

**ENHANCING FOREIGN INVESTMENT PROTECTION THROUGH ANTI-CORRUPTION
 COMPLIANCE: A PERSPECTIVE ON DOING BUSINESS IN AFRICA**

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I. INTRODUCTION

While large parts of the world are on a trajectory of slower economic growth, Africa is home to six of the decade's ten fastest growing economies.¹ But if Africa offers potentially high returns to foreign investors,² significant risks deter many of them from pursuing those alluring opportunities.³ One of these risks, corruption, “remains the most daunting challenge to good governance, sustainable economic growth, peace, stability, and development in Africa,”⁴ because it “discourage[es] foreign investments, creates distortion in resource allocation and competitive

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¹ Jeanny Lorgeoux & Jean-Marie Bockel, *L’Afrique est notre avenir Rapport d’information fait au nom de la commission des affaires étrangères, de la défense et des forces armées du Sénat*, 79 n.104 (2013-2014) (pointing to the cases of Angola, Ethiopia, Mozambique, Nigeria, Rwanda, and Chad) [hereinafter *Report of the French Senate*].

² *Africa’s Future and the World Bank’s Role in It*, THE WORLD BANK (Apr. 9, 2015, 5:05 PM), http://siteresources.worldbank.org/INTAFRICA/Resources/Africa_s_Future_and_the_World_Bank_s_Role_in_it.pdf.

³ Foundufe & Mansuri, *Doing Deals in Africa – Reflections on What is Different and What is Not*, 14 BUS. L. INT’L 163, 176-83 (2013) (discussing the following risks and challenges: (i) the judiciary, (ii) regime change, (iii) local content laws, (iv) culture of corruption, (v) lack of capacity, (vi) governing law, (vii) financing, (viii) the Uniform Securities Act of OHADA, and (ix) local counsel) [hereinafter *Doing Deals in Africa*].

⁴ Combating Corruption, Improving Governance in Africa, Regional Anti-Corruption Programme for Africa (2011-2016), United Nations Economic Commission for Africa and the African Union Advisory Board on Corruption AT 1, available at <http://www.uneca.org/sites/default/files/publications/combating-corruption-improving-governance-in-africa-2011-2016.pdf> [hereinafter *Combating Corruption*]. See also Reagan R. Demas, Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives, 26 AM. U. INT’L L. REV. 324 (2012); See also Ana Gomez, Committee on Foreign Affairs, Report on Corruption in the Public and Private Sectors: The Impact on Human Right in Third Countries, EUROPEAN PARLIAMENT, August 19, 2013 (last visited Dec. 15, 2014, 8:27 PM), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0250+0+DOC+XML+V0//EN> (noting that “corruption creates obstacles to FDI and discourages external actors from engaging in economic cooperation with developing countries”).

markets, [and] increases the cost of doing business [...].”⁵ Africa is perceived by many as one of the most corrupt regions in the world,⁶ although the precise impact that corruption may have on the decision to participate in an investment remains unclear.⁷ The prevailing view thus seems to hold that Africa is “a new frontier between risk and opportunities”⁸ in international business.

This Article argues that many investors would benefit from a framework to navigate the corruption risks in Africa and a roadmap to address them appropriately. Properly designed anti-corruption mechanisms could help some foreign investors overcome the obstacle that they see in the risk of corruption.⁹ Since this article posits that compliance can contribute to the long-term success of a transaction, corporate compliance would serve the dual purpose of protecting a foreign investor’s asset value, while transforming growth into development for the host state.¹⁰

Evidently, the legal instruments at play in an African transaction vary depending on the position of the investor and the nature of the investment, but foreign transactions typically involve an investment contract with a state or state-owned entity, a joint-venture agreement, equity purchase contracts, or an agency, intermediary or consultancy agreement, as well as related financing agreements. Anti-corruption considerations are present at all stages of an investment; whether it is in connection with developing business, structuring vehicles, transaction planning and execution, managing assets, dealing with creditors, or handling disputes arising out of the investment. Transactions build on a combination of these tools and are typically governed by a myriad of laws and regulations. Consequently, the conduct associated with their execution may have to hold up under various layers of regulatory scrutiny.

⁵ See *Combating Corruption*, *supra* note 4 at 3. This point has already been made in the pages of this publication. See Leo Graham-Dullaert, Nick Branson, & Chris Lane, *The Importance of Legal Capacity for Economic Development: an Undervalued Priority for Sub-Saharan Africa*, 3 AFRICA LAW TODAY 7 (2013).

⁶ See *Combating Corruption*, *supra* note 4 at 1.

⁷ Bert Denolf, *The Impact of Corruption on Foreign Investment*, 9 J. WORLD INVESTMENT & TRADE 249 (2008) [hereinafter *The Impact of Corruption*] (noting that the effect is mild but acknowledging that further research would be needed to ascertain the exact effect of corruption on the decision to participate in a foreign direct investment); See also Ali Al-Sadig, *The Effects of Corruption on FDI Inflows*, 29 CATO J. 267 (2009) (arguing that the corruption level in the host country has an adverse effect on FDI inflows).

⁸ See *Report of the French Senate*, *supra* note 1 at 141.

⁹ Moiz A. Shirazi, *The Impact of Corruption on International Trade*, 40 DENV. J. INT’L & POL’Y 436 (2011) (noting that “[i]n general, corruption or the perception of corruption, is highly correlated with perceptions regarding difficulty of trade”).

¹⁰ “Growth” defined as “an increase in the capacity of an economy to produce goods and services, compared from one period of time to another...economic growth can be measured in nominal terms, which include inflation, or in real terms, which are adjusted for inflation.” INVESTOPEDIA, <http://www.investopedia.com/terms/e/economicgrowth.asp> (last visited Apr. 9, 2015); “Development” defined as “how to promote economic growth countries by improving factors like health, education, working conditions, domestic and international policies and market conditions...it examines both macroeconomic and microeconomic factors relating to the structure of a developing economy and how that economy can create effective domestic and international growth,” INVESTOPEDIA, <http://www.investopedia.com/terms/d/development-economics.asp> (last visited Apr. 9, 2015).

This issue bears emphasis, because while enforcement agencies outside of Africa have prosecuted conduct in Africa, and will likely continue to do so, African jurisdictions have intensified their anti-corruption efforts with varying degrees of intensity and success.¹¹ Investors should not wait until they face the threat of prosecution to reflect on how to incorporate anti-corruption measures into their investment strategy and dealings. This approach, if applied more generally, could benefit weaker jurisdictions by fostering their resistance to improper conduct, thus yielding a “win-win” relationship between investors and host States and possibly contributing to the transformation of growth into development.

This Article proceeds in three parts: by discussing a number of strategic sectors and industries and their specific corruption risks, Part I strives to delineate the frontier between corruption risks and business opportunities for foreign investors in Africa. Part II maps out the anti-corruption enforcement environment outside of Africa governing conduct taking place in Africa to underline the proposition that foreign investors should take the risk of prosecution in capital-exporting jurisdictions very seriously. Part III presents the pan-African anti-corruption landscape as well as a number of brief specific country case studies to illustrate the extent to which Africa’s anti-corruption environment is diverse and rapidly changing.

II. DELINEATING THE FRONTIER BETWEEN INVESTMENT OPPORTUNITIES AND CORRUPTION RISKS IN AFRICA

Fully integrated in globalization,¹² Africa is home to investors hailing from the full spectrum of business sectors and includes multinational corporations, global financial institutions, private equity and hedge funds, and sovereign wealth funds.¹³ Direct and portfolio foreign investments surpassed \$84 billion in 2014,¹⁴ showcasing the growing confidence in Africa’s potential among global investors. Intra-African transactions accounted for 13% of new investments in 2012¹⁵ and are expected to continue to drive investments in the region,¹⁶ while capital investment by BRICS countries (“Brazil, Russia, China, India, and South Africa”) account for more than 25% of capital investment in Africa.¹⁷

¹¹ See Part II and Part III of this article.

¹² See *Report of the French Senate*, *supra* note 1 at 151.

¹³ See *Doing Deals in Africa*, *supra* note 3 at 165, 174; See also James Hagerty & Will Connors, *U.S. Companies Race to Catch Up in Africa*, THE WALL ST. J., 6 June 2011, available at <http://www.wsj.com/articles/SB10001424052748703841904576257233342891732>; Alastair Green, Conor Kehoe, & Farid Sedjelmaci, *Uncovering Hidden Investment Opportunities in Africa*, MCKINSEY QUARTERLY (2014).

¹⁴ Javier Blas, *Foreign investment in Africa set to reach record*, FINANCIAL TIMES, 19 May 2014, available at <http://www.ft.com/intl/cms/s/0/bb92ba22-df2e-11e3-86a4-00144feabdc0.html#axzz3S17QZZ00>.

¹⁵ See *Doing Deals in Africa*, *supra* note 3 at 167.

¹⁶ Economic Report in Africa Report 2013 Intra-African Trade: Unlocking Private Sector Dynamism, *United Nations Conference on Trade and Development* (2013); Africa Investor and the Value Columbia Center on Sustainable International Investment, *Intra-African Investment*, 48 AFRICA INVESTOR (2012), available at http://ccsi.columbia.edu/files/2013/12/johnson_intraafrica.pdf.

¹⁷ Amadou Sy, *Investment in Africa: Who Profits from the Boom?*, BROOKINGS INSTITUTION AFRICA IN FOCUS BLOG (Apr. 9, 2015, 5:23 PM), available at <http://www.brookings.edu/blogs/africa-in-focus/posts/2014/03/06-investment-africa-middle-class-sy>.

In this context, the flow of foreign private capital has surpassed the disbursements of official development assistance (“ODA”).¹⁸ Unlike decades past however, foreign capital is not the exclusive driver of growth. Robust private sectors across the continent now provide 90% of employment, over 60% of investment, and produce 70% of economic output.¹⁹ Additionally, growing prosperity has pushed consumer spending past \$1.3 trillion in 2010.²⁰ Consumer spending across the continent is expected to double by 2030,²¹ proving Africa’s status as a collection of markets that can no longer be ignored by global business. Real GDP continues to rise on average 5% per year, a rate which the World Bank forecasts will be sustained over the next three years.²²

As the CEO of the African Finance Corporation has noted: “[t]he opportunities in Africa are varied [...] If an investor wants to achieve diversification in their portfolio, investing across jurisdictions is important. Africa is quite fragmented, there is a population of one billion across 54 countries and the ability to tap into different markets across the continent is important.”²³ Foreign investment now flows into growing industries such as consumer goods, tourism, manufacturing, financial services, telecommunications, construction, and commercial agriculture, in addition to oil, mining, and forestry.²⁴ This diversification away from raw material exports has given African economies greater resilience to today’s highly volatile energy and mineral markets.²⁵ Some corruption risks are ubiquitous and significant across industries and countries, such as those associated with customs, logistics, and government approvals, but others are more specific to certain industries. The sections below present some of these risks in context.

A. Banking & Finance

African businesses across all industries find that one of the greatest barriers to continued expansion is limited access to credit and financing.²⁶ While the number of middle class Africans with the discretionary income to afford financial products rose to 350 million people in 2010,²⁷ the vast majority of the continent’s inhabitants (middle class and otherwise) remain “unbanked.” Africa’s banking sector has been developing rapidly to meet new demand, with industry growth

¹⁸ *Id.*

¹⁹ *Tracking Africa’s Progress in Figures*, AFRICAN DEVELOPMENT BANK GROUP 2014, 2014 at 24, *available at* http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Tracking_Africa%E2%80%99s_Progress_in_Figures.pdf.

²⁰ *Id.*

²¹ *Id.*

²² *Africa’s Pulse: Decades of Sustained Growth is Transforming Africa’s Economies*, THE WORLD BANK GROUP (2014).

²³ *Africa Investor and the Value* Columbia Center on Sustainable International Investment, *Intra-African Investment*, 48 AFRICA INVESTOR (2012), *available at* http://ccsi.columbia.edu/files/2013/12/johnson_intraafrica.pdf.

²⁴ *Economic Diversification in Africa: A Review of Selected Countries*, NEPAD-OECD AFRICA INVESTMENT INITIATIVE AND UN OFFICE OF SPECIAL ADVISER ON AFRICA, 2011 at 55-6.

²⁵ *Economic Diversification and Important Buffer for Africa in Uncertain Global Environment*, WORLD ECONOMIC FORUM RELEASE, 10 May 2013.

²⁶ Celine Kauffmann, *Financing SMEs in Africa*, OECD Development Center, Policy Insights, Issue 7, May 2005.

²⁷ Maurice Mubila and Mohamed-Safouane Ben Aissa. *The Middle of the Pyramid: Dynamics of the Middle Class in Africa*. AFRICAN DEVELOPMENT BANK GROUP, 20 April 2011.

outpacing GDP growth in most of the continent's main economies.²⁸ International players in the field have also been expanding their presence on the continent, often through acquisitions of local financial groups. This trend, as well as reforms in banking laws, is leading to a consolidation of the sector that is yielding larger and more competitive institutions.²⁹ In recent years, South Africa, Angola, Côte d'Ivoire, Gabon, Ghana, Namibia, Nigeria, Senegal, Seychelles, and Zambia have accessed international capital markets for the first time, and "foreign investment in local capital markets in the form of purchases of stocks, bonds and treasury bills is growing rapidly."³⁰

Generally, in high risk markets where credit is difficult to secure, banks may sometimes be asked to increase credit limits to a company in return for improper payments.³¹ States looking for long-term financing may also propose unconventional arrangements in return for loans, such as loans collateralized or secured by a country's natural resources.³² Emerging market banking sectors are often prone to policy uncertainty as regulations are frequently changing.³³ Certain regulators in these markets have required foreign banks to create separately capitalized local subsidiaries and even set lending quotas mandating these institutions to lend to certain areas.³⁴

Other corruption risks for the banking industry can arise in the context of mergers and acquisitions financing (part of buyer's due diligence); joint-venture financing (e.g. loans to a joint venture, secured with oil revenues); structured finance (e.g. loans collateralized by deposits of a state-owned company or public official); export & trade finance (e.g. letters of credit or loans made to a state-owned company or government, collateralized by natural resources); or project finance (e.g. non-recourse loans to projects receiving international development bank financing).

B. *Extractives*

Africa has long been a major source, at times to its detriment, of a diverse range of raw materials, from rare and precious minerals to timber, rubber and of course oil and gas. African oil and natural gas reserves are estimated to be equivalent to approximately 200 billion barrels.³⁵ The continent is a top world producer of rare minerals such as gold, manganese, diamond, chromite, phosphorite and cobalt.³⁶

Extractive industries face significant corruption risks; from 2006 to 2010, approximately one third of Foreign Corrupt Practices Act ("FCPA") settlements or prosecutions concerned entities

²⁸ Africa's Path to Growth: Sector by Sector, MCKINSEY & COMPANY, June 2010.

²⁹ *Id.*

³⁰ *Sy, supra* note 17.

³¹ *See e.g.*, Victor Mallet, *India bank chief arrested in bribery probe*, FINANCIAL TIMES, 3 August 2014, <http://www.ft.com/intl/cms/s/0/455963b4-1ada-11e4-b649-00144feabdc0.html#axzz3S17QZZ00>.

³² Pallister, David. *Alarm bells sound over massive loans bankrolling oil-rich, graft-tainted Angola*, THE GUARDIAN, 1 June 2005, <http://www.theguardian.com/business/2005/jun/01/hearafrica05.development>.

³³ Banking in Emerging Markets: Investing for Success, ERNST & YOUNG, at 13 (2014).

³⁴ *Id.*

³⁵ *The African oil and gas landscape*, ERNST & YOUNG, available at: <http://www.ey.com/GL/en/Industries/Oil--Gas/Africa-oil-and-gas--a-continent-on-the-move---The-African-oil-and-gas-landscape>.

³⁶ *2010 Minerals Yearbook: Africa*, UNITED STATES GEOLOGICAL SURVEY, 2010, available at <http://minerals.usgs.gov/minerals/pubs/country/2010/myb3-sum-2010-africa.pdf>.

from those industries.³⁷ Extractive industries are both capital and labor intensive and by nature involve both the public sector, which controls the allocation of exploration and production rights, and the private sector, which has the technical and financial capacity to develop and extract. This brings companies in close and frequent contact with a horde of public officials at every stage of the development of a mine, well or timber tract. Bidding and tendering processes, custom clearance, registration, licensing and obtaining permits are all stages of development with a particularly high risk of corruption. Companies in this sector are also often part of joint ventures or consortia along with state-owned entities or local companies closely tied to the government. Possible liability for improper conduct by other joint venture or consortium members is therefore a significant risk.

C. *Telecommunications and Infrastructure*

In just the last two years alone, the number of mobile subscribers increased by 56% to 625 million continent-wide, while mobile internet use is expected to grow by 20 times over the next five years.³⁸ The economic potential becomes clear when considering that just a 10% increase in broadband penetration has been estimated to generate additional GDP growth of 0.5-1.5% in developing countries.³⁹

The high potential for revenue generation of this sector is matched by a high risk of corruption in the processes of building necessary infrastructure and securing required licenses. The telecommunications industry is in fact composed of both public and private elements that are tightly interwoven. Infrastructure construction is often financed and owned by the State but built by third-party contractors, while the use of the infrastructure is granted to certain service providers through licenses. Competition for licenses in many markets is still not entirely open and transparent. While any type of third-party contracting transaction is vulnerable to improper conduct, the licensing process carries a particularly high risk of corruption.⁴⁰ Additionally “large sums of money paid in license fees, equipment contracts, purchase of state operators, and mergers and acquisitions all provide incentives and opportunities for corruption.”⁴¹

D. *Agriculture*

Agriculture is one of the continent’s largest economic sectors, representing 12.7% of combined GDP in 2009 and employing over 60% of the labor force.⁴² However, the African continent contains a quarter of all arable land on Earth but generates only 10% of global agricultural output.⁴³ The vast majority of farm production (approximately 90%) is still performed by small

³⁷ Kevin T. Abikoff, *Anti-Corruption Law and Compliance: Guide to the FCPA and Beyond* 350 (2014) [hereinafter *Abikoff*].

³⁸ David Smith, *Internet use on mobile phones in Africa predicted to increase 20-fold*, THE GUARDIAN, 5 June 2014, <http://www.theguardian.com/world/2014/jun/05/internet-use-mobile-phones-africa-predicted-increase-20-fold>.

³⁹ *Africa’s Path to Growth: Sector by Sector*, MCKINSEY & COMPANY, June 2010, http://www.mckinsey.com/insights/economic_studies/africas_path_to_growth_sector_by_sector [hereinafter *Africa’s Path to Growth*].

⁴⁰ Transparency International, *Overview of corruption in the telecommunications sector*, 2014.

⁴¹ Ewan Sutherland, *Bribery and corruption in telecommunications: New approaches to licensing*, INTERNATIONAL ASSOCIATION FOR MEDIA AND COMMUNICATIONS RESEARCH, 25-29 (2013).

⁴² *African Fact Sheet: Main Economic Indicators*, NEPAD-OECD AFRICA INVESTMENT INITIATIVE, 2010 available at <http://www.oecd.org/investment/investmentfordevelopment/47452483.pdf>.

⁴³ See *Africa’s Path to Growth*, *supra* note 39.

landowners who do not have the scale, capital, and technology needed to produce adequate surpluses and sell to market.⁴⁴

Registration of land is often an inefficient, complex, and costly process with a high possibility of being approached for improper payments to facilitate the processing of a title.⁴⁵ Applications for access to government subsidies may come with unnecessary fees and requests for percentage payments that benefit corrupt officials.⁴⁶ Additionally, collusion often exists between government officials and the limited number of private firms providing fertilizers, insecticides, new seeds, tools, and other important inputs.⁴⁷

II. EXTRA-AFRICAN ENFORCEMENT OF IMPROPER CONDUCT TAKING PLACE IN AFRICA

It has been noted that “[p]erhaps the most curious observation is that it is not the African governments, but the Western governments [...] that have taken effective legal action to eradicate corruption and hold corrupt companies and individuals accountable for their actions in Africa.”⁴⁸ While corruption-related laws are ubiquitous in OECD jurisdictions, the FCPA⁴⁹ in the United States and the Bribery Act in the United Kingdom (the “Bribery Act”)⁵⁰ (less so but possibly increasingly) provide the backbone of the supply-side enforcement of international anti-corruption norms of conduct occurring in Africa.

A. *Overview of the FCPA & UK Bribery Act*

1. U.S. FCPA

The FCPA prohibits bribery of foreign (i.e. non-United States) public officials and provides record-keeping and accounting requirements for entities traded on United States securities markets. The FCPA prohibits, among other things, (i) a payment, offer, or promise of, (ii) anything of value, (iii) to a foreign official, or any other person while knowing that such person will provide all or part of the thing of value to a foreign official, (iv) with corrupt intent, (v) for the purpose of influencing an official act or decision, inducing a person to do or omit an act in violation of his official duty, inducing a foreign official to use his influence with a foreign government to affect or influence any government decision or action, or securing an improper advantage, (vi) to assist in obtaining or retaining business.⁵¹ The accounting provisions, applicable to certain issuers, consist of books and records provisions and internal reporting and control requirements.⁵²

FCPA enforcement has expanded exponentially in the last decade,⁵³ and companies with operations in Africa have been significantly affected.⁵⁴ Broad jurisdiction of the FCPA is used to

⁴⁴ Ending Hunger in Africa: Prospects for the Small Farmer, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, 2004.

⁴⁵ Rodney Fink, *Corruption and the Agricultural Sector*, USAID, November 2002 at 3.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *Doing Deals in Africa*, *supra* note 3 at 178.

⁴⁹ Foreign Corrupt Practices Act (FCPA) of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2006).

⁵⁰ Bribery Act 2010, Chapter 23 (English).

⁵¹ See *Abikoff*, *supra* note 37 at 22.

⁵² *Id.*

⁵³ *Id.* at 62.

enforce the law against American companies that engage in international business, but also, “and more significantly perhaps,” in cases of foreign issuers.⁵⁵ Foreign companies that raise capital in the U.S. are subject to the anti-bribery provisions of the FCPA for conduct “anywhere around the world that corruptly makes use of U.S. mails or the means or instrumentalities of U.S. interstate commerce, such as executing a foreign business transaction denominated in U.S. dollars that foreign banks clear through correspondent accounts held at U.S. banks,”⁵⁶ while other foreign companies that are not covered issuers are subject to these provisions if “they corruptly do any act or corruptly use U.S. mails or other means or instrumentalities of U.S. interstate commerce ‘while in the territory of the United States.’”⁵⁷ This last provision has been broadly construed by the two agencies which enforce the FCPA: the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”), stating that “[t]hose who are not issuers or domestic concerns may be prosecuted under the FCPA if they directly, or through an agent, engage in *any* act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the U.S. mails or a means or instrumentality of interstate commerce.”⁵⁸

2. U.K. Bribery Act

In force since July 1, 2011, the Bribery Act similarly has extensive jurisdictional reach, based on nationality and territorial hooks.⁵⁹ The Bribery Act prohibits active and passive bribery and contains a specific offense for bribery of a foreign official; facilitation payments are also prohibited under the Bribery Act. Under the Bribery Act, failing to prevent bribery by persons “associated with” that corporation is a strict liability offense. An “associated person” is anyone who “performs services for or on behalf of” a corporate entity. Unlike the FCPA, the Bribery Act provides a defense for companies that “had in place adequate procedures to prevent” associated persons from undertaking to commit the offenses covered by the Bribery Act. The UK Ministry of Justice provided some guidance on what would constitute an adequate procedure, including (i) adopting procedures proportionate to an organization’s activities and bribery risks, (ii) including strong “top level” commitment to compliance, (iii) periodic, informed and documented assessments of bribery risks, (iv) including proportionate and risk-based due diligence on associated persons, (v) including internal and external anti-corruption communication and training, and (vi) ongoing monitoring, regular review, and modification as necessary.⁶⁰

B. Illustrations of Notable Enforcement Actions

⁵⁴ Reagan R. Demas, Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives, 26 AM. U. INT’ L L. REV. 315, 333 (2010).

⁵⁵ See *Abikoff*, *supra* note 37 at 62.

⁵⁶ *Id.* at 90.

⁵⁷ *Id.*

⁵⁸ Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) at 12 (emphasis added).

⁵⁹ See *Abikoff*, *supra* note 37 at 653.

⁶⁰ Ministry of Justice, The Bribery Act Guidance About Procedures Which Relevant Commercial Organizations Can Put In Place to Prevent Persons Associated With Them From Bribing (30 March 2011) [hereinafter *MOJ Guidance*].

The sections that follow provide examples of supply-side enforcement of corrupt conduct taking place in Africa.⁶¹ As will be seen throughout these examples, liability can arise in a broad variety of situations. In some cases, one enforcement action in the U.S. can lead to other actions in Africa, as well as before multilateral development banks (“MDBs”). A foreign investor engaging in business in Africa should thus maintain a holistic view of anti-corruption compliance and consider that actions taken in one jurisdiction may have consequences in other, seemingly less-implicated, jurisdictions.

1. TSKJ

The Bonny Island TSKJ consortium – which was made up of Kellogg Brown & Root LLC and its former parent Halliburton, Technip SA, Snamprogetti Netherlands BV, and JGC Corporation – was formed for purposes of bidding on and performing a series of engineering, procurement, and construction contracts to design and build a liquefied natural gas plant in Nigeria.⁶² An investigation by the DOJ alleged that between 1995 and 2004, the joint venture bribed Nigerian officials over \$180 million to win \$6 billion worth of contracts relating to the Bonny Island LNG facility.⁶³ According to the indictment, former KBR CEO Albert “Jack” Stanley and other co-conspirators met with three senior Nigerian officials to discuss how much would be paid in bribes and to whom.⁶⁴ The joint venture was stated to have two agents to make payments to Nigerian officials: U.K. lawyer Jeffrey Tesler, whose Gibraltar corporation received approximately \$132 million, and a Japanese trading company that received over \$50 million.⁶⁵ The payments were made through a joint venture “cultural committee,” involving former KBR employee Wojciech Chodan.⁶⁶

Between 2009 and 2011 all members of the joint venture agreed to settlements with the DOJ and the SEC. KBR was the first to settle with U.S. authorities, agreeing to pay \$579 million in fines and disgorgement and to engage an independent corporate compliance monitor.⁶⁷ Later Technip agreed to pay \$388 million in penalties and disgorgement, and have an independent compliance monitor for two years.⁶⁸ Snamprogetti accepted a penalty of \$365 million in penalties and

⁶¹ For a full discussion of reported cases involving conduct in Africa see *2013 FCPA Alert*, HUGHES HUBBARD & REED WINTERK (Apr. 9, 2015, 5:29 PM) [hereinafter *Hughes Hubbard 2013 FCPA Alert*].

⁶² See Trace Compendium, *available at* <https://www.traceinternational2.org/compendium/view.asp?id=15>.

⁶³ Press Release, African Development Bank Group, AfDB Charges Snamprogetti Netherlands B.V. US \$5.7 Million in Monetary Sanction for Corrupt Practices, (28 May 2014).

⁶⁴ United States Department of Justice, Indictment U.S v. Jeffrey Tesler and Wojciech Chodan, General Allegations Section 20.d.

⁶⁵ Press Release, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), *available at* <http://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546> [hereinafter *DOJ Press Release*].

⁶⁶ *Id.*

⁶⁷ Laurel Brubaker Calkins, *KBR, Halliburton Agree to \$579 Million Fine for Nigeria Bribes*, BLOOMBERG, 12 February 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5SIJHgE3rXA>

⁶⁸ Press Release, United States Department of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty, (28 June 2010), *available at* <http://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million>.

disgorgement,⁶⁹ and JGC agreed to pay a \$218.8 million penalty and have an independent compliance consultant for two years,⁷⁰ bringing the total penalties imposed on the consortium to over \$1.55 billion. U.S. enforcement actions were also brought and resolved against the agents used by TSKJ, and various executives of the companies involved have also faced charges in the US, including Albert Stanley, who was sentenced to 30 months in prison.⁷¹

Furthermore, the conduct led to enforcement actions in other jurisdictions, including as discussed in Part III, in Nigeria. KBR settled with the U.K. authorities for £ 7,028,077 (approximately €9.5million), representing its share of JV dividends from the Bonny Island project's profits.⁷² French authorities have fined two Technip managers, and Tesler will face trial in France after he is released from prison.⁷³ In April 2013, KBR disclosed that the African Development Bank Group had notified them in March 2013 of an investigation by the group into the Bonny Island project.⁷⁴ In March 2014, the African Development Bank announced that it had reached "Negotiated Resolution Agreements" with KBR, Technip and JGC, for a total of \$17 million in penalties.⁷⁵

2. *Alcatel-Lucent*

On December 27, 2010, Alcatel-Lucent S.A. settled with the DOJ and SEC charges of violating the FCPA's anti-bribery and accounting provisions by three of its subsidiaries—Alcatel-Lucent France, S.A. (formerly Alcatel CIT, S.A.), Alcatel-Lucent Trade International A.G. (into which Alcatel Standard A.G. was merged in 2007), and Alcatel Centroamerica S.A. (formerly Alcatel de Costa Rica S.A.).⁷⁶ The allegations involved conduct in thirteen countries, including: Kenya,

⁶⁹ Darrell Hughes & Tess Stynes, *Eni, Snamprogetti to Pay Total \$365 Million to Settle Bribery Charges*, WALL ST. J., 7 July 2010, <http://www.wsj.com/articles/SB10001424052748703636404575353673801750984>.

⁷⁰ Calkins Riley & Michael Riley, *JGC to Pay \$218.8 Million to Resolve Foreign Bribery Charges*, BLOOMBERG, 7 April 2011, <http://www.bloomberg.com/news/articles/2011-04-06/jgc-agrees-to-pay-218-8-million-to-resolve-u-s-claims-of-nigerian-bribes>.

⁷¹ DOJ Press Release, *supra* note 65; *Stanley Jailed for 30 Months*, FCPA BLOG, (Apr. 9, 2015, 5:39 PM), <http://www.fcpablog.com/blog/2012/2/23/stanley-jailed-for-30-months.html>.

⁷² Press Release, United Kingdom Serious Fraud Office, *MW Kellogg Ltd to pay £.7 million in SFO High Court Action*, (16 February 2011), available at <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/mw-kellogg-ltd-to-pay-7-million-in-sfo-high-court-action.aspx>.

⁷³ *Tesler trial in France adjourned for a year*, THE FCPA BLOG, (Apr. 9, 2015, 5:39 PM), <http://www.fcpablog.com/blog/2012/11/19/tesler-trial-in-france-adjourned-for-a-year.html>.

⁷⁴ Christopher Matthews, *African Development Bank Opens Corruption Probe Into KBR*, WALL ST. J., 29 April 2013, available at <http://blogs.wsj.com/riskandcompliance/2013/04/29/african-development-bank-opens-corruption-probe-into-kbr/>.

⁷⁵ *AfDB Levies US \$17 Million in Financial Penalties in Corruption Case*, AFDB, <http://www.afdb.org/en/news-and-events/article/afdb-levies-us-17-million-in-financial-penalties-in-corruption-case-12923/> (last visited Apr. 9 2015).

⁷⁶ Press Release, United States Securities and Exchange Commission, *SEC Charges Alcatel-Lucent with FCPA Violations* (27 December 2010), <http://www.sec.gov/news/press/2010/2010-258.htm> [hereinafter Alcatel-Lucent Press Release].

Nigeria, Angola, Ivory Coast, Uganda, and Mali.⁷⁷ The combined monetary penalty on Alcatel-Lucent and its subsidiaries totaled more than \$137 million.⁷⁸

According to the SEC, “Alcatel and its subsidiaries failed to detect or investigate numerous red flags,” and the company’s “bribery scheme was the product of a lax corporate control environment at the company.”⁷⁹ With respect to activities that took place in Angola, the allegations were that Alcatel Standard failed to conduct adequate due diligence on two companies engaged in 2006 to provide consultancy services in connection with three projects for an Angolan telecommunications company, which had close ties to a senior Angolan government official and his family.⁸⁰ One of the consultancy companies was wholly-owned by a relative of the senior government official. The other consultancy company was paid approximately \$3.5 million by Alcatel-Lucent France in 2007.⁸¹ The payments were allegedly intended to influence the Angolan telecommunications company to award business to Alcatel-Lucent, and such payments were inaccurately recorded in Alcatel-Lucent’s books and records as consulting fees.⁸²

3. *Panalpina*

On November 4, 2010, Panalpina World Transport (“PWT”) and its wholly owned, U.S.-based subsidiary, Panalpina, Inc. (“Panalpina U.S.”) resolved DOJ and SEC corruption investigations under which PWT and Panalpina U.S. agreed to pay a penalty of \$70.56 million to the DOJ and \$11.33 million in disgorgement of illicit profits to the SEC.⁸³ According to the DOJ, from approximately 2002 to 2007 Panalpina paid approximately \$49 million in bribes to foreign officials through subsidiaries in seven countries, including Angola and Nigeria, to help both itself and its customers obtain preferential customs, duties, and import treatment for international freight shipments.⁸⁴ Panalpina admitted to paying approximately \$27 million of those bribes on behalf of customers, who were U.S. issuers or domestic concerns.⁸⁵ In addition, Panalpina admitted to improperly recording and invoicing the bribes paid on behalf of clients to make them appear to be legitimate charges, in violation of the books and records provisions.⁸⁶ Panalpina also admitted to making improper payments in order to secure foreign government contracts for itself.⁸⁷

⁷⁷ See also *Hughes Hubbard 2013 FCPA Alert*, *supra* note 61 at 102-13.

⁷⁸ Alcatel-Lucent Press Release, *supra* note 76.

⁷⁹ *Id.*

⁸⁰ See *United States v. Alcatel-Lucent, S.A.*, No.1:10-cr-20907-PAS, ¶¶ 110-11 (S.D. Fla. Dec. 27, 2010) ECF No. 1, <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-et-al/12-27-10alcatel-et-al-info.pdf>.

⁸¹ *Alcatel-Lucent Settles Bribery Case*, FCPA BLOG <http://www.fcpablog.com/blog/2010/12/28/alcatel-lucent-settles-bribery-case.html>.

⁸² Alcatel-Lucent, *supra* note 80.

⁸³ Press Release, United States Securities and Exchange Commission, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (4 November 2010), *available at* <http://www.sec.gov/news/press/2010/2010-214.htm>.

⁸⁴ United States Department of Justice, *U.S. v. Panalpina World Transport (Holding) Ltd.*, Indictment, ¶ 1.

⁸⁵ *Id.* at ¶ 13.

⁸⁶ See Press Release, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties, *available at*

The DOJ considered a variety of factors in deciding to enter into a Deferred Prosecution Agreement (“DPA”) with PWT. Those included PWT’s comprehensive compliance investigations and reviews, prompt and voluntary reports of its findings from these investigations, efforts to require and encourage employee cooperation with government investigations, PWT’s (eventual) cooperation with DOJ and SEC investigations, and PWT’s “substantial remedial measures.”⁸⁸ These remedial actions included the establishment of a compliance department with direct reporting to the Board of Directors, implementation of a compliance program and related policies, conducting systematic risk assessment in high-risk countries, developing internal review mechanisms, retaining/promoting/firing employees and management based on their individual commitments to compliance, implementation of internal compliance and audit functions, voluntarily and independently hiring outside compliance counsel, and PWT’s decision to independently and at substantial cost close down operations in Nigeria to avoid future potential improper conduct, as further discussed in Part III(B)(4)below⁸⁹

The case of PWT led what have since become known as FCPA-related “sector sweeps” as a tactic to combat what was described as “widespread corruption in the oil services industry.”⁹⁰ Seven companies, their subsidiaries, and parent companies, many of whom had employed the services of PWT, were the target of criminal and/or civil actions. The companies in question eventually agreed to pay over \$236 million to resolve these DOJ and SEC investigations.⁹¹

4. *Layne Christensen Co.*

On October 27, 2014, the SEC announced a settled administrative proceeding against Layne Christensen, a U.S.-based water management, construction and drilling company.⁹² According to American investigators, Layne Christensen subsidiaries made improper payments to public officials in several Sub-Saharan African countries, including payments to reduce tax liabilities in Mali, Guinea, and the Democratic Republic of Congo (“DRC”), to avoid customs duties in Burkina Faso and the DRC, and to facilitate entry of equipment and employees in Burkina Faso, Guinea, Tanzania and the DRC.⁹³ The total amount of illicit payments was over \$1 million and led to approximately \$3.9 million worth of savings for Layne Christensen from 2005 to 2010.⁹⁴

<http://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See Panalpina Settlements Announced, With \$236.5 Million In Penalties*, WALL ST. J., Nov. 4, 2010, <http://blogs.wsj.com/corruption-currents/2010/11/04/panalpina-settlements-announced-with-2365-million-in-penalties/>.

⁹¹ *Id.*

⁹² Press Release, United States Securities and Exchange Commission, *SEC Charges Texas-Based Layne Christensen Company with FCPA Violations* (27 October 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857> [hereinafter *SEC Layne*].

⁹³ *Id.*

⁹⁴ *Id.*

The SEC alleged that Layne Christensen violated the FCPA's anti-bribery, books-and-records, and internal controls provisions.⁹⁵ The company agreed to pay approximately \$3.9 million in disgorgement and \$859,000 in prejudgment interest, as well as a \$375,000 civil penalty.⁹⁶ The lower than expected settlement was a result of Layne Christensen's voluntary disclosure of compliance problems to the SEC and DOJ, as well as its "exemplary cooperation" during the ensuing investigation by U.S. authorities.⁹⁷ Layne Christensen also agreed to implement several remedial measures and report on the progress of this implementation for a period of two years.⁹⁸

C. *Multilateral Development Banks*

Distinctive of financing in many transactions involving an African jurisdiction is the participation of institutions such as the African Development Bank, the International Finance Corporation of the World Bank Group, or other MDBs. These institutions have taken an increased role in enforcing anti-corruption (and other business conduct) standards. In the case of the World Bank Group, its sanctions process applies whenever the World Bank's Procurement Guidelines, Consultant Guidelines or Anti-Corruption Guidelines govern an agreement between the World Bank and a borrower.⁹⁹ Five practices are prohibited and sanctionable by the World Bank, including coercive practice, collusive practice, corrupt practice, fraudulent practice, and obstructive practice. The World Bank can impose a number of sanctions, including: (i) debarment with conditional release, (ii) conditional non-debarment, (iii) debarment, (iv) letter of reprimand, or (v) restitution or remedy.¹⁰⁰

On April 9, 2010, five MDBs concluded the "Agreement for Mutual Enforcement of Debarment Decisions," a cross-debarment agreement binding the World Bank Group, the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group.¹⁰¹ This effort could be suggestive of a trend towards increased convergence between MDBs.¹⁰²

As of 2012, the World Bank had sanctioned over 450 respondents, including both entities and individuals,¹⁰³ and to date close to thirty sanctions decisions had been made public.¹⁰⁴ The following example illustrates how World Bank sanctions and local enforcement can sometimes be interwoven.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Rachel Louise Ensign, *How Layne Christensen Cut Its Expected FCPA Penalty In Half*, WALL ST. J., 28 October 2014, <http://blogs.wsj.com/riskandcompliance/2014/10/28/how-layne-christensen-cut-its-expected-fcpa-penalty-in-half/>.

⁹⁸ *SEC Layne*, *supra* note 92.

⁹⁹ *See Abikoff*, *supra* note 37 at 520.

¹⁰⁰ *Id.* at 528-29.

¹⁰¹ *Id.*

¹⁰² *See* Frank A. Fariello, Jr. & Conrad C. Dally, *Coordinating the Fight Against Corruption Among MDBs: The Past, Present, and Future of Sanctions*, 45 GEO. WASH. INT'L L. REV. 253 (2013).

¹⁰³ Elizabeth Lin Forder, *The World Bank's Sanction System as An Example*, 106 AM. SOC'Y INT'L L. PROC. 122, 123 (2012).

¹⁰⁴ *Sanctions Board Decisions*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23059612~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html> (last visited Apr. 9, 2015).

In 1999, Lesotho successfully prosecuted foreign investors for corrupt payments to public officers to secure a contract related to the Lesotho Highlands Water Project, which was in part funded by the World Bank.¹⁰⁵ Relying to a certain extent on the judgments of the Lesotho courts, which were of the first criminal prosecutions of a major foreign investor in a developing country,¹⁰⁶ the World Bank debarred Acres International Limited (“Acres”) from doing business with the World Bank.¹⁰⁷ At the time, the Acres debarment was one of the largest debarment proceedings in World Bank history.¹⁰⁸

D. *Corruption Issues in International Arbitrations Involving Operations in Africa or African States*

Anti-corruption compliance can surface in the context of a dispute between a foreign investor and an African host state. Arbitration is often the preferred forum for the resolution of investment disputes, and some have noted that most cases where corruption had been an issue in arbitration concerned a dispute between either (i) the investor and the host state or state-owned entity or (ii) the investor and an agent or intermediary.¹⁰⁹ As of 2008, 27 % of all bilateral investment treaties (“BITs”) were concluded with African States.¹¹⁰ Regional investment agreements, such as the SADC Finance and Investment Protocol, the COMESA Investment Agreement, or the ECOWAS Energy Protocol, also contain investment protection clauses and investor-state dispute settlement provisions.¹¹¹

A number of African states have pointed to alleged acts of corruption as a defense in arbitrations with foreign investors. For instance, in *Wena v. Egypt*, the respondent raised the defense of corruption of a public official, although unsuccessfully.¹¹² In *Africa Holding Co. v. Democratic Republic of Congo*, an International Center for the Settlement of Investment Disputes (“ICSID”) tribunal stated that it was disposed to take into account “irrefutable” evidence of corruption from domestic criminal proceedings.¹¹³ *West Duty v. Kenya*, however, has been described as “the leading case on corruption in investment arbitration.”¹¹⁴ In that case, responding to the claim that the host

¹⁰⁵ See The Impact of Corruption, *supra* note 7 at 269.

¹⁰⁶ Ndiva Kofelle-Kale, Change of the Illusion of Change: The War Against Official Corruption in Africa, 38 GEO. WASH. INT’L L. REV. 710 (2006) [hereinafter Change of the Illusion of Change]; See Francesco De Simone, Bruce Zagaris, Impact of Foreign Bribery Legislation on Developing Countries and the Role of Donor Agencies, 6 ANTI-CORRUPTION RESOURCE CENTRE CHR. MICHELSEN INSTITUTE 23 (September 2014).

¹⁰⁷ See The Impact of Corruption, *supra* note 7 at 269.

¹⁰⁸ See Change of the Illusion of Change, *supra* note 107 at 709.

¹⁰⁹ Hilmar Raeschle-Kessler & Dorothee Gottwald, *Corruption in Foreign Investment-Contracts and Dispute Settlement between Investors, States, and Agents*, 9 J. WORLD INVESTMENT & TRADE 12 (2008) [hereinafter *Corruption in Foreign Investment*]; See generally Jose Rosell & Harvey Prager, *Illicit Commissions and International Arbitration: The Question of Proof*, 15 ARBITRATION INT’L 330 (1999).

¹¹⁰ Ibiroke T. Odumosu-Ayanu, *South-South Investment Treaties, Transnational Capital and African Peoples*, 21 AFR. J. INT’L & COMP. L. 172, 184 (2013).

¹¹¹ *Id.* at 189-95.

¹¹² *Wena v. Egypt*, ICSID Case No. ARB/98/4, 41 I.L.M. 896, Award 8 December 2000.

¹¹³ *Africa Holding Co. v. Democratic Republic of Congo*, ICSID Case No. ARB/05/21, Award, 29 Jul. 2008, ¶ 52.

¹¹⁴ Thomas Kendra & Anna Bonini, *Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?*, 31 J. OF INT’L ARBITRATION 447(2014)..

state had expropriated the claimant of its investment, Kenya argued that the underlying agreement with the claimant was unenforceable because it had been obtained with a “personal donation” of \$2 million to the then-acting President, a fact that the claimant had described in detail in its original pleading. The ICSID tribunal found that the main contract was unenforceable under English and Kenyan law¹¹⁵ and invalid as a matter of international public policy.¹¹⁶

III. ANTI-CORRUPTION LEGAL FRAMEWORK(S) IN AFRICA: A DIFFICULT GENERALIZATION

The norms prohibiting corruption in Africa stem from global,¹¹⁷ regional,¹¹⁸ and sub-regional agreements¹¹⁹ as well as national legislation. Those instruments include preventive and enforcement mechanisms and measures relating to international cooperation.¹²⁰

A. *Pan-African Efforts*

1. *African Union*

By developing and adopting a Convention on Preventing and Combating Corruption (“CPCC”) on July 11, 2003, which came into force on August 5, 2006, the African Union has taken a pivotal role in developing a body of international anti-corruption law in Africa.¹²¹ Described as “one of the broadest efforts against corruption to date,”¹²² the CPCC tackles corruption “through preventative measures, criminalization, and international cooperation, including measures aimed at the recovery of assets.”¹²³ Under the CPCC, all contracting states must take measures to prohibit all forms of bribery,¹²⁴ although it does not include provisions prohibiting corruption of foreign officials (i.e. those outside of the State contracting to the CPCC) or officials of international organizations and is silent on the question of facilitation payments.¹²⁵ Offenses covered include: (i) bribery, (ii) diversion of property by public officials, (iii) trading in influence, (iv) illicit enrichment, (v) money laundering, and (vi) concealment of property. Today, 48 countries have signed the

¹¹⁵ See *Corruption in Foreign Investment*, *supra* note 110 at 14.

¹¹⁶ *Id.*

¹¹⁷ See United Nations Convention against Corruption (“UNCAC”); United Nations Convention against Transnational Organised Crime (“UNTOC”).

¹¹⁸ AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION; See generally *Change of the Illusion of Change*, *supra* note 107.

¹¹⁹ *Southern African Development Community (SADC) Protocol Against Corruption*, TRANSPARENCY INTERNATIONAL, http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/ecowas_protocol#sthash.3Hsqxr0D.dpuf.

¹²⁰ Some African states, such as Ghana, have entered into BILATs with the United States, UK, Brazil, Germany, and Italy to assist state parties to combat corruption.

¹²¹ See generally Nsongurua J. Udombana, *Fighting Corruption Seriously? Africa’s Anti-Corruption Convention*, 7 SINGAPORE J. OF INT’L & COMP. L. 448 (2003); See also Thomas R. Snier & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT’L L. J. 691 (2007).

¹²² See *Abikoff*, *supra* note 37 at 33. For a critical assessment of the CPCC See Kolawole Olaniyan, *The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal*, 4 AFR. HUM. RTS. L.J. 74 (2004).

¹²³ See *Abikoff*, *supra* note 37 at 33.

¹²⁴ Africa Union, Convention on Preventing and Combating Corruption, Article 4, ¶1(a), July 11, 2003.

¹²⁵ See *Change of the Illusion of Change*, *supra* note 107, at 718-19.

convention, and 35 have ratified it.¹²⁶ Success of the CPCC depends in large part on how well individual member states decide to implement it,¹²⁷ and some commentators have observed that some of its provisions may prove difficult to apply in practice.¹²⁸

The CPCC established an Advisory Board, inaugurated in 2009, comprising eleven members responsible for “promoting adoption and application of anti-corruption measures across Africa, advising governments on how to address corruption-related issues, gathering information on corruption in Africa, and building relationships with other African governmental and nongovernmental organizations.”¹²⁹ Under the auspices of the United Nations Economic Commission for Africa and the Advisory Board, a regional anti-corruption program for Africa aims to “scal[e] up the fight against corruption on the continent with a view to ensuring a corruption free, better governed and economically prosperous continent.”¹³⁰

The United Nations Convention against Corruption (“UNCAC”) and the CPCC constitute the framework for the program.¹³¹ The objectives of the program are to (i) facilitate the elaboration and implementation of the international and regional anti-corruption frameworks; (ii) promote the domestication of international and regional anti-corruption frameworks in national laws and legislations; (iii) promote harmonization and coherence between regional and sub-regional initiatives and frameworks on corruption in Africa; (iv) promote and document best practices and lessons learned on anti-corruption aimed at encouraging countries to improve their anti-corruption efforts; (v) facilitate technical capacity enhancement for sub-regional and regional institutions; (vi) promote sustained focus on anti-corruption in Africa as a means of ensuring its continued attention, relevance and mainstreaming in national programs, planning and policy process; and (vii) articulate policy options and recommendation, on the fight against corruption in Africa.¹³²

2. *Sub-Regional Instruments*

The Southern African Development Community (“SADC”), a regional organization with no supranational mandate, complements the work of its member states.¹³³ In 2000, following a meeting on Ethics and Governance of the SADC Ministers of Justice and Generals in Zimbabwe, the SADC

¹²⁶ See List of countries that signed, ratified the Convention, available at http://www.au.int/en/sites/default/files/Corruption_0.pdf.

¹²⁷ See e.g. John Mukum Mbaku, *The International Dimension of Africa’s Struggle Against Corruption*, 10 ASPER REV. INT’L BUS. & TRADE L 41 (2010); See also *Change of the Illusion of Change*, *supra* note 107 at 718 (noting that “[w]hile most of the [CPCC] articles commence with a mandatory general principle, the manner of implementation is left to the discretion of each state party”).

¹²⁸ Snier & Kidane, *supra* note 121 at 713.

¹²⁹ See *Abikoff*, *supra* note 37 at 34.

¹³⁰ See *Combating Corruption*, *supra* note 4 at 1.

¹³¹ *Id.*

¹³² *Id.*, at 6.

¹³³ Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe. *SADC Protocol, TRANSPARENCY INTERNATIONAL*, http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/sadc_protocol#sthash.ERQGDLuH.dpuf

adopted a Protocol Against Corruption.¹³⁴ The SADC Protocol against Corruption was adopted in August 2001, making it the first sub-regional anti-corruption treaty in Africa. The Protocol was signed by Heads of State and Government of all 14 SADC member states and entered into force in July 2005. The Protocol provides both preventive and punitive measures to combat corruption. The Southern African Forum Against Corruption (“SAFAC”) was created in June 2000 to implement the SADC Protocol at the regional level.¹³⁵

Similarly, the Economic Community of West Africa States (“ECWAS”) Protocol on the Fight against Corruption aims to strengthen effective mechanisms to prevent and eradicate corruption through cooperation between contracting parties.¹³⁶ It was signed in December 2001 and has not yet become operational. The Protocol binds State Parties to adopt the necessary legislative measures to criminalize, amongst other things, bribery, false accounting, and acts of assisting corrupt practices.

Lastly, the East African Community (“EAC”) is currently drafting a protocol to prevent and combat corruption.¹³⁷ The objectives of the draft of the Protocol on preventing and combating corruption, according to the EAC, is “to promote and strengthen the development of mechanisms to prevent and combat corruption; to promote, facilitate and regulate cooperation among the Partner States to ensure the efficiency and effectiveness of measures for preventing and combating corruption and to develop and harmonize laws, policies and strategies relating to prevention and combating corruption across borders.”¹³⁸

B. Country Case Studies

It has been observed that corruption in sub-Saharan Africa continues to thrive, because “demand-side corruption enforcement is lagging.”¹³⁹ A review of all the anti-corruption legislation of all 53 African States is beyond the scope of this Article, but this section offers a general overview of some anti-corruption legislation in select jurisdictions to illustrate the importance of understanding the legal framework in which foreign investors operate.

¹³⁴ D.D.N. Nsereko & Z.Kebonang, *The SADC Protocol against Corruption: Example of the Region’s Response to an International Scourge*, 1 UNIV. OF BOTSWANA L.J. 86 (2005).

¹³⁵ *See Change of the Illusion of Change*, *supra* note 107 at 716.

¹³⁶ Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. *Southern African Development Community (SADC) Protocol Against Corruption*, TRANSPARENCY INTERNATIONAL, http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/ecowas_protocol#sthash.3Hsqxr0D.dpuf (last visited Apr. 9, 2015).

¹³⁷ *Legal Drafters & Anti-Corruption Experts Fine-tune EAC Protocol on Preventing and Combating Corruption*, EAST AFRICAN COMMUNITY, http://www.eac.int/index.php?option=com_content&id=1124:legal-drafters-a-anti-corruption-experts-fine-tune-eac-protocol-on-preventing-and-combating-corruption&Itemid=194 (last visited Apr. 9, 2015).

¹³⁸ *Combating Corruption and enhancing Ethics and Integrity in the EAC Integration*, FEDERATION OF THE EAC, http://federation.eac.int/index.php?option=com_content&view=article&id=183&Itemid=71 (last visited Apr. 9, 2015).

¹³⁹ Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives*, 26 AM. U. INT’ L L. REV. 356 (2010).

1. *Angola*

Between 2013 and 2014, Angola fell from 153rd to 161st out of 175 countries in Transparency International's annual Corruption Perceptions Index ("CPI").¹⁴⁰ In the World Bank's 2010 Enterprise Survey, 64% of firms operating in Angola expected to give gifts to secure government contracts and 75.6% viewed corruption as a major constraint.¹⁴¹ In 2008, Global Integrity declared that Angola had "one of the worst overall anti-corruption frameworks" in the world.¹⁴² For many, the environment has not improved much despite President José Eduardo dos Santos' pledge of a "zero tolerance" crackdown on corruption in 2009.¹⁴³

Active and passive corruption, including embezzlement, extortion, and bribery, are criminalized under the Angolan Penal Code, though as of 2008, the bribery of foreign officials was still not covered under the law.¹⁴⁴ In 1996, the government passed the Law of the High Authority against Corruption, which established a new, independent body (the High Authority Against Corruption), charged with working with the National Assembly to investigate and prosecute allegations of corruption and fraud.¹⁴⁵ Despite the law clearly laying out the organization's powers, some have noted that the body in fact exists in law only.¹⁴⁶ In 2010, the government passed the Public Probity Law, which was intended to consolidate anti-corruption provisions from earlier statutes.¹⁴⁷ Notably, the new law required government officials to disclose their assets, those held both domestically and abroad, but established no system for reviewing these disclosures and proving their veracity.¹⁴⁸

2. *Democratic Republic of Congo*

Transparency International ranked the DRC 154th out of 175 countries in their 2014 Corruption Perceptions Index,¹⁴⁹ and the U.S. State Department's 2014 Investment Climate

¹⁴⁰ See *Corruption by country/territory*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/country#COD> (last visited Apr. 9, 2015) [hereinafter *Corruption by Country*].

¹⁴¹ *World Bank Group Enterprise Survey, Angola 2010*, WORLD BANK, <http://www.enterprisesurveys.org/~media/GIAWB/EnterpriseSurveys/Documents/Profiles/English/angola-2010.pdf> (last visited Apr. 9, 2015).

¹⁴² *Global Integrity Report 2008, Angola Integrity Scorecard*, GLOBAL INTEGRITY <https://www.globalintegrity.org/global/the-global-integrity-report-2008/angola/> (last visited Apr. 9, 2015).

¹⁴³ Henrique Almeida, *Angola President calls on party to end corruption*, REUTERS, 22 November 2009, <http://in.reuters.com/article/2009/11/22/idINIndia-44149320091122>

¹⁴⁴ *Overview of corruption and anticorruption in Angola*, U4 REPORT, http://www.transparency.org/files/content/corruptionqas/257_Corruption_and_anti_corruption_in_Angola.pdf (last visited Apr. 9, 2015) [hereinafter *U4 Angola Report*].

¹⁴⁵ *Law of High Authority Against Corruption, Article 2*, INTERNATIONAL ASSOCIATION OF ANTI-CORRUPTION AUTHORITIES, http://www.iaaca.org/AntiCorruptionLaws/ByCountriesandRegions/A/Angola/201202/t20120216_805928.shtml (last visited Apr. 9, 2015).

¹⁴⁶ See U4 Angola Report, *supra* note 144 at 7.

¹⁴⁷ *Anticorruption and Transparency, Countries at the Crossroads, Angola*, FREEDOM HOUSE, <https://freedomhouse.org/report/countries-crossroads/2011/angola> (last visited Apr. 9, 2015).

¹⁴⁸ See U4 Angola Report, *supra* note 144 at 7.

¹⁴⁹ *Corruption by Country*, *supra* note 140.

Statement described corruption levels in DRC as “endemic...at all levels of government.”¹⁵⁰ Despite putting in place a legal framework to combat corruption, it has been noted that there is little evidence of it being enforced in practice,¹⁵¹ and the Millennium Challenge Corporation Corruption found that corruption was only 6% under control as of 2011.¹⁵²

Following the end of the Second Congo War in 2003, the transitional government of President Joseph Kabila established a basic anti-corruption legal framework with the assistance of the international community. That year, the country signed (but still has not ratified) the CPCC.¹⁵³ In May 2005, the government enacted Law N° 05/006 modifying anticorruption articles in the Congolese Penal Code.¹⁵⁴ The law declared all corruption of, illicit payments to, and influence peddling by, public officials to be illegal and clearly defined public officials in Article 147 as any functionary or employee of the State or its institutions, whether elected or appointed.¹⁵⁵ The law also outlined stiff punishments for those found guilty of corruption, money laundering or bribery, including 6 months to 2 years of imprisonment and fines of fifty thousand to two million Congolese francs.¹⁵⁶ In a clear effort to increase transparency, whistleblowers are also accorded special protections against reprisals, intimidation, and persecution under the law.¹⁵⁷ In 2006, a new Code of Ethics for Public Officials required all government officials and civil servants to submit asset declarations, which led Global Integrity to declare that the country’s collective anti-corruption laws were “very strong.”¹⁵⁸ However, the country’s investigation and enforcement track records remain anemic. Institutions charged with leading the fight against corruption, from the Ethics and Anti-Corruption Commission (“CELC”) to the DRC Financial Intelligence Unit, created in 2009 to investigate money laundering and embezzlement, to the State Auditor General, have to date been ineffective.¹⁵⁹ A lack of funding and staffing for the above agencies and a judiciary that is itself considered by some to be rife with corruption and political interference have prevented the application of the country’s anticorruption laws.¹⁶⁰

3. Kenya

¹⁵⁰ See *Investment Climate Statement – Democratic Republic of the Congo*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/e/eb/rls/othr/ics/2014/227134.htm> (last visited Apr. 9, 2015).

¹⁵¹ See *Country Profile: Democratic Republic of Congo*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/files/content/corruptionqas/Country_Profile_DRC_2014.pdf (last visited Apr. 9, 2015).

¹⁵² *2011 Investment Climate Statement – DRC citing the Millennium Challenge Corporation*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/e/eb/rls/othr/ics/2011/157260.htm> (last visited Apr. 9, 2015).

¹⁵³ See Signatures and Ratifications of the African Convention on Preventing and Combating Corruption, available at <http://www.au.int/en/sites/default/files/Corruption.pdf>.

¹⁵⁴ Law 05/006 of May 29, 2005 modifying Congolese Penal Code of 1940.

¹⁵⁵ *Id.* at Art. 147.

¹⁵⁶ *Id.* at Art. 148.

¹⁵⁷ *Id.* at Art. 149, part 5

¹⁵⁸ *Overview of Corruption and Anti-Corruption in Democratic Republic of Congo (DRC)*, U4, http://www.transparency.org/files/content/corruptionqas/Country_Profile_DRC_2014.pdf (last visited Apr. 9, 2015) [hereinafter *U4 DRC Report*].

¹⁵⁹ *Id.*

¹⁶⁰ See *Congo, Democratic Republic of (Kinshasa)*, FREEDOM HOUSE, https://www.freedomhouse.org/report/freedom-world/2013/congo-democratic-republic-kinshasa#.VL_XedLF-1k (last visited Apr. 9, 2015).

Ending the 24-year reign of President Daniel Arap Moi, in 2002, Mwai Kibaki won the Kenyan presidential elections on an anti-corruption and public accountability platform. One year later, however, members of Kibaki's administration were implicated in a massive public procurement corruption scandal.¹⁶¹ Kenya ranked 145th out of 175 countries on the 2014 CPI,¹⁶² while the U.S. State Department described corruption levels in Kenya as “pervasive and entrenched” and “a major impediment” to business.¹⁶³ Given the nature of Kenya's economy, corruption is not limited to one dominant industry but instead is considered to touch every facet of the public and private sectors.¹⁶⁴

Kenya's anti-corruption legal framework has nonetheless consistently been ranked as one of Africa's best, with Global Integrity giving it a score of 82% or “strong.”¹⁶⁵ The principle piece of anti-corruption legislation is the Anti-Corruption and Economic Crimes Act of 2003, which criminalizes active, passive and attempted corruption, bribery, abuse of power, money laundering, extortion, conflict of interest, and bid rigging.¹⁶⁶ In addition to defining offenses, the law called for special magistrates to hear corruption-related cases (Section II) and for the establishment of an independent Kenya Anti-Corruption Commission (“KACC”) to investigate complaints (Section III).¹⁶⁷ The Public Officers Ethics Act, also enacted in 2003, obliges government officials, *inter alia*, to declare gifts and hospitality offered to civil servants.¹⁶⁸ Further measures were passed to curtail corruption in certain high risk areas such as public procurement and money laundering.¹⁶⁹ Additional institutions were established to help police corruption, including the Public Complaints Standing Committee to receive all complaints relating to public officials,¹⁷⁰ and the Financial Reporting Centre to review suspicious transactions and implement regulations to monitor corruption.¹⁷¹

The replacement of the KACC with the Ethics and Anti-Corruption Commission (“EACC”) in 2011 was intended to reinvigorate the fight against corruption,¹⁷² but to date only one senior

¹⁶¹ Xan Rice, “The Looting of Kenya,” THE GUARDIAN, 31 August 2007, <http://www.theguardian.com/world/2007/aug/31/kenya.topstories3>.

¹⁶² *Corruption by Country*, *supra* note 140.

¹⁶³ See 2014 Investment Climate Statement – Kenya, U.S. DEPARTMENT OF STATE, <http://www.state.gov/e/eb/rls/othr/ics/2014/228886.htm> (last visited Apr. 9, 2015).

¹⁶⁴ *Kenya: overview of corruption and anticorruption*, U4, <http://www.u4.no/publications/kenya-overview-of-corruption-and-anti-corruption/> (last visited Apr. 9, 2015) [hereinafter *U4 Kenya Report*].

¹⁶⁵ *Kenya Integrity Scorecard 2011*, GLOBAL INTEGRITY, <https://www.globalintegrity.org/global/the-global-integrity-report-2007/kenya/2011/> (last visited Apr. 9, 2015).

¹⁶⁶ *U4 Kenya Report*, *supra* note 164.

¹⁶⁷ Anti-Corruption and Economic Crimes Act, 2003, UN DOCUMENT TRACK, <http://www.track.unodc.org/LegalLibrary/LegalResources/Kenya/Laws/Kenya%20Anti-Corruption%20and%20Economic%20Crimes%20Act%202003.pdf> (last visited Apr. 9, 2015).

¹⁶⁸ The Public Officer Ethics Act, 2003, ICT REGULATION TOOLKIT, <http://www.ictregulationtoolkit.org/en/toolkit/docs/Document/1418> (last visited Apr. 9, 2015).

¹⁶⁹ See *Kenya: Public Procurement and Disposal Act, 2005*, WORLD BANK, <http://ppp.worldbank.org/public-private-partnership/library/public-procurement-and-disposal-act-2005> (last visited Apr. 9, 2015); see also *Proceeds of Crime and Anti Money Laundering, 2009* (Revised Edition 2012), Financial Reporting Center, <http://www.frc.go.ke/legislation> (last visited Apr. 9, 2015).

¹⁷⁰ See *Kenyan Public Anti-Corruption Initiatives*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/kenya/initiatives/public-anti-corruption-initiatives.aspx> (last visited Apr. 9, 2015).

¹⁷¹ See FINANCIAL REPORTING CENTRE (FRC), <http://www.frc.go.ke/> (last visited Apr. 9, 2015).

¹⁷² See ETHICS AND ANTI-CORRUPTION COMMISSION, <http://www.eacc.go.ke/> (last visited Apr. 9, 2015).

official has ever been convicted for abuse of office in connection with a multi-million public procurement corruption, for which he was sentenced to pay just \$35,400 in fines.¹⁷³ Political interference in the judiciary and a general lack of political will to actively pursue corrupt officials are seen as preventing any real efforts to enforce the law. In 2011, the EACC's director, Patrick Lumumba, was dismissed shortly after announcing he would be investigating high level officials, including ministers, senior civil servants, and members of parliament.¹⁷⁴ Law enforcement agencies are seen as some of the most corrupt institutions in the country,¹⁷⁵ and State Department cables from 2008, later released by Wikileaks, mentioned that people within the KACC were blocking progress on high-level investigations and had direct ties to the President's office.¹⁷⁶

4. Nigeria

Despite its new status as Africa's largest economy,¹⁷⁷ Nigeria still struggles significantly with corruption and has been the backdrop of many FCPA enforcement actions. Transparency International ranked it 136th out of 175 countries in its 2014 CPI,¹⁷⁸ with over 40% of business operating in the country admitting in a World Bank survey that they had "given gifts to public officials to 'get things done.'"¹⁷⁹ Though the country's anti-corruption framework was graded "moderate" in a 2008 Global Integrity report,¹⁸⁰ it was noted that the government at times seems more interested in pursuing those fighting corruption than those perpetrating it.¹⁸¹

Two laws form the bedrock of Nigeria's anticorruption legal framework, the Corrupt Practices and Other Related Offenses Act of 2000 and the Economic and Financial Crimes Commission Establishment Act of 2004.¹⁸² The former established the Independent Corrupt Practices and Other Related Offenses Commission ("ICPC") to receive and investigate complaints of bribery and improper conduct and to prosecute the offenders.¹⁸³ The ICPC was also charged with reviewing and reforming practices in the public sector with a high risk of corruption and to educate the public on matters of compliance.¹⁸⁴ The law covers nineteen corruption-related offenses, from

¹⁷³ *Kenya makes first conviction in Anglo Leasing graft scam*, REUTERS, 5 September 2012, <http://www.reuters.com/article/2012/09/05/us-kenya-corruption-idUSBRE8840RJ20120905>.

¹⁷⁴ See U4 Kenya Report, *supra* note 167, at 3,

¹⁷⁵ *Id.*

¹⁷⁶ David Smith, *Wikileaks Cables: Rampant Corruption 'could push Kenya back into Violence*, THE GUARDIAN, 8 December 2010. <http://www.theguardian.com/world/2010/dec/08/wikileaks-cables-kenya-violence-china>.

¹⁷⁷ *Rebasing Boost Lifts Nigeria to Top of Continental table*, ERNST & YOUNG, <http://emergingmarkets.ey.com/worldmap/nigeria/> (last visited Apr. 9, 2015).

¹⁷⁸ *Corruption by Country*, *supra* note 140.

¹⁷⁹ World Bank Enterprise Survey, 2007, ENTERPRISE SURVEYS, <http://www.enterprisesurveys.org/data/exploreconomies/2007/nigeria> (last visited Apr. 9, 2015).

¹⁸⁰ "2080 Global Integrity Report: Nigeria Notebook", GLOBAL INTEGRITY <https://www.globalintegrity.org/global/the-global-integrity-report-2008/nigeria/2010/> (last visited Apr. 9, 2015).

¹⁸¹ *Id.*

¹⁸² *Investment Climate Report on Nigeria, 2013*, UNITED STATES STATE DEPARTMENT, <http://www.state.gov/e/eb/rls/othr/ics/2013/204707.htm> (last visited Apr. 9, 2015) [hereinafter *State Nigeria*].

¹⁸³ Corrupt Practices and Other Related Offenses Act of 2000, Section 6(a)

¹⁸⁴ *Corrupt Practices and Other Related Offenses Act of 2000, Sections 6(b) and(c)*, NIGERIA LAW, <http://www.nigeria->

accepting or giving bribes to concealing fraud.¹⁸⁵ The latter created the Economic and Financial Crimes Commission (“EFCC”), which was given greater power to “prevent, investigate, prosecute and penalize economic and financial crimes.”¹⁸⁶ This EFCC was given jurisdiction, a much wider array of financial crimes, and the tools to conduct investigations quickly and effectively. Both the EFCC and the ICPC were further reinforced with additional laws on misconduct in Public Procurement and in the Extractive Industries passed in 2007.

Although the ICPC was initially anticipated to serve as the main hub for combating corruption, since it was established in 2001, only 14 convictions have resulted from ICPC investigations.¹⁸⁷ Eight years after its inauguration, the EFCC reportedly had secured over 600 convictions and recovered over \$9 billion in assets.¹⁸⁸ The EFCC achieved high-profile convictions of former government leaders, including the former governor of the Bayelsa State,¹⁸⁹ the former inspector general of the police, and the former chair of the Nigerian Ports Authority board.¹⁹⁰ The EFCC also brought charges against multiple international oil companies and certain executives in connection with a bribery scheme related to contracts for the Bonny Island LNG plant.¹⁹¹ The EFCC has also brought corruption allegations against Siemens, which were resolved through a \$7

law.org/Corrupt%20Practices%20and%20other%20Related%20Offences%20Act%202000.htm (last visited Apr. 9, 2015).

¹⁸⁵ *State Nigeria, supra* note 182.

¹⁸⁶ *International Association of Anti-Corruption Authorities*, NIGERIA –ECONOMIC AND FINANCIAL CRIMES COMMISSION (EFCC), <https://efccnigeria.org/efcc/index.php/news/1112-anti-corruption-day-lamorde-charges-nigerians-to-break-the-corruption-chain> (last visited Apr. 9, 2015).

¹⁸⁷ *Our Role*, INDEP. CORRUPT PRACTICES & OTHER RELATED OFFENSES COMM’N, <http://icpc.gov.ng/our-role/> (last visited November 6, 2014).

¹⁸⁸ From June 2008-March 2011, the EFCC reported recovered approximately \$6.5 billion from the following sectors: \$4.3 billion from banking, \$23.3 from cases relating to taxation; \$10 million from local businesses; \$240 million from multinational penalties; and \$903 Million from asset forfeitures.

¹⁸⁹ In September 2005, Mr. Diepreye Alamiyeseigha, former governor of Bayelsa state in the Niger Delta region was detained in London on charges of money laundering. At the time of his arrest, the British authorities found approximately £1m in cash in his London home and £1.8m (\$3.2m) in his bank accounts as well as real estate in valued £10 million. He fled bail and returned to Nigeria in December 2005, allegedly disguising himself as a woman. On July 26, 2007, Alamiyeseigha pled guilty before a Nigerian court to charges of corruption and was sentenced to two years in prison for each of the six counts on which he was found guilty and ordered to forfeit assets to the Bayelsa government. However, because the sentences were set to run concurrently and the time was counted from the point of his arrest nearly two years before the sentences, his actual sentence was relatively short and he was released from prison the next day on July 27, 2007. On 12 March 2013, Alamiyeseigha received a controversial and widely criticized pardon from President Goodluck Jonathan, thus setting the stage for return of his assets.

¹⁹⁰ *State Nigeria, supra* note 182.

¹⁹¹ In December 2010, Halliburton announced that it had reached an agreement with the Nigerian government to resolve charges brought against Halliburton, KBR, and associated persons. Under the agreement, Halliburton consented to pay a \$32.5 million criminal penalty and \$2.5 million in legal fees. During the same month, Snamprogetti reached agreements with the EFCC, under which it agreed to pay a \$32.5 million in criminal penalties and legal costs. JGC has reportedly paid \$28.5 million to resolve EFCC charges related to the Bonny Island project. See, generally, Press Release, Halliburton, Halliburton Confirms Agreement to Settle with Federal Government of India (Dec. 21, 2010), *available at* http://www.halliburton.com/public/news/pubsdata/press_release/2010/corpnws_12212010.html.

billion (approximately \$46.5 million) settlement.¹⁹² The EFCC also initiated investigations into allegations, involving improper payments to customs-officials.¹⁹³ Today, critics accuse Nigeria's current administration of insincerity in combating corruption and of fostering an environment of even more rampant corruption.¹⁹⁴ Indeed, the Chief Justice of Nigeria in 2013 challenged the Nigerian attorney general to demonstrate the political will to prosecute high profile corruption cases in the country.¹⁹⁵

5. Senegal

Since 2012, Senegal has made significant progress in the fight against corruption. Transparency International ranked Senegal 69th out of 175 countries in their 2014 CPI.¹⁹⁶ While Senegal continues to suffer corruption in certain areas, particularly at lower levels of government,¹⁹⁷ the U.S. State Department noted that the government had "prioritized efforts to fight corruption, increase transparency and improve governance."¹⁹⁸

Corruption is criminalized under the Senegalese Penal Code's Article 159, which covers several types of corruption-related misconduct, both direct and indirect, sets stiff penalties of 2-10 years imprisonment and fines double the value of gifts or promises offered as bribes (with a

¹⁹² *Legal Proceedings*, SIEMENS, <http://www.siemens.com/press/pool/de/events/2011/corporate/2011-q2/2011-q2-legal-proceedings-e.pdf> (last visited Apr. 9, 2015); *see also Recent Domestic Bribery Enforcement Developments in Nigeria*, Trace Blog, <http://www.traceinternational.org/recent-domestic-bribery-enforcement-developments-in-nigeria/>.

¹⁹³ The conduct involved in the Panalpina industry sweep primarily involving improper payments made to customs officials and other government officials in Nigeria (discussed above), led to enforcement action by Nigeria's EFCC. In November 2010, the Nigerian EFCC arrested eleven Panalpina officials in connection with bribery allegations. The EFCC also reportedly sent letters of invitation to question one of the vice presidents for Africa from Royal Dutch Shell in connection with the Panalpina investigation. Elisha Bala-Gbogbo, *Nigeria Seeks Testimony From Shell, Halliburton Over Payments*, BLOOMBERG, Nov. 30, 2010, <http://www.bloomberg.com/news/2010-11-30/nigeria-seeks-testimony-from-shell-halliburton-over-payments.html>.

¹⁹⁴ In 2007, Nigeria joined the international Extractive Industries Transparency Initiative ("EITI"), an initiative of the G-8 countries, which creates a global standard to encourage payment and revenue transparency for extractive industries, such as oil and gas. The government has since passed implementing legislation pursuant to which oil, gas, and mining sectors will be subject to audits that are consistent with international standards, and any violations may result in fines, license revocation, or criminal sanctions. Nigeria has also completed a comprehensive audit of oil sector payments and government revenues from 1999-2004. The Nigerian organization ("NEITI") was tasked with establishing a framework for transparency and accountability for disclosing payments between the Nigerian government and companies in the extractive industry *State Nigeria*, *supra* note 182.; *see also* Elisha Bala-Gbogbo, *Nigeria Files Charges Against Dick Cheney, Halliburton Over Bribery Case*, BLOOMBERG, Dec. 7, 2010, <http://www.bloomberg.com/news/2010-12-07/nigeria-files-charges-against-dick-cheney-halliburton-over-bribery-case.html>; *Saipem Offers \$30 million to Settle Nigeria's Case*, OIL & GAS PRESS, Dec. 21, 2010, <http://www.oilandgaspress.com/wp/?p=4976>.

¹⁹⁵ NIGERIAN EYE, <http://nigerianeyeonline.com/cjn-tasks-agf-over-high-profile-corruption-cases/> (last visited June 19, 2013).

¹⁹⁶ *Corruption by Country*, *supra* note 140.

¹⁹⁷ *See 2014 Investment Climate Statement – Senegal*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/e/eb/rls/othr/ics/2014/228602.htm> (last visited Apr. 9, 2015)

¹⁹⁸ *Id.*

minimum fine of 150,000 francs).¹⁹⁹ In 2003, Loi N° 2003-35 established a commission charged with identifying causes of corruption, proposing reforms, receiving and investigating complaints, and providing the President of Senegal with yearly reports on the status of corruption in the country.²⁰⁰ Additional laws, such as the Procurement Code and the Law on Money Laundering, strengthened the legal framework by targeting high-risk areas.²⁰¹

Soon after his election, President Sall declared “the era of impunity is over” and reestablished the Court of Repression of Economic and Financial Crime, which had become inactive under his predecessor.²⁰² Sall introduced a bill requiring the government to make public its accounts and certain officials to declare their assets before taking office.²⁰³ He also introduced a new anti-corruption commission, OFNAC,²⁰⁴ with greater powers to investigate allegations and full independence from the executive branch.²⁰⁵ Additional agencies were created to assist OFNACs mission, including the Ministry for the Promotion of Good Governance, the National Anticorruption Office, the National Commission on Restitution and Recovery of Ill-gotten Assets, and the Court of Repression of Economic and Financial Crime.²⁰⁶ In an unprecedented move the President launched independent audits in order to investigate all members of the former regime, including himself, to promote greater transparency within Senegal's government.²⁰⁷

6. Botswana

Ranking 31st on the 2014 CPI, Botswana has also been recognized for vigorously investigating allegations and complaints of corruption and holding both private and public parties accountable.²⁰⁸ Rates of bribery incidence, defined as the percent of firms experiencing at least one bribe payment request, and bribery depth, defined as the percentage of public transactions where a gift or informal payment was requested, were the lowest of any African country.²⁰⁹ The largely

¹⁹⁹ Code Penal Senegal, Paragraphe III, Article 159, *available at*

<http://www.droit-afrique.com/images/textes/Senegal/Senegal%20-%20Code%20penal.pdf>.

²⁰⁰ LOI n° 2003-35 du 24 novembre 2003 portant création d'une Commission nationale de lutte contre la non transparence, la corruption et la concussion, Article II.

²⁰¹ Anti-Corruption Initiatives, Senegal Profile, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/senegal/initiatives/public-anti-corruption-initiatives.aspx> (last visited Apr. 9, 2015) [hereinafter *Anti-Corruption Senegal*].

²⁰² *Foreign Affairs Interview with President Macky Sall*, FOREIGN AFFAIRS, September/October 2013 Issue, <http://www.foreignaffairs.com/discussions/interviews/africas-turn>.

²⁰³ *Id.*

²⁰⁴ OFFICE NATIONAL DE LUTTE CONTRE LA FRAUDE ET LA CORRUPTION (“OFNAC”), <http://www.ofnac.sn/> (last visited Apr. 9, 2015).

²⁰⁵ *Anti-Corruption Senegal*, *supra* note 201.

²⁰⁶ *See U.S. Department of State 2014 report*, UNITED STATES STATE DEPARTMENT, <http://www.state.gov/documents/organization/228812.pdf> (last visited Apr. 9, 2015).

²⁰⁷ *See Senegal Embarks On Anti-Corruption Drive to Attract Investors*, ECONOMY WATCH, June 2012, <http://www.economywatch.com/in-the-news/senegal-embarks-on-anti-corruption-drive-to-attract-investors.11-06.html>.

²⁰⁸ *Investment Climate Report on Botswana, 2013*, UNITED STATES STATE DEPARTMENT, <http://www.state.gov/e/eb/rls/othr/ics/2014/226918.htm> (last visited Apr. 9, 2015).

²⁰⁹ World Bank Group Enterprise Survey, Botswana 2010, ENTERPRISE SURVEYS, <http://www.enterprisesurveys.org/data/exploreconomics/2010/botswana> (last visited Apr. 9, 2015).

corruption-free business environment is consistently ranked as one of Botswana's greatest assets by companies operating in the country.²¹⁰

The Penal Code's already strong sections on corruption and abuse of power were reinforced by the Corruption and Economic Crime Act of 1994, which established the Directorate on Corruption and Economic Crimes ("DCEC") to investigate complaints of corruption, bribery, and other misconduct as well as to educate the public on corruption.²¹¹ The law gives the DCEC and its director broad powers of investigation (Part II, sections 6-11), clearly defines corruption offenses (IV, 23-35), and protects both whistleblowers (VII, 45) and those falsely accused of corruption (VII, 43).²¹² The law sets a penalty of imprisonment for up to 10 years, a fine of up to 500,000 Pula, or both, for those convicted of corruption or influence peddling for personal gain (IV, 36).²¹³

The DCEC is designated as an "operational autonomous law enforcement agency" under portfolio responsibility of the Minister for Justice, Defense and Security, and its head is appointed by the president.²¹⁴ The Directorate is a highly effective institution and has achieved notable successes in the two decades since its establishment. In 2011 alone, the agency received 1,800 reports of corruption and in 2012 investigated 433 allegations.²¹⁵ The government usually wins 16-20 corruption-related convictions per year, among which have been personnel from all levels of government.²¹⁶

III. CONCLUSION

Corruption in the course of doing business in Africa remains a significant risk factor for investors and a scourge for host states. Admittedly, the prospect of having to deal with improper conduct, or the possibility of being exposed to it, can deter otherwise sound business decisions and hampers the transformation of growth into development. These concerns, however, can be assuaged and addressed effectively by embracing anti-corruption compliance efforts early on, not as mere regulatory cost, but as a means of enhancing the underlying value of an investment and potentially serving as a competitive advantage.

With adequate planning and advice, foreign investors in Africa should be able to better navigate complex environments, thereby reaping the maximum value of their investments. Investors

²¹⁰ *Botswana Profile*, KPMG, <https://www.kpmg.com/Africa/en/KPMG-in-Africa/Documents/Botswana.pdf> (last visited Apr. 9, 2015) [hereinafter *KPMG Botswana*].

²¹¹ *Botswana – Corruption and Economic Crime Act*, INTERNATIONAL ASSOCIATION OF ANTI-CORRUPTION AUTHORITIES, <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/2-6June2014/V1403502e.pdf> (last visited Apr. 9, 2015).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Directorate on Corruption and Economic Crime – Overview of the DCEC*, Republic of Botswana, <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/About-the-DCEC1/Overview-of-the-DCEC/> (last visited Apr. 9, 2015).

²¹⁵ See *U.S. Department of State 2014 report - Senegal*, UNITED STATES STATE DEPARTMENT, <http://www.state.gov/documents/organization/228812.pdf> (last visited Apr. 9, 2015).

²¹⁶ *KPMG Botswana*, *supra* note 210.

would be well advised to devote sufficient attention and resources to adequate anti-corruption risk analysis and management in the relevant country and industry of operations. To that end, companies operating in Africa can resort to a diversified compliance toolbox, which includes:

- Risk Assessment: As part of elaborating an investment strategy, or at least when considering a potential transaction in Africa, investors should conduct a risk analysis of the relevant economic and political environment and define their risk profile. Once the transaction has been executed, the investor should monitor geopolitical and economic developments and re-assess the level and nature of risks to which it may be exposed.
- Policies & Procedures: Company policies and procedures prohibiting corrupt practices can play a fundamental role in mitigating the risk of corruption. As such, investors should seek to ensure that they have in place effective and tailored anti-corruption policies and procedures, and that such policies and procedures are incorporated into their business activities. For example, companies entering into joint venture relationships should take steps to ensure that their partners adhere to the same principles to which they hold themselves, and in the event of an acquisition, companies should review the extent to which the target entity comports with such requirements and react accordingly.
- Third Party Due Diligence: As seen in this Article, significant compliance risks can arise out of third party relationships. Prior to entering into any new relationship, foreign investors should conduct thorough due diligence on third parties, including agents, joint venture or consortium partners, and monitor any developments in these relationships that may require a re-evaluation of their due diligence. This process often entails seeking assurances and certifications from agents and partners, and emphasizes the importance of knowing and understanding the business and political dynamics of the local environment.
- Training & Awareness: Adequate training and awareness are pillars of anti-corruption prevention. Investors should consider offering training to relevant internal personal as well as third parties, and, to the extent possible, encourage participation in local events or organizations that promote a culture of compliance, transparency and ethical business practices.

Host States, for their part, should find value in such an approach, for it encourages competitive practices and long-term commitments. Their resolve, however, may be tested by political realities, which are often driven by short term interests, and the fact that not all foreign investors are expected to adhere to the same norms of conduct in their home jurisdiction. It remains to be seen whether all capital exporting jurisdictions will express sufficient desire and will to enforce anti-corruption standards internationally, assuming they have the tools to do so. Host States with a demonstrated ability to curtail corruption in their business environments should see their attractiveness increase. In this context, regional organizations such as the African Union could be well poised to play a key role in supporting individual host jurisdictions and coordinating actions in the fight against corruption in international business. As seen, they can already draw on a number of existing mechanisms to that effect.