. Corruption is difficult to counter when prosecutors have to clash with powerful state actors. It should not be surprising that the federalist system is amenable to corruption prosecutions: a federal prosecutor from Washington, D.C., theoretically remains insulated from the sphere of influence exerted by a corrupt state political leader. Such firewalls are non-existent in cases of corruption in developing countries, cases which often involve grand corruption or corruption involving public officials at the top of the food chain.

An international anti-corruption court would require "elite corps of investigators" and "experienced, impartial judges" who enforce basic,

[291] The FCPA's legislative history suggests that some congressional leaders were concerned about the export of morality, a charge that can also be directed at the choice to use alternative frameworks to reach parties that are excepted by the FCPA. Koehler, *supra* note 21, at 945. However, this contention has little weight: combating corruption is inherently a moral fight, and the U.S.'s leadership in the space was inspired by a commitment to rule of law over the rule of man.

[292] Mark L. Wolfe, *The Case for an International Anti-Corruption Court*, BROOKINGS INST. (2014), http://www.brookings.edu/research/papers/2014/07/international-anti-corruption-court-wolf.

accepted norms of honesty.[293] Courts would be able to hear criminal actions and civil fraud actions modeled after the False Claims Act (private whistleblower lawsuits alleging fraud against the government),[294] and would exercise jurisdiction by treaty. Though these solutions may very well go far in reducing corruption by bypassing the status quo, they lack the immediacy of fighting corruption with existing statutes. Corruption has immediate costs, and the U.S. should do what it can do, now, to combat it. Furthermore, an anti-corruption court proposes a myriad of problems related to sovereignty that limit its substantiation in the near future, some shared by other international criminal courts and some unique to the anti-corruption context.[295] Though these problems are not insurmountable by any means, the benefit of using existing federal statutes cannot be understated when immediate, unilateral action may be available—in contrast to the slow, negotiated process an anti-corruption court would require. Similarly, other commentators have proposed that African countries should reduce foreign aid (which often ends up financing corruption).[296] This course of action is optimistic at best—it is in current leadership's best interest to accept foreign aid, and countries like China have shown their readiness to provide aid with "no-strings attached."

Finally, using a more robust anti-corruption toolkit in Africa raises questions about the relationship between foreign corruption-fighting efforts and existing sovereign efforts to combat corruption. Although countries like Liberia, Rwanda, and Tanzania have made progress in reducing corruption, African anti-corruption agencies have generally been ineffective and inefficient due to shaky political footing.[297] Furthermore, agencies funded and overseen by executive branches can be entirely eliminated (as in South Africa) or have their leadership exiled (as in Nigeria or Kenya).[298] Although concern for sovereign interests carries significant weight, human rights concerns should trump any fear of trampling sovereign efforts, as those efforts are largely ineffectual in the first place. In passing the Foreign Assistance Act of 1961, Congress declared that "the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms."[299] State corruption renders this goal impossible. Thus, any statute or jurisdictional framework that helps to fight corruption should be energetically enforced, both in the interest of

[293] Wolfe, *supra* note 292.

[294] *Id*.

[295] Matthew Stephenson, *The Case Against an International Anti-Corruption Court*, GLOBAL ANTICORRUPTION BLOG (Jul. 31, 2014), http://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/ (submitting that an international anti-corruption court is an inherently unworkable institution due to concerns of international sovereignty, corrupt nations refusing to sign treaties endowing the court with jurisdiction, the court's neo-imperialist image, and the massive injection of resources the court would require).

[296] Moyo, supra *note* 178.

[297] Hanson, *supra* note 183.

[298] *Id*.

[299] 22 U.S.C. § 2151 (2006) (congressional findings and declaration of policy).

American citizens and businesses, and for the welfare of citizens of demand-side nations.

B. MLCA

One option certainly satisfies the concerns for immediacy, efficacy, and if jurisdiction is satisfied, adequately respecting sovereignty. The Money Laundering Control Act (MLCA) of 1986 was originally intended to combat criminal activities such as drug trafficking which generated large amounts of cash income, or the "lifeblood of organized crime."[300] Since then, the MLCA has seen growing interest from DOJ prosecutors to reach overseas activities in place of the FCPA.[301] One reason for its popularity is its broad reach. The MLCA allows jurisdiction over foreign nationals where any of the money laundering activity takes place in the U.S. and the value involved is greater than $10,000.[302]

Money laundering at its core is a financial transaction with property that "represents the proceeds of some form of unlawful activity.[303] The goal of money laundering is to make illegally-gained assets appear legal.[304] Money laundering is generally framed in three stages.[305] First is the placement stage, or the introduction of assets generated through criminal activity.[306] Next is the layering stage, where the launderer engages in a transaction or series of transactions designed to disguise the origin and trail of the money.[307] The final stage is the integration stage, where the launderer seeks to repossess the funds through what appears to be a legitimate transaction.[308] Money laundering may be worth roughly 2-5% of global GDP (at least hundreds of billions of dollars).[309]

Section 1956 of the MLCA prohibits individuals from engaging in any financial transaction with proceeds generated from "specified unlawful activities," including bribery of a public official, misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official, fraud, or any scheme or attempt to defraud, by or against a foreign bank.[310]

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[300] PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984) [hereinafter INTERIM REPORT], https://www.ncjrs.gov/pdffiles1/Digitization/166517NCJRS.pdf.

[301] Asheesh Goel et al., *International Anti-Money Laundering Enforcement Trends and Developments*, ROPES & GRAY 1, 4 (2014), https://www.ropesgray.com/~/media/Files/articles/2013/03/International-anti-money-laundering-goel.ashx.

[302] 18 U.S.C. § 1956(f) (2006).

[303] *Id.* at § 1956 (a)(1).

[304] INTERIM REPORT, *supra* note 300.

[305] Goel, *supra* note 301, at 8.

[306] *Id.*

[307] *Id.*

[308] Goel, *supra* note 301, at 8.

[309] *Frequently Asked Questions Relating to Money Laundering*, U.K. FINANCIAL SERVICES AUTHORITY, http://www.fsa.gov.uk/about/what/financial_crime/money_launderi ng/faqs.

[310] 18 U.S.C. § 1956(c).

The MLCA covers more than 250 offenses or "unlawful activities."[311] In prosecuting the MLCA the government does not even have to show the capacity to commit the underlying unlawful activity, but rather that the defendant knew the property involved originated from unlawful activity and that the defendant intended to promote the unlawful activity. [312] Though the prosecutor must prove the unlawful activity, the level of proof required functionally is not equivalent to proving the crime independently, and the jury can infer proof of the crime circumstantially.[313]

Section 1956(a)(1) covers domestic money laundering transactions.[314] Section 1956(a)(2) outlaws the interstate or international transportation or transmission of funds, while 1956(a)(3) is a sting section which outlaws transactions that the defendant believes involve the proceeds of a predicate offense and that are intended to promote a predicate offense.[315] Under 1956(a)(1), the prosecutor must show that the defendant knew the property involved proceeds of any felony under state, federal, or foreign law, but need not show the specific crime involved.[316] Under section 1956(a)(2), the prosecutor must show that the defendant knew that the funds represented the proceeds of an unlawful activity, but if the transportation, transmission or transfer is conducted with the intent to promote the carrying on of specified unlawful activity, the prosecutor does not have to show that the funds were derived from any criminal activity.[317] Section 1957 makes spending or depositing tainted money a crime, outlawing otherwise innocent transactions contaminated by the source of the property involved in the transaction.[318] Section 1956 requires an intent standard: (i) intent to promote a specified unlawful activity; (ii) intent to engage in a violation of § 7201 or § 7206 of the Internal Revenue Code; (iii) intent to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity; or (iv) intent to avoid a reporting requirement under state or federal law.[319] Section 1957 of the MLCA covers property exceeding $10,000 which is derived from specified unlawful activities and does not include an element of criminal intent.[320]

Section 1956 of the MLCA covers transactions covering any item of value, and allows U.S. prosecutors to reach public and private conduct

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[311] United States v. Santos, 553 U.S. 507, 516 (2008).

[312] United States. v. Cruz, 993 F.2d 164, 167 (8th Cir. 1993).

[313] S*ee* United States v. Corchado-Peralta, 318 F.3d 255, 258 (1st Cir. 2003) (upholding jury ruling that the defendant, well-educated and involved in family bookkeeping, knew her husband's income originated from drug activity upon a showing that the defendant knew her husband's income from his legitimate business was far lower than the amount she signed off on her tax records).

[314] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 2101, https://www.justice.gov/usam/criminal-resource-manual-2101-money-laundering-overview, [hereinafter CRIMINAL RESOURCE MANUAL].

[315] Pancho Nagel & Christopher Wieman, *Money Laundering*, 52 AM. CRIM. L. REV. 1357, 1365, 1375 (2015).

[316] 18 U.S.C. § 1956(c)(1) (2012).

[317] CRIMINAL RESOURCE MANUAL, note 248.

[318] 18 U.S.C. § 1957 (2012). *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL 33315, MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. 1956 AND RELATED FEDERAL CRIMINAL LAW J 21 (2012).

[319] Nagel, *supra* note 315, at 1365, 1375.

[320] *See* United States. v. Rutgard, 116 F.3d 1270, 1291 (9th Cir. 1997) (criticizing 18 U.S.C. § 1957 of the MLCA as "draconian").

anywhere in the world.[321] The MLCA's jurisdictional reach was expanded by the USA PATRIOT Act, giving federal district courts jurisdiction over properly served persons not only when a transaction occurs in part or whole in the United States, but when the foreign person "converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States."[322] The MLCA is written broadly to cover both simple and complex schemes, as long as there is intent to disguise the source, ownership, location, or control of the money.[323] Because of its scope, the MLCA is used to target a wide range of additional criminal offenses unrelated to drug trafficking and organized crime, such as espionage, prostitution, illegal sales of weapons, human trafficking, fraud, political corruption, terrorism financing, child pornography and tax evasion.[324]

Thus, the MLCA, with its broad jurisdiction and tailored predicate offenses, allows the DOJ to reach areas generally understood as outside the jurisdiction of the FCPA.[325] With the MLCA, the government does not have to hook itself to a law-breaking American or a Chinese company that is listed on an American exchange to prosecute demand-side bribery—the MLCA allows a prosecutor to go straight to the foreign official.[326] The statute, unlike the FCPA, can reach both fund outflows and inflows, and is thus used increasingly by the DOJ to prosecute corruption.[327]

C. The Money Laundering and Corruption Link

Using the MLCA alongside the FCPA or as a standalone to reach bribery related violations is an intuitive use of the MLCA. Money laundering and corruption are inextricably linked. Corruption begets illicit gains, and money laundering is often the only way to keep those gains in a manner that does not raise suspicion.[328] Corrupt public officials who amass sizeable amounts of money through corrupt means are vulnerable in their home countries, facing pressure from political rivals and criminals.[329] Recent criminal prosecutions have emphasized the intertwined relationship between money laundering and bribery.[330] Even though banks have

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[321] Lucinda A. Low, Ethics, *Extraterritorial Anticorruption Laws, and Anti-Money Laundering Laws*, 51 ROCKY MT. MIN. L. INST. 3-1 (2005) § 3.03[1][a] (2005).

[322] Low, *supra* note 321.

[323] *Id.*

[324] Nagel, *supra* note 315, at 1358–59.

[325] FOREIGN CORRUPT PRACTICES ACT, FINANCIAL INDUSTRY REGULATORY AUTHORITY 1 (2011).

[326] Andres Rueda, *International Money Laundering Law Enforcement & the USA PATRIOT Act of 2001*, 10 MICH. ST. U. DET. C. L. J. INT'L L. 141, 151 (2001).

[327] Mike Dearington, *U.S. v. Siriwan Filing Sheds Light on Extradition Relations with Thailand in Pivotal Justice Department Case*, FCPA PROFESSOR (July 31, 2012), http://fcpaprofessor.com/u-s-v-siriwan-filing-sheds-light-on-extradition-relations-with-thailand-in-pivotal-justice-department-case/.

[328] LAUNDERING THE PROCEEDS OF CORRUPTION 6 (Financial Action Task Force 2011).

[329] *Id.*

[330] United States v. Green, 722 F.3d 1146, 1147 (9th Cir. 2013) (charged with violating the FCPA and engaging in money laundering for allegedly conspiring to pay $1.8 million in bribes to a Thai government official); U.S. v. Kozeny, 667 F.3d 122, 128 (2d Cir. 2011) (charged with violations of the

strengthened their anti-money laundering compliance programs, the FBI has noted a trend of individuals buying businesses in the U.S. and using shell companies with established banking histories to avoid opening new bank accounts, dodging bank scrutiny.[331] Launderers will continue to adopt to anti-money laundering programs. Illicit gains serve as engines for criminal activity which in turn harm U.S. citizens and frustrates national policy.[332]

Although the government has used the MLCA to prosecute foreign nationals, the laundering framework has its hurdles. The first arises when a prosecutor must select the underlying unlawful act. Defendants have challenged the use of a bribery scheme as the underlying criminal act for a separate money laundering conviction from an FCPA conviction.[333] *U.S. v. Siriwan* highlights the hurdles the DOJ potentially faces when bringing a money laundering case against a foreign official.[334]

D. Hurdles in Using the MLCA to Prosecute Foreign Corruption

In *Siriwan*, the DOJ targeted foreign national Juthamas Siriwan (former governor of the tourism authority of Thailand) for seeking bribes from two American movie producers in exchange for lucrative tourism contracts.[335] Proceeding *Siriwan*, the two Americans, Gerald and Patricia Green were convicted of violating the FCPA by making over $1.8 m in payments to Siriwan's daughter from 2002 to 2007 for the contracts.[336] Because the Siriwans were foreign officials, prosecuting the Siriwans was limited by the FCPA's reach. Instead, the DOJ brought a money laundering action against Siriwan.[337] The DOJ's choice of "specified unlawful activity" brought skepticism from District Judge George Wu.[338] The DOJ cited two theories of unlawful activity: (1) aiding and abetting the Green's violation of the FCPA[339] and (2) violations of Thai law.[340] Though not settled, under the

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FCPA and violating anti-money laundering laws in an effort to secure a controlling interest in the state-owned oil company in Azerbaijan); U.S. v. Jefferson, 674 F.3d 332, 335 (4th Cir. 2012) (indicted U.S. Congressman William Jefferson on counts of solicitation of a bribe by a public official and money laundering); U.S. v. Leo Winston Smith, No. SACR 07–69 AG, 208 WL1869674, (C.D. Cal. Apr. 21, 2008) (indicted under for FCPA and money laundering violations by participating in a conspiracy to bribe a United Kingdom official).

[331] Joe Palazzolo, *DOJ's Kleptocracy Unit Unveiled*, WALL ST. J. (Feb. 7, 2011), http://blogs.wsj.com/corruption-currents/2011/02/07/dojs-kleptocracy-unit-unveiled.

[332] Assistant Attorney Gen. Leslie R. Caldwell, Remarks at Duke University School of Law (Oct. 23, 2014) (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law), [hereinafter Assistant Attorney Gen. Remarks].

[333] ASHEESH GOEL, INTERNATIONAL ANTI-MONEY LAUNDERING ENFORCEMENT TRENDS AND DEVELOPMENTS 19 (2013).

[334] Richard L. Cassin, *Judge Mulls Wider Ban on Prosecution of Briber Takers*, FCPA BLOG (Jan. 14, 2013), http://www.fcpablog.com/blog/2013/1/14/judge-mulls-wider-ban-on-prosecution-of-bribe-takers.html.

[335] *Id.*

[336] Richard L. Cassin, *Hollywood Couple Released From Jail*, FCPA BLOG (June 2, 2011), http://www.fcpablog.com/blog/2011/6/2/hollywood-couple-released-from-jail.html.

[337] *Judge Mulls Wider Ban supra* note 334.

[338] *Id.*

[339] FCPA violations expressly constitute specified unlawful under the MLCA. 18 U.S.C. § 1956(c)(7)(D) (2012).

[340] Dearington, *supra* note 327.

MLCA, violations of Thai law may constitute an "offense against a foreign nation" violating Section 149 of Thailand's penal code.[341]

At a 2012 hearing on Siriwan's motion to dismiss, Judge Wu expressed concern with what he saw was an attempt by DOJ to dodge the jurisdictional limits of the FCPA.[342] Referencing *Castle*,[343] Judge Wu commented that the FCPA's legislative policy meant to keep foreign officials unpunished, and like a conspiracy charge against a foreign official brought under the FCPA (barred under *Castle*), the prosecutors could not circumvent the FCPA's exclusions using the MLCA while targeting essentially the same conduct.[344] Specifically, Judge Wu claimed that the DOJ was using money laundering to get around charging bribery in violation of the *Gebardi* principal.[345] Articulated by the court in *Castle*, the *Gebardi* principle states that where Congress chooses to exclude a class of individuals from liability under a statute, "the Executive [may not] . . . override the Congressional intent not to prosecute" that party by charging it with conspiring to violate a statute that it could not directly violate.[346] In response, the DOJ argued that the charge was not based on bribery, but a "misuse of [the] U. S. financial system."[347] The Americans who received funds for tourism services from the Thai tourism authority had wired a portion of the funds to U.S. banks and then to Siriwan through banks in Singapore, Isle of Jersey, and the UK.[348]

In March 2013, Judge Wu held another hearing to dismiss the DOJ's case.[349] This time, Judge Wu focused on the violations of Thai law as the underlying unlawful activity.[350] Notably, Judge Wu was hesitant to decide the "ins and outs" of Thai law.[351] Judge Wu also argued that the penalties for violating the MLCA exceeded those for the FCPA, and that Congress was therefore unlikely to allow foreign officials to be prosecuted under the MLCA while exempting them from the FCPA.[352] Unfortunately, Judge Wu never had a chance to rule on the government's novel legal theory. First, the

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[341] Siriwan indictment, (2007), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/01-28-09siriwan-indictment.pdf; See 1956(c)(7)(B) (including "an offense against a foreign nation involving . . . (iv) bribery of a public official" in the statutory definition of "specified unlawful activity").

[342] Miwa Shoda & Andrew G. Sullivan, *Attacking Corruption at its Source: the DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L. L.J. 1, 3 (2015).

[343] The Castle court decided determined that Congress purposefully chose to exempt foreign officials from prosecution under the FCPA. *Castle*, 925 F.2d 831, 833.

[344] Shoda, *supra* note 17.

[345] *Id.*

[346] *Castle*, 925 F.2d at 833..

[347] Shoda, *supra* note 17, at 2.

[348] Siriwan indictment, *supra* note 341.

[349] Mike Dearington, *From Siriwan to Gonzalez: Why the DOJ Altered the Way It Charges Alleged Corrupt Foreign Officials*, FCPA PROFESSOR (August 26, 2013), http://fcpaprofessor.com/from-siriwan-to-gonzalez-why-the-doj-altered-the-way-it-charges-alleged-corrupt-foreign-officials/.

[350] Shoda, *supra* note 17.

[351] *Id.*

[352] *Id.*

prosecution's case was stalled because they could not extradite Siriwan.[353] Then, Thailand instated a criminal case against Siriwan at home,[354] and Judge Wu subsequently stayed the case.[355] Combined with the prosecution in Thailand and the difficulties in extradition, it is likely that the DOJ will not be able to test the reach of the money laundering statutes through *Siriwan*.

Siriwan thus poses challenges related to extradition, foreign law, and the perceived overreach of criminal actions seeking to replicate the force of FCPA. Other judges have balanced the policies underlying the FCPA and the MLCA differently.[356] In *U.S. v. Bodmer*, a case the prosecution referenced in *Siriwan*,[357] the court held that the government's claim that defendant Bodmer allegedly conspired to violate section 1956(a)(2) based on corruption could go forward, even though the district judge dismissed the FCPA count on jurisdictional grounds.[358] Judge Shira Scheindlin warned against dismissing money laundering cases brought under FCPA predicate offenses, as foreign officials exempted from the FCPA could avoid liability even if part of their conduct occurred in the United States, and allowing such conduct would "contravene Congress's clearly articulated intention to include foreigners within the scope of the money laundering statute."[359] Judge Scheindlin added that the text of the MLCA penalizes the "transportation of monetary instruments in promotion of unlawful activity, not the underlying unlawful activity."[360] In her ruling, Judge Scheindlin relied on section 1956(f) which explicitly refers to extraterritorial jurisdiction over non-U.S. citizens.[361] The *Bodmer* court also noted in a footnote that *Gebardi* had never been applied to dismiss a charge for conspiracy to launder money.[362] Tackling *Bodner*, Judge Wu distinguished *Bodner* on the grounds that the defendant in *Bodner* was not a foreign official.[363]

U.S. v Duperval provides a more positive outlook for the use of money laundering statutes to prosecute corruption barred by the FCPA's jurisdictional limitations.[364] ***In Duperval*,** two American telecommunications companies paid $500,000 to two companies for what the parties claimed

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[353] Samuel Rubenfeld, *Siriwan Case Hits Snag Over Extradition*, WALL ST. J. (Nov. 19, 2012), http://blogs.wsj.com/corruption-currents/2012/11/19/siriwan-case-hits-snag-over-extradition/.http://www.scribd.com/doc/248122744/U-S-v-Siriwan-Status-Report.

[354] Chinnawat Thongpakdee, *Thai Authorities Announce Siriwan Prosecution*, LEXOLOGY (Nov. 20, 2014), http://www.lexology.com/library/detail.aspx?g=843d8d97-7b27-424c-97b7-bb7a91e7f3eb.

[355] Julia Filip, *Thai Official's Forfeiture Action Stalled in D.C.*, COURTHOUSE NEWS SERVICE (Apr. 10, 2015), http://www.courthousenews.com/2015/04/10/thai-officials-forfeiture-action-stalled-in-d-c.htm.

[356] United States v. Bodmer, 342 F.Supp.2d 176, 191 (S.D.N.Y. 2004); United States v. Duperval, 777 F.3d 1324, 1329, 1331, 1338 (11th Cir. 2015), *cert denied*, 136 S. Ct. 859, 193 L. Ed. 2d 757 (2016).

[357] Shoda *supra* note 17.

[358] *Bodmer*, 342 F.Supp.2d at 190-91.

[359] *Id.* at 191.

[360] *Id.*

[361] *Id.*

[362] *Id.* at n.15.

[363] Shoda, *supra* note 17.

[364] *Duperval*, 777 F.3d at 1329, 1331, 1338.

were consulting services.[365] The bribes were hidden through a series of payments to a shell company established by Jean Rene Duperval, the director of foreign relations for one of the companies.[366] Six defendants were convicted of FCPA-related charges related to the scheme.[367] Like in *Siriwan*, the DOJ could not prosecute Duperval under the FCPA because Duperval was a foreign official.[368] Instead, the DOJ argued that Duperval violated the MLCA.[369] In doing so, the DOJ used evidence from the successful FCPA convictions of defendants involved in the scheme[370]—charging the same underlying unlawful activity that so concerned Judge Wu in *Siriwan*.[371] The indictment alleged that Duperval's transactions involved the proceeds of FCPA violations.[372] Though Duperval never argued that the FCPA charges contravened congressional intent to shield foreign officials under the FCPA, Duperval was sentenced to nine years in prison.[373] Assistant Attorney General Breuer seemed to forecast the DOJ's growing use of money laundering proseuctions to reach officials outside the FCPA's jurisdiction, commenting that "[j]ust as we prosecute corrupt business people under the FCPA, we will hold accountable foreign officials when they seek to launder the proceeds of that bribery through the U.S. financial system."[374] Duperval had the distinction of being the first foreign official convicted at trial for money laundering based on an underlying FCPA bribery scheme.[375] In addition to *Duperval*, the DOJ has successfully reached three other foreign officials using the MLCA and an underlying FCPA offense.[376] However, in these cases, the court never addressed the "intent" argument that the defendants brought up in *Siriwan*.[377]

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[365] DEPT. OF JUSTICE, *Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes*, (May 21, 2012), https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes.

[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] DEPT. OF JUSTICE, *supra* note 365.

[371] *Judge Mulls Wider Ban on Prosecution of Briber Takers supra*, note 334.

[372] United States v. Duperval, 777 F.3d 1324, 1329 (11th Cir. 2015), cert. denied, 136 S. Ct. 859, 193 L. Ed. 2d 757 (2016).

[373] *Id.*

[374] U.S. Dep't. of Justice, *Former Haitian Government Official Sentenced to Prison For His Role In Money Laundering Conspiracy Related to Foreign Bribery Scheme*, DOJ (Jun. 2, 2010), https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes.

[375] Charles Duross et al., *Conviction of First Foreign Official at Trial for Money Laundering based on Underlying FCPA Bribery Scheme Upheld*, MORRISON FOERSTER (Feb. 18, 2015), http://www.mofo.com/~/media/Files/ClientAlert/2015/02/150217ConvictionMoneyLaundering.pdf.

[376] U.S. ATTORNEY'S OFFICE OF THE SOUTHERN DIST. OF N.Y, TWO U.S. BROKER-DEALER EMPLOYEES AND VENEZUELAN GOVERNMENT OFFICIAL CHARGED IN MANHATTAN FEDERAL COURT FOR MASSIVE INTERNATIONAL BRIBERY SCHEME (May 7, 2013), http://www.justice.gov/usao/nys/pressreleases/May13/ClarkeetalComplaintPR.php (detailing the guilty plea by Venezuelan official Maria de los Angeles Gonzalez de Hernandez); U.S. DEP'T. OF JUSTICE, FLORIDA TELECOMMUNICATIONS COMPANY, TWO EXECUTIVES, AN INTERMEDIARY AND TWO FORMER HAITIAN GOVERNMENT OFFICIALS INDICTED FOR THEIR ALLEGED PARTICIPATION IN FOREIGN BRIBERY SCHEME (July 13, 2011), http://www.justice.gov/opa/pr/florida-telecommunications-company-two-

E. Judge Wu's Hesitation in Siriwan

Looking forward, one possibility is that courts may accept MLCA prosecutions based on underlying FCPA violations, the latter of which the defendant is not charged and convicted on, as an established norm given *Duperval*. However, the "intent" argument from *Siriwan* could be raised again in prosecutions of foreign officials, and Duperval never raised the argument at trial or appeal. Thus, Judge Wu's hesitation deserves careful evaluation. There are three thrusts to Judge Wu's argument against MCLA prosecutions based on underlying FCPA violations: (1) that an MLCA charge with an underlying FCPA violation against a foreign official is in tension with the principles set by *Gebardi* (the "intent" argument), (2) that Congress could not have intended a greater punishment from the MLCA while exempting them from the FPCA, and (3), the difficulties involved for U.S. judges when interpreting foreign law.

F. The "Intent" Argument Misapplies Gebardi

Judge Wu's first argument relies on an unnecessarily broad reading of *Gebardi*.[378] In *Gebardi*, the government sought to prosecute a woman who agreed to be transported by her lover across state lines through a charge of conspiracy to violate the Mann Act.[379] The Mann Act prohibited transportation of women across state lines for immoral purposes, but did not criminalize the conduct of the woman who was transported.[380] The Supreme Court dismissed the conspiracy charge, arguing that Congress had specifically exempted the woman from the Mann Act, and given Congress's desire to leave women unpunished under the Act, a conspiracy charge based on the same act couldn't go forward.[381] *Castle*'s articulation of *Gebardi* is the lead case in the FCPA space. Recently in *U.S. v. Hoskins*, U.S. District Court Judge Janet Arterton, also referencing *Gebardi*, dismissed a FCPA conspiracy charge against Lawrence Hoskins, a British national and the former vice president of the Asia region of a French firm, reasoning that "Congress did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability under the FCPA . . . ,,[382]

executives-intermediary-and-two-former-haitian (press release reporting on the guilty plea by Robert Antoine and Patrick Joseph, directors of Haiti's state-owned telecommunications company).

[377] Mike Shoda & Andrew G. Sullivan, *Attacking Corruption at its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L L. J. 4 (2015), https://jenner.com/system/assets/publications/14373/original/Shoda_Sullivan_California_Int_Law_Journal.pdf?1440539681.

[378] *See Judge Mulls Wider Ban on Prosecution of Briber Takers supra* note 334 (showing Judge Wu's hesitation for prosecuting officials through other means).

[379] Gebardi v. United States., 287 U.S. 112, 116 (1932).

[380] *Id.* at 122.

[381] *Id.*

[382] United States v. Hoskins, 123 F.Supp.3d 316, 323 (D. Conn. 2015)

The bottom line is that the framework of the MLCA distinguishes the statute from a mere conspiracy (or aiding and abetting) charge. Money laundering is a completely separate transaction from the specified unlawful activity. The MLCA was intended by Congress to boast a broad jurisdictional reach to place a tourniquet on the lifeblood of organized and systemic crime: concealing the profits which motivated the crime itself.[383]

Secondly, the Supreme Court has already addressed Judge Wu's concern with MLCA sentencing disparities. In *U.S. v. Santos*, the defendant was convicted of running an illegal gambling business and promotional money laundering under section 1956.[384] Although the key issue before the court was definitional (whether the word "proceeds" designated profits or receipts), a tangential issue that arose before the Court was the sentencing disparity between operating a gambling business (five years maximum imprisonment) and money laundering (twenty year max). [385]Justice Scalia, writing for the plurality, pointed out that a "rational Congress could surely have decided that the risk of leveraging one criminal activity into the next poses a greater threat to society than the mere payment of crime-related expenses and justifies the money-laundering statute's harsh penalties."[386] Thus, the Court presumptively approved of the sentencing disparities which arose from the money laundering charge. Sentencing disparities arising from the MLCA reflect Congress's concern with the wellspring for continued criminal activity money laundering actualizes. Additionally, those sentencing disparities are present in many other MLCA prosecutions. The U.S. Sentencing Commission working group actually examined the disparity between sentences that arose from money laundering convictions versus the sentences provided from the specified unlawful activity, and sent Congress amendments to the MLCA to harmonize sentencing practices.[387] Congress passed legislation, signed by then President Clinton, to disallow the amendments to the MLCA.[388]

G. Judges Are Increasingly Forced to Evaluate Foreign Law

The second underlying unlawful activity from Siriwan, violations of foreign law, would require district court judges to make judgements on potentially complex questions of foreign law. If the hesitation expressed by

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[383] Senator D'Amato, a chief sponsor of the Senate Bill, posited: "Money laundering permits the drug traffickers to evade taxes and to conduct their operations and finance their drug networks behind a veil of secrecy. It allows them to buy more drugs for resale, and to acquire the planes, boats, and front corporations they use to smuggle drugs into the United States." *Drug Money Laundering: Hearing Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 99th Cong., 1st Sess. 7 (1985) (statement of Senator Al D'Amato).

[384] United States v. Santos, 553 U.S. 507, 509 (2008).

[385] *Id.* at 530.

[386] United States v. Santos, 553 U.S. at 515.

[387] MONEY LAUNDERING WORKING GROUP, SUMMARY OF FINDINGS, UNITED STATES SENTENCING COMMISSION (1995), http://www.ussc.gov/research-and-publications/research-projects-and-surveys/miscellaneous/summary-findings.

[388] *Id.*

Judge Wu, a former federal prosecutor, serves as an adequate barometer, then placing violations of foreign law under the "offense against a foreign nation" theory of unlawful activity will continue to be met with resistance. However, Judge Wu's hesitation shouldn't preclude future MLCA violations under the foreign law offense underlying criminal activity. Federal courts are capable of applying foreign law and routinely apply the law of other sovereigns. Federal courts have applied foreign law for over a century.[389] Applying foreign law has become even more commonplace with the expansion of global commerce. For example, private parties in international commerce regularly insert choice-of-law clauses into their contracts, choosing the application of the law of sovereigns other than the U.S.[390] There is obviously a clear difference between applying foreign law in MCLA prosecution violation for purposes of the specified unlawful activity versus the use of foreign law as precedent.

Granted, applications of foreign law may be difficult. But outweighing this concern, the MLCA represents a *congressional determination* that individuals using the U.S. financial system to conceal the illicit origins of the money should be punished. Criminal activity in an increasingly connected global financial and informational network already requires the DOJ to cooperate with foreign partners, understand foreign law, and navigate foreign procedure.[391] Avoiding the analysis of a statutory claim because of the potential difficulties of foreign law, law which becomes increasingly harmonized due to global corruption and bribery standards (for example, the U.S.'s 1998 compliance with the OECD Anti-Bribery Convention) cuts against congressional intent.

H. Asset Forfeiture: A Powerful Complement to the MLCA and the Fight Against Corruption

Alongside, the MLCA, asset forfeiture provides additional firepower for U.S. prosecutors. Property involved in money laundering is subject to civil forfeiture, and criminal forfeiture is statutorily required under section 1956 and 1957 actions.[392] A criminal case involving forfeiture is bifurcated into two trials: the guilt phase and the forfeiture phase.[393] In the forfeiture phase, the sole issue for the jury is whether the prosecution has established the required nexus between the property and the offense for which the defendant

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[389] *See generally* Nashua Sav. Bank v. Anglo-Am. Land, Mortg. & Agency Co., 189 U.S. 221, 227–29 (1903) (discussing methods of proving foreign law in U.S. courts); Ennis v. Smith, 55 U.S. 400, 426 (1852) (accepting French Civil Code into evidence); Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 161 F.3d 314, 319 (5th Cir. 1998) (weighing expert testimony and internal research to decide corporate status under Chinese law).

[390] *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS 5 (2007), http://www.hcch.net/upload/wop/genaff_pd22a2007e.pdf

[391] Assistant Attorney Gen. Remarks, *supra* note 322.

[392] 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1) (2006).

[393] Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in A Criminal Case*, 32 AM. J. CRIM. L. 55, 88 (2004).

has been found guilty.[394] In the case of civil in rem forfeiture no criminal conviction is required, and the prosecutor must establish a lower, civil burden of proof.[395] Civil forfeiture also allows immediate possession pending the resolution of the forfeiture action.[396] Asset forfeiture in the money laundering context has been criticized as aggressive and burdensome.[397] Still, the U.S. has used asset forfeiture alongside money laundering and FCPA claims in high profile prosecutions, reaching the assets of foreign officials who would otherwise escape the FCPA's jurisdiction.

The Department of Justice Kleptocracy Asset Recovery Initiative (KARI) forms the ideal complement to the MLCA framework. Intended to complement enforcement of the FCPA, KARI is led by the Money Laundering Section of the DOJ.[398] A conviction for money laundering, without the threat of underlying seizure of assets, relies on extradition for its punitive force.[399] Another avenue is to use civil and criminal statutes to seize the assets of corruption officials. Aimed at kleptocrats who are largely immune from U.S. prosecution, the goal of DOJ's KARI is to identify the proceeds of official corruption, seize them, and use the seized assets to repay the citizens to which they are owed.[400]

Using civil forfeiture statutes, the DOJ has seized $120 million from kleptocrats.[401] However, even though the assets the DOJ is seeking to seize are located within the U.S. and its territories, the DOJ has had limited success relative to the amount of assets it has targeted. In fact, only 8% of what the DOJ has sought has been taken into federal possession.[402] A number of factors influence this recovery rate. First are the evidentiary difficulties inherent in foreign prosecutions: although the assets the DOJ is looking to seize are located domestically, showing that the assets are related

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[394] *Id.* At this stage it does not matter whether the property really belongs to the defendant or to the third party. *Id.*

[395] DEE R. EDGEWORTH, ASSET FORFEITURE, PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 20 (ABA Criminal Justice Section, 2d ed. 2008). Civil in personam actions are brought against a person, while in rem actions are brought against property rather than the property owner based on the legal fiction that the property is "guilty." *Id.* at 2. 218 U.S.C. § 545 provides the only federal civil in personam provision. *Id.* at 21.

[396] *Id.* at 20.

[397] Forfeiture in a civil proceeding can be accomplished prior to the proceedings culmination. *Id*.

[398] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL LORETTA E. LYNCH ANNOUNCES RETURN OF FORFEITED PUBLIC CORRUPTION ASSETS TO KOREAN MINISTER OF JUSTICE KIM HYUN-WOONG (Nov. 9, 2015), https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-announces-return-forfeited-public-corruption-assets-korean.

[399] A conviction can be obtained in abstentia, and many courts have ruled that an in abstentia conviction conclusively establishes probable cause for the purposes of extradition. Roberto Iraola, *Foreign Extradition and In Absentia Convictions*, 39 SETON HALL L. REV. 843, 850 (2009). A conviction gained in abstentia could also serve as the basis for criminal forfeiture.

[400] Steven A. Meyerowtiz, *Kleptocracy, and the Feds' Asset Recovery Initiative*, LEXISNEXIS LEGAL NEWSROOM (May 27, 2011), https://www.lexisnexis.com/legalnewsroom/financial-fraud-law/b/blog/archive/2014/01/06/kleptocracy-and-the-feds-asset-recovery-initiative.aspx?Redirected=true.

[401] Leslie Wayne, *Wanted by U.S.: The Stolen Millions of Despots and Crooked Elites*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/17/business/wanted-by-the-us-the-stolen-millions-of-despots-and-crooked-elites.html?_r=0.

[402] *Id.*

to criminal acts in a foreign country involve people and acts in foreign countries.[403] Second, given the political power of kleptocrats, it is also difficult to convince witnesses with legitimate concerns related to retaliation to testify.[404] Finally, the assets are often hidden in a maze of shell corporations, or quickly withdrawn to sovereign territory in violation of U.S. court orders.[405] Global asset recovery initiatives are also performing poorly.[406] The Stolen Asset Recovery Initiative, a World Bank and UN anti-money-laundering effort estimates that only about $5 billion of the $20–40 billion lost to developing countries annually through corruption has been recovered in the last 15 years.[407]

Still, KARI represents a legitimate and important national interest. Noting the demand-side limitations of the FCPA, Special Agent George McEachern, Head of the International Corruption Unit at the FBI, argues that KARI gives prosecutors greater control over the demand-side of the bribe, and investigations into the demand-side sphere may lead to investigations in the supply-side sphere.[408]

I. Success Does Not Require Extradition

Moreover, the fact that Thailand instated a prosecution against Siriwan at home should be considered a success. Many countries with anti-bribery statutes fail to enforce them energetically, perpetuating a culture of corruption that promotes externalities beyond their borders. Thus, whether motivated by concerns of sovereignty, the incentives of rival political actors, or national embarrassment, Thailand's decision is exactly what the U.S. should want in the global fight against corruption: sovereigns that actually prosecute corruption in domestic courts. Furthermore, a criminal conviction can still lead to the seizure of assets gained through the proceeds of bribery. Whether the sovereign is pressured into complying with a growing global consensus towards stopping bribery or the benefits of the laundering activity are seized, the MLCA/FCPA framework offers more than just the threat of potential jail time through the extradition process.

VII. More Compelling Than the Moral Argument: A Strong Federal Interest

A potent criticism still remains: what federal interest underlies the use of the MLCA framework to attack foreign corruption? First, is the jurisdictional element. If money is flowing through U.S. banks, U.S. courts have jurisdiction under the MLCA. By the bare text of the statute,[409]

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[403] *Id.*

[404] *Id.* In one case against the scion of the ruling family from Equatorial Guinea, Teodoro Nguema Obiang Mangue, the prosecution's main witness remained "in an "insect-infested" prison cell … subject to "torture including beating and flogging." *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.*

[408] FED. BUREAU OF INVESTIGATION, FBI ESTABLISHES INTERNATIONAL CORRUPTION SQUADS (Mar. 3, 2015), https://www.fbi.gov/news/stories/2015/march/fbi-establishes-international-corruption-squads/fbi-establishes-international-corruption-squads.

[409] 18 U.S.C. § 1956(f).

Congress clearly understood that the MLCA would reach foreigners who use U.S. banks to perpetuate criminal activity and the difficulties involved in securing their convictions. Thus, the concerns of the court in *Castle*, or the "inherent jurisdictional, enforcement, and diplomatic difficulties" involved in prosecuting foreign officials through the FCPA should not, and do not apply.[410] The MLCA is a standalone statute.

Second, the presence of demand-side corruption undermines the high-level goal of the FCPA and OECD Anti-Corruption Convention: to combat and reduce international corruption. When other nations are willing to transact with kleptocrats and other corrupt foreign officials on terms facilitating corruption, "progress made over the past thirty years of enforcement … will be lost when corrupt officials can simply shift their illicit transactions to other players ready and willing to "pay to play."[411] The FCPA's long term goal is to reduce bribery and corruption to create a favorable business environment for American firms while stomaching the short term pains a loss of competitiveness engenders. By actually fighting demand-side corruption through the MLCA, the U.S. can take the teeth out of the argument that FCPA compliance is too demanding when other nations (like China) can push U.S. firms aside. In essence, using the MLCA to fight corruption advances the federal interest behind the FCPA, the ideals of the FPCA, and defends the continued use of the FCPA, a statute which represents manifestation of the Founders' belief in the primacy of the rule of law over the rule of man.[412]

The third arises when we analyze the goals behind DOJ's KARI, one of DOJ's newest asset forfeiture initiatives. The interest articulated by KARI is identical to the one backing the use of the MLCA to attack bribery and corruption. Just because the FCPA cannot reach the actions of foreign officials, it does not mean enforcement efforts should be limited to the supply-side harms of a bribe. Foreign officials are using U.S. banks to perpetuate the harms of corruption, harms that go beyond a bottom line change in public revenue. The interconnectedness of banking institutions is not an excuse for U.S. complacency, but an opportunity to continue its leadership in the foreign corruption space. Corruption and money laundering are intertwined, and tainted money flows through channels that the U.S. facilities and regulates. Anything outside vigorous prosecution of corruption, either through the FCPA or the MLCA, is borderline complicity in the process by which the proceeds of corruption are secured. Thus, the U.S. has a duty to enforce the MLCA to attack corruption even if the FCPA is limited from doing so in certain instances.

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[410] *Castle*, 925 F.2d at 834.
[411] Demas, *supra* note 10, at 348.
[412] The Declaration of Independence para. 2 (U.S. 1776) [hereinafter Declaration]

VIII. Conclusion

Describing the difficulties of DOJ's KARI, Kenneth Hurwitz, senior legal officer with the Open Society Foundations, expressed what many could characterize as at best wistful thinking. Hurwitz conceded that "no one is confident that" forfeiture "will work perfectly," but "that's still better than if the U.S. didn't try."[413]

Viewing corruption in the African resource space through a rights-sensitive framework, it is clear that the U.S. should try. The fight against corruption is deeply ingrained in the U.S.'s national conscience: the power of the government is derived from the consent of the people, and government should not become destructive towards unalienable rights.[414] The harms of corruption in the African resource space, an area particularly sensitive to bribery, are human rights harms. Under "no-strings attached," the U.S.'s most powerful anti-corruption statute is losing its force, hampering the goals Congress envisioned when passing the then idealistic FCPA, the very goals that the world has come to share through expanding anti-corruption treaties and agreements. The use of the MLCA alongside initiatives such as DOJ's KARI are avenues where the high-level policy aims of the FCPA and the OECD Anti-Corruption Convention can be fulfilled. Prosecuting the MCLA where the FCPA falls short balances the concerns of immediacy, efficacy, respect for sovereignty, and the need for a strong federal interest all while satisfying the moral imperative to fight corruption. As this Note has argued, the legal concerns raised in *Siriwan* about the MCLA—an influential hurdle to the MLCA's energetic prosecution—are off-the-mark.

The fight against corruption is truly marred by limitations. Yet corruption's costs to humanity are too high to ignore. Few shoulder its weight more than the innocent citizens suffering perpetually from corruption's effects in the African resource space. The MLCA framework presents a new avenue for federal prosecutors to reach demand-side corruption, and an opportunity to uphold the vision of the Founders, the framers of the FCPA, and those derived generally from a basic concern and respect for human progress and a sense of justice. This Note argues that the U.S. should and must try to fight corruption using the MLCA—if not, the advances the world has made so far towards limiting corruption's debilitating effects will be in vain.

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[413] Wayne, *supra* note 401.
[414] Declaration, *supra* note 412.