American University International Law Review

Volume 26 | Issue 2 Article 2

2011

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

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

REAGAN R. DEMAS*

* Reagan Demas is a Partner at Baker & McKenzie LLP in Washington, D.C. His practice focuses on anti-corruption and Foreign Corrupt Practices Act (FCPA) investigations and conducting business or investing in developing countries, particularly in Africa. He has traveled extensively on the African continent, evaluating business opportunities with greater clarity, providing advice on FCPA compliance and business operations (including solutions on issues of taxation, investment, entity registration, security, and risk management), and conducting training and due diligence on behalf of clients. In addition to his practice, Mr. Demas has written and spoken extensively on corruption, compliance, and doing business in Africa.

INTRODUCTION

While sub-Saharan Africa[1] was hit hard by the global recession of 2008-09, the region's economies seem to be more resilient than the economies of much of the world.[2] However, as Africa emerges from the downturn, the quality and character of its emergence is not yet clear. Can the continent's varied economies resurface stronger than ever in the same way high-growth developing states outside of Africa

1. Sub-Saharan Africa typically refers to those African countries which are fully or partially located south of the Sahara Desert, in contrast to the countries that constitute North Africa. This paper focuses on sub-Saharan Africa, but in the interest of space will often refer to sub-Saharan Africa by the term "Africa" alone.

2. *See* INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK: APRIL 2010: REBALANCING GROWTH 2 (2010), *available at* http://www.imf.org/external/pubs/ft/weo/2010/01/pdf/text.pdf (showing a downturn in growth for sub-Saharan Africa from 5.5% for 2008 to 2.1% growth for 2009, but projecting increased growth rates of 4.7% for 2010 and 5.9% for 2011; whereas world growth is shown as 1.8% for 2008, -2.1% for 2009, 3.2% for 2010, and 3.4% for 2011).

are poised to rebound?

Despite the plethora of challenges facing African states today, the nature of the continent's recovery, as well as the future of its economic and political development, will likely hinge on progress made in the battle against official corruption.[3] This paper argues that Africa's future depends on a reduction in corruption and proposes essential changes to the current battle against corruption in order to ensure that it is fought thoroughly and effectively.

Part I discusses the opportunities and risks investors and companies face in Africa, highlighting the potential perils of the continent's focus on natural resource exportation, and explains the importance of an established rule of law, unfettered by corruption, as necessary to sustain economic growth and development. Part II addresses the primary supply-side anti-corruption tool in use today, the U.S. Foreign Corrupt Practices Act ("FCPA"), and highlights the mounting yet uneven enforcement of the law in Africa. Part III presents a case study of China's activities in Africa, illustrating how irregular enforcement of anti-corruption regulations combined with foreign engagement lacking sensitivity to the fragility of the rule of law, particularly in poorly-governed African states, can exacerbate corruption and its associated ills. Part IV discusses the lagging demand-side anti-corruption efforts in Africa. Part VI presents two potential endgame scenarios in the fight against corruption on the continent. And finally, Part VII lays out the specific need for consistent, global supply-side measures, a greater focus on demand-side efforts, and sustained commitments by governments around the world to fight corruption in Africa, even when not politically expedient.

3. *See For African Business, Ending Corruption is 'Priority Number One'*, AFR. RENEWAL, Aug. 2010, at 7-8, *available at* http://www.un.org/ecosocdev/geninfo/afrec/vol24no2-3/Africa-Renewal-August-2010-en.pdf (noting that business leaders from fifteen African countries all cited corruption as their top concern because it undermines competition and growth in the market).

I. POST-RECESSION SUB-SAHARAN AFRICA: OPPORTUNITIES AND RISKS

The recession of 2008-09 hit global economies hard and did not spare the economies of sub-Saharan Africa.[4] As the global appetite for risk evaporated, commodity prices collapsed and investors fled Africa, a continent still generally considered to be "the riskiest region."[5] Banks drastically curtailed lending to African exporters at a higher rate than to exporters in other regions, and the continent's export-driven economies suffered from the heightened risk aversion, lower energy consumption, and lower commodity prices.[6] Average growth rates on the continent dipped from a continuous 4% increase each year from 2001-05[7] and 6% increase each year from 2006-08, to only a 2.5% increase in 2009.[8]

Nevertheless, compared to the rest of the world, "Africa weathered the economic storms well."[9] Many sub-Saharan African economies grew at a rate approximately twice as fast as economies in Europe or the United States prior to the recession and contracted less sharply during the recession.[10] Average growth on the continent is projected

---

4. INT'L MONETARY FUND, REGIONAL ECONOMIC OUTLOOK: SUB-SAHARAN AFRICA: BACK TO HIGH GROWTH? 4 (2010), *available at* http://www.imf.org/external/pubs/ft/reo/2010/afr/eng/sreo0410.pdf (noting that the median growth rate in the region's low-income and fragile "countries decelerated . . . from 5.5% in 2004-08 to 3.5% in 2009").

5. Paul Collier, *The Case for Investing in Africa*, MCKINSEY Q., June 2010, at 2, *available at* http://www.mckinseyquarterly.com/PDFdownload.aspx?ar=2611.

6. *See id.* at 2 (emphasizing that oil prices dropped more than $100 per barrel).

7. *See* AGENCE FRANÇAISE DE DÉVELOPPEMENT & THE WORLD BANK, AFRICA'S INFRASTRUCTURE: A TIME FOR TRANSFORMATION 2 (Vivien Foster & Cecilia Briceño-Garmedia eds., 2010), *available at* http://www.infrastructure africa.org/aicd/system/files.AIATT_consolidated_smaller.pdf.

8. *AEO Finds Africa Hit by the Crisis But Set to Rebound*, ORG. FOR ECON. CO-OPERATION & DEV. (May 24, 2010), http://www.oecd.org/document/33/0,3343,en_2649_33731_45248993_1_1_1_1,00.html.

9. Collier, *supra* note 5, at 2.

10. *See* INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK: APRIL 2007: SPILLOVERS AND CYCLES IN THE GLOBAL ECONOMY 2 (2007), *available at* http://www.imf.org/external/pubs/ft/weo/2007/01/pdf/text.pdf (providing annual growth rates and growth projections of countries and regions for the years 2005-08); *see also Africa's GDP Growth Could Reach 7 pct in 2011: AfDB*, REUTERS (Feb. 22, 2010), http://af.reuters.com/articlePrint?articleId=AFJOE61L14O20100 222 (arguing that "[t]he world's poorest continent, mainly dependent on minerals and commodity exports for revenue, surprised economists by weathering the global

to rise to 5.5% in 2010 and 7% in 2011, outpacing rates in the developed world.[11] Categorized by region, anticipated 2010-11 growth rates range from 4% in Central and South Africa, to 5% in North and West Africa, to at least 6% in East Africa.[12] In the wake of the global financial crisis and while Western banks still lick the wounds inflicted by toxic debts, African banks remain "among the healthier financial companies anywhere in the world."[13] To date, Africa's economies rebounded with greater vigor in part because of the rapid stabilization of commodity prices.[14] Of the twenty fastest growing economies on earth today, eight are in Africa.[15]

A. OPPORTUNITIES

Sub-Saharan Africa today is a land of both vast opportunity and significant risk for investors and corporations alike. The economic rebound in Africa is driven by a high demand for natural resources, primarily from China and other fast-growing Asian economies, which shows few signs of slowing.[16] Growth of the resource trade is

economic crisis better than the West").

11. *See Africa's GDP Growth Could Reach 7 pct in 2011: AfDB*, *supra* note 10 (citing GDP predictions from the International Monetary Fund and African Development Bank); *see also AEO Finds Africa Hit by the Crisis But Set to Rebound*, *supra* note 8 (forecasting that growth will reach 4.5% in 2010 and 5.2% in 2011); Gus Lubin & Lawrence Delevingne, *Corruption In Africa's 'Best Countries' Can Still Crush Investors*, BUS. INSIDER (Feb. 4, 2010, 8:42AM), http://www.businessinsider.com/corruption-in-africas-best-countries-can-still-crush-investors-2010-2 (predicting that sub-Saharan Africa's economies will grow at a rate of over 1% above the global average in 2010-11).

12. *AEO Finds Africa Hit by the Crisis But Set to Rebound*, *supra* note 8 (stating that "the continent has proved resilient to the crisis" due to macroeconomic policies in force prior to the downturn, sustained aid flows, and assistance from the International Monetary Fund, the World Bank, and the African Development Bank).

13. Ethan B. Kapstein, *Africa's Capitalist Revolution: Preserving Growth in a Time of Crisis*, 88 FOREIGN AFF. 119, 124 (2009) (noting that African banks were "relatively shielded from the toxic assets that are now laying waste to U.S. and European financial institutions").

14. *See* Collier, *supra* note 5, at 2-3 (explaining that prices stabilized, generally, at levels higher than before the recession).

15. Lubin & Delevingne, *supra* note 11 (indicating that Angola is predicted to grow 9% and Republic of Congo 12%).

16. *See* Charles Roxburgh et al., *Asia Should Buy Into Africa's Growth*, FORBES (Aug. 12, 2010, 10:00 AM), http://www.forbes.com/2010/08/12/asia-china-africa-trade-growth-markets-economy-investment.html (noting that Asian and African economies are increasingly crossing paths and that Asian companies

predicted to accelerate, given the likelihood that current exploration has merely scratched the surface of valuable subsoil deposits in the region.[17]

In addition, opportunities for foreign direct investment ("FDI") in Africa are plentiful, and historical FDI returns on the continent are high. The rate of return on FDI in Africa averaged 29% from 1990 to 1999,[18] and continued to be the highest of any developing region in the world during 2006-07.[19] At the same time, FDI inflows (particularly outside the petroleum industry) remain relatively low, and therefore opportunities for investment exist.[20] Specifically, healthy growth and investment opportunities exist in the energy, banking, telecommunications and technology, materials, and pharmaceuticals industries.[21] As GDP per capita grows in China and

should look to invest more into four African sectors: consumer goods and services, natural resources, agriculture, and infrastructure); *see also* Collier, *supra* note 5, at 3 (remarking that worldwide commodity prices have increased due to emerging Asian markets).

17. *See* Collier, *supra* note 5, at 3 ("In the long-explored countries of the OECD, the average square kilometer of territory still has beneath it around $114,000 of known subsoil assets, despite two centuries of intense extraction. In contrast, the average square kilometer of sub-Saharan Africa has a mere $23,000 of known subsoil assets . . . . [T]he difference in known assets is likely to indicate an offsetting difference in what is awaiting discovery.").

18. Ernest Harsch, *Africa's Untapped Investment Potential*, 13 AFR. RECOVERY ONLINE 26 (1999), http://www.un.org/ecosocdev/geninfo/afrec/vol13no2/26_27eca.htm.

19. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2008: TRANSNATIONAL CORPORATIONS AND THE INFRASTRUCTURE CHALLENGE, at xvii, U.N. Sales No. E.08.II.D.23 (2008), *available at* http://www.unctad.org/en/docs/wir2008_en.pdf; *see* Collier, *supra* note 5, at 2 (reporting that return on investment of companies operating in Africa was two-thirds higher than companies operating in China, India, Indonesia, or Vietnam).

20. Samuel Kamndaya, *Africa: Poor Infrastructure Scares Away Investors, Africa Told*, THE CITIZEN, Apr. 27, 2010, http://allafrica.com/stories/printable/201004280004.html (citing the World Investment Report of 2009, which found that Africa received only $88 billion of a total global FDI of $1.7 trillion in 2008).

21. *E.g.*, Charles W. Corey, *Diverse Investment Opportunities Springing Up Across Africa: Investment Banker Says Ongoing Reforms in Africa Invite Investment*, AMERICA.GOV (Oct. 16, 2008), http://www.america.gov/st/business-english/2008/October/20081016140446WCyeroC0.7312586.html; Louise Harris, *Africa Offers Several Investment Opportunities: Frost & Sullivan Says Water, Energy, Telecom Options Available*, SUITE101.COM (Dec. 22, 2009), http://www.suite101.com/content/africa-offers-several-investment-opportunities-a182225 (indicating that Frost & Sullivan reported investment opportunities in

other Asian states, and as wages rise commensurately, Africa will soon be the world's last "major low-wage region."[22] Incentives are growing for companies from member states of the Organization for Economic Cooperation and Development ("OECD") to outsource work to Africa and to set up low-cost operations in the same way such activities were shifted to Asia over the past three decades.[23]

B. RISKS

Although sub-Saharan Africa's economies are primed for growth and opportunities exist, the region presents unique challenges. The continent cannot reach its full growth potential until the substantial risks of investing in Africa are alleviated and the business environment improves.[24]

1. Corruption

Corruption remains the largest risk factor, slowing growth and development and threatening to stymie Africa's strong rebound from the global recession. Africa loses an estimated 25% of its GDP to corruption, roughly U.S. $148 billion.[25] According to Transparency International, Nigeria loses "nearly 40[%] of its wealth" to corruption and government mismanagement.[26] A 2002 study by the African Union estimated that corruption costs the continent $150 billion per year; by comparison, OECD reported that sub-Saharan

Africa in telecommunications and technology, biofuels, renewable energy, and water sectors); *Mobile Growth 'Fastest in Africa'*, BBC NEWS (Mar. 9, 2005), http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/business/4331863.stm (arguing that telecommunications remains a high-growth industry on the continent).

22. *See* Collier, *supra* note 5, at 4 (explaining further that per capita GDP in China is already higher than the world average).

23. *See id.* at 4 (indicating that this shift is also logical because Africa's coastline is enormous and more proximate than Asia to European and North American markets).

24. *See For African Business, Ending Corruption is 'Priority Number One'*, *supra* note 3, at 8 (citing corruption as the chief concern of African leaders, who acknowledged that reducing corruption is a prerequisite for creating an enabling business environment).

25. Ndiva Kofele-Kale, *Change or the Illusion of Change: The War Against Official Corruption in Africa*, 38 GEO. WASH. INT'L L. REV. 697, 728 (2006).

26. Amanda Wheat, *West Africa: The BP Oil Spill Spells Disaster for Region*, MEDIAGLOBAL (June 18, 2010), http://allafrica.com/stories/printable/201006200023.html.

Africa received a total of $22.5 billion in aid from developed countries in 2008.[27]

Corruption—a lack of accountability and rule of law—takes root at the top of African political systems and creeps down to impact all aspects of society.[28] When asked why political opposition was suppressed in Congo, President Denis Sassou-Nguesso, who has been at Congo's helm for twenty-six years, responded that "[i]n Africa, we don't like that sort of thing, we don't admire that. Our values are that we respect our leaders. In this regard, Africa will never imitate Europe, you can be sure of that."[29] Additionally, President Jose Eduardo dos Santos, Angola's leader for over thirty years, recently declared in an address to his nation that "democracy . . . was imposed on Africa by the West."[30] Angola provides a particularly alarming example of how corruption can take root and drain public coffers; in the past, "billions of dollars in oil revenues illegally bypassed Angola's central bank and disappeared," even as the country's development indicators sagged near the lowest in the world.[31]

Corruption continues to pose significant risks for investors in Africa, and the continent faces an uphill battle in rebuilding the rule of law. The cycle of corruption is a difficult one to stop; once a

27. Elizabeth Blunt, *Corruption 'Costs Africa Billions'*, BBC NEWS (Sept. 18, 2002), http://news.bbc.co.uk/2/hi/africa/2265387.stm, *cited in* Stephanie Hanson, *Corruption in Sub-Saharan Africa*, COUNCIL ON FOREIGN RELATIONS (Aug. 6, 2009), http://www.cfr.org/publication/19984/corruption_in_subsaharan_africa .html; *Development Aid at its Highest Level Ever in 2008*, OECD, http://www.oecd.org/document/35/0,3343,en_2649_34487_42458595_1_1_1_1,00 .html (last visited Feb. 1, 2011), *cited in* Hanson, *supra*.

28. *See generally* Hanson, *supra* note 27 (tracing multi-million dollar corruption from political leaders to low-level bribes by local officials).

29. JOHN GHAZVINIAN, UNTAPPED: THE SCRAMBLE FOR AFRICA'S OIL 124 (2007) (quoting Sassou-Nguesso further as stating: "You think it's a good thing to insult one's leader on every street corner? You think it fitting that the little local magistrate can come knocking on the door of the president to summon him to court?").

30. *Id.* at 147 (presenting this quote as the President's response, in part, to American efforts to convince the Popular Movement for the Liberation of Angola to hold elections).

31. HUMAN RIGHTS WATCH, "TRANSPARENCY AND ACCOUNTABILITY IN ANGOLA": AN UPDATE 1 (2010) [hereinafter "TRANSPARENCY AND ACCOUNTABILITY IN ANGOLA"], *available at* http://www.hrw.org/sites/default/ files/reports/angola0410webwcover_1.pdf.

country is perceived as corrupt, investors are more likely to expect the solicitation of bribes and therefore preemptively offer bribes, adding fuel to the fire.[32] For example, Nigeria has developed, correctly or incorrectly, a widely-held reputation as one of the most corrupt countries in Africa.[33] This prompted the U.S. Secretary of State—America's highest ranking diplomat—to say in January 2010 that the level of Nigeria's "corruption is unbelievable."[34] Once a reputation for corruption builds and investors and businesses attach the label to a given country, it becomes exceedingly difficult to shed the moniker. Changing these deeply-held perceptions requires authentic, holistic reform, consistent demonstration of those reforms to investors, and plenty of time.[35]

2. Other Perils

In addition to corruption, other related factors pose risks to investors and businesses seeking to profit on the continent. Unstable political and business environments and uncertain sources of information pose significant hazards.[36] One of the most insidious factors businesses encounter is poor infrastructure. African

32. Bernadette M. Gawanas, Op-Ed., *Africa: What Really Causes Corruption in Africa? Particularly in Country?*, NEW ERA (Dec. 4, 2009), *available at* http://allafrica.com/stories/printable/200912071167.html (describing the snowball effect of corruption and how it becomes an acceptable way of life).

33. *Corruption Perceptions Index 2010*, TRANSPARENCY INT'L, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last visited Feb. 1, 2011) (ranking Nigeria 134 out of 178 countries in terms of corruption with a score of 2.4 out of 10).

34. *Gus Lubin & Lawrence Delevingne Corruption In Africa's 'Best Countries' Can Still Crush Investors*, BUS. INSIDER (Feb. 4, 2010, 8: 42AM), http://www.businessinsider.com/corruption-in-africas-best-countries-can-still-crush-investors-2010-2#no-5-nigeria-6 (indicating the full quote from Secretary Clinton as: "There has to be a recognition that in the last 10 years, a lot of indicators about the quality of life in Nigeria have gone in the wrong direction. Quality-of-life factors in the country like literacy and health care are deteriorating. The corruption is unbelievable.").

35. *See* Okechukwu Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus* 34 N.Y.U. J. INT'L L. & POL. 397, 406-07 (2002) (emphasizing that anti-corruption laws must be combined with substantial changes to cultural attitudes and economic systems).

36. *See id.* at 413 (explaining that dishonest leadership and the marketplace ideology encourage the acceptance of bribes as inevitable and make it easier to operate through corruption where there is escape from regulations through payoffs or kickbacks).

infrastructure, in particular power generation, notably lags behind other developing regions.[37] Poor power infrastructure alone lops off as much as 1-2% of Africa's GDP.[38] The continent also suffers from markedly poor road and air networks.[39] Overall, poor infrastructure depresses productivity in Africa by as much as 40%.[40]

It is corruption, however, that poses the biggest threat to sub-Saharan Africa's future. Corruption erodes the rule of law, the foundation for economic development.[41] Poor infrastructure, along with numerous other negative social troubles, is exacerbated by high levels of corruption.[42] Corruption and its associated ills not only spook investors, but also relegate the countries in which they flourish to sub-par growth and consistently poor standards of living.[43] With few exceptions, including South Africa, Mauritius, Seychelles and Botswana, the peoples of sub-Saharan Africa remain extraordinarily poor.[44] Additionally, over half of the world's poor live in Africa, limiting the ability of domestic consumers to help drive economic

37. *See* AGENCE FRANÇAISE DE DÉVELOPPEMENT & THE WORLD BANK, *supra* note 7, at 1, 3 (noting that although sub-Saharan Africa possessed almost three times the power generating capacity per million people as compared to South Asia in 1970, by 2000, South Asia possessed twice the capacity per million people than Africa).

38. *Id.* at 5.

39. *See* Kamndaya, *supra* note 20 (reporting that most current transit links only connect African countries to Europe and the United States, but not other parts of Africa).

40. AGENCE FRANÇAISE DE DÉVELOPPEMENT & THE WORLD BANK, *supra* note 7, at 2 (adding that infrastructure constraints are at least as important as crime, bureaucracy, corruption, and financial markets in depressing productivity).

41. *See* Reagan R. Demas, *All Hands on Deck: Collaborative Global Strategies in the Battle Against Corruption and Human Trafficking in Africa*, 6 U. ST. THOMAS L.J. 204, 205-06 (2008) (detailing the consequences of such corruption as including rights violations, prevalent crime, and even war).

42. *See id.* (describing the mutually reinforcing cycle of destabilized political systems, decreased investment, and widespread poverty).

43. *See* Gbenga Lawal, *Corruption and Development in Africa: Challenges for Political and Economic Change*, 2 HUMAN. & SOC. SCI. J. 1, 4 (2007) (discussing the social and economic effects of corruption, including the lack of social services typically available to the poor in less-corrupt states).

44. Xavier Sala-i-Martin, The World Distribution of Income: Falling Poverty and . . . Convergence, Period(*) 22 (Oct. 9, 2005) (draft paper) (on file with Columbia University), *available at* http://www.columbia.edu/~xs23/papers/pdfs/World_Income_Distribution_QJE.pdf (indicating that these countries were the only African countries where the poverty headcounts did not increase from 1970-2000).

growth and serving to maintain the continent's dependence on exports.[45]

3. The Curse of Resources

Somewhat paradoxically, one of sub-Saharan Africa's largest economic engines actually inhibits breakout economic growth. The continent's focus on the extraction and exportation of oil and other natural resources hinders growth by subjecting it to the "resource curse,"[46] and reduces incentives for the United States and other Western oil-importers to take effective stands against corruption in Africa.[47]

Today, sub-Saharan Africa's economies are driven primarily by the exportation of natural resources, including oil, metals, and wood.[48] The global petroleum industry since 1990 invested well over $20 billion in African exploration and production activities.[49] The heavy exportation of natural resources inflates the value of a

45. *See* U.N. CONFERENCE ON TRADE & DEV., THE LEAST DEVELOPED COUNTRIES REPORT 2002: ESCAPING THE POVERTY TRAP, at 137, U.N. Doc UNCTAD/LDC/2002, U.N. Sales No. E.02.II.D.13 (2002) (noting the correlation between poverty and export commodity dependence through trade mechanisms); *see also* Sala-i-Martin, *supra* note 44, at 22–23 (observing that while only 10% of the world's population lives in Africa, those people account for 67.8% of the world's poor).

46. *See, e.g.*, *'The Resource Curse': Why Africa's Oil Riches Don't Trickle Down to Africans*, KNOWLEDGE@WHARTON (Oct. 31, 2007), http://knowledge.wharton.upenn.edu/article.cfm?articleid=1830 [hereinafter *'The Resource Curse'*] (indicating that Africa's people are hurt by the resource curse due to exports of oil). The resource curse, also known as "Dutch disease," was first recognized in the 1960s in the Netherlands, where the discovery of large quantities of natural gas led to an increase in the value of its currency and made other Dutch exports less competitive on the global market. *Id.*; Collier, *supra* note 5, at 4 n.2.

47. *See* Kirsten Korosec, *Bono Versus Big Oil: The Resource Curse Battle Moves to the SEC*, BNET (Aug. 17, 2010), http://www.bnet.com/blog/clean-energy/bono-versus-big-oil-the-resource-curse-battle-moves-to-the-sec/2284 (reporting the political tension between western petroleum companies and anti-corruption legislation due to the potential for companies to report profits from oil and gas extraction).

48. ORG. FOR ECON. COOPERATION & DEV. [OECD], THE RISE OF CHINA AND INDIA: WHAT'S IN IT FOR AFRICA? 3 (2006) [hereinafter THE RISE OF CHINA AND INDIA], *available at* http://www.oecd.org/dataoecd/54/62/36905545.pdf (explaining that these export markets are driven increasingly by Asian and Indian demand).

49. *'The Resource Curse'*, *supra* note 46 (estimating that another $50 billion will be invested in Africa before the end of the decade).

country's currency and incentivizes workers to shift into the booming resource business, wilting other lower-paying but vital domestic industries such as agriculture and textiles.[50] The extinction of local staple industries leads to the importation of goods previously produced and sold within the country.[51] In essence, when a poor or mismanaged country discovers substantial, exportable natural resources, market forces make it harder for other domestic industries to survive, and locals are forced to purchase more expensive imported staple goods.[52] Gabon, which produces and exports approximately 300,000 barrels of oil a day, is covered by jungle in which bananas thrive.[53] Nevertheless, the country imports most of its bananas from Cameroon because the Gabonese banana industry withered after oil became the biggest industry.[54]

More importantly, in countries without an enforced rule of law or accountable leadership, the extraction and exportation of natural resources and resulting influx of foreign currency results in a frenzied political contest for the incoming cash.[55] Where they can get away with it, these officials, such as Presidents, Ministers of Mines, or other high-ranking officeholders with control over commodities and access to incoming foreign currency, siphon away valuable funds that would otherwise go into public coffers and stash it away in foreign bank accounts or French villas.[56] Opaque public bookkeeping and a lack of revenue monitoring make it more likely that these funds end up in the pockets of the elite instead of funding the country's

50. *See* Patrick J. Keenan, *Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth*, 27 BERKELEY J. INT'L L. 84, 105-106 (2009) (labeling this labor shift as the "resource movement effect" and describing a related "spending effect" through which higher incomes from resource sales increase the purchase of goods); *see also* THE RISE OF CHINA AND INDIA, *supra* note 48, at 3 (explaining that most of Africa's trade growth is tied to raw material exports).

51. *See* THE RISE OF CHINA AND INDIA, *supra* note 48, at 4 (noting that the impact on local industry is particularly sharp in the labor-intensive garment sector).

52. '*The Resource Curse'*, *supra* note 46.

53. *Id.*

54. *Id.*

55. *See* Collier, *supra* note 5, at 3 (explaining that the commodity booms in the 1970s were not "harnessed for transformative growth" but instead produced a highly competitive and ugly competition for revenues).

56. *See 'The Resource Curse'*, *supra* note 46 (arguing that profits from oil and other foreign investments corrupt government officials and that much of the funds corruptly obtained by these officials are stashed in Western banks).

health, education, or infrastructure.[57]

Angola presents a particularly bleak example of the conditions in which the resource curse can take hold. Oil accounts for "85[%] of public revenue in Angola,"[58] and the country's leadership relies on a centrally controlled stream of revenue from oil and gas sales and not on domestic taxation or a diversified economy.[59] As Human Rights Watch determined, "[Angola's] rulers have unique opportunities for self-enrichment and corruption, especially because there is not enough transparency or political space for the public to hold them accountable. There are enormous disincentives to relinquish political power because it is also a path to economic enrichment."[60] Angola's President, Jose Eduardo dos Santos, has entered his fourth decade of rule and while the country's records are sufficiently opaque to prevent verification, he is widely believed to be one of the richest men in Africa, if not the world.[61] Despite Angola's oil and the wealth of its elite, "68[%] of the population survives on less than a dollar a day."[62] As industries shrivel and society becomes dependent upon a revenue stream in the control of an elite few, it is not hard to see how a deepening "reliance on commodity [exports] has been shown to be at odds with poverty reduction."[63]

The extraction and exportation of oil and other commodities, while today one of the few methods of wealth transfer from developed

57. *See id.* (explaining that the government officials get away with this because the governments are not dependent on income taxes and, thus, are not held accountable to the people).

58. Mario de Queiroz, *Angola: Wealth for Just a Few*, INTER PRESS SERV. NEWS AGENCY (Jan. 15, 2005), http://ipsnews.net/africa/interna.asp?idnews=21948. Angola contributed an estimated $17.8 billion from oil sales between 1997 and 2002 to its state coffers. *Id.*

59. "TRANSPARENCY AND ACCOUNTABILITY IN ANGOLA", *supra* note 31, at 3 (noting that a centrally managed revenue stream provides government elites with unchecked control).

60. *Id.*

61. David Blair, *Africa's Oil Boom Shifts Balance of Power*, TELEGRAPH.CO.UK (July 17, 2008, 10:07 PM), http://www.telegraph.co.uk/mews/worldnews/africaandindianocean/angola/2420477/africas-oil-boom-shifts-balance-of-power.html.

62. *See* Queiroz, *supra* note 58 (indicating that the country's population is in need because, despite the oil and diamond revenue, Angola's government spends only half that spent by neighboring countries on basic services such as health and education for its people).

63. THE RISE OF CHINA AND INDIA, *supra* note 48, at 4.

countries to African countries, fails on its own to foster sustainable development in Africa.[64] Nigeria raked in approximately $700 billion in oil revenue, yet the country still ranks only 158th out of 182 countries on the United Nations' Human Development Index.[65] In the process, Nigerians face total yearly oil spills of eleven million gallons—the equivalent to an Exxon Valdez spill—every year.[66] But the global thirst for oil continues, and African oil reserves are tempting alternatives for a world dominated by Middle Eastern oil.[67] In 1960, the world consumed twenty-one million barrels of oil per day; by 2004, consumption increased by 285% to eighty-one million barrels per day.[68] African oil output is estimated to almost double between 2002 and 2025.[69] A "third of the world's new discoveries of oil since 2000 have taken place in Africa,"[70] and analysts believe the

64. *See* AFR. OIL POLICY INITIATIVE GRP., AFRICAN OIL: A PRIORITY FOR U.S. NATIONAL SECURITY AND AFRICAN DEVELOPMENT 12 (2002), *available at* http://www.iasps.org/strategic/africawhitepaper.pdf ("Oil revenues have helped to prop up dictatorships (Nigeria under Sani Abacha), prolong wars (Angolan civil war), devastate residential environments (the Niger Delta), and obstruct transparency in commercial transactions (the primary reason for World Bank involvement in Chad-Cameroon Pipeline Project).").

65. U.N. DEV. PROGRAM [UNDP], HUMAN DEVELOPMENT REPORT 2009: OVERCOMING BARRIERS: HUMAN MOBILITY AND DEVELOPMENT 169 (2009) [hereinafter HUMAN DEVELOPMENT REPORT 2009], *available at* http://hdr.undp.org/en/meia/HDR_2009_EN_Complete.pdf (placing Nigeria in the "Medium Human Development" category, though only one spot above the "Low Human Development" category); Michael Watts, *Nigeria at a Tipping Point*, HUFFINGTON POST (Aug. 12, 2009, 5:17 PM), http://www.huffingtonpost.com/michael-watts/nigeria-at-a-tipping-poin_b_257969.html (citing an International Monetary Fund report which states that Nigeria has accumulated $700 billion in revenue since 1960, but more than three quarters of that revenue accrues to only 1% of the population).

66. Adam Nossiter, *Far From Gulf, a Spill Scourge 5 Decades Old*, N.Y. TIMES, June 16, 2010, http://www.nytimes.com/2010/06/17/world/africa/17nigeria.html?_r=1&pagewanted=print ("Perhaps no place on earth has been as battered by oil, experts say, leaving residents [of Nigeria] astonished at the nonstop attention paid to the gusher half a world away in the Gulf of Mexico.").

67. Recent political tensions and increased uncertainty in certain Middle Eastern oil producing states (including Libya, Bahrain and Iran) will likely increase the demand for African oil in the future.

68. Michael Klare & Daniel Volman, *The African 'Oil Rush' and US National Security*, 27 THIRD WORLD Q. 609, 610 (2006) (explaining that petroleum accounts for 40% of the global energy supply).

69. *Id.* at 611 (estimating that, in that time frame, Africa's oil production will increase from 8.6 million barrels per day to 16.4 million barrels per day).

70. *'The Resource Curse'*, *supra* note 46.

continent could possess considerable undiscovered reserves.[71] The continent's oil is of high quality,[72] and "under almost any scenario Africa will become an increasingly important supplier to the world's energy markets in the next decade."[73]

C. IMPORTANCE OF THE RULE OF LAW

Africa's growth is dependent upon the establishment of a rule of law and official accountability.[74] Sub-Saharan Africa's emergence from the global recession of 2008-09 and continued economic development will hinge on the success of its battle against corruption, particularly in light of past misappropriation of oil revenue and the potential for further economic harm under the resource curse.[75]

However, the battle against corruption in Africa will not be easy. The presence of substantial natural resource wealth controlled by an elite few, without an enforced rule of law, encourages private actors to bribe those unaccountable elite in exchange for access to those resources.[76] There is a critical need for consistent, credible enforcement of corruption laws on both the supply- and demand-sides,[77] including laws regulating the behavior of multinationals and

---

71. *See* Stephanie Hanson, *China, Africa, and Oil*, COUNCIL ON FOREIGN RELATIONS (June 6, 2008), http://www.cfr.org/publication/9557/china_africa_and_oil.html (noting, however, that in 2008 Africa held only 9% of the world's known reserves as compared to 62% held by Middle East).

72. *See* NAT'L ENERGY POLICY DEV. GRP., NATIONAL ENERGY POLICY 8-11 (2001), *available at* http://www.ne.doe.gov/pdfFiles/nationalEnergyPolicy.pdf (explaining that such quality is important in order to take advantage of refining centers on the U.S. east coast).

73. *The Gulf of Guinea and U.S. Strategic Energy Policy: Hearing Before the Subcomm. on International Economic Policy, Export and Trade Promotion of the S. Comm. on Foreign Relations*, 108th Cong. 11-12 (2004) (statement of John R. Brodman, Deputy Assistant Secretary of Energy for International Energy Policy).

74. *See supra* note 41 and accompanying text.

75. *See supra* Section I.B.3.

76. *See* Keenan, *supra* note 50, at 107 ("[A]s to corruption, there is evidence that natural resource wealth creates strong incentives for economic actors to bribe those who control access to the resources."); *see also* Elissaios Papyrakis & Reyer Gerlagh, *The Resource Curse Hypothesis and its Transmission Channels*, 32 J. COMP. ECON. 181, 188 (2004) (citing a number of economic studies on the rent-seeking competition induced by natural resource wealth).

77. The demand-side of bribery refers to public officials that "demand" bribes from economic actors. The supply-side refers to economic actors that "supply"

other companies operating in Africa and laws prohibiting public officials in Africa from demanding or accepting bribes.[78]

II. THE SUPPLY-SIDE BATTLE AGAINST CORRUPTION IN AFRICA

The United States' Foreign Corrupt Practices Act ("FCPA")[79] and related laws in other OECD[80] countries are the primary supply-side anti-corruption tools in use today. The U.S. government is particularly aggressive in prosecuting private companies and individuals under the FCPA, which provides harsh penalties for offering bribes to public officials around the world, including in Africa.[81]

The FCPA prohibits U.S. issuers, domestic concerns, and other non-U.S. persons and entities, as well as their officers, directors, employees, and agents, from corruptly offering or giving anything of value to foreign officials to obtain or retain business.[82] Though there is one exception and two affirmative defenses built into the law, in general the FCPA imposes strict anti-bribery and accounting obligations on activities conducted by companies having sufficient connection to the United States.[83] Moreover, the supply-side anti-

bribes to public officials. *See* Demas, *supra* note 41, at 217–18.

78. *See id.* (providing internal affairs bureaus and the FCPA as examples of demand- and supply–side anti-corruption measures).

79. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2006).

80. OECD member countries include Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. *Ratification of the Convention on the OECD*, OECD, http://www.oecd.org/document/33/0,3343,en_2649_33731_45248993_1_1_1_1,00.html (last visited Feb. 1, 2011).

81. *See* Jeffrey Cramer, *The FCPA Landscape Has Changed: Trends in Enforcement*, KROLL (Apr. 2010), http://www.kroll.com/about/library/fraud/Apr2010/fcpa.aspx (noting that sixty cases were brought since 2005, with penalties sometimes in excess of $1.6 billion).

82. *See* 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2006) (defining bribes to include the giving of anything of value to an official, political party, or other person in order to improperly influence the official).

83. The FCPA does not apply to "facilitating" or "expediting" payments to government officials for performing essentially clerical activities or "routine governmental actions." *See id.* §§ 78dd-1(b), -2(b), -3(b). Examples include small, one-time payments for vehicle registration, visa renewal, and utilities service. The

bribery standards contained in the FCPA, in theory, are broadly accepted across the West and beyond.[84] The recently-passed and soon to be implemented U.K. Bribery Act imposes similar, if not more aggressive, standards on companies and individuals falling within its jurisdiction.[85]

specific definition of what constitutes a "facilitating" payment is unclear from the law, and in practice the scope of the exception has been narrowing in the course of government enforcement actions and settlements. David M. Howard & Elisa T. Wiygul, *FCPA Compliance: The Vanishing "Facilitating Payments" Exception?*, DECHERT ON POINT 3 (Apr. 2010), http://www.dechert.com/library/4-7-10-WCSL-Howard_and_Wiygul-FCPA_Compliance-The_Vanishing_Facilitating_Payments_Exception.pdf. Note also that most of these payments, though not actionable under the FCPA, are likely prohibited by the law of the African state in which they are paid. *See* Melissa Klein Aguilar, *Facilitation Payments Still Leave Companies Vexed*, COMPLIANCE WK. (Oct. 20, 2009), http://www.complianceweek.com/article/5638/facilitation-payments-still-leave-companies-vexed. The FCPA also provides for two affirmative defenses. First, defendants can assert that the payment made was lawful under the written laws of the foreign official's country. 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1). In practice this is extremely rare, as few if any countries' laws explicitly permit bribery. Second, it is an affirmative defense to assert that a payment was a "reasonable and bona fide expenditure, such as travel and lodging expenses, . . . related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof." *See id.* §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).

84. FCPA anti-corruption standards are embodied in numerous international instruments around the world. *See, e.g.*, Inter-American Convention Against Corruption, *opened for signature* Mar. 29, 1996, S. TREATY DOC. NO. 105-39 (1998); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998) [hereinafter Convention on Combating Bribery]; Criminal Law Convention on Corruption ch. 2, art. 2, Jan. 27, 1999, E.T.S. No. 173 [hereinafter Criminal Law Convention on Corruption I]; Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174; African Union Convention on Preventing and Combating Corruption, *opened for signature* July 11, 2003, 43 I.L.M. 5; United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003); *see also* ASIAN DEV. BANK & ORG. FOR ECON. CO-OPERATION & DEV., ANTI-CORRUPTION ACTION PLAN FOR ASIA AND THE PACIFIC Pillar 2 (2005), *available at* http://www.oecd.org/dataoecd/38/24/35021642.pdf.

85. *See generally* Bribery Act of 2010, c. 23, § 1 (U.K.). The UK law, passed in 2010 and set to go into force in early 2011, is similar to the FCPA but (1) does not contain a facilitating payments exception, (2) creates a new corporate offense of failing to prevent bribery, and (3) includes provisions for private sector bribery not involving government officials. *Id.* §§ 3, 7.

A. SUPPLY-SIDE ANTI-BRIBERY ENFORCEMENT TRENDS

Enforcement of the FCPA continued to grow over the past decade and shows no sign of abating.[86] Recent enforcement of the FCPA can be summarized in five key trends. First, the U.S. government enforces the FCPA with ever-increasing vigor, imposing larger penalties and bringing a growing number of actions against individuals.[87] Second, the U.S. government aggressively pursues its jurisdiction over the activities of non-U.S. companies with operations that touch upon the United States.[88] Third, authorities in the United

86. *See* Cramer, *supra* note 81 (emphasizing that the number of investigations and prosecutions of FCPA cases in the U.S. increased).

87. *See* Philip Urofsky & Danforth Newcomb, *FCPA Digest Reports Increased Prosecutions of Individuals, Emphasis on Industry Compliance*, SHEARMAN & STERLING LLP (Mar. 29, 2010), http://www.shearman.com/FCPA-Digest-Reports-Increased-Prosecutions-of-Individuals-Emphasis-on-Industry-Compliance-03-29-2010/ (indicating that the U.S. government charged sixteen individuals with violations of the FCPA in 2008 and forty-two in 2009).

88. FCPA settlements in the first four months of 2010 included resolutions with BAE (U.K.), Daimler (Germany), Technip (France), Panalpina (Switzerland), Pride (U.S.), Alcatel-Lucent (France), and Snamprogetti/ENI (Netherlands/Italy). *See* Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilt and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010) [hereinafter BAE Fine Press Release], *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-209.html; Press Release, Dep't of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010) [hereinafter Daimler Fine Press Release], *available at* http://www.justice.gov/opa/pr/2010/April/10-crm-360.html; Press Release, Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010) [hereinafter Technip Fine Press Release], *available at* http://justice.gov/opa/pr/2010/June/10-crm-751.html; Press Release, Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (November 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html; Press Release, Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (December 27, 2010) *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html; Litigation Release, U.S. Sec. & Exch. Comm'n, SEC Charges Snamprogetti Netherlands, B.V. with Foreign Bribery and Related Accounting Violations and ENI, S.p.A. with Books and Records and Internal Controls Violations—ENI and Snamprogetti to Pay Jointly $125 Million in Disgorgement; Snamprogetti Also to Pay a Criminal Penalty of $240 Million (July 7, 2010) [hereinafter Snamprogetti/ENI Fine Press Release], *available at* http://www.sec.gov/litigation/litreleases/2010/lr21588.htm.

States continue to encourage companies to disclose possible misconduct and to cooperate with law enforcement authorities in FCPA investigations.[89] Fourth, there is increasing cooperation among law enforcement agencies in the United States and beyond, particularly in Europe.[90] Finally, the U.S. government consistently imposes a "probation period" on indicted companies, typically utilizing independent monitors or other reporting mechanisms to monitor progress of offending corporations for a fixed period beyond the date of case settlement.[91]

While overall enforcement of the FCPA increased significantly over the past decade, enforcement of the law against companies operating in Africa is particularly pronounced. In the first four months of 2010 alone, four noteworthy FCPA settlements were released involving allegations of bribery in Africa, including: bribery relating to the sale of an aircraft in South Africa; air traffic control equipment in Tanzania; vehicles in Nigeria, Ivory Coast, and Egypt; and other assorted violations in Nigeria.[92] These four cases alone resulted in over $1.3 billion in fines paid.[93]

---

89. *See* Melissa Klein Aguilar, *FCPA Research Stirs Debate on Voluntary Disclosure*, COMPLIANCE WK. (Aug. 6, 2010), http://www.complianceweek.com/blog/aguilar/2010/08/06/fcpa-research-stirs-debate-on-voluntary-disclosure/&printable=1 (discussing a U.S. government spokeswoman's remarks in August, 2010 indicating the U.S. Department of Justice "[has] and will continue to encourage voluntary disclosures of possible FCPA violations").

90. *See* Melissa Klein Aguilar, *Innospec Settlement Shows Latest FCPA Thinking*, COMPLIANCE WK., June 2010, at 18, 18 (noting "the high degree of cooperation among U.S. and British regulators" in a recent FCPA action).

91. *E.g.*, BAE Fine Press Release, *supra* note 88; Daimler Fine Press Release, *supra* note 87; Technip Fine Press Release, *supra* note 88. These press releases outlined probation periods between two and three years and included an independent monitor, third party compliance consultant, or other regular reporting obligations to the U.S. government relating to compliance issues as well as ongoing obligations to cooperate with other investigations and report potential misconduct.

92. BAE Fine Press Release, *supra* note 88; Daimler Fine Press Release, *supra* note 87; Technip Fine Press Release, *supra* note 88; Snamprogetti/ENI Fine Press Release, *supra* note 88.

93. *See* BAE Fine Press Release, *supra* note 88 (indicating BAE paid a $450 million fine); Daimler Fine Press Release, *supra* note 88 (specifying that Daimler paid $185 million in criminal and civil penalties); Technip Fine Press Release, *supra* note 88 (noting that Technip was assessed a $240 million fine); Snamprogetti/ENI Fine Press Release, *supra* note 88 (specifying that Snamprogetti and ENI jointly paid $125 million in disgorgement and Snamprogetti paid a

In the last two years alone, the U.S. Department of Justice has imposed a total of $579 million in disgorgement and fines for instances of bribery in Africa, including oil and gas bribes paid to Nigerian officials dating back twenty years,[94] kickbacks paid in Nigeria relating to the purchase of law enforcement equipment,[95] payments to Egyptian Air Force officials for an aerospace defense services contract,[96] and payments for the procurement of oil and gas construction projects on Nigeria.[97] Four additional settlements in 2007 involved companies bribing African officials in Rwanda, Senegal, Angola, and Nigeria.[98]

---

criminal penalty of $240 million).

94. Press Release, Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

95. Complaint at 10, United States v. Bistrong, No. 1:10-CR-00021 (D.D.C. Jan. 21, 2010) (reciting the kickback agreement in Nigeria, but noting that it ultimately did not lead to a purchase).

96. Press Release, Sec. & Exch. Comm'n, SEC Sues Former President of the United industrial Corporation Subsidiary for Authorizing the Payment of Foreign Bribes (May 29, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21063.htm (stating that the bribe was for a business award relating to an aircraft depot in Cairo).

97. Press Release, Dep't of Justice, Willbros Group Inc. Enter Deferred Prosecution Agreement and Agrees to Pay $22 Million Penalty for FCPA Violations (May 14, 2008), *available at* http://www.justice.gov/opa/pr/2008/May/08-crm-417.html (describing the agreement to award a $387 million gas pipeline contract for the Eastern Gas Gathering System to Willbros).

98. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Institutes Enforcement Action Against Bristow Group for Improper Payments to Nigerian Government Officials and Other Violations (Sept. 26, 2007), *available at* http://sec.gov/news/press/2007/2007-201.htm (indicating that the settlement with Bristow Group involved payments to Nigerian tax officials to reduce tax liability); Press Release, Dep't of Justice, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://justice.gov/criminal/pr/2007/09/09-24-07paradigm-agree.pdf (noting that in the settlement with Paradigm, who voluntarily disclosed its illegal activities, the company paid Nigerian politicians $100,000–$200,000 in order to obtain an oil and gas services contract); Press Release, Dep't of Justice, Two Former Executives of ITXC Corp Plead Guilty and Former Regional Director Sentenced in Foreign Bribery Scheme (Sept. 24, 2007), *available at* http://justice.gov/opa/pr/2007/July/07_Crm_556.html (detailing that the settlement with former executives of ITXC Corporation alleged payments were made to employees of state-owned telecommunications carriers in Nigeria, Rwanda, and Senegal); Press Release, Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined

Perhaps the most intriguing recent Africa-related FCPA case stems from a U.S. government sting in which twenty-two individuals were indicted for offering to pay money in exchange for law enforcement supply contracts.[99] The sting involved a fake African Minister of Defense from an African country offering to give law enforcement equipment supply contracts to the defendants in exchange for a kickback.[100] The sting and resulting prosecutions broke new ground in FCPA enforcement, marking the first time U.S. officials utilized such tactics.[101]

The heavy enforcement of the FCPA and other supply-side anti-corruption laws against corporations and individuals operating in Africa is not surprising given the high incidence of corruption on the continent. FCPA practitioners attest to the fact that the high enforcement levels contributed to a substantial growth in the breadth and depth of the anti-corruption compliance programs of U.S. and European companies operating in emerging markets.[102] Companies, particularly those with substantial connections to the United States and significant operations in Africa or other emerging markets, are dedicating more and more financial and human resources to complying with the FCPA and preventing, detecting, and responding

Sanction Ever Imposed in FCPA Case (April 26, 2007), *available at* http://justice.gov/opa/pr/2007/April/07_Crm_296.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Baker Hughes with Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007), *available at* http://www.sec.gov/news/press/2007/2007-77.htm (indicating that the settlement with Baker Hughes Inc. alleged payments in Kazakhstan as well as payments made to the state oil company Sonangol in Angola and Nigerian officials in exchange for business).

99. *See* Press Release, Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://justice.gov/opa/pr/2010/January/10_crm_048.html (recognizing that the case was the largest DOJ anti-bribery case against individuals).

100. *See id.* (stating that the investigation also involved an undercover FBI agent acting as a middleman in the bribe scheme).

101. *Id.*

102. *See* Frederic D. Firestone & Michael A. Ungar, *DOJ and SEC will Significantly Increase FCPA Enforcement Efforts*, MCDERMOTT, WILL & EMERY (Mar. 11, 2010), http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/c2bea4e1-2573-4e83-b0bf-8086e0001d96.cfm (indicating that such compliance programs should include "strong internal controls, procedures and internal audits").

to incidents of corruption within their businesses.[103] Many of these companies are even ceasing operations in countries with particularly acute corruption risks, often at substantial cost and future profit loss.[104]

B. FCPA ENFORCEMENT CHALLENGES

Bribery cannot be consummated without both a supplier and a demanding party. The enforcement of laws discouraging private actors from supplying bribes to public officials will theoretically lead to a decrease in corruption on the continent.[105] However, critical fissures in the application of the FCPA's anti-corruption principles are limiting the effectiveness of such supply-side enforcement and ultimately hampering the continent's ability to stage a strong recovery from the global recession.[106]

The principal problem with the FCPA today is the uneven enforcement of its supply side anti-corruption parameters.[107] Although the jurisdictional reach of the FCPA is broad, there are

103. *See* Fidelis I. Agbapuruonwu, *The Unique Challenges of FCPA Compliance for U.S. Companies Doing Business in Sub-Saharan Africa*, MAYER BROWN (Mar. 1, 2010), http://www.mayerbrown.com/publications/article.asp?id=8636&nid=6 (encouraging companies with operations in Africa to protect against FCPA violations through proactive steps that are sensitive to sub-Saharan Africa's unique problems).

104. *See, e.g.*, *Panalpina Quits Nigeria*, THE FCPA BLOG (Aug. 18, 2008, 10:10 PM), http://www.fcpablog.com/blog/2008/8/19/panalpina-quits-nigeria.html (discussing the withdrawal from Nigeria by Panalpina World Transport, a Swiss logistics industry leader, due to compliance concerns, and quoting Panalpina's CEO as saying: "Admittedly foreign companies operate in an ongoing uncertain and hard to assess legal environment in Nigeria. This makes it difficult for Panalpina to offer both a comprehensive service portfolio and at the same time meet the high ethical standards as outlined in Panalpina's Code of Business Conduct . . . .").

105. *See generally* Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. OF L. & SOC. SCI. 217 (2010), *available at* http://www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-102209-152942.

106. *See infra* notes 106-21 and accompanying text; Jack Gage, *The Most Corrupt Countries*, FORBES (Mar. 20, 2009, 5:45 PM), http://www.forbes.com/2009/03/20/most-corrupt-countries-bizcountries09-business-washington-corrupt-countries.html (reiterating that corruption continues to significantly prevent economic development in Africa).

107. *See infra* Part IV (analyzing the inconsistency of application in enforcement actions).

limits to its application. In particular, the FCPA can only be enforced against companies listed on U.S. exchanges or with operations touching upon the United States.[108] As a result, while the law is enforced heavily against U.S. and European companies with substantial operations touching upon the United States, very few cases are pursued against other foreign companies, such as Chinese or Russian companies.[109] At the same time, many of these countries, including China, lack FCPA-equivalent legislation and therefore do not enforce anti-corruption standards on the operations of their own companies in Africa.[110] This irregular enforcement limits the ability of the FCPA to achieve its ultimate objective—that is, decreasing the incidence of official corruption in Africa and other jurisdictions around the world. Instead, it tends to place those companies operating in Africa with a U.S. connection at a competitive disadvantage.[111] Ultimately, the current supply-side anti-corruption enforcement environment is unsustainable, and the future of the corruption battle and economic development in Africa hinges on change.

Despite the fact that thirty-eight OECD countries signed the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[112] few are noticeably enforcing

108. *See* 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a) (2006) (asserting FCPA jurisdiction over U.S. issuers, domestic concerns, and foreign persons using the U.S. mails or interstate commerce).

109. *See supra* notes 92-104 and accompanying text.

110. *See* Sam Eastwood, *Aiding Progress in Africa: Anti-Corruption Efforts for a Diverse Continent*, *in* UNDERSTANDING ANTI-CORRUPTION ISSUES IN AFRICA: AN IN-DEPTH LOOK AT RECENT DEVELOPMENTS AND UPCOMING TRENDS 21, 33 (2010) (indicating that China's laws focus on domestic corruption and lack applicability to Chinese companies operating abroad).

111. Soren Lindstrom & Curtis Riddle, *The Foreign Corrupt Practices Act: A Pickle in M&A Transactions*, THE M&A LAW., May 2008, at 6, 10 (concluding that risks and uncertainties, at least for U.S. companies contemplating mergers with or acquisitions of foreign entities, could be alleviated by the DOJ and SEC through "greater transparency in the interpretation and enforcement of the FCPA," but for the time being U.S. companies continue to operate at a competitive disadvantage).

112. *Ratification Status as of March 2009*, OECD, http://www.oecd.org/dataoecd/59/13/40272933.pdf (last visited Feb. 1, 2011); *see* TRANSPARENCY INT'L, PROGRESS REPORT 2009: OECD ANTI-BRIBERY CONVENTION 6 (2009) [hereinafter OECD PROGRESS REPORT 2009], *available at* http://www.transparency.org/news_room/in_focus/2009/oecd_pr_2009 (covering the enforcement status of thirty-six of the parties and questioning whether

foreign official bribery laws.[113] In fact, the OECD Working Group on Bribery admitted in June 2010 that "most of its member nations failed to levy a single penalty since the group established its Anti-Bribery Convention a decade ago."[114] Of all foreign bribery investigations brought against non-U.S. companies or individuals, 75% were conducted by the United States under the FCPA.[115] Transparency International found that "[eighteen] of the original [thirty-four] OECD signatory nations to the Convention . . . have taken little or no action in enforcing the national anti-bribery laws" outlined in the agreement,[116] while eleven countries moderately enforce but not at a "high enough level to provide effective deterrence against foreign bribery."[117] In fact, not long ago, offering bribes to public officials in Africa "was a perfectly normal way of doing business in many OECD countries."[118] At the time the OECD anti-bribery Convention was signed in 1997, half of OECD countries allowed bribes paid to foreign officials to be deducted from taxes.[119]

enforcement is improving or deteriorating).

113. *See* OECD PROGRESS REPORT 2009, *supra* note 112, at 8 (indicating that Transparency International reported in 2009 that "[t]he Convention is still far from achieving the goal of ending bribery in international business transactions" and classified only four countries as active enforcers and twenty-one as having little or no enforcement).

114. Channing Turner, *OECD: Few Nations Punish Bribery*, MAIN JUSTICE (June 15, 2010, 6:10 PM), http://mainjustice.com/2010/06/15/oecd-few-nations-punish-foreign-bribery (citing OECD WORKING GRP. ON BRIBERY, ANNUAL REPORT (2009), *available at* http://www.oecd.org/dataoecd/23/20/45460981.pdf). Although overall enforcement levels are increasing—263 foreign public corruption investigations were launched and 256 cases were brought in 2008, these cases involved only nineteen OECD countries. *The Long Arm of the Foreign Corrupt Practices Act*, METROPOLITAN CORP. COUNS., Nov. 2010, at 8, *available at* http://www.metrocorpcounsel.com/pdf/2010/November/08.pdf.

115. Turner, *supra* note 114 (citing a report by TRACE International).

116. Skip Kaltenheuser, *Anti-corruption—US leads the way*, INT'L BAR ASS'N (April 2010), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=21F61c45-0318041F6-89f8-3E8C01EC57B1. Conversely, "[o]f all the OECD enforcement cases since convention ratification a decade ago, the US, with about a tenth of total exports of the OECD nations, has logged half of the OECD enforcement cases." *Id.*

117. OECD PROGRESS REPORT 2009, *supra* note 112, at 8.

118. Martine Milliet-Einbinder, *Writing Off Tax Deductibility*, 220 OECD OBSERVER, Apr. 2000, at 38, 38 .

119. *See id.* (noting that even where bribes were not deductible, they were often classified as gifts or entertainment expenses, such as in the Czech Republic and Japan, respectively, and therefore nondeductible for reasons other than their moral repugnancy).

Transparency International's recent warning regarding the effectiveness and future of foreign public bribery laws was dire: "The present situation is dangerously unstable. Unless enforcement is sharply increased, existing support will erode and the Convention will fail."[120]

Outside of OECD countries, prosecutions of foreign public bribery are extremely rare.[121] Even within countries committed to enforce anti-bribery laws, the enforcement levels are patchy, and most prosecutions involve U.S. companies or companies with substantial operations in the United States. As noted by former head of the U.S. Department of Justice's FCPA enforcement section Mark Mendelsohn, more even enforcement by countries outside of the United States is critical: "I don't think we need more instruments. What we need is to see more global enforcement outside the [United States]. Quite frankly, we need to see more of those OECD countries prosecuting cases and fulfilling their obligations under the OECD Convention. That's what's going to make the difference."[122]

120. *See generally* OECD PROGRESS REPORT 2009, *supra* note 112 (reporting on three non-OECD countries—China, Russia, and India—all of which have substantial challenges to overcome if they are to make headway in the fight against foreign bribery).

121. This article does not delve into the reasons foreign bribery laws are not being passed or enforced evenly across the OECD or in other critical countries like China and Russia. Instead, the article seeks to explain the negative impact of irregular global enforcement and warn of future consequences if current trends do not shift. There are a number of reasons many countries both inside and outside of the OECD are not enforcing supply-side anti-corruption laws. These include general challenges in defining and globalizing legal norms on corruption, privacy laws, lack of whistleblower protections that make investigating improprieties within companies difficult, and cultural norms that at times view bribery as a "necessary evil" or even encourage it where a competitive advantage can be achieved. *See* Joseph P. Covington & Iris E. Bennett, *Signs of Life in International Anti-Bribery Enforcement—Recent Enforcement of Anti-Bribery Laws Outside the U.S. and Issues to Consider for a Multi-Jurisdictional Defense Strategy*, JENNER & BLOCK LLP (May 4, 2009), http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C2499%5Ccovington%20%20bennett%20pdf.pdf.

122. Kaltenheuser, *supra* note 116.

III. CHINA IN AFRICA: HOW IRREGULAR ENFORCEMENT OF ANTI-CORRUPTION REGULATIONS CAN IMPACT AFRICA

Although there is evidence of heightened enforcement of foreign public bribery laws against U.S. and some European companies operating in Africa, little progress can be seen regarding companies from non-OECD countries operating in Africa, in particular China. To understand how such uneven enforcement of supply-side anti-corruption laws can impact Africa, an overview of China's presence in Africa is instructive.

A. CHINA IN AFRICA: THE BASICS

China's economic activities in Africa increased dramatically in recent years. In 2006, Chinese companies were operating businesses in Africa worth over $1 billion.[123] Trade in the first three quarters of 2007 was over $50 billion, a 42% increase over the same time from for the prior year.[124] As of 2008, China was the second largest trading partner on the African continent behind the United States.[125] Overall, trade flows between Africa and China expanded more than tenfold between 2000 and 2009—to $107 billion.[126] Many of the activities of Chinese companies in Africa relate to the oil and gas industry,[127] as evidenced by China's oil imports from Africa recently "increasing at an annual compounded rate of [30%] . . . ."[128]

123. Keenan, *supra* note 50, at 91 (indicating this figure constituted the aggregate worth of 750 Chinese companies operating in Africa).

124. Williams Wallis, *Drawing Contours of a New World Order*, FIN. TIMES (U.K.), Jan. 24, 2008, at 1 (explaining that the growth resulted from increasing Chinese demand for African natural resources and African demand for Chinese low-cost manufactured goods).

125. Hanson, *supra* note 71 (reporting that most of the trade growth came from raw materials such as oil, copper, timber, and diamonds).

126. Emma Graham-Harrison, *China trade outweighs corruption fears for Africa*, REUTERS (Nov. 5, 2009), http://www.reuters.com/assets/print?aid=USTRES5A441220091105.

127. *See* HARRY G. BROADMAN, AFRICA'S SILK ROAD: CHINA AND INDIA'S NEW ECONOMIC FRONTIER 78 (2007), *available at* http://siteresources.worldbank.org/AFRICAEXT/Resources/Africa_Silk_Road.pdf (mentioning that oil constituted 62% of African exports to China in 2004).

128. *Id.* at 77. In addition to petroleum ventures, Chinese companies also invested in a variety of sectors, including telecommunications, apparel, fisheries and seafood farming, tourism, and transport construction. *Id.* at 2.

Despite its growing profile on the continent, China is still a relative newcomer to Africa and remains well behind Western countries in the competition for oil and gas concessions.[129] Nevertheless, Chinese companies won half of all new public works contracts in Africa in recent years.[130] As Africa grows in importance as a global oil supplier and as China's ravenous economic engine continues to demand greater quantities of fuel, Chinese involvement in Africa is primed to continue its rapid expansion.[131] The Chinese government is supporting this growth by taking significant steps to assist firms competing in Africa. The government provides political risk investment insurance to Chinese firms in Africa who are operating in China's national interest,[132] and it provides substantial tax incentives for companies with African operations.[133] Commercial medium- and long-term loans from Chinese banks are also given to Chinese companies with foreign investments.[134]

The Chinese government's "African Policy," issued in January 2006, describes the country's objectives in engaging Africa.[135] The

129. Many of the best concessions on the continent are held by U.S. or European companies, leaving China to explore less desirable locations. Keenan, *supra* note 50, at 93–94; *see* Hanson, *supra* note 71 (indicating that in 2008, China held only about 2% of Africa's oil reserves, most of which were of little interest to international oil companies because of size and quality or due to previous relinquishment by such international oil companies).

130. *See* Wallis, *supra* note 124 (attributing the success of Chinese companies to their lower overhead costs).

131. The U.S. Department of Energy estimates that China's total energy consumption will increase by over 150% between 2002 and 2025, and its net oil consumption will rise by approximately 270% over the same period. ENERGY INFO. ADMIN., DOE/EIA-0484, INTERNATIONAL ENERGY OUTLOOK 2005 89, 93 (2005).

132. *See* BROADMAN, *supra* note 127, at 268–69 (recognizing, however, that most Chinese companies do not utilize this resource).

133. *See* UNDP, ASIAN FOREIGN DIRECT INVESTMENT IN AFRICA: TOWARDS A NEW ERA OF COOPERATION AMONG DEVELOPING COUNTRIES, at 55, U.N. Sales No. E.07.II.D.1 (2007) (explaining that all Chinese enterprises overseas are exempt from corporate income tax for five successive years after beginning operations, and thereafter as long as there is a double taxation treaty in place with the other country).

134. *Id.*

135. *See generally China's African Policy*, MINISTRY OF FOREIGN AFF. OF THE PEOPLE'S REPUBLIC OF CHINA (Jan. 12, 2006), http://www.fmprc.gov.cn/end/zxxx/t230615.htm (describing the principles governing the China-Africa exchange as sincerity, friendship, equality, mutual benefit, reciprocity, common prosperity, common development, mutual support, close coordination, and the "one China principle").

document's foundation is the principle of non-intervention in the affairs of African states—or, in other words, China's "respect[] [for] African countries' independent choice of the road of development."[136] As Chinese Premier Wen Jiabao said in November 2009, "China's involvement in Africa is sincere with no strings attached—it isn't political."[137] As a result, the Chinese do not view their economic or diplomatic activity in Africa as a vehicle to pass judgment on Africa's concentration of flawed democracies and outright authoritarian regimes.[138] By its own declared policy, the Chinese government does not desire to eradicate public corruption in Africa,[139] and consequently does not impose negative consequences on its enterprises working in Africa when they pay bribes or engage in other acts of corruption on the continent.[140] Nor does China hesitate to strike lucrative business deals with regimes spurned by the West, including Zimbabwe and Sudan.[141]

B. DEFENDING CHINA IN AFRICA

Despite China's clear disinterest in changing the policies of African states, a number of commentators defend China's activities in Africa. Some point out that China's investment in Africa's infrastructure, including construction of roads and bridges, fills a

136. *Id.*

137. *Chinese Investment in Africa Faces Corruption Charges*, ALTERNATIVE ENERGY AFR. (May 12, 2010), http://www.ae-africa.com/read_article.php?NID=2026&PHPSESSID=c64070eecdf6ae22092538c10f399b98.

138. *See* Keenan, *supra* note 50, at 95 (describing Chinese investment in Africa as pure capitalism, free from conditions, and as refreshing to African leaders).

139. *See* Graham-Harrison, *supra* note 126 (explaining that China's dealings with other nations do not include conditions based on standards of human rights or governance because of its "long-standing pledge of 'non-interference' in the affairs of other nations"). One of the few conditions China does impose on any African country with which it works is that the country recognizes Taiwan as a part of greater China. *See China's African Policy*, *supra* note 135 ("The Chinese Government appreciates the fact that the overwhelming majority of African countries abide by the one China principle, refuse to have official relations and contacts with Taiwan and support China's great cause of reunification.").

140. *See generally China's African Policy*, *supra* note 135 (lacking a policy regarding consequences of corrupt dealings).

141. *See generally China to Search for Oil in Sudan*, BBC NEWS (July 2, 2007), http://news.bbc.co.uk/2/hi/6261418.stm (reporting an oil deal between China's biggest oil company and Sudan); *Zimbabwe Signs China Energy Deal*, BBC NEWS (June 12, 2006), http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/5071824.stm (reporting an energy deal between China and Zimbabwe worth $1.3 billion).

critical need on the continent.[142] While the Chinese government disclaims any interest in altering the policies or practices of its African trading partners,[143] China does highlight the ability of its investments in Africa to reduce poverty on the continent.[144]

There are also those who point out the general hypocrisy of the West in criticizing China's aggressive, market-driven activities in Africa, asserting that the United States and Europe historically behaved and continue to behave in a similar fashion.[145] They consider the "alarmist" Western view of China's activities in Africa as a product of fear—particularly fear of stronger competition on the continent. One Western banker was quoted as saying, "[j]ust because another competitor has arrived doesn't warrant this specter of the Chinese resource monster stomping all over Africa you see in the media."[146] Others do not directly counter the claim that China supports rogue states but simply note that China is not the only player in this unsavory game. One commentator suggests that the United States assigns moral criticism selectively, citing U.S. support for Pakistan and Saudi Arabia, and flatly declares that "China [is] not unique in cutting deals with bad governments and providing them arms."[147]

And then there are the numerous African governments who, unsurprisingly, welcome China's presence.[148] They appreciate

142. *See, e.g.*, Graham-Harrison, *supra* note 126 ("African and Chinese business men and academics say Beijing is filling a yawning need for key infrastructure, and Chinese firms are also shaking up moribund markets where Western companies were doing little to develop local economies.").

143. *See China's African Policy*, *supra* note 135 (suggesting further that the political atmosphere among African states is stable as a whole because of the efforts of the Organization of African Unity, African Union, and individual countries and because African countries' development is tailored to their national conditions).

144. *See id.* (noting that China supports African nations' growth by aiding in the areas of trade, investment, agriculture and infrastructure development, tourism, debt reduction, and other forms of economic assistance).

145. *See* Klare & Volman, *supra* note 68, at 622 (noting the similarity in the approaches of China and the West, both of whom used economic incentives, diplomacy, and arms deals to acquire oil assets in Africa).

146. Graham-Harrison, *supra* note 126.

147. Hanson, *supra* note 71.

148. *See* Keenan, *supra* note 50, at 95 (explaining that China is appealing because many Western states are not providing as much investment and aid as in prior years and because China's only condition is that the recipient refuse

China's "pure capitalism" engagement, which does not "attempt[] to enact social or political changes [in Africa] through the pursuit of wealth."[149] They are of course grateful that China does not require recipient countries to implement the rigorous anti-corruption measures upon which the U.S. and other Western governments frequently insist.[150] Some African officials are outspoken in their defense of the continent's right to fully engage China, including South Africa's High Commissioner in the United Kingdom:

> Why can we deal freely with Western countries who once colonized us, but not with the Chinese who have never done so. It's an absurdity. All countries are making a beeline for China. If it is good enough for Germany then why not for Africa? It is patronizing to suggest that Africa cannot discern what is in its own best interest.[151]

In the end, African governments support China's investment in the continent because it makes financial sense to them. As Ethiopia's Prime Minister Meles Zenawi bluntly stated in 2010, "[i]t's in [China's] interest to spend tens of billions of dollars in Africa and it's in our interest to have access to those tens of billions of dollars."[152]

C. CHINESE ENGAGEMENT IN SUB-SAHARAN AFRICA AND SLIPPAGE IN THE FIGHT AGAINST CORRUPTION

Is Chinese investment and engagement in Africa a net positive for the continent? Are African officials and some academics in the West justified in criticizing those who lament the potential dangers of Chinese engagement?

---

recognition of Taiwan).

149. *Id.*

150. *See* Lindsey Hilsum, *The Chinese Are Coming*, NEW STATESMAN, July 4, 2005, at 18 (noting that China has not signed onto any of the recently drafted anti-corruption conventions, making Chinese investment come with fewer procedural hurdles than Western investment). Sierra Leone's ambassador to China is quoted as stating: "We like Chinese investment because we have one meeting, we discuss what they want to do, and then they just do it . . . . There are no benchmarks and preconditions, no environmental impact assessment." *Id.*

151. Heidi Kingstone, *What fuels China's Africa Policy*, SPECTATOR.CO.UK (Feb. 13, 2008), http://www.spectator.co.uk/print/politics/all/503086/web-exclusive-what-fuels-chinas-africa-policy.thtml.

152. *Chinese Investment in Africa Faces Corruption Charges*, *supra* note 137.

It is clear that China's involvement in Africa does bring benefits such as infrastructure development, the expertise of specialized Chinese firms, and the contribution of Chinese peacekeepers in U.N. peacekeeping missions.[153] But the greatest advantage Chinese engagement brings Africa is access to foreign currency—large sums often exchanged in nontransparent natural resource deals.[154]

Two types of investments by Chinese state-owned or private enterprises in Africa are of particular interest. One category of investments involves lines of credit extended to African countries in exchange for drilling or mining concessions. These lines of credit may be used for particular development or infrastructure projects, but consistent with China's Africa Policy, African governments are typically free to use the funds as they wish.[155] A second category of investments involves loans (or grants) given to African states in support of infrastructure or other needed projects, where the loan or grant is required to be spent in a certain way.[156] While China would not require funds to be spent transparently, as other donors might, it may require the grantee to use the funds to purchase equipment or services from specified Chinese enterprises, usually selected and

153. Hanson, *supra* note 71 (praising the benefits of Chinese-African ties, which allowed for better quality infrastructure at lower cost, $10 billion in canceled bilateral debt, medical aid, and Chinese contributions to U.N. peacekeeping missions).

154. *See* Jian-Ye Wang, *What Drives China's Growing Role in Africa?* 11 (Int'l Monetary Fund, Working Paper No. WP/07/211, 2007) (indicating that the Chinese Ministry of Commerce totals direct investment to Africa at $6.6 billion for 2000 through 2006, but suggesting that official statistics may not paint the full picture because "the dividing line between trade and project financing . . . is often unclear"); *cf.* Kent Hughes Butts & Brent Bankus, *China's Pursuit of Africa's Natural Resources*, COLLINS CENTER STUDY, June 2009, at 1, 5, *available at* http://www.csl.army.mil/usacsl/publications/CCS1_09_ChinasPursuitofAfricasNaturalResources.pdf (describing an agreement between China and the Democratic Republic of Congo's national mining company, wherein China agreed to develop mining infrastructure in return for the company agreeing to grant to China concessions in two copper deposits).

155. *Cf.* Keenan, *supra* note 50, at 118 (pointing out that the condition-free nature of the funds make the loans seem like "political slush funds" as opposed to investments for financial return).

156. Sharon LaFraniere & John Grobler, *China Spreads Aid in Africa, With a Catch for Recipients*, N.Y. TIMES, Sept. 22, 2009, http://www.nytimes.com/2009/09/22/world/africa/22namibia.html (noting how Chinese investments are not without catches because recipients of Chinese aid must use it to purchase goods from Chinese companies, many of which are state-owned).

communicated behind closed doors.[157] Competitive bidding is often discouraged or even disallowed, and the terms of the deals are often opaque and rarely made public.[158]

It is important to recognize that Chinese engagements in Africa are diverse, and certainly not all involve acts of corruption.[159] However, the risk of China's current engagement philosophy in Africa, as defined in its Africa Policy, is that the offer of wealth to unaccountable regimes, unconditioned on good governance, fosters increased corruption and ultimately impedes development.[160] Rent-seeking officials[161] in Africa take advantage of the lack of transparency in resource deals with China to personally profit in the transactions.[162] The opaqueness of China's engagement in Africa therefore facilitates corruption in states where the rule of law is already severely inhibited.[163] Furthermore, by offering "no questions asked" cash deals to regimes, China erodes African states' incentives

157. *See id.* (reporting that China does not publicize deal terms such as project costs, loan terms, and repayment conditions); Jonathan Clayton, *China tightens grip on Africa with $4.4bn lifeline for Guinea Junta*, THE TIMES (U.K.), Oct. 13, 2009, http://www.timesonline.co.uk/tol/news/world/africa/article6871943.ece (pointing out that African marketplaces are now filled with plastic sandals, underwear, tools, motorcycles, and artificial flowers from China). While the United States often requires recipients of aid to purchase U.S. products and services with the aid, the process for vendor selection is typically transparent and the deal comes bundled with the usual anti-corruption checks and conditions on the recipient government. *See* Steven Radelet, *A Primer on Foreign Aid* 7 (Center for Global Development, Working Paper No. 92, July 2006) (estimating that the United States historically ties 75% of its aid to conditions).

158. LaFraniere & Grobler, *supra* note 156.

159. The author recognizes that China's engagement with Africa involves a variety of enterprises, both state and private, interacting in numerous different ways. The author does not wish to paint all Chinese investment in Africa with a single brush, but rather focus specifically on the opaque engagements by China that pose the greatest risk to the continent's development.

160. *Cf.* Keenan, *supra* note 50, at 110-15 (explaining that unconditioned wealth discourages politicians from developing other revenue streams, which can lead to overconsumption of a resource and a failure to respond to citizens' concerns).

161. Rent seeking officials in this context are government officials with control over natural resources who seek to illicitly profit from the "rents" obtained by leasing access to such resources—typically to foreign countries or enterprises.

162. *Cf. infra* notes 215-24 and accompanying text (detailing corrupt African leaders' past abuse of U.S. aid).

163. *See* Graham-Harrison, *supra* note 126 (observing that Western activists and politicians argue that China is building up corrupt regimes and receiving valuable natural resources in return).

to implement a rule of law or combat corruption. Sadly, but predictably, those rent-seeking officials who stand to personally profit defend China's opaque engagement methods.[164]

In countries where the rule of law is weak and public officials are not fully accountable to the populace, nontransparent engagement by the Chinese incentivizes unaccountable leaders to behave in abusive, self-serving ways.[165] Deals that offer cash for access to natural resources without enforcing good governance or anti-corruption measures on the recipient regimes negatively impact the economic and political health of the recipient countries.[166] Such unconditioned wealth perverts the incentives of officials with control over a country's natural resources and encourages the over-extraction of resources to the detriment of future generations.[167]

This is not to say that no country on earth can extract and trade abundant natural resources to the benefit of its people. Despite talk of the resource curse, the problem is not the presence of natural resources but rather the presence of natural resources in a country without strong public institutions and accountability for public officials. Countries with a strong rule of law and strong democratic institutions are better positioned to manage natural resources.[168] Resource wealth is detrimental to economic, political, and social development in many African states because they are ruled by unaccountable, autocratic regimes and their rule of law is either weak

164. *Cf.* Rob Crilly, *Chinese Seek Resources, Profits in Africa*, USA TODAY, June 22, 2005, at 4B (quoting a Kenyan government spokesman who said: "You never hear the Chinese saying that they will not finish a project because the government has not done enough to tackle corruption. If they are going to build a road, then it will be built.").

165. *See* Keenan, *supra* note 50, at 90 (arguing that China's investments can lead to human rights abuses because they provide leaders with access to financial resources otherwise denied to them by countries concerned with their abusive behavior).

166. *See id.* at 88-90 (explaining that the receipt of "unconditioned wealth" results in, inter alia, the consumption of resources "too quickly," the failure to "respond to the concerns of citizens," and the centralization of the decision-making process).

167. *Id.* at 114.

168. *See id.* at 111 (noting that evidence shows that resource wealth does not seem to have a detrimental effect on well-functioning democracies, whereas it has adverse affects on weaker democracies or delays transitions to democracy for other countries).

or non-existent.[169] Where unaccountable public officials possess access to unconditional funds from the natural resource trade, they no longer rely on domestic taxation to fund the operations of state, and this undermines the need for institutions or procedures that would support a sustainable system of revenue generation.[170]

On the whole, investments by the Chinese government where no governance conditions are imposed on the recipient states, i.e., no demand-side anti-corruption accountability, and by Chinese enterprises that are not required to comply with FCPA-type anti-corruption regulations, i.e., no supply-side anti-corruption accountability, are prone to reduce economic and political welfare in Africa.[171] The fact that Chinese investment in Africa provides an injection of wealth and infrastructure to the continent is only one part of the narrative. The combination of vast natural resources, unaccountable leaders, weak public institutions, and trading partners willing to ignore these conditions leads to an economic windfall for African officials—but exploitation for the African people.

D. FIVE CHINESE ENGAGEMENTS IN AFRICA

An examination of recent Chinese engagements in Africa reveals several prominent examples of African countries being harmed by natural resource deals. This harm is the direct result of a weak rule of law and no enforcement of anti-corruption or governance standards by either the Chinese or African contracting party.

1. Namibia

In 2007, China gave the Namibian government a large, low-interest loan to purchase smuggler-deterrent cargo scanners.[172] Namibian officials wanted to seek competitive bids for the scanner

169. *Cf. Africa's Year of Elections: The Democracy Bug is Fitfully Catching On*, THE ECONOMIST, July 24, 2010, at 47, 47-48 (contending that the elections in many African nations are illegitimate because they are fixed in advance or go unrecognized when an incumbent loses).

170. *See* Keenan, *supra* note 50, at 111, 114 (arguing that the presence of unconditioned wealth undermines a regime's respect for human rights because rent-seeking public officials with access to outside wealth are no longer accountable to the people for votes or taxes).

171. *E.g.*, THE RISE OF CHINA AND INDIA, *supra* note 48, at 5.

172. LaFraniere & Grobler, *supra* note 156.

purchases, but China refused and required the scanners to be purchased only from Nuctech, a state-controlled Chinese firm.[173] It was later revealed that Nuctech was run by Hu Haifeng, the son of Chinese President Hu Jintao.[174] Moreover, the firm paid $4.2 million in kickbacks to Namibian officials to seal the original loan and scanner purchase deal, and investigators found that the Namibian government actually overpaid for the scanners.[175] Shortly after the allegations broke, Namibia requested assistance in its investigation, but China refused to fully cooperate.[176] Chinese censors immediately blocked any mention of the scandal in the Chinese media and on the Internet.[177]

2. Democratic Republic of Congo

In 2008, China agreed to give $9 billion in low-interest loans to develop a joint venture, Sicomines, together with the government mining company of the Democratic Republic of Congo ("DRC").[178] In exchange for the twenty-five year term loans, China was granted concessions for "10 million tons of minerals, 6.5 million tons of refined copper, 200,000 tons of cobalt, and 372 tons of gold."[179] The deal also included large signing bonuses paid by Chinese enterprises involved in the project to Gecamines, DRC's largest state-owned

---

173. *See id.* (quoting the permanent secretary of the Namibian Finance Ministry, who worried about the Chinese insistence that "[w]e tell you from whom you buy the equipment").

174. *See generally* Sebastien Berger & Malcolm Moore, *Hu Jiantao's Son Linked to African Corruption Probe*, TELEGRAPH.CO.UK (July 17, 2009, 5:25 PM), http://www.telegraph.co.uk/news/worldnews/asia/china/5851056/Hu-Jintaos-son-linked-to-African-corruption-probe.html. Hu Haifeng was president of Nuctech until 2008 before he was promoted to party secretary of a larger Chinese state holding company. *Id.*

175. *See* LaFraniere & Grobler, *supra* note 156 (explaining that Namibia's anti-corruption commission found that Nuctech paid the kickbacks to a "front company set up by a Namibian official, who split the funds with her business partner and Nuctech's southern Africa representative, a Chinese citizen").

176. *See id.* (indicating that investigators sought Nuctech's explanation for more than two months and even traveled to Beijing, but these investigators never received answers).

177. Sharon LaFraniere & John Grobler, *Namibians Say Inquiry on China Will Expand*, N.Y. TIMES, July 31, 2009, http://www.nytimes.com/2009/08/01/world/africa/01namibia.html.

178. *Chinese Investment in Africa Faces Corruption Charges*, *supra* note 137.

179. *Id.*

mining company.[180] Shortly after the Chinese paid the loan, $23 million in signing bonuses vanished, presumably into the pockets of DRC officials.[181]

3. Zimbabwe

Facing global sanctions and skyrocketing inflation, Zimbabwe's oppressive regime led by Robert Mugabe turned to China several years ago for help.[182] Following China's commitment to provide $5 billion in loans to Zimbabwe in 2009, Zimbabwe's state-run newspaper declared, "[w]e salute China for being an all-weather friend to our country."[183] As part of its "Look East" policy, Zimbabwe gave Chinese enterprises significant stakes in previously state-owned firms, many of which involved loans in exchange for access to natural resources.[184] Unable to purchase weapons elsewhere, Zimbabwe also bought military equipment from China.[185] China's importance to the pariah regime in Harare is even reflected in the latest push by Zimbabwe's public universities to develop "required courses in Chinese history and language."[186]

180. *Id.* (noting the National Assembly of DRC investigated the missing money paid as bonuses).

181. *Id.* (indicating that the investigation into the missing signing bonuses prompted questions about transparency in China's business deals); *see also Congo-Kinshasa: Kinshasa's Missing Millions*, AFR.-ASIA CONFIDENTIAL (London), Feb. 15, 2010, *available at* http://www.allafrica.com/stories/printable/201002151711.html (indicating that the bonuses were part of a larger $50 million dollar scheme and suggesting that the investigation into the missing funds will lead to public scrutiny of the Chinese parties involved).

182. *See, e.g.*, Editorial, *Zimbabwe: Look East Policy Pays Off*, THE HERALD (Zimbabwe), July 8, 2009, *available at* http://allafrica.com/stories/printable/200907070383.html (praising China for a $950 million line of credit to Zimbabwe for economic growth and for the promotion of diplomacy).

183. *Id.*

184. Keenan, *supra* note 50, at 104; *see The "Look East Policy" of Zimbabwe Now Focuses on China* 5 (Policy Briefing Paper, Friedrich-Evert-Stiftung, November 2004) (suggesting that China is particularly interested in Zimbabwe because of its abundance of iron, chrome, and platinum).

185. *See* Keenan, *supra* note 50, at 104 (indicating that Zimbabwe needed China because of the existence of a Western arms embargo); *cf. The "Look East Policy" of Zimbabwe Now Focuses on China*, *supra* note 184 at 7-8 (describing a deal between China and Zimbabwe for fighter jets and other military vehicles as potentially threatening to regional stability).

186. Keenan, *supra* note 50, at 104.

4. Sudan

One of China's most successful African energy investments is in Sudan, another pariah state.[187] The Chinese provided weapons and military equipment to Sudan, much of which was used in Darfur.[188] China also invested in a consortium drilling for oil in Darfur, and it was alleged that Chinese companies assisted Sudanese forces in bulldozing and torching southern Sudanese villages to make way for an oil pipeline.[189] While the West spurned Sudan in response to massive human rights abuses, and Western companies abandoned valuable concessions there, China on the other hand actually increased its activity to compensate for the loss of Western participation.[190] As of 2008, 60% of Sudan's oil output was exported to China.[191]

5. Angola

Oil constitutes over 95% of all Angolan exports,[192] and corruption in Angola's oil and gas-related ministries is rampant. Between 1997 and 2002, Human Rights Watch estimates that $4.22 billion was stolen from the public treasury, roughly equivalent to the total "foreign and domestic social and humanitarian spending in Angola

187. *See id.* at 100-01 (discussing how China began selling military weapons to Sudan's government and maintaining that China's deals to buy into oil consortiums in South Sudan and the Darfur region insulated Sudan from sanctions for human rights abuses).

188. *See* Peter S. Goodman, *China Invests Heavily in Sudan's Oil Industry: Beijing Supplies Arms Used on Villagers*, WASH. POST, Dec 23, 2004, http://www.washingtonpost.com/wp-dyn/articles/A21143-2004Dec22.html (articulating how the Sudanese government utilized Chinese-made military vehicles and arms in the Second Sudanese Civil War and in the commitment of genocide during fighting in the Darfur region).

189. *See* GHAZVINIAN, *supra* note 29, at 287 (contending that according to locals, "Chinese people" in bulldozers preceded Sudanese soldiers who burnt huts, and Chinese troops continue to protect the 900-mile Chinese-built pipeline).

190. *See id.* at 288 (explaining that China clarified that it will veto any attempt by the U.N. Security Council to bring sanctions against Sudan for human rights abuses because of Sudanese sovereignty); Goodman, *supra* note 188 (noting that China National Petroleum Corp. owns the largest share (40%) of the consortium that dominates Sudan's oil fields).

191. Hanson, *supra* note 27.

192. ALEX VINES ET AL., THIRST FOR AFRICAN OIL: ASIAN NATIONAL OIL COMPANIES IN NIGERIA AND ANGOLA 41 (2009), *available at* http://www.chathamhouse.org.uk/files/14524_r0809_africanoil.pdf.

over the same period."[193] Years of civil war, fiscal mismanagement, and an economy dependent on commodity prices left Angola dependent on the International Monetary Fund ("IMF") for emergency assistance during periods of low oil prices or other hardship. When Angola sought IMF assistance in 2007, the IMF helped but conditioned assistance on democratic elections and other important governance reforms.[194] Ultimately, Angola rejected IMF assistance in favor of an equal package from China, which offered aid without transparency and accountability requirements.[195] During this time, Angola also postponed elections and rejected reforms which were expected to reduce corruption and enhance the country's rule of law.[196]

At least one study concludes that Angola benefitted from Chinese state investment in the oil and gas industry.[197] However, the question is not whether Angola benefitted, but who in Angola benefitted—either Angolan ministers and state oil company executives or the Angolan people. The fact that signature bonuses or discounts from China were requested[198] by an African government as part of tough negotiations on resource deals does not, in and of itself, mean that the arrangement benefitted the African state's people. Deals in states with a weak rule of law that financially benefit unaccountable leaders are unlikely to benefit society in the long run.[199]

193. "TRANSPARENCY AND ACCOUNTABILITY IN ANGOLA", *supra* note 31, at 1.

194. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2008: EVENTS OF 2007 81 (2008), [hereinafter WORLD REPORT 2008], *available at* http://www.hrw.org/wr2k8/pdfs/wr2k8_web.pdf (noting that donors such as the World Bank also attempted to lend Angola funds contingent on transparency and good governance, but Angola avoided them by opting to receive unconditional Chinese loans).

195. *See* John Reed, *Angolan Oil Likely to Raise Transparency Issues*, FIN. TIMES (London), Oct. 11, 2005, at 13, 13 (pointing out that China's Eximbank loaned $2 billion to Angola to rebuild infrastructure crippled by Angola's civil war).

196. *See* WORLD REPORT 2008, *supra* note 194, at 81 (citing a failure of foreign governments and intergovernmental organizations to publicly condemn Angola for human rights abuses and convince them to set election dates).

197. *See* VINES ET AL., *supra* note 192, at 3 (finding that the China-Angola relationship was "nurtured with care and grew steadily in a pragmatic but disciplined way to the mutual advantage of both countries").

198. *Id.* at 28.

199. *See* Hanson, *supra* note 71, (remarking that in 2007, China offered $2 billion in loans to Angola in exchange for future oil production stakes on condition that the loaned funds be spent on Chinese companies building schools, roads, and

E. LESSONS FROM CHINESE ENGAGEMENT IN AFRICA

The above five incidents share several commonalities. First, they all involved foreign investment where no conditions of good governance or transparency were mandated, i.e. a demand-side failure.[200] Second, no anti-corruption standards were imposed on the Chinese entity involved in the deal, i.e., a supply-side failure.[201] Third, the recipient African country is ruled by an undemocratic regime, with the exception of Namibia, and is plagued by unaccountable leaders and a poor or non-existent rule of law.[202]

As stated, this paper does not wish to demonize all Chinese enterprises in Africa as corrupt and ruthless. Nor does it seek to glamorize U.S. and other Western engagement in Africa. The actions of U.S. and other Western companies operating in Africa are not altogether different from the actions of Chinese enterprises because many are profit-driven, resource extraction deals that enhance the resource curse threat and are rarely, if ever, guided by the best interests of Africans.[203] The key distinction is that the United States and many other Western states impose strict demand-side anti-corruption and other governance standards on their state aid to Africa, and the United States applies strict supply-side anti-corruption measures against its private enterprises operating on the continent.[204] When properly enforced, these measures can better align the incentives of economic actors engaging Africa and reduce the

other infrastructure, but these projects have been halted or seriously delayed).

200. *See supra* Part III.D (detailing Chinese deals with Namibia, the Democratic Republic of the Congo, Zimbabwe, Sudan, and Angola where the sole condition was the purchasing of Chinese goods).

201. *See supra* Part III.D (mentioning that China is not a member of the OECD and therefore not subject to its policies).

202. *See supra* Part III.D (describing Namibia, the Democratic Republic of the Congo, Zimbabwe, Sudan, and Angola as countries with corrupt leaders).

203. *See* Mandy Turner, *Scramble for Africa*, THE GUARDIAN (U.K.), May 2, 2007, http://www.guardian.co.uk/environment/2007/may/02/society.conservationandendangeredspecies1/print (describing the race between the United States, France, Britain, China, and India for Africa's timber, oil, minerals, diamonds, and natural gas – a race that includes the construction of U.S. military bases).

204. *See supra* text accompanying notes 79-104 (explaining that the U.S. FCPA is a primary supply-side-anti-corruption tool); *see also* Radelet, *supra* note 157, at 7 (estimating that the U.S. historically ties 75% of its foreign aid to conditions, which can add costs and "reduc[e] its impact on recipient countries").

incidence of bribery and other forms of public corruption. China not only does not impose such standards, but it also explicitly rejects any intention or desire to impose such standards.[205]

Some vocal critics of Chinese investment in Africa go overboard with their rhetoric. One article in a major Western publication, titled *How China Has Created a New Slave Empire in Africa*, declared that "[n]ow a new great power, China, is scrambling for wealth, power and influence in this sad continent, without a single illusion or pretence."[206] Such oratory presents an unfair or inaccurate assessment of China's activities in Africa. It cannot, however, be denied that China's policy of engagement in Africa refuses to shun ruthless dictators[207] and, to some degree, facilitates official corruption.[208] Nor is the fear of Chinese bribery in Africa baseless or mere speculation; Transparency International rated China next to last on its 2006 Bribe Payers Index for its measured propensity to pay bribes.[209]

China should change its engagement practices in Africa, jettisoning its policy of non-interference and enforcing good governance and anti-corruption standards. In the end, however, China is not the real problem. Official corruption in Africa, nurtured

205. *See China's African Policy*, *supra* note 135 (stating that the only condition recipients of Chinese aid must agree to is to support the one China principle).

206. Peter Hitchens, *How China Has Created a New Slave Empire in Africa*, MAILONLINE (Sept. 28, 2008, 12:00 PM), http://www.dailymail.co.uk/news/worldnews/article-1063198/PETER-HITCHENS-How-China-created-new-slave-empire-Africa.html.

207. *See* Keenan, *supra* note 50, at 103 (arguing that Robert Mugabe could not have remained in power in Zimbabwe without China's support because China supported Mugabe's party during a "power struggle").

208. U.S. diplomatic cables recently released by Wikileaks quote a senior U.S. official in Africa describing China as "a very aggressive and pernicious economic competitor with no morals." *Wikileaks: U.S. monitors 'aggressive' China in Africa*, BBC NEWS (December 9, 2010), http://www.bbc.co.uk/news/world-africa-11955516 (quoting the same U.S. official as writing: "The United States will continue to push democracy and capitalism while Chinese authoritarian capitalism is politically challenging. The Chinese are dealing with the Mugabe's and Bashir's of the world, which is a contrarian political model.").

209. TRANSPARENCY INT'L, BRIBE PAYERS INDEX (BPI) 2006: ANALYSIS REPORT 4 (2006), *available at* http://www.transparency.org/content/download/9757/71853/file/BPI_2006_Analysis_Report_270906_FINAL.pdf (giving China an average score of 4.62 out of a possible 10).

by the lack of a rule of law, is the crisis.[210] The actions of foreign companies and states operating in Africa can help solve the primary problem by incentivizing change and reducing corruption from both the supply- and demand-sides, but lasting reforms in the rule of law and transparency of leadership must take place before foreign investment can truly flourish on the continent.[211] The international community must heighten its efforts to bring about these changes.

IV. CORRUPTION IN AFRICA AND LAGGING DEMAND-SIDE ENFORCEMENT

Over thirty years after passage of the FCPA, corruption in Africa continues at what seems to be an unabated pace. Corruption still impacts all aspects of life in sub-Saharan Africa, where daily life is marred by a broken rule of law.[212] In particular, corruption erodes the health and education sectors of sub-Saharan Africa society, as health care leakage[213] and educator absenteeism[214] lowers life spans and sets up the next generation of Africans for failure. Additionally, corruption in conjunction with a weak rule of law means many African countries collect only half of the anticipated taxes, especially in resource-rich countries with little incentive to develop their tax bases.[215] As an example of the extent of corruption of African

210. *See supra* Part I.B.1 (describing corruption as the largest hindrance to Africa's economic growth).

211. *See supra* text accompanying notes 25-27 (estimating that Africa loses 25% of its GDP, or $150 billion, to corruption each year).

212. *See* THE WORLD BANK, AFRICA'S DEVELOPMENT INDICATORS 2010: SILENT AND LETHAL: HOW QUIET CORRUPTION UNDERMINES AFRICA'S DEVELOPMENT EFFORTS 14 (2010), *available at* http://siteresources.worldbank.org/AFRICAEXT/Resources/english_essay_adi2010.pdf. (finding that in nearly half the countries in sub-Saharan Africa, "more than 50[%] of firms reported an expectation of having to make informal payments to 'get things done'").

213. *See id.* at 11 (defining "leakage" in the context of health care as the difference between resources designated for the health industry and the actual amounts received by the industry). Health care leakage rates in sub-Saharan Africa range from 38% in Kenya to 99% in Chad. *Id.*

214. *See id.* at 7 (noting that a UNICEF survey found that "more than half the teachers in Tanzania and Uganda were absent at least one day" per week, while 25% were absent two or more days).

215. *AEO finds Africa hit by the crisis but set to rebound*, OECD (May 24, 2010), http://www.oecd.org/document/33/0,3343,en_2649_33731_45248993_1_1_1_1,00.html (describing how some countries collect few taxes, but other countries such as Kenya, Morocco, Ghana, and Cape Verde receive nearly three

government officials, the Ibrahim Foundation, which grants a $5 million prize annually to "a democratically elected former African Executive Head of State or Government who has served their term in office within the limits set by the country's constitution and has left office," was unable to identify a single candidate worthy of the award for the past two years.[216] Unfortunately, the future is not particularly encouraging on the corruption front.

One of the key reasons corruption thrives in sub-Saharan Africa is that demand-side anti-corruption enforcement is lagging. African states are not investigating and prosecuting public officials who demand and accept bribes, and developed countries are not using the tools at their disposal to help Africa end corruption and structure their countries for sustainable development.[217] Little credible diplomatic pressure is placed on African states to reform, primarily due to the political considerations of oil access, which often run counter to the goal of ending corruption in Africa.[218]

African dictators use many different aspects of the U.S. financial system to launder corrupt funds, including through U.S. escrow

times what is expected).

216. Press Release, Mo Ibrahim Found., Mo Ibrahim Foundation Announces Decision Not to Award 2010 Ibrahim Prize (June 13, 2010), *available at* http://www.moibrahimfoundation.org/en/media/get/20100614_130610-news-release-2010-ibrahim-prize-announcement.pdf (announcing that the Foundation did not award a prize for the second year in a row). The Foundation attempted to put a positive spin on the situation by noting that "[t]he standards set for the Prize winner are high, and the number of potential candidates each year is small." *Id.* In reality the standards are quite simple; they are only made difficult by the fact that Africa is a continent chock-full of dictators and authoritarian regimes. *See generally Africa's Year of Elections: The Democracy Bug is Fitfully Catching On*, *supra* note 169, at 47 (finding that while a handful of African states recently held or are about to hold elections, many of these elections are illegitimate because they are "fixed").

217. *See, e.g.*, *South Africa Seen Not Doing Enough to Combat Bribery*, IN-DEPTH NEWS, July 22, 2010, *available at* http://www.australia.to/2010/index.php?option=com_content&view=article&id=4045:south-africa-seen-not-doing-enough-to-combat-bribery&catid=1:latest-news&Itemid=201 (summarizing an OECD report finding no prosecutions for bribery in South Africa and recommending that South Africa implement special investigators and prosecutors to combat bribery).

218. *See supra* Part I.B.3 (explaining that market forces behind the "curse of resources" reduce incentives for developed nations to take stands against corruption and shift focus to a particular industry, such as oil, which causes the extinction of other domestic industries).

agents, energy considerations, and even universities.[219] The ability to launder money stolen from African state coffers is a critical component of any tyrant's plan for self-enrichment; without it, seized funds are difficult to use outside of the dictator's home country. In February 2010, the U.S. Congress highlighted several particularly egregious instances where unaccountable African leaders of oil producing states freely used the U.S. financial system to launder funds stolen from the African people.[220] These instances included the secretive transfer of millions of dollars into U.S. bank accounts by Gabon's President to purchase military equipment and to finance the lavish lifestyle of his daughter,[221] the wiring of $50 million by Nigeria's former Vice President into the United States to pay for suspect consulting services,[222] and a supplier of arms to the Angolan government who used thirty Bank of America accounts in the United States to launder Angolan government funds and transfer those funds to accounts around the globe.[223] In each of these instances, U.S. laws and mechanisms designed to prevent corrupt officials from exploiting the U.S. financial system and reaping the benefits of their ill-gotten gains failed miserably.

Family and friends of Equatorial Guinea's dictator are successful in finding support in the United States for their corrupt rule.

219. *See* STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV'T. AFFAIRS, 111TH CONG., KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES 1-6 (Comm. Print 2010) [hereinafter SUBCOMM. REPORT ON FOREIGN CORRUPTION] (summarizing situations where corrupt government officials of Equatorial Guinea, Gabon, Nigeria, and Angola used U.S. lawyers, realtors, escrow agents, lobbyists, shell corporations, bank accounts, and a university to launder funds).

220. *See id.* (describing how the wife of Atiku Abubakar, the former Vice President in Nigeria, helped her husband launder $40 million into the U.S. through wire fraud).

221. *See generally id.* at 108-173 (detailing how Gabon President El Hadj Omar Bongo Ondimba used a U.S. lobbyist and three banks to launder funds in the U.S. financial system and purchase U.S.-built armored cars and cargo aircrafts).

222. *See generally id*. at 174-243 (considering how the U.S.-born wife of Nigerian Vice President Atiku Abubakar assisted her husband in using U.S. bank accounts, offshore shell corporations, and an American University to launder funds from 2000 to 2008).

223. *See generally id.* at 244-325 (examining how an Angolan arms dealer, government official, and private bank that caters to "politically exposed persons" used accounts at Bank of America, Citibank, HSBC, and other small, private U.S. banks to bring funds into the United States).

Exploiting gaping holes in U.S. money laundering laws, from 2004 to 2008 the son of Equatorial Guinea's President, Teodoro Nguema Obiang, moved $110 million in pilfered state funds to the United States with the help of U.S. lawyers, bankers, and real estate agents, which he used to purchase a $30 million Malibu mansion and a $38.5 million Gulfstream jet.[224] As early as 1997, U.S. oil companies were making payments to Equatorial Guinea, half of which were diverted into Obiang's private accounts. Many of those accounts were with Riggs Bank in the United States, which at one point managed as much as $700 million in funds for Equatorial Guinea's officials and family members.[225]

Equatorial Guinea's unsavory regime was the beneficiary of another key failure of the United States to enforce an important demand-side anti-corruption measure. In 2004, President Bush issued Presidential Proclamation 7750, denying entry to the United States foreign officials who engage in serious corruption, and Congress later passed supporting legislation.[226] Nevertheless, Teodoro Obiang was welcomed with open arms into the United States and given free access to his Malibu home, private jet, and fleet of luxury cars.[227] This access is granted despite the fact that U.S. officials believe "most if not all" of his wealth is a product of corruption, including

224. *See id.* at 2 (noting that the scheme "allow[ed] him to use attorney-client, law office, and shell company accounts as conduits for his funds . . . without alerting the bank to his use of those accounts . . . [and i]f a bank later uncovered Mr. Obiang's use of an account and closed it, the lawyers helped him open another")

225. *See* Kofele-Kale, *supra* note 25, at 731 (explaining that the funds were distributed among more than sixty accounts and certificates of deposit instead of utilizing such funds for health services or education in his home country); *see also* MINORITY STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON GOV'T AFFAIRS, MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT, CASE STUDY INVOLVING RIGGS BANK 37-68 (2004) (finding Riggs Bank culpable because of its willful blindness to the fact that it was handling funds obtained through corruption, especially given the bank's longstanding relationship with officials of Equatorial Guinea).

226. *See* Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 12, 2004) (citing the "the serious negative effects that corruption of public institutions has on the United States' efforts to promote security and to strengthen democratic institutions and free market systems" as reasons for denying entry to corrupt foreign officials).

227. *See* Ian Urbina, *A U.S. Visa, Shouts of Corruption, Barrels of Oil*, N.Y. TIMES, Nov. 17, 2009, at A1 (stating that Teodoro Obiang goes to his $35 million Malibu estate several times per year and is always allowed into the United States).

proceeds from a tax which Obiang, Equatorial Guinea's Forest and Agriculture Minister, imposed on timber and demanded be paid to him personally.[228] While Obiang finds a welcome mat at the U.S.'s door, the United States publicly shuns Zimbabwean strong man Robert Mugabe. A former U.S. ambassador to Equatorial Guinea summed up the disconnect by stating that "if Zimbabwe had Equatorial Guinea's oil, Zimbabwean officials wouldn't still be blocked from the U.S."[229]

While the Chinese government does not even attempt to use demand-side mechanisms to reform corrupt governments in sub-Saharan Africa, such efforts by the United States and other Western countries remain weak, and political considerations prevent them from effectively reducing the incidence of corruption in Africa. In the absence of strong public institutions and a firm rule of law, both supply-side regulations, *e.g.*, the FCPA, and demand-side conditions, *e.g.*, best practices governance standards, must be placed on economic actors and regimes to rein in incentives to abuse and exploit.

V. THE FUTURE OF CORRUPTION AND ECONOMIC DEVELOPMENT IN AFRICA: TWO SCENARIOS

Supply-side anti-corruption efforts in Africa are at a critical juncture, and the near future presents two likely scenarios. In Scenario 1, enforcement of anti-corruption standards continues in the United States, and other key countries, including China, Russia, and

228. See *id.* (quoting former U.S. ambassador to Equatorial Guinea, John Bennett, who argues that the U.S. allows Obiang into the country in spite of federal law because of U.S. dependence on Equatoguinean oil reserves); *see also* Memorandum from U.S. Dep't of Justice Criminal Division on Request for Assistance in the Investigation of Teodoro Nguema Obiang and his associates to the Central Authority of France (Sept. 4, 2007), *available at* http://documents.nytimes.com/investigating-teodoro-nguema-obiang/ (noting that Obiang is involved in "the illicit transfer and laundering of assets believed to be derived from extortion, bribery and/or the misappropriation, theft, or embezzlement of public funds" from oil companies operating in Equatorial Guinea).

229. Urbina, *supra* note 227; *cf.* Proclamation 7750, *supra* note 226, §§ 1(a)-(c) (limiting application to officials whose corruption has "serious adverse effects on the national interests of the United States").

India, join in the fight by passing and enforcing similar tough standards on their entities operating in Africa. This enforcement results in reforms within the political and business cultures of key developing countries, and the supply of bribes by foreign entities in Africa evaporates. The incidence of corruption drops, paving the way for governance reforms in African states where accountability is embraced and where a rule of law is implemented.

Scenario 2 offers a much less pleasant vision. The United States and several other countries continue the anti-corruption crusade primarily alone, and enterprises from China and other countries free from supply-side enforcement gain significant ground in sub-Saharan Africa. Oil and gas companies with connections to the United States, and thus subject to the FCPA, lobby Congress for a reprieve amidst the search for energy independence and rising energy costs, and the United States tires of fighting the battle alone. The tide of enforcement wanes and progress made to date is lost.

Of the two scenarios, a Scenario 1 outcome would result in the greatest utility for both the people of sub-Saharan Africa and the global economy. However, reforms must be implemented to increase the likelihood that this scenario comes to fruition instead of Scenario 2. It is to be noted that as unpleasant as Scenario 2 may be, it is not unlikely given the current enforcement trajectory of FCPA cases focusing on U.S. oil operators and related suppliers and subcontractors working in Africa.[230] This could present a future problem because Africa is an increasingly important source of U.S. oil; in 2005 18.7% of oil imported into the U.S. came from Africa.[231] A loss of U.S. operator competitiveness in Africa due to heightened anti-corruption enforcement, including the costs of compliance programs and concessions lost to competitors not subject to FCPA-

230. *See supra* notes 93-101 and accompanying text (discussing recent FCPA settlements involving South Africa, Tanzania, Nigeria, Ivory Coast, and Egypt).

231. *See* Rob Crilly, *Oil From Africa Comes with Political Instability*, USA TODAY, May 1, 2006, at 7B (comparing African imports to Middle Eastern imports and reporting that from 2000 to 2005, the share of U.S. imports from the Middle East fell from 22% to 17% of the U.S. total); *see also* AFR. OIL POLICY INITIATIVE GRP., *supra* note 64, at 4 (projecting a major increase in U.S. oil imports from Africa by the year 2020, which may necessitate multi-layered agreements with the Gulf of Guinea region); Wheat, *supra* note 26 (emphasizing U.S. dependence on African oil and noting that by 2015, the U.S. is projected to obtain over 25% of its oil through offshore drilling West Africa).

like laws, could pressure the U.S. government to jettison its anti-corruption crusade.[232]

VI. RECOVERY IN AFRICA: WHAT IS NEEDED TO SUCCEED IN THE BATTLE AGAINST CORRUPTION

The scale of sub-Saharan Africa's emergence from the global recession of 2008-2009 will depend on two critical elements: the even global enforcement of supply-side anti-corruption standards on foreign companies operating in Africa, and a renewed commitment to demand-side anti-corruption efforts, including a sustained effort by governments that engage Africa to utilize anti-corruption tools even when it is not politically expedient.

A. CONSISTENT, GLOBAL ENFORCEMENT OF SUPPLY-SIDE ANTI-CORRUPTION STANDARDS

The international community must push for global universal enforcement of FCPA supply-side anti-corruption principles. This concept includes increased enforcement within OECD countries that already passed and, in principle, agreed to enforce supply-side anti-corruption laws, as well as passage and enforcement of FCPA-type legislation by non-OECD states.[233] In particular, the capital-rich countries of China, Russia, and India, none of which are parties to the OECD convention, must be pressured to impose and enforce anti-corruption standards on their businesses in Africa.[234] The activities of

232. *See* Alex Free, *Multinational Oil, the US and Nigeria: A Crude Contract*, PAMBAZUKA (May 13, 2010), http://www.pambazuka.org/en/category/features/64412 (arguing that the 2010 Gulf of Mexico oil spill heightened pressure to cease offshore drilling in the United States and source more oil from Africa).

233. *See generally* Convention on Combating Bribery, *supra* note 84, art. 3 (requiring all states parties to criminalize bribery of foreign public officials and impose sanctions on culpable individuals, such as the "deprivation of liberty"). For a timeline of each member country's implementing legislation, see David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 488-89 n.101, 489-90 n. 102, 490-91 n.103 (2009).

234. *See* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 401 (2010) (noting that out of the four largest "BRIC" emerging markets countries—Brazil, Russia, India and China—only Brazil has adopted the OECD

these states today, particularly in the energy and mining industries, unimpeded by the rigorous anti-corruption standards faced by their competitors, are hampering the fight against corruption in Africa. For example, while the United States and some OECD counterparts take a hard line against official corruption in oil and gas exporters like Angola,[235] China in particular is cultivating "'pragmatic' partnership[s]" with the opaque Angolan regime "with no political preconditions."[236]

The U.S. government should also broaden its enforcement practices to cover a larger array of industries and players within industries. One current trend in prosecutions under the FCPA involves focusing on individual players within larger industries identified as making improper payments in Africa, with the goal of deterring corrupt behavior across the industry.[237] While these high-profile prosecutions may deter such behavior, they subject the target entities to huge fines and loss of business while non-prosecuted industry players, who may be more culpable, are rewarded with

convention).

235. *See* "TRANSPARENCY AND ACCOUNTABILITY IN ANGOLA", *supra* note 31, at 25 (applauding the United States as one of the first to advocate transparency and to "point out the widespread corruption, mismanagement, and lack of transparency in the oil and diamond sectors").

236. *See id.* at 23-24 (quoting Angolan President José Eduardo dos Santos and arguing that Chinese influences "have served as a counterweight to Western pressure for reform").

237. *See* Press Release, Dep't of Justice, Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges (Sep. 3, 2008), *available at* http://www.justice.gov/opa/pr/2008/September/08-crm-772.html (announcing the guilty plea of a former officer and director of a Houston-based global engineering, construction, and services company for participation in a scheme to bribe Nigerian government officials); Press Release, Dep't of Justice, Former Willbros International Consultant Pleads Guilty to $6 million Foreign Bribery Scheme (Nov. 12, 2009), *available at* http://www.justice.gov/opa/pr/2009/November/09-crm-1220.html (announcing the guilty plea of a consultant for Willbros International, Inc. for conspiring to pay more than $6 million in bribes to Nigerian government officials); Press Release, Dep't of Justice, Twenty-two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html (announcing that "twenty-two executives and employees of companies in the military and law enforcement products industry have been indicted for engaging in schemes to bribe" African government officials).

additional customers and contracts.[238]

At the same time, the U.S government should continue to focus on foreign and multinational corporations within its jurisdictional reach to help level the playing field in favor of the United States and European countries and against states without FCPA-type legislation. While FCPA affords the U.S. government limited jurisdiction over foreign companies, the United States possesses an array of tools for reaching non-U.S. entities, including the use of U.S. mails or "acts in furtherance" of corruption committed on U.S. soil, improprieties committed as an agent of a U.S. entity or aiding and abetting a U.S. entity, investigations of the U.S. customers of purely foreign enterprises, and use of the federal conspiracy statute.[239]

B. RAMPING UP DEMAND-SIDE EFFORTS AND RENEWED GOVERNMENT COMMITMENTS IN THE CORRUPTION FIGHT

Supply-side efforts alone cannot salve the lesions of corruption in sub-Saharan Africa. While enforcing anti-corruption values on the private sector, governments around the world must also make the hard choice to condemn corrupt officials even when not politically

238. *See* Jeffrey Cramer, *Commentary: The FCPA Game Has Changed: Trends in Enforcement*, MAIN JUSTICE (Apr. 23, 2010), http://www.mainjustice.com/2010/04/23/commentary-the-fcpa-game-has-changed-trends-in-enforcement (noting that the DOJ has greatly increased the number of FCPA cases it prosecutes and discussing how FCPA investigations typically take several years from start to finish, beginning with a description of the arrest of twenty-two business executives following a two-and-a-half year undercover operation). Target companies suffer from the loss of investors and customers for an extended period due to the uncertainty of the investigation's outcome, and unprosecuted industry competitors therefore get a lengthy period of time to gain market share and take advantage of the target company's misfortune. *Id.*

239. *See, e.g.*, 15 U.S.C. § 78dd-3(a) (2006) (permitting the U.S. government to assert jurisdiction over non-U.S. companies and individuals whose conduct occurs "in the territory of the United States"); DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' CRIMINAL RESOURCE MANUAL § 1018 (interpreting 15 U.S.C. § 78dd-3 as "conferring 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"). The FCPA's anti-bribery provisions apply to U.S. persons, domestic concerns, and foreign persons who commit an act in furtherance of a violation. 15 U.S.C. § 78dd-3(f)(1). By using these additional FCPA investigative and prosecutorial tools, the DOJ is potentially able to impact the operations of purely foreign companies with a subsidiary in the United States, customers in the United States, or operations that otherwise touch upon the United States.

expedient and pressure African states to crack down on corrupt officials.[240]

Three actions to fight corruption stand as particularly important for the United States and other governments with respect to sub-Saharan Africa. First, governments must enforce greater controls on corrupt officials' use of the global financial system to launder funds stolen from public coffers or spend these funds on lavish lifestyles.[241] It is deplorable that, for example, one of the most depraved regimes on earth could obtain free rein to launder and spend money in the United States that should be used to provide basic health care for the desperately poor people of Equatorial Guinea.[242] Specifically, prevention and detection controls relating to known corrupt officials and their families should be strengthened, allowing banks and other players in the global financial system to detect and prevent attempts to launder the proceeds of corruption.[243] These controls may include new requirements on money transfers with shell corporations, broader use of existing databases of corrupt officials and their associates, and extension of existing Patriot Act money laundering requirements to intermediaries like real estate agents. The U.S. government should also fully enforce Proclamation 7750 and deny U.S. visas to these officials, even where it could result in a row over oil supplies and a slight uptick in the price of gasoline in the United

240. *See, e.g.*, Christopher M. Matthews, *Nigeria Investigating Bribes Stemming from Daimler FCPA Case*, MAIN JUSTICE (June 7, 2010, 4:23 PM), http://www.mainjustice.com/justanti-corruption/2010/06/07/Nigeria-investigating-bribes-stemming-from-daimler-fcpa-case/print/ (describing Nigeria's Economic and Financial Crimes Commission announcement of its investigation of Nigerian officials allegedly involved in corruption with German car maker Daimler). The Nigerian government specifically announced the investigation in response to Daimler's $185 million FCPA settlement with the U.S. DOJ that included charges of $15 million in bribes paid to Nigerian officials. *Id.*

241. *See, e.g.*, SUBCOMM. REPORT ON FOREIGN CORRUPTION, *supra* note 219, at 6 (recommending passage of a law that requires banks to screen clients against the Politically Exposed Persons database and obtain other background information on them).

242. *See supra* text accompanying notes 219-24 (explaining that the son of Equatorial Guinea's president moved over $100 million from Equatorial Guinea to the United States to buy a Malibu mansion, Gulfstream jet, and to lead a lavish lifestyle).

243. *See* SUBCOMM. REPORT ON FOREIGN CORRUPTION, *supra* note 219, at 6 (advocating for a law implementing World Bank recommendations on bank controls relating to Politically Exposed Persons).

States.[244]

Second, governments must apply consistent pressure, coupled with the credible threat of consequences, on sub-Saharan African countries to increase the accountability of their public officials and implement a rule of law.[245] U.S. policy is to reward good governance in African states with greater trade, but this policy is not consistently practiced, particularly when the importation of oil is involved.[246] Governments and multinational public institutions, including the World Bank and IMF, should take advantage of the economic downturn to redouble efforts to influence particularly corrupt African states and incentivize reform.[247] Such efforts might include loans or aid contingent on implementation of an externally-managed national oil pension fund into which oil revenues must be invested for future generations.[248] Governments could also require their oil and gas companies operating in Africa to publicly report an accounting of monies paid to oil exporting states, while economic and diplomatic pressure could be used to require those same oil exporting states to disclose all funds received from oil operators. Authentic commitments by African oil exporting states to financial and

244. *See* note 226 and accompanying text.

245. *Cf.* Martyn Drakard, *Corruption and Bribery as a Way of Life in Africa*, THE CUTTING EDGE (Oct. 26, 2009), http://www.thecuttingedgenews.com/index.php?article=11736 (reporting a May 2008 study finding that 90% of Burundi entrepreneurs understand that bribes are a standard part of business practice, especially when taxes are involved).

246. *See* James S. Guseh & Emmanuel O. Oritsejafor, *The African Growth and Opportunity Act and Economic Growth in Sub-Saharan Africa*, 10 WHITEHEAD J. DIPL. & INT'L REL. 123, 131 (2009) (noting one of the three objectives of the U.S. African Growth and Opportunity Act is to "[s]trengthen relationships with those governments, institutions and civil society organizations committed to deepening democracy, accountability and reducing poverty in Africa").

247. *See* "TRANSPARENCY AND ACCOUNTABILITY IN ANGOLA", *supra* note 31, at 3 (reporting that Angola agreed to full audits of Sonangol, the state-owned oil company, and increased transparency in government expenditures in exchange for $1.4 billion in emergency funds from the IMF). While these are positive steps, Angola made similar commitments in the past only to renege when the economic good times rolled once again. *See supra* notes 194-95 and accompanying text (explaining that Angola rejected IMF assistance previously, opting to receive funds from China encumbered by far fewer conditions).

248. *See, e.g.*, '*The Resource Curse*', *supra* note 46, at 2 (explaining that Norway, the world's third largest exporter of oil, invests much of its oil revenue in a national pension fund nicknamed "the future generations fund," which will reach an estimated value of $900 billion in the next decade).

accounting transparency in state oil revenues and expenditures would discourage rampant pilfering of public funds and increase revenues available to construct roads, schools, and hospitals.[249]

Third, Western countries should curb their protectionist tendencies and allow African states to sell products on world markets. European policies that prevent African farmers from exporting certain crops to the European Union and other similar protectionist measures are "costly" for the developed countries who implement them but "potentially deadly" for African states with small domestic markets.[250] Without the ability to develop local industries like agriculture and textiles for export, sub-Saharan African states will continue to rely on the extraction and export of natural resources for much needed revenue.[251] As discussed above, dependence on exportation of natural resources subjects African states to the risk of an inflated currency, which harms local industries.[252] Diversification is critical to sub-Saharan Africa's development, and the international community should drop protectionist barriers and allow African products other than petroleum to compete on global markets.

CONCLUSION

Over three decades after its passage, the FCPA is significantly influencing the behavior of companies subject to its jurisdiction. Millions of dollars are being spent by these companies on compliance programs, third party due diligence, and training programs to ensure acts of bribery are prevented, detected, and promptly remediated.[253] The FCPA, in particular the ramp-up in

249. *See generally* Extractive Indust. Transparency Initiative, *EITI Fact Sheet* (Nov. 25, 2010), *available at* http://eiti.org/files/2010-11-25%20EITI%20 Fact%20Sheet.pdf (describing EITI, a voluntary initiative designed to develop standardized revenue reporting requirements for companies and governments involved in the trade of natural resources).

250. *See* Ethan B. Kapstein, *Africa's Capitalist Revolution: Preserving Growth in a Time of Crisis*, 88 FOREIGN AFF. 119, 128 (2009) (noting the "absurdity of developed-world governments that give with one hand by promoting economic development and take with the other by practicing protectionism").

251. Guseh & Oritsejafor, *supra* note 246, at 137 (noting that in 2007 "80[%] of U.S. imports under the [African Growth and Opportunity Act] were petroleum products").

252. *See supra* Part I.B.3 (explaining the curse of resources).

253. *See United States Sentencing Guidelines Manual*, UNITED STATES SENT'G COMMISSION (2010), § 8B2.1, *available at* http://ftp.ussc.gov/2010guid/8b2_1.htm

enforcement over the past decade, considerably increased the practice of anti-corruption law as companies seek valuable counsel on how to avoid and respond to acts of corruption within their ranks.[254] A shift in mentality is underway for U.S. companies, companies with operations in the United States, and companies who do business on behalf of U.S. companies operating in Africa or in other higher-risk developing jurisdictions. This shift towards a focus on anti-corruption compliance and anti-bribery measures, while not complete, is palpable and shows little sign of abating. While there are certainly companies yet to fully embrace the costs and commitment associated with robust FCPA compliance, the risks of staying on the sidelines are growing, and many companies are responding accordingly, albeit sometimes grudgingly.[255]

Despite this clear trend, attaining the ultimate goal of the FCPA to lower the incidence of official bribery and corruption in Africa and beyond seems no closer than it was when the Act was passed in 1977.[256] Bribery of officials in Africa continues, and it is not clear what the FCPA's impact is on the incidence of official bribery in Africa. Official corruption remains high in Africa, despite the fact that many companies subject to the FCPA instituted compliance programs and demonstrated a commitment to eradicating official bribery within their operations.

These same companies however are growing ever more concerned about the numerous other companies operating in Africa that are unencumbered by the anti-bribery strictures weighing upon U.S.

(outlining what the U.S. government considers essential elements of an effective compliance and ethics program, including due diligence, training, and remediation).

254. *See* Cramer, *supra* note 238 (noting that the DOJ brought over sixty FCPA cases from 2005 to mid 2010, which is more than the total between 1977 and 2005).

255. *See, e.g.*, Ted Acosta & Eileen Erdos, *Does Your Overseas R&D Organization Comply with the US FCPA?*, APPLIED CLINICAL TRIALS ONLINE (Sep. 29, 2010), http://appliedclinicaltrialsonline.findpharma.com/applied clinical trials/Online+Extras/Does-Your-Overseas-RampD-Organization-Comply-With-/ArticleStandard/Article/detail/689139?contextCategoryId=47497 (warning pharmaceutical and medical device companies not to take an "out of sight, out of mind" approach to the FCPA just because most clinical trials take place outside the United States).

256. *See supra* Part IV (discussing the lack of demand-side enforcement in Africa).

entities and foreign companies with a sufficient jurisdictional connection to the United States.[257] They are growing more vocal about their worries that companies not subject to FCPA-type regulations are gaining a significant competitive advantage in Africa. The rapidly-growing footprint of Chinese companies on the continent provides some measure of support for those expressing these concerns.[258] At the same time, enforcement against those public officials in Africa who demand bribes is lacking significantly. Prosecutions by African states of their own officials who engage in bribery are inadequate.[259] Western countries are, on the whole, failing to use their full arsenal of weapons to attack the demand-side of bribery, allowing these efforts to play second fiddle to politics, energy independence, and national security considerations.

It is important both for the development of the continent and for the reassurance of companies seeking a place to invest that all companies competing in African markets play by the same rules. This concept is not simply an appeal to abstract notions of justice and fair play, though one could make a compelling argument on those grounds alone. Without consistency in the application and enforcement of anti-corruption principles against companies operating in Africa, the lofty goals of the FCPA and other similar initiatives are doomed to fail.[260] Progress made over the past thirty years of enforcement with respect to companies from some OECD countries will be lost when corrupt officials can simply shift their illicit transactions to other players ready and willing to "pay to play."

In the same way, governments outside of Africa must make the often difficult decisions to consistently apply demand-side anti-corruption pressures on governments in Africa to increase the consequences for those public officials who demand and accept bribes. Failure to put pressure on such officials simply allows them to seek a supplier of bribes not bound by anti-corruption laws. In the

257. *See supra* note 239 and accompanying text (explaining jurisdiction under the FCPA for non-U.S. entities).

258. *See supra* Part III.A (discussing the rise in Chinese investment in Africa in the last decade).

259. *E.g.*, *South Africa Seen Not Doing Enough to Combat Bribery*, *supra* note 217.

260. *See supra* Part IV (analyzing the difficulty in anti-corruption efforts and consistent application of enforcement materials).

end, uneven supply- and demand-side enforcement of anti-corruption measures in Africa not only rewards those who fail to play by the same rules. It also ensures that the very objectives sought by those important enforcement efforts, i.e., a significant decrease in official corruption in Africa and sustained development on the continent, will remain unattained.