

Combating Bribery of Indigenous Leaders in International Business

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As U.S. law enforcement agencies have intensified their efforts to combat bribery in international business under the Foreign Corrupt Practices Act (FCPA), one form of corruption has been overlooked: bribery of indigenous leaders by multinational enterprises undertaking projects that will impact their communities. This Article demonstrates that the FCPA, the Travel Act, and other federal statutes could be readily applied to this form of bribery. However, it also shows that certain economic dealings between companies and indigenous leaders have legitimate purposes, and that these dealings likely would be treated as permissible under these statutes. The author proposes guidelines for distinguishing between legitimate and corrupt transactions, which should inform companies, indigenous leaders, and law enforcement agencies when navigating and applying the statutory requirements. This Article also argues that enforcement agencies should assign to this form of bribery an enforcement priority equal to that of more conventional foreign corrupt practices, if and when the statutory elements are satisfied.

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INTRODUCTION

Federal law enforcement agencies have been combating corrupt practices by U.S. companies in international business for decades, but in recent years their efforts have increased in both breadth and intensity.¹ The U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) have dramatically expanded the number of investigations and enforcement proceedings under the Foreign Corrupt Practices Act (FCPA),² a federal statute that prohibits giving or offering anything of value to an official of a foreign government, in a corrupt manner, for a business purpose.³ The DOJ and the SEC have achieved this spike in enforcement in part by developing novel legal theories of liability, which have allowed these agencies to reach previously-overlooked forms of corruption.⁴ Most notably, the DOJ and the SEC have extended the

1. See generally Lucinda A. Low & Owen Bonheimer, *The Widening FCPA Dragnet: The Increasing Pursuit of Individuals and Foreign Persons and Expansive Use of Legal Theories*, 3 J. SEC. OPERATIONS & CUSTODY 166 (2010).

2. See Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325, 326–27 (2013) (“Passed in 1977, the [FCPA] lay in abeyance until undergoing an astounding enforcement boom in recent years.”); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495–96 (2011) (“In the current era of invigorated enforcement, the SEC and DOJ are bringing ten times as many [FCPA] cases as in prior years.”).

3. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1–3, 78ff, 78m(b), 78m(d)(1), 78m(g)–(h) (2006 & Supp. 2010)) [hereinafter FCPA], amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at §§ 78dd-1–3, 78ff (2006)), and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at §§ 78dd-1–3, 78ff (2012)).

4. See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 104 (2010) (“Not only are these agencies

reach of the FCPA beyond bribery of governmental officeholders to bribery of individuals working for state-owned businesses.⁵ In addition, these agencies have begun harnessing legislation beyond the FCPA to combat bribery of officers or employees of foreign private-sector companies⁶: a practice not covered by the FCPA even under an aggressive interpretation of the statute.

Remarkably, in the midst of this concerted drive to detect and punish corruption in international business, there is another foreign corrupt practice that seems to have escaped the attention of law enforcement agencies: bribery of the leaders of indigenous peoples⁷ to secure these leaders' support for business activities.⁸ The apparent

bringing many more cases, but the DOJ is also starting to utilize novel theories of liability to prevent corrupt corporations from avoiding prosecution.”).

5. Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT'L L. REV. 961, 1044 (2014) (“In this new era of FCPA enforcement, a prominent enforcement agency theory has been that employees of alleged state-owned or state-controlled enterprises (SOEs) are ‘foreign officials’ under the FCPA and thus occupy a status equal to traditional bona fide government officials such as a president or prime minister.”).

6. Sarah Clark, Note, *New Solutions to the Age-Old Problem of Private-Sector Bribery*, 97 MINN. L. REV. 2285, 2286 (2013) (noting that recent scandals involving private-sector bribery have prompted the DOJ to employ other statutes beyond the FCPA, including the Travel Act and mail and wire fraud statutes).

7. There is no universally-accepted definition of “indigenous peoples,” but the term is used herein to encompass any group that possesses the following characteristics to some degree: self-identification and identification by others as a culturally-distinct group; a collective attachment to a distinct geographical area and its natural resources; and customary cultural, economic, social, or political institutions that are separate from those of the mainstream society in the country where they reside. This formulation is based on that employed by the World Bank in its policies relating to indigenous peoples. See World Bank, *Operational Manual: Operational Policy (OP) 4.10*, ¶¶ 3–4 (July 2005, rev'd Apr. 2013). A distinction is sometimes made between “indigenous” and “tribal” peoples, the former referring to culturally-distinct groups that descend from pre-conquest populations, and the latter to those that do not necessarily descend from pre-conquest populations, but are nevertheless regulated wholly or partially by their own customs or traditions or by special laws or regulations; see, e.g., Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 1, June 27, 1989, 28 I.L.M. 1384 [hereinafter ILO Convention No. 169]. However, the term “indigenous peoples” is used herein broadly to refer to either type of group.

8. See Barak Cohen & T. Markus Funk, *Assessing the Ambiguous Status of Tribal Leaders and Other Traditional Authorities Under the Foreign Corrupt Practices Act*, 28 WESTLAW J. WHITE-COLLAR CRIME 3 (2014) (highlighting the absence of case law or enforcement agency guidance regarding the applicability of the FCPA to bribery of “traditional authorities, such as tribal leaders”); see also U.S. Dep't of Justice, *Related Enforcement Actions*, <http://www.justice.gov/criminal-fraud/related-enforcement-actions> (last visited Nov. 21, 2015) (listing all FCPA and related enforcement actions by the DOJ to date); U.S. Sec. & Exch. Comm'n, *SEC Enforcement Actions: FCPA Cases*, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Nov. 21, 2015) (listing all

absence of any attempt to punish *this* type of corruption is striking, considering that the phenomenon is quite common (if widespread reports by the media, NGOs, and scholars are to be believed⁹), and at least as harmful as the types of corruption that these agencies routinely target.

The risk of corruption of this nature arises from the fact that business entities often seek to undertake projects on or near the lands of indigenous peoples. Common examples of these projects are the extraction of minerals or other natural resources¹⁰; the damming of rivers to produce hydroelectric power¹¹; the construction of highways, pipelines, and other infrastructure¹²; and agroforestry.¹³ Projects like these typically need approval from formal governmental authorities in the countries hosting them, but may also require the consent or cooperation of local landowners or communities.¹⁴ Given the risk of protests or other forms of resistance that will hinder operations,¹⁵ project developers may be reluctant to proceed with any

FCPA enforcement actions by the SEC to date).

9. Allegations in this regard are summarized in Part I.

10. See Susann Funderud Skogvang, *Legal Questions Regarding Mineral Exploration and Exploitation in Indigenous Areas*, 22 MICH. ST. INT'L L. REV. 321, 323 (2013) ("Several indigenous areas around the world host rich deposits of different types of valuable minerals. This fact makes international commercial industries very eager to enter indigenous territories.").

11. See generally Marcus T. Pearson, David Aronofsky & Emily Royer, *Chile's Environmental Laws and the HidroAysen Northern Patagonia Dams Megaproject: How Is This Project Sustainable Development?*, 41 DENV. J. INT'L L. & POL'Y 515 (2013) (discussing dam projects in Chile that have adversely impacted indigenous and other local communities).

12. See Lorenzo Pellegrini & Marco Octavio Ribera Arismendi, *Consultation, Compensation and Extraction in Bolivia After the "Left Turn": The Case of Oil Exploration in the North of La Paz Department*, 11 J. LATIN AM. GEOGRAPHY 103, 109–10 (2012) (discussing plans to build a highway through an ecological preserve occupied by indigenous peoples in Bolivia); Clifford Krauss & Ian Austen, *Rocky Road for Canadian Oil*, N.Y. TIMES, May 13, 2014, at B1 (discussing oil pipeline projects in Canada opposed by some First Nations in that country).

13. See generally Colin Filer, *Why Green Grabs Don't Work in Papua New Guinea*, 39 J. PEASANT STUD. 599, 600 (2012) (discussing foreign investment in agroforestry in Papua New Guinea).

14. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 79–80 (2008) (companies contemplating extractive operations increasingly "need to obtain a *de facto* social license to operate . . . in addition to a *de jure* license to operate from host country governments").

15. See Patricia O'Brien, *The Politics of Mines and Indigenous Rights: A Case Study of the Grasberg Mine in Indonesia's Papua Province*, 11 GEO. J. INT'L AFF. 47, 47–49

large-scale project without the support of local stakeholders. In addition, the domestic laws of many countries, as well as various international human rights instruments, now recognize that indigenous peoples have special legal rights in connection with development projects.¹⁶ These human rights instruments include the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁷ and the International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.¹⁸ Notably, these instruments and related domestic laws recognize an obligation on the part of states to consult with indigenous peoples prior to approving any development projects likely to affect such peoples.¹⁹ What is more, project developers must comply with a “free, prior and informed consent” requirement with respect to indigenous stakeholders before obtaining funding from the Internation-

(2010) (discussing acts of violence and protest by indigenous groups in Indonesia against mining activity); Martí Orta-Martínez & Matt Finan, *Oil Frontiers and Indigenous Resistance in the Peruvian Amazon*, 70 *ECOLOGICAL ECON.* 207, 215 (2010) (describing protests by indigenous communities in Peru against extractive operations and the resulting disruption of operations).

16. Siegfried Wiessner, *Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples*, in *INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION* 31, 38–56 (Elvira Pulitano ed., 2012) (summarizing achievements of the indigenous rights movement at the domestic and international levels); Pellegrini & Ribera Arismendi, *supra* note 12, at 106–07 (discussing human rights instruments that confer special protections on indigenous peoples, and recent amendments to the Bolivian Constitution designed to implement the same); CATHAL M. DOYLE & ANDREW WHITMORE, *INDIGENOUS PEOPLES AND THE EXTRACTIVE SECTOR: TOWARDS A RIGHTS-RESPECTING ENGAGEMENT* 36–38 (Raymond de Chavez ed., 2014) (discussing indigenous rights legislation in Bolivia, the Philippines, Greenland, Venezuela, Colombia, El Salvador, Liberia, Benin, and India).

17. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

18. ILO Convention No. 169, *supra* note 7.

19. See DERRICK HINDERY, *FROM ENRON TO EVO: PIPELINE POLITICS, GLOBAL ENVIRONMENTALISM, AND INDIGENOUS RIGHTS IN BOLIVIA* 168 (2013) (describing UNDRIP’s requirement that states consult with indigenous peoples in order to obtain their “free, prior and informed consent” prior to approving development projects, and explaining how that language has been implemented in Bolivian law); George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, 33 *MICH. J. INT’L L.* 627, 664–68 (2012) (summarizing the key features of UNDRIP, including its “free, prior and informed consent” requirement); PATRICIA I. VÁSQUEZ, *OIL SPARKS IN THE AMAZON: LOCAL CONFLICTS, INDIGENOUS POPULATIONS, AND NATURAL RESOURCES* 40–45 (2014) (discussing consultation requirements under domestic laws in Latin America, as well as under UNDRIP and other international standards).

al Finance Corporation (IFC), an arm of the World Bank.²⁰ Similarly, many private financial institutions will no longer lend funds for high-impact projects unless the borrower has consulted with local stakeholders.²¹

The foregoing laws and standards reflect growing awareness of the unique social, cultural, and environmental costs that development projects can entail for indigenous peoples. These can include displacement from their lands, deforestation and loss of traditional food sources, depletion and contamination of water supplies, and erosion of culture and social cohesion.²² It may be possible to mitigate these types of costs if adequate safeguards are taken,²³ and the costs may be offset to some degree by benefits flowing from the project.²⁴ However, these concessions often are secured only through a lengthy and good-faith consultation process and may reduce the project de-

20. See INT'L FIN. CORP., *Performance Standard 7: Indigenous Peoples*, in PERFORMANCE STANDARDS ON ENVIRONMENT AND SOCIAL SUSTAINABILITY 41, 41 (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.

21. See Joshua A. Lance, Note, *Equator Principles III: A Hard Look at Soft Law*, 17 N.C. BANKING INST. 175, 192–93 (2014) (summarizing the stakeholder engagement requirements of the latest version of the Equator Principles, a set of voluntary guidelines for international project finance); EQUATOR PRINCIPLES ASS'N, THE EQUATOR PRINCIPLES III, princ. 5 (June 2013), http://www.equator-principles.com/resources/equator_principles_III.pdf.

22. See James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. on Extractive Industries Operating Within or Near Indigenous Territories*, ¶ 30, U.N. Doc. A/HRC/18/35 (July 11, 2011) (summarizing reported impacts of extractive projects on indigenous peoples); Pellegrini & Ribera Arismendi, *supra* note 12, at 105; Orta-Martínez & Finer, *supra* note 15, at 208–13; DOYLE & WHITMORE, *supra* note 16, at 21.

23. See James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. on Extractive Industries and Indigenous Peoples*, ¶ 73, U.N. Doc. A/HRC/24/41 (July 1, 2013) [hereinafter Special Rapporteur 2013 Report] (discussing the importance of safeguards against “potential impacts on health conditions, subsistence activities and places of cultural or religious significance”); Inter-Am. Comm'n. H.R., *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 426–29 (2011) (discussing elements of an adequate environmental and social impact assessment and impact mitigation).

24. Special Rapporteur 2013 Report, *supra* note 23, ¶ 77 (noting that in some cases “indigenous peoples are guaranteed a percentage of profits from the extractive operation or other income stream” or “a minority ownership interest in the extractive operation”); Orta-Martínez & Finer, *supra* note 15, at 213 (summarizing benefits that indigenous communities in Peru have derived from extractive projects, including employment as wage laborers, wells for drinking water, health care services, electric generators, and improved transportation options).

veloper's profits.²⁵ Accordingly, some developers may be tempted to bribe the people's designated representatives to induce these leaders to support the project and allow the project to proceed sooner, while including fewer safeguards and community benefits.²⁶

Several practitioners have noted that law enforcement agencies could begin employing the FCPA to target bribery of indigenous leaders (to whom these authors have sometimes referred as "traditional" or "tribal" leaders).²⁷ Yet there does not seem to be published literature that has considered the wide variation in the nature of dealings between project developers and indigenous leaders, or that has examined in detail how the FCPA and other anti-corruption statutes could be applied under diverse circumstances. Nor has any literature considered why this form of corruption has been overlooked to date, or how factors inhibiting enforcement of the FCPA might be overcome.

This Article will undertake each of these tasks. In doing so, this Article will demonstrate that the FCPA and other anti-corruption legislation could indeed be applied to bribery of indigenous leaders, but that there are distinct limits to the conduct that enforcement agencies could and should target. In particular, this Article will show

25. See Almut Schilling-Vacaflor, *Democratizing Resource Governance Through Prior Consultations? Lessons from Bolivia's Hydrocarbon Sector* 12–15 (Ger. Inst. of Glob. & Area Stud., Working Paper No. 184, 2012) (describing a series of recent consultations between project developers and indigenous communities in Bolivia, and asserting that communities secured better compensation arrangements and environmental precautions when negotiations were lengthier, more elaborate, and not tainted by corruption); Inter-Am. Comm'n H.R., *supra* note 23, at 430 (explaining that cooperation with and input by impacted indigenous communities is critical for successful impact mitigation).

26. Schilling-Vacaflor, *supra* note 25, at 13–14 (distinguishing the results of negotiations that were reportedly corruption-free from those in which indigenous leaders were allegedly corrupted or pressured).

27. See, e.g., Cohen & Funk, *supra* note 8, at 3 ("One of the many definitional challenges facing Foreign Corrupt Practices Act practitioners worldwide is whether and under what circumstances traditional authorities, such as tribal leaders, qualify as 'foreign officials' under the FCPA."); Brian Pinkowski, *Tales from the Wild: Traditional Law and Foreign Officials*, HOW TO FIGHT CORRUPTION (Nov. 30, 2013), <http://brianpinkowski.wordpress.com/2013/11/30/tales-from-the-wild-traditional-law-and-foreign-officials/> ("While the U.S. Department of Justice has not yet turned its eye to agreements involving [tribal] officials, it seems such individuals are more clearly 'foreign officials' than many of the medical personnel at the heart of so many FCPA actions in the past few years."); Sharie Brown, *When Is a Nigerian Local Tribal Leader a Foreign Official Under the FCPA?*, TRACE BLOG (July 27, 2009), <http://www.traceinternational.org/when-is-a-nigerian-local-tribal-leader-a-foreign-official-under-the-fcpa/> (asserting that a tribal chief might qualify as a "foreign official" for purposes of the FCPA, and identifying factors relevant to the analysis).

that indigenous peoples' representatives will often qualify as "foreign officials" within the meaning of the FCPA because they occupy positions in the state apparatus or otherwise carry out governmental functions. These representatives may also qualify as fiduciaries within the meaning of state private-sector bribery laws, because the representatives have assumed positions of trust and confidence vis-à-vis their communities.²⁸ Moreover, benefits conferred on indigenous leaders by project developers may qualify as corrupt if the benefits were conferred in order to influence the leaders in the performance of their duties.²⁹ Nevertheless, in some cases the benefits may have been offered for purposes that are legitimate and non-actionable.³⁰ Additionally, the project developer or its conduct may lack a sufficient territorial connection to the United States to be subject to the FCPA.³¹

This Article will also show that certain factors may have deterred law enforcement agencies from taking action in some cases arguably within their jurisdictions, but that these factors could potentially be overcome in the future. Notably, in some cases investigators may not have recognized the relevant indigenous leaders as "foreign officials" within the meaning of the FCPA, or may have lacked any concrete proof of violations. Therefore, enforcement action will be more likely if investigators become more familiar with the roles played by indigenous leaders and if local stakeholders, NGOs, or corporate insiders take advantage of newly-available whistleblower bounties and present investigators with actionable evidence of misconduct.³² In addition, as law enforcement agencies come to better

28. See *infra* Part II.B.3 (discussing the FCPA's definition of "foreign official" and its application to indigenous peoples' representatives); see also *infra* Part II.C.1 (explaining when indigenous leaders would qualify as an employee, agent, or fiduciary within the meaning of state private-sector bribery statutes and the Travel Act). For a list of state private-sector bribery statutes, see Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 173 (2014).

29. See *infra* Part II.B.4 (discussing the FCPA element that concerns whether or not a payment or offer was made "corruptly" and its application to the various types of dealings between project developers and indigenous leaders alleged in the literature).

30. *Id.*

31. See *infra* Part II.B (discussing the categories of persons covered under the FCPA and required territorial connections); see also *infra* Part II.C (discussing the same with regard to the Travel Act and mail and wire fraud statutes).

32. For a summary of the new whistleblower bounty provisions and their potential application in FCPA cases, see Gordon Kaiser, *Corruption in the Energy Sector: Criminal Fines, Civil Judgments, and Lost Arbitrations*, 34 ENERGY L.J. 193, 207-08 (2013). The possible impact of bounties is discussed in greater detail in Part III.

understand the effects of this corruption upon indigenous communities and U.S. national interests, these agencies may begin assigning this form of bribery a higher priority.³³

Following this Introduction, Part I highlights a number of cases in which project developers have been accused of corrupting indigenous leaders. Part II examines U.S. anti-corruption laws and explains when various types of transactions could violate these laws, while outlining considerations and principles that should guide project developers, indigenous representatives, and law enforcement authorities when navigating and applying these statutory requirements. The discussion is confined to U.S. law, but a number of other countries have enacted legislation similar to the FCPA.³⁴ Thus many observations in Part II are relevant to other countries' laws as well. Part III explores factors that may have inhibited enforcement efforts in this context and prospects for overcoming them.

I. CORRUPTION IN THE VILLAGE, ON A GLOBAL SCALE: ALLEGED ATTEMPTS TO "BRIBE" OR "CO-OPT" INDIGENOUS LEADERS

Like any other leaders, indigenous peoples' representatives are sometimes accused of corruption. Some allegations involve the misappropriation of community funds or other misdeeds distinct from bribery.³⁵ Yet the focus of this Article is bribery, and in particular

33. Notably, the U.S. government has recognized that it has a strong interest in fostering respect for indigenous and other human rights; promoting economic efficiency and market integrity in international business; and achieving stability and security for U.S. companies investing in the developing world—all of which are undermined by bribery of indigenous peoples' representatives. See *infra* Part III.

34. Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. LEGIS. 425, 459 (2009) (explaining that "anti-bribery laws have now gained worldwide acceptance, as reflected in numerous international agreements and domestic laws modeled after the FCPA"); Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 498 (2012) ("Thirty-five years after the FCPA was enacted more than one hundred countries have enacted or committed themselves to enact laws similar to the FCPA that criminalize bribery of government officials.").

35. See, e.g., Rob Shaw & Peter O'Neil, *Harper Government Outraged that B.C. Chief of Tiny Coquitlam First Nation Received \$900K+ in Latest Fiscal Year*, VANCOUVER SUN (Sep. 24, 2014), http://www.vancouversun.com/business/harper+government+outraged+that+chief+tiny+coquitlam+first+nation+received+900k+latest/10080633/story.html?_Isa=8547-ef6a (discussing concerns that a bonus paid by a First Nation to its chief in connection with a contract he helped secure represented an improper form of self-enrichment); Schilling-Vacaflor, *supra* note 25, at 13 (discussing allegations that the leaders of an indigenous people misappropriated funds received from a hydrocarbon project in Bolivia).

situations in which a project developer has allegedly given something to indigenous leaders to induce them to approve or facilitate a project. The sections that follow provide non-exhaustive examples of the types of reports of this nature that sometimes appear in the media, scholarly literature, or NGO publications.

The reports highlighted below suggest that bribery of indigenous leaders is both common in nature and global in scope. It is important to keep in mind, however, that many of these reports are one-sided in that they do not reflect any response by the accused. Also, many reports are lacking in details regarding the nature and context of the impugned conduct, the individuals or entities involved, and the sources of the information. It is possible, therefore, that factors exist that would help explain or justify what took place, or that the events alleged never occurred at all. These caveats notwithstanding, bribery allegations involving indigenous leaders and development projects occur with such frequency that they warrant taking the phenomenon seriously and considering what, if anything, can be done to combat corruption of this nature if and when it can be proven.

A. Projects in Latin America

Latin America has experienced a boom in natural resource extraction and infrastructure development in recent years, often on the lands of indigenous peoples.³⁶ Dealings between project developers and indigenous leaders concerning many of these projects have generated bribery allegations.

For example, the Massachusetts-based NGO Cultural Survival recently reported that a local subsidiary of U.S. Capital Energy, a Texas-based oil company, has offered money, vehicles, and other benefits to the leaders of Maya communities in Belize in an effort to convince the leaders to drop legal proceedings that they initiated to block the company's operations.³⁷ Cultural Survival names one Maya leader who allegedly accepted a new truck and thereafter began "campaigning for the company," and another who "has repeatedly been the target of U.S. Capital's bribery attempts to accept and promote oil drilling, which he has declined."³⁸ Similarly, another NGO,

36. VÁSQUEZ, *supra* note 19, at 27–35.

37. See *Campaign Update–Belize: Oil Company Attempts Bribery, Corruption of Traditional Leaders*, CULTURAL SURVIVAL (Feb. 14, 2013), <https://www.culturalsurvival.org/news/campaign-update-belize-oil-company-attempts-bribery-corruption-traditional-leaders>.

38. *Id.*

Minority Rights Group International, has reported that this subsidiary has given cash or jobs to leaders who support the company's activities, while "marginaliz[ing] critics by denying them jobs and other benefits."³⁹

Foreign oil companies that have operated on lands claimed by indigenous Achuar communities in the Amazon have drawn similar allegations, including U.S.-based Occidental Petroleum⁴⁰ and Argentina-based Pluspetrol.⁴¹ Among the benefits allegedly offered to Achuar leaders have been money, houses, and tuition for their children's education.⁴²

German sociologist-anthropologist Almut Schilling-Vacaflor has reported allegations that a subsidiary of French energy company Total improperly influenced representatives of the Guaraní indigenous people during recent consultations over planned explorations in Bolivia's Ipati-Aquio Block.⁴³ She cites a report by a Peruvian NGO that quotes statements by members of the Guaraní community, which claim that that the Total subsidiary gave lucrative jobs to Guaraní leaders in exchange for their support.⁴⁴

Professor Derrick Hindery has reported allegations that the energy companies Enron and Shell bribed representatives of the Chiquitano indigenous people during consultations over the construction of an oil pipeline in the Bolivian Amazon during the late 1990s.⁴⁵

39. CHELSEA PURVIS, MINORITY RIGHTS GROUP INT'L, "SUDDENLY WE HAVE NO MORE POWER": OIL DRILLING ON MAYA AND GARIFUNA LAND IN BELIZE 8 (Sept. 2013), http://minorityrights.org/wp-content/uploads/2015/07/MRG_Brief_Belize.pdf.

40. AMAZON WATCH, THE RIGHT TO DECIDE: THE IMPORTANCE OF RESPECTING FREE, PRIOR AND INFORMED CONSENT 6 (Feb. 2011), <http://amazonwatch.org/assets/files/fpic-the-right-to-decide.pdf> ("Achuar leaders in Peru attest they have been offered houses in Lima, education for their children and substantial amounts of cash by representatives of Occidental Petroleum, in exchange for persuading their community to permit oil or gas operations in their territory.").

41. Orta-Martínez & Finer, *supra* note 15, at 213–14 (describing the relationship between Pluspetrol and Achuar communities, noting that "[t]here are often rumours of leaders being involved in corruption," and asserting that "[i]n the last two years we have directly observed . . . bribery of indigenous leaders").

42. AMAZON WATCH, *supra* note 40.

43. Schilling-Vacaflor, *supra* note 25, at 13 ("Some months after the agreements had been signed, the consultation was declared invalid by the regional and national Guaraní organizations. They argued that indigenous authorities had been 'bought' by the corporations.").

44. *Id.*

45. HINDERY, *supra* note 19, at 99 (citing allegations by certain Chiquitano organizations that Enron and Shell corrupted "uninformed community authorities by paying

Newstex Web Blog has asserted that the Canadian mining company Goldcorp has “divided indigenous communities through gifts, benefits, and violence,” in order to facilitate the company’s operation of the Marlin mine in Guatemala.⁴⁶ Newstex cites assertions by a former mayor of the town that “the company offers presents, money, and infrastructure projects to the local authorities in order to gain their support.”⁴⁷

ABColumbia, an advocacy project undertaken jointly by five British and Irish NGOs, has reported “[g]ross irregularities . . . in the consultation processes carried out by companies interested in exploiting indigenous lands” in Colombia, including “bribery” and “co-opting of leaders.”⁴⁸ A newsletter of another NGO, Peace Brigades International, has named certain companies that have been accused of “buying off” indigenous leaders in Colombia, including BHP Billiton, Anglo-American, and Xstrata⁴⁹ (now Glencore⁵⁰).

B. Projects in the Asia-Pacific Region

Development projects in the Asia-Pacific region are often carried out on the lands of indigenous communities by private companies. As in Latin America, these projects are sometimes accompanied by allegations that the company undertaking the project bribed the representatives of the impacted communities to secure the representatives’ support.

them \$100 in exchange for signing agreements that transferred the communities’ easement rights to the company”); *id.* at 122 (noting suspicions that the companies “influenced” leaders of one of the Chiquitano representative bodies involved in subsequent negotiations over supplemental compensation to be provided to impacted communities).

46. See, e.g., Frauke Decoodt, *Guatemala: Divide and Rule in the Land of Gold, Indigenous Peoples Issues and Resources*, NEWSTEX WEB BLOG (July 25, 2012), <http://ww4report.com/node/11335> (“In San Miguel Ixtahucán, Guatemala, the Mina Marlin gold mine, operated by [Canadian company] Goldcorp, has divided indigenous communities through gifts, benefits, and violence. . . . Bámaca, who was an indigenous mayor for a year, asserts that the company offers presents, money, and infrastructure projects to the local authorities in order to gain their support.”).

47. *Id.*

48. See, e.g., ABCOLOMBIA, CAUGHT IN THE CROSSFIRE: COLOMBIA’S INDIGENOUS PEOPLES 4 (Oct. 2010), http://www.abcolombia.org.uk/downloads/Caught_in_the_Crossfire_ExecRecs_PRINT.pdf.

49. *Mining in Colombia: At What Cost?*, NEWSL. NO 18 (Peace Brigades Int’l Colom., London, U.K.), Nov. 2011, at 35, http://www.pbi-colombia.org/fileadmin/user_files/projects/colombia/files/colomPBIA/111203_mining_in_colombia_web.pdf.

50. Javier Blas, *Glencore Finishes Takeover of Xstrata*, FIN. TIMES (May 2, 2013), <http://www.ft.com/intl/cms/s/0/9d355d82-b31a-11e2-95b3-00144feabdc0.html>.

Many of these allegations emanate from the Philippines. For example, a 2009 submission to the U.N. Committee on the Elimination of Racial Discrimination by several Philippine NGOs asserted that “[r]eports of explicit bribery of individuals in indigenous and other communities are common,”⁵¹ and cataloged a host of alleged incidents, involving companies such as OceanaGold of Australia and TVI Pacific of Canada.⁵² The benefits said to have been conferred on indigenous leaders included cash, land, and vehicles.⁵³ The director of the NGO Forest Peoples Programme, Joji Cariño, has also reported allegations of bribery by TVI Pacific.⁵⁴

Cariño has further alleged bribery by Australia-based Western Mining Corporation (WMC), a company since acquired by BHP Billiton.⁵⁵ In particular, Cariño reports that WMC placed relatives of traditional leaders known as *datus* on its payroll for services as “community liaison officers,” while “[s]ome *datus* have been taken to Manila and, according to reports, given lavish hospitality and taken to night clubs.”⁵⁶ Other commentators have provided further detail regarding alleged attempts by WMC to corrupt indigenous leaders in the Philippines.⁵⁷

51. ALTERNATIVE LAW GROUPS INC ET AL., PHILIPPINES INDIGENOUS PEOPLES ICERD SHADOW REPORT, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 52 (Aug. 2009), http://www2.ohchr.org/english/bodies/cerd/docs/ngos/PIP_Philippines75.pdf [hereinafter ICERD Shadow Report]. A Philippine Congressman has likewise reported that bribery of indigenous representatives is a widespread phenomenon in the country. See Teddy Brawner Baguilat, Jr., Representative of the Lone District of Ifugao, *Mining and Its Impacts to Indigenous Communities*, FACEBOOK (Aug. 25, 2011), https://www.facebook.com/note.php?note_id=251074264926161 (“Bribery and cooptation of tribal leaders . . . are just some of the methods employed to push mining projects in the ancestral domains of indigenous peoples.”).

52. ICERD Shadow Report, *supra* note 51, at 52–53.

53. *Id.*

54. See Joji Cariño, *Indigenous Peoples’ Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT’L & COMP. L. 19, 37 (2005).

55. Tan Hwee Ann, *BHP Billiton Wins Control of WMC with a \$9.2 Bln Bid*, BLOOMBERG (June 3, 2005), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=amwoD_HGgwYU&refer=uk.

56. Cariño, *supra* note 54, at 37.

57. Raymundo D. Rovillos, Salvador B. Ramo & Catalino Corpuz, Jr., *When the “Isles of Gold” Turn into Isles of Dissent: A Case Study on the Philippine Mining Act of 1995*, in EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK 185, 196 (Marcos Colchester & Emily Caruso eds., 2d ed. 2005), http://www.waterculture.org/uploads/Extracting_Promises_2nd_Edition_1_.pdf (describing an alleged incident in which WMC offered a B’laan chief a house, and other cases in which indigenous leaders were entertained at nightclubs); Marina Wetzlmaier, *Cultural Impacts of Mining in Indigenous Peoples’ Ancestral Domains in the Philippines*, 5 AUSTRIAN J. SOUTH-

Project developers on the island of New Guinea have also been the subject of bribery allegations. Notably, Professor John Braithwaite has reported bribery of traditional leaders by companies engaged in palm oil production and logging on the Indonesian side of the island.⁵⁸ Among the inducements that developers reportedly have given to these leaders are alcohol, prostitutes, and money.⁵⁹ Similarly, Forest Peoples Programme has asserted that Wilmar International Group, a company headquartered in Singapore, improperly influenced traditional leaders on the Indonesian side in order to secure access to land for growing sugar cane.⁶⁰ According to Forest Peoples Programme, Wilmar “often co-opt[s] tribal leaders, paying them a salary to convince the other villagers to sell their land”⁶¹ Similarly, various scholars have asserted that some dealings between the leaders of indigenous landowner groups in Papua New Guinea and plantation developers or oil companies have been tainted by corruption.⁶² However, these scholars have supplied little detail regarding the alleged corruption.

C. Projects in Africa

Development projects in Africa have also given rise to brib-

EAST ASIAN STUD. 335, 339–40 (2012) (describing consultations “conducted with selected village leaders who were offered incentives by the mining company”).

58. John Braithwaite et al., *Papua*, in ANOMIE AND VIOLENCE: NON-TRUTH AND RECONCILIATION IN INDONESIAN PEACEBUILDING 49, 103, 108 (John Braithwaite et al. eds., 2010).

59. *Id.* at 103.

60. *Conflict in Indonesia’s Papua Region*, IRIN ASIA SERVICE (Mar. 28, 2014), <http://www.irinnews.org/report/99856/conflict-in-indonesia-s-papua-region>.

61. *Id.*

62. See, e.g., MARCUS COLCHESTER & SOPHIE CHAO, OIL PALM EXPANSION IN SOUTH EAST ASIA: TRENDS AND IMPLICATIONS FOR LOCAL COMMUNITIES AND INDIGENOUS PEOPLES 9–10 (Marcus Colchester & Sophie Chao eds., 2011), <http://www.forestpeoples.org/sites/fpp/files/publication/2011/11/oil-palm-expansion-southeast-asia-2011-low-res.pdf> (asserting that some plantation developers have “manipulate[d] landowners through bribery, through creating non-representative associations, and through making (often unfulfilled) promises of careful land management and provision of services”); Jim Fingleton, *A Legal Regime for Issuing Group Titles to Customary Land: Lessons from the East Sepik*, in CUSTOMARY LAND TENURE AND REGISTRATION IN AUSTRALIA AND PAPUA NEW GUINEA: ANTHROPOLOGICAL PERSPECTIVES 15, 32–33 (James F. Weiner & Katie Glaskin eds., 2007) (citing an allegation by an officer in Papua New Guinea’s Department of Petroleum and Energy that some dealings between oil companies and indigenous landowner groups have been plagued by “unlawful and unfair sharing of benefits,” “lack of accountability and transparency,” and “bribery and corruption,” among other problems).

ery allegations. For example, in 2009, a local publication called *Financial Intelligence* accused Newmont Ghana, a subsidiary of U.S.-based gold mining company Newmont, of paying bribes to chiefs of Ghana's Akyem people to secure their support for the company's bid to mine in a local forest reserve.⁶³ Prior to the alleged bribes, the project had been the subject of protests by local stakeholders, and a body known as the Concerned Farmers Association reportedly had gathered more than two hundred signatures for a petition against the mine.⁶⁴ In addition, several U.N. Special Rapporteurs had sent letters to Newmont Ghana and the government of Ghana raising concerns about potential impacts of the mine on local communities and the forest reserve.⁶⁵ Notably, a joint letter sent by these Special Rapporteurs to the government on June 19, 2009, alluded to the potential for "considerable environmental damage within the forest reserve and impact on the rich and rare biodiversity in the forest," as well as a risk that "the project could have severe impacts on the livelihood of an estimated 7,900 to 10,000 people," many of them small-scale farmers who were facing eviction.⁶⁶ According to *Financial Intelligence*, Newmont Ghana responded by drafting its own letter and bribing certain Akyem chiefs to append their signatures to the letter in order to generate the appearance of community support for the project.⁶⁷

Newmont Ghana has acknowledged making payments to Akyem traditional councils, but has denied that these payments were improper. The company has asserted that its payments to traditional councils were intended as compensation for burdens imposed on the leaders as a result of the mining project, including the need to "attend meetings and manage issues that come up due to Newmont Ghana's presence."⁶⁸

63. Justice Lee Adoboe, *Bribery Scandal Rocks Newmont*, FINANCIAL INTELLIGENCE (Aug. 26, 2009), <http://www.myfinancialintelligence.blogspot.com/2009/08/bribery-scandal-rocks-newmont.html>.

64. *Id.*; see also *Ghana—Ajenjua Bepo Forest Reserve: Newmont*, EARTHWORKS, http://www.earthworksaction.org/voices/detail/akyem_mine_ghana#.U-ZoC2PAQu0 (last visited Oct. 25, 2015) (asserting that before Newmont began production in this forest reserve it faced heated opposition from community groups in the Akyem area).

65. *Id.*; Olivier De Schutter (Special Rapporteur on the Right to Food), *Summary of Communications Sent and Replies Received From Governments and Other Actors*, ¶¶ 16–20, 74–75, U.N. Doc. A/HRC/13/33/Add.1 (Feb. 26, 2010) [hereinafter Special Rapporteur Summary of Communications].

66. Special Rapporteur Summary of Communications, *supra* note 65, ¶ 16.

67. Adoboe, *supra* note 63.

68. BUS. & HUM. RTS. RESOURCE CENTRE, FACT SHEET: NEWMONT GHANA'S AKYEM PROJECT (Jan. 31, 2009), <http://198.170.85.29/Newmont-fact-sheet-Akyem-project-31-Jan->

Other reports concern dealings between an unnamed Chinese company and traditional leaders of the Himba people of Namibia. Notably, the *Windhoek Observer* has reported allegations that an intermediary gave benefits to leaders of that country's Himba people to secure support for the company's bid to construct a dam that would impact local communities.⁶⁹ The article alludes to sources who contend that the company took eight leaders on a trip to China to tour a dam built by the company there and bought a car for a prominent chief.⁷⁰ The website Earth Peoples has cited a report by the same journalist that an intermediary promised cash payments to a prominent chief's associates "should they convince him to sign his consent for the dam's construction."⁷¹ At one time that chief was at the forefront of opposition to the dam,⁷² but he has since reportedly "softened his attitude."⁷³

Other allegations involve the multinational energy company Shell. Notably, German anthropologist Tobias Haller and his co-authors have contended that Shell improperly influenced traditional leaders among the Ogoni people of Nigeria to win support for the company's operations.⁷⁴ Shell reportedly had a practice of giving gifts to Ogoni chiefs and entering into contracts with businesses they controlled.⁷⁵ Similarly, London-based policy institute Chatham House has asserted that a U.K. contractor hired by Shell to clean up a pipeline spill bribed an Ogoni chief in connection with the project.⁷⁶

2009.pdf; *Newmont To Replicate Its Ahafo Success At Akyem*, MODERNGHANA (Sept. 2, 2009), <http://www.modernghana.com/news/235926/1/newmont-to-replicate-its-ahafo-success-at-akyem.html>.

69. Diana Ndimbira, *Graft Suspects Flirt with Chief*, WINDHOEK OBSERVER (Feb. 6, 2014), <http://observer24.com.na/8-latest-news/2913-graft-suspects-flirt-with-chief>; see also Sidney L. Haring, "God Gave Us This Land": *The OvaHimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa*, 14 GEO. INT'L ENVTL. L. REV. 35, 61 (2001) (describing Chief Kapika as "one of fifteen Himba chiefs, and one of four whose lands border the Kunene River as it courses through Kaokoland").

70. Ndimbira, *supra* note 69.

71. Rebecca Sommer, *Namibia Himba Protest March Against Hydro Power Dam Orokawe Baynes Mountains*, EARTH PEOPLES (Mar. 29, 2014), <http://earthpeoples.org/blog/?tag=namibia-himba-protest-march-against-hydro-power-dam-orokawe-baynes-mountains-29-march-2014>.

72. Ndimbira, *supra* note 69; see also Haring, *supra* note 69, at 61.

73. Ndimbira, *supra* note 69; Sommer, *supra* note 71.

74. TOBIAS HALLER ET AL., FOSSIL FUELS, OIL COMPANIES, AND INDIGENOUS PEOPLES 89–90 (2007).

75. *Id.*

76. MICHAEL PEEL, CHATHAM HOUSE, CRISIS IN THE NIGER DELTA: HOW FAILURES OF

The benefits reportedly given to influence the chief included cash payments, improvements to his residence, as well as “a wider local development programme in areas such as education and health.”⁷⁷

II. HARNESSING ANTI-CORRUPTION LAWS TO COMBAT BRIBERY OF INDIGENOUS LEADERS

As the foregoing summary indicates, allegations of impropriety in consultations between project developers and indigenous peoples’ representatives are quite common, although the precise nature and context of the impugned conduct varies. The sections below explore whether and when U.S. anti-corruption legislation could be properly applied to dealings between project developers and indigenous leaders.⁷⁸

A. Overview of U.S. Anti-Corruption Legislation

U.S. law enforcement agencies have many legislative tools that they can use to combat corruption, whether the corruption occurs domestically or abroad. These include state and federal legislation criminalizing bribery of public officials in the United States⁷⁹ and state statutes criminalizing private-sector bribery.⁸⁰ Additionally, the FCPA targets bribery of foreign public officials. Moreover, the Travel Act⁸¹ and the mail and wire fraud statutes⁸² criminalize certain bribery schemes that cross state or national borders.

On the domestic front, the DOJ has long employed the latter statutes to prosecute bribery of public officials or private fiduciaries, including Native American tribal officials. For example, in *United States v. Boots*, the government successfully prosecuted individuals under the Travel Act and wire fraud statute when these individuals

TRANSPARENCY AND ACCOUNTABILITY ARE DESTROYING THE REGION 14 (July 2005), <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/bpniگردelta.pdf>.

77. *Id.*

78. Even if conduct does not violate U.S. anti-corruption statutes, it might violate the laws of another country.

79. *See, e.g.*, 18 U.S.C.S. § 201 (2014) (criminalizing bribery of federal public officials).

80. *See* Boles, *supra* note 28, at 132–33.

81. 18 U.S.C.S. § 1952 (2014).

82. 18 U.S.C.S. §§ 1341, 1343, 1346 (2014).

attempted to bribe the chief of police of the Passamaquoddy Tribe. Through this bribery scheme, the individuals sought to secure the police chief's participation in a plan to smuggle tobacco into Canada through the tribe's reservation.⁸³ In upholding the conviction, the U.S. Court of Appeals for the First Circuit determined that the police chief qualified as a "public servant" within the meaning of Maine's bribery statute, thereby satisfying one of the elements of the Travel Act—namely, that the bribery scheme violated state or federal law.⁸⁴

On the international front, the DOJ and the SEC have been extremely aggressive in applying the FCPA to bribery of conventional public officials in foreign countries and the employees of foreign state-owned entities as described in the Introduction, particularly within the last decade.⁸⁵ In addition, the DOJ recently began employing the Travel Act and mail and wire fraud statutes to combat bribery of foreign private-sector employees.⁸⁶ As demonstrated below, under some circumstances, these statutes could be applied as well to bribery of indigenous leaders in foreign countries.

B. The Foreign Corrupt Practices Act and Its Potential Applicability to Dealings Between Project Developers and Indigenous Leaders

Of the legislative tools available to law enforcement agencies in the United States, the FCPA would likely be the most useful for combating bribery of indigenous peoples' representatives in foreign countries.

1. Elements and Defenses

The FCPA is a federal statute that prohibits covered persons from using instrumentalities of interstate or international commerce to "corruptly" give or offer "anything of value" to a foreign official, political party, party official, or candidate, for a business purpose.⁸⁷

83. *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996) (upholding convictions of several individuals based on their attempted bribery of the police chief of the Passamaquoddy Tribe), *overruled on other grounds by* *Pasquantino v. United States*, 544 U.S. 349, 354–55 (2005).

84. *Boots*, 80 F.3d at 590–92. The elements of a Travel Act violation are discussed in greater detail in Part II.C.1.

85. *See supra* Introduction.

86. *See Clark, supra* note 6, at 2286.

87. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (1998).

The statute also prohibits offers or payments via an intermediary if the payment is made with a covered person's knowledge.⁸⁸ In addition, under the statute, companies whose securities are publicly traded in the United States are subject to significant accounting requirements.⁸⁹ Among other things, the statute requires these companies to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."⁹⁰ This rule is designed to prevent companies from concealing improper payments and otherwise promote sound book-keeping practices.⁹¹

When a person or entity violates the FCPA, the sanctions can be severe.⁹² In particular, under the FCPA's penalty provisions, corporate defendants who commit willful violations of the anti-bribery provisions can incur a maximum fine of two million dollars per violation,⁹³ and the maximum fine for a willful accounting violation is even steeper: twenty-five million dollars.⁹⁴ Moreover, under the Alternative Fines Act, corporate defendants can incur a penalty of up to twice the gain obtained by reason of the offense, or twice the loss to any other person, in lieu of the statutory penalty.⁹⁵ Because of this Alternative Fines Act option, the penalties imposed routinely exceed the FCPA's statutory maximums, and on several occasions have amounted to hundreds of millions of dollars.⁹⁶

88. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (1998).

89. 15 U.S.C. § 78m(b) (2012). For an overview of the FCPA's accounting provisions, see U.S. DEP'T OF JUSTICE, CRIM. DIV. & U.S. SEC. & EXCH. COMM'N, ENF'T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 38-41 (2012) [hereinafter FCPA RESOURCE GUIDE].

90. 15 U.S.C. § 78m(b)(2)(A) (2012).

91. See H.R. REP. NO. 94-831, at 10 (1977) (Conf. Rep.) ("[T]he issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payment of bribes."); see also Cort Malmberg & Allison B. Miller, *Foreign Corrupt Practices Act*, 50 AM. CRIM. L. REV. 1077, 1083 (2013) ("The record-keeping provisions serve three primary goals: (i) ensuring that illegal transactions are reported; (ii) preventing the falsification of records to conceal illegal transactions; and (iii) promoting the correct characterization of all transactions.").

92. Mark V. Vlasic & Peter Atlee, *Myanmar and the Dodd-Frank Whistleblower "Bounty": The U.S. Foreign Corrupt Practices Act and Curbing Grand Corruption Through Innovative Action*, 29 AM. U. INT'L L. REV. 441, 451 (2014) (summarizing civil and criminal penalties for FCPA violations).

93. 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A) (1998); 15 U.S.C. § 78ff(c)(1)(A)-(2)(A) (2015).

94. 15 U.S.C. § 78ff(a) (2015).

95. 18 U.S.C. § 3571(d) (2015).

96. Sarah Bartle et al., *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265,

If a law enforcement agency or court sought to evaluate whether offers or payments to an indigenous leader violated the FCPA's anti-bribery provisions, the most important elements to consider would likely be whether (i) the person who made them was covered by the statute, (ii) the recipient qualified as a "foreign official," and (iii) the offers or payments were made "corruptly." Should a scenario satisfy these three elements, the fulfillment of the remaining requirements likely would be straightforward.

In particular, the instrumentality of interstate commerce element is almost always satisfied, because the defendant will have traveled, sent an e-mail, or made a phone call when planning or carrying out the bribery scheme.⁹⁷ Likewise, the "business purpose" element would be readily satisfied if a project developer had bribed indigenous leaders to influence their decision-making. The business purpose element requires only that the payer of the bribe intend to obtain an advantage for the payer's business,⁹⁸ and securing support for a development project would plainly benefit the developer's business. Additionally, while the statute recognizes certain exceptions and affirmative defenses, most of these are unlikely to apply. Namely, an exception exists for payments intended to "expedite or to secure the performance of a routine governmental action."⁹⁹ Yet if a payment were made to influence an indigenous leader in connection with matters over which he or she had discretion, then this exception would not be available.¹⁰⁰ Similarly, the FCPA provides an affirmative defense for offers or payments that are "lawful under the written laws" of the foreign country.¹⁰¹ But this defense, too, is unlikely to be available, because countries' laws generally do not authorize cor-

1290 (2014) (highlighting the frequency with which penalties exceed the statutory maximums by virtue of the Alternative Fines Act, and noting criminal fines of \$450 million against Siemens AG and its foreign subsidiaries in 2008, of \$402 million against Kellogg, Brown & Root in 2009, and of \$398.2 million against Total, S.A. in 2013).

97. See Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 *FORDHAM J. CORP. & FIN. L.* 285, 288 n.14 (2007) ("Generally speaking, courts have taken a very broad interpretation of 'interstate commerce' such that this jurisdictional requirement will, in most cases, be easily satisfied.").

98. See FCPA RESOURCE GUIDE, *supra* note 89, at 12–13 (explaining that this element requires only that the bribe be given "in the conduct of business or to gain a business advantage").

99. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2015).

100. See FCPA RESOURCE GUIDE, *supra* note 89, at 25 ("The facilitating payments exception applies only when a payment is made to further 'routine governmental action' that involves non-discretionary acts.").

101. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2015).

rupt payments.¹⁰²

Finally, the statute provides an affirmative defense for “reasonable and bona fide expenditures” for the negotiation or performance of a contract or the demonstration of products or services.¹⁰³ However, this defense relates to whether or not the payment was made “corruptly,” which is the third element highlighted above.¹⁰⁴ Consequently, this defense will be considered below in connection with the discussion of the third element.

Subsections 2 through 4, below, explore each of the elements upon which a potential case under the FCPA’s anti-bribery provisions would likely turn. Thereafter, subsection 5 demonstrates that the FCPA’s accounting provisions could serve as a source of liability for project developers in some cases even if the government were unable to satisfy one or more elements of the anti-bribery provisions.¹⁰⁵

2. When Project Developers Are Covered by the FCPA

The FCPA covers several different categories of persons.

One category is “issuers” and their representatives.¹⁰⁶ Under the FCPA, the term “issuer” refers to a company that has issued securities that are publicly traded in the United States.¹⁰⁷ An issuer need not actively conduct business in the United States, and many foreign companies qualify.¹⁰⁸ Of the companies mentioned in Part I’s sum-

102. See FCPA RESOURCE GUIDE, *supra* note 89, at 23 (“In practice, the local law defense arises infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments.”).

103. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2015).

104. See H.R. REP. NO. 100-576, at 922 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1952 (noting that if a payment or gift is corruptly made in return for an official act or omission, then it cannot be bona fide); FCPA RESOURCE GUIDE, *supra* note 89, at 17 (noting that if a payment falls within the reasonable and bona fide expenditure defense there is nothing to suggest corrupt intent); Malmberg & Miller, *supra* note 91, at 1097 (“This defense is only available if the defendant can show that the bona fide expenditures lack a corrupt purpose.”).

105. See FCPA RESOURCE GUIDE, *supra* note 89, at 39 (“In instances where all the elements of a violation of the anti-bribery provisions are not met—where, for example, there was no use of interstate commerce—companies nonetheless may be liable if the improper payments are inaccurately recorded.”).

106. 15 U.S.C. § 78dd-1(a) (2015).

107. *Id.*

108. FCPA RESOURCE GUIDE, *supra* note 89, at 11 (“A company thus need not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers. As of December 31, 2011, 965 foreign companies were registered with [the] SEC.”).

mary of bribery allegations, those that constitute issuers include U.S. companies Occidental Petroleum, Newmont, and Enron (prior to its bankruptcy), as well as foreign companies Total, Shell, and Goldcorp.¹⁰⁹

A second category of covered persons is “domestic concerns” and their representatives.¹¹⁰ “Domestic concern” is defined to include any U.S. citizen or resident, or any company incorporated in or having its principal place of business in the United States.¹¹¹ An example of a domestic concern (not already mentioned as constituting an issuer) would be U.S. Capital Energy, the Texas company whose conduct Cultural Survival has questioned.¹¹²

A third category is foreign persons not otherwise covered who commit an act in furtherance of a FCPA violation while in the United States,¹¹³ or aid and abet a violation by a covered person.¹¹⁴ Although foreign subsidiaries of covered companies generally are *not* covered under the FCPA, they can be liable if they commit proscribed acts in the United States or aid and abet violations by their parent companies. Moreover, a covered parent company can be liable for corrupt conduct of a foreign subsidiary if the parent directs or authorizes the conduct, or knows about the conduct and fails to prevent it.¹¹⁵ In addition, issuers may be liable for FCPA bookkeeping

109. All of these companies have securities listed on the New York Stock Exchange. Enron’s stock was previously so listed. See *Listings Directory*, N.Y. STOCK EXCHANGE (Oct. 22, 2015, 4:30 PM), https://www.nyse.com/listings_directory/stock; John R. Kroger, *Remarks: Enron and Multi-Jurisdictional Fraud*, 28 CARDOZO L. REV. 1657, 1657 (2007).

110. 15 U.S.C. § 78dd-2(a) (2015).

111. 15 U.S.C. § 78dd-2(h)(1) (2015).

112. *Campaign Update—Belize*, *supra* note 37.

113. See 15 U.S.C. § 78dd-3(a) (2015); FCPA RESOURCE GUIDE, *supra* note 89, at 11–12 (“Those 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.”).

114. See FCPA RESOURCE GUIDE, *supra* note 89, at 12 (“A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.”).

115. See Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT’L L.J. 397, 427 (2007) (“[I]f a company controls a foreign entity and has actual or constructive knowledge that the entity is engaging in improper activity, a parent company may be considered to be a participant in those actions and subject to prosecution under the FCPA.”); MILLER CHEVALIER, JOINT DOJ-SEC GUIDANCE ON FCPA CLARIFIES AND CONFIRMS AGENCY ENFORCEMENT ATTITUDES AND POLICIES (2012), <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=91808>

or internal controls violations by subsidiaries they control.¹¹⁶

Based on the foregoing, a number of the entities that have been accused of improper dealings with indigenous leaders likely are covered by the statute: namely, those that are based in the United States or have securities that are publicly traded in this country. By contrast, certain other project developers are not covered by the statute, at least insofar as these companies refrain from issuing publicly traded securities or committing proscribed acts in the United States.

3. When Indigenous Leaders Qualify as “Foreign Officials”

The FCPA defines the term “foreign official” to mean:

[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.¹¹⁷

There are two main ways that an indigenous leader could fit under this provision: (i) as an “officer or employee of a foreign government or any department, agency, or instrumentality thereof,” or (ii) as someone otherwise “acting in an official capacity for or on behalf of” any such entity.

a. Indigenous Leaders as “Officers or Employees of a Foreign Government”

The FCPA does not define the term “foreign government.” It may be significant, however, that the FCPA uses the term “government,” whereas other federal statutes concerning foreign govern-

(asserting that a parent company may properly be held liable under the FCPA for misconduct by a foreign subsidiary if the parent “directed, authorized, or was actively involved in the subsidiary’s action,” or “the foreign subsidiary was acting at the behest of its parent and serving as its parent’s agent”).

116. FCPA RESOURCE GUIDE, *supra* note 89, at 43 (“Although the FCPA’s accounting requirements are directed at ‘issuers,’ an issuer’s books and records include those of its consolidated subsidiaries and affiliates. An issuer’s responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions.”).

117. 15 U.S.C.S. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2014).

ments use “state.”¹¹⁸ This may leave room for the notion of “government” to encompass governments abroad that are not affiliated with any formal state apparatus—including, notably, unrecognized tribal governments. It does not appear that any court or enforcement authority has yet addressed this possibility, and the FCPA’s legislative history sheds little light on the matter. Although a proposed amendment to a Senate draft of the FCPA would have defined the term “foreign government” as the government of a foreign *country* or a subdivision thereof,¹¹⁹ no such definition was included in the statute as adopted in 1977.¹²⁰

In any event, the FCPA’s definition of “foreign official” certainly includes individuals at *any* level of the state apparatus in a foreign country, from the highest to the lowest, as well as others acting in an official capacity.¹²¹

Some foreign indigenous leaders will readily qualify as “foreign officials” within this definition because they have formal positions within the state apparatus of the country in which they reside. In the Nunavut territory of Canada, for example, the Inuit people constitute a majority of the population, and therefore are able to determine the outcome of territorial elections.¹²² In fact, the Inuit form a majority in the entire country of Greenland, which has been granted broad self-rule within the Kingdom of Denmark.¹²³ Consequently,

118. See, e.g., 28 U.S.C.S. § 1604 (2014) (establishing the general rule that “a foreign state shall be immune from the jurisdiction of the courts of the United States,” subject to certain exceptions).

119. See 122 CONG. REC. 30,333 (1976) (proposing an amendment to S. 3664 that would have defined “foreign government” as “the government of a *country* other than the United States” or any political subdivisions or instrumentalities of such a government) (emphasis added); see also Susan Rose Ackermann & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433, 437–38 (2012) (explaining that S. 3664 was the Senate version of a bill that ultimately became the FCPA).

120. See Pub. L. No. 95-213, 91 Stat. 1494 (1977) (containing no definition of “foreign government”).

121. FCPA RESOURCE GUIDE, *supra* note 89, at 20 (“[T]he FCPA broadly applies to corrupt payments to ‘any’ officer or employee of a foreign government and to those acting on the foreign government’s behalf. The FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike.”).

122. Shin Imai, *Indigenous Self-Determination and the State*, in INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 285, 305 (Benjamin J. Richardson et al. eds., 2009).

123. GARTH NETTHEIM, GARY D. MEYERS & DONNA CRAIG, INDIGENOUS PEOPLES AND GOVERNANCE STRUCTURES: A COMPARATIVE ANALYSIS OF LAND AND RESOURCE MANAGEMENT RIGHTS 189–90 (2002).

elected Inuit leaders in Nunavut or Greenland are indisputably part of the state apparatus in their respective countries. Furthermore, in Australia, aboriginal groups comprise the majority of the population in some areas, and their representative institutions serve as municipal governments, receiving funding from provincial governments to cover local government functions, and in some cases having the authority to enact ordinances and levy taxes.¹²⁴

In some countries where bribery allegations have been made (see Part I), indigenous representatives enjoy similar official statuses. For example, certain Maya leaders in Belize are appointed by the government and have a recognized place in the state apparatus.¹²⁵ Known as *alcaldes*, these leaders serve as judicial officers or magistrates for their villages, adjudicating disputes and imposing punishment for minor offenses.¹²⁶ *Alcaldes* also have the authority to decide who can live in the village, oversee management of communal land, and organize community work projects.¹²⁷

Other allegations discussed in Part I concern projects in Bolivia, where most hydrocarbon resources are found in areas occupied by indigenous communities, which are organized into official indigenous territories.¹²⁸ The Bolivian state has devolved some of its governmental powers to these territories, including those powers previously exercised by municipal or regional authorities.¹²⁹ In addition,

124. See generally *id.* at 377–430.

125. See *Local Government*, GOV'T OF BELIZE—OFFICIAL GOV'T PORTAL, <http://www.belize.gov.bz/index.php/our-governance/how-we-are-governed/local-government> (last visited Oct. 25, 2015) (noting that “[t]he *alcalde* system is part of the local government structure of Belize” and that “[t]he government appoints *alcaldes* every two years”) (italics added).

126. *Id.* (“The *alcaldes* are effectively local magistrates operating at the village and community level. They differ from the chairperson of the village as they have a judicial role for which they are paid a small stipend by the government. . . . The inferior court is charged mainly with maintaining law and order and is authorized to hear and pass judgment on petty crimes committed within its jurisdiction. The *alcaldes* can therefore judge disputes and punish misdeeds and petty crime.”) (italics added).

127. *Id.* (“They have power to decide who can live in the village and can call for the communal cleaning of a village. They are responsible for managing the communal land and act as school officers.”).

128. Pellegrini & Ribera Arismendi, *supra* note 12, at 107; see also LAURENT LACROIX, INDIGENOUS TERRITORIALITY AND POLITICAL AGENDA IN BOLIVIA (1970–2010) 1 (2012), http://www.sogip.ehess.fr/IMG/pdf/llacroix_indigenous_territoriality.pdf (noting that the Bolivian Constitution calls for “the establishment of autonomous [indigenous] territories integrated into the political administrative organization of the Bolivian State”).

129. Pellegrini & Ribera Arismendi, *supra* note 12, at 107; see also Alexandra Tomaselli, *Autonomía Indígena Originaria Campesina in Bolivia: Realizing the Indigenous Autonomy?*, 1 EUR. DIVERSITY & AUTONOMY PAPERS 28–31 (2012),

some communities outside these indigenous territories have majority indigenous populations and therefore can elect representatives to municipal governments.¹³⁰

Likewise, Philippine law formally recognizes an official role for certain indigenous representative institutions. Specifically, the Philippines' Indigenous Peoples Rights Act gives indigenous peoples or communities the right to create their own municipal governments,¹³¹ and mandates that the state give them "representation in policy-making bodies and other local legislative councils."¹³² Moreover, in some areas traditional representative institutions have been recognized by the state as responsible for regulating local land and water use.¹³³

Other allegations highlighted in Part I concern projects in Africa, where many traditional leaders also have formal official statuses. For example, chiefs of the Himba people of Namibia perform duties on behalf of the national state and receive government salaries.¹³⁴ Their responsibilities include adjudicating disputes about customary land or grazing rights, and their judgments are final and ordinarily are not reviewable by Namibian courts.¹³⁵ Similarly, in Nigeria, gov-

http://www.eurac.edu/en/research/autonomies/minrig/publications/Documents/EDAP/2012_edap01.pdf (explaining that newly established indigenous territories absorb the powers of the municipality or region that existed previously, and have the power to enact certain types of laws or implementing regulations).

130. See J. Montgomery Roper, *Bolivian Legal Reforms and Local Indigenous Organizations: Opportunities and Obstacles in a Lowland Municipality*, 30 *LATIN AMERICAN PERSPECTIVES* 139, 143 (2003) (discussing various towns in Bolivia where indigenous representative organizations have taken control of the municipal government, or indigenous representatives have been elected to governmental positions).

131. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8371, § 19, 94:13 O.G. 276 (Oct. 29, 1997) (Phil.).

132. *Id.* § 16.

133. See, e.g., DAVID E. DE VERA, PHIL. ASS'N FOR INTERCULTURAL DEV., *INDIGENOUS PEOPLES IN THE PHILIPPINES: A COUNTRY CASE STUDY* 13 (2007), http://www.iapad.org/publications/ppgis/devera_ip_phl.pdf (discussing an indigenous community that was "able to convince the Government to recognize the local traditional leadership as an 'interim Protected Area Management Board,'" which has since been working to regulate "the utilization and management of the land and seas"); see also Wetzlmaier, *supra* note 57, at 338 ("Village leaders or the council of elders act as guardians of values and practices and are in charge of ensuring the 'protection of watersheds, water sources, and acceptable uses of forests and resources.'").

134. Harring, *supra* note 69, at 44.

135. *Id.*

ernment-appointed Ogoni chiefs perform administrative functions on behalf of the national state among the Ogoni people.¹³⁶ In fact, some commentators have identified a pattern across sub-Saharan Africa whereby states increasingly are giving formal recognition to traditional leaders and incorporating them into their governmental frameworks.¹³⁷

b. Indigenous Leaders as Persons Otherwise “Acting in an Official Capacity”

As noted above, the FCPA’s definition of “foreign official” recognizes that an individual can act in an official capacity even if he or she does not hold a formal position in the state apparatus. The statute does not clarify when this would be the case, but the DOJ, the SEC, and federal courts have explained in a number of contexts how someone without such a position can act in an official capacity. In addition, the International Law Commission’s Draft Articles on State Responsibility (ILC Articles) address the distinction between private and official conduct.¹³⁸

i. FCPA Interpretive Guidance

One important source of guidance is a DOJ opinion issued on September 18, 2012, which seeks to identify the circumstances under which a member of a foreign country’s royal family could qualify as a “foreign official,” despite having no formal position in government.¹³⁹ The DOJ issued this opinion in response to a request for guidance by a U.S. company. The U.S. company sought to hire a foreign royal family member to provide consulting services in con-

136. HALLER ET AL., *supra* note 74, at 55.

137. Carolyn Logan, *The Roots of Resilience*, 112 AFRICAN AFF. 353, 356 (2013) (explaining that many states in sub-Saharan Africa “have increasingly offered formal recognition and even institutionalization to traditional authorities”); BARBARA OOMEN, CHIEFS IN SOUTH AFRICA: LAW, POWER & CULTURE IN THE POST-APARTHEID ERA 11 (2005) (explaining that in recent years some states in Africa have “sought to attain extra legitimacy by recognising traditional structures of rule,” and providing examples); *id.* at 53 (describing the official roles of traditional leaders as recognized in the South African Constitution).

138. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc A/56/10, at 43 (2001) [hereinafter ILC Articles].

139. U.S. Dep’t of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 12-01 (Sept. 18, 2012), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf> [hereinafter Opinion Procedure Release No. 12-01].

nection with efforts to secure lobbying work from the foreign state.¹⁴⁰ The DOJ identified a number of non-exclusive factors that were relevant to the analysis, including, *inter alia*, the likelihood that the royal family member could someday hold a position in government (such as by royal succession)¹⁴¹; the family member's ability, directly or indirectly, to affect governmental decision-making¹⁴²; whether the foreign government characterized him as having governmental power¹⁴³; and whether he could act on behalf of the foreign government.¹⁴⁴

Based on the information provided by the company requesting the opinion, the DOJ concluded that this particular royal family member did not constitute a foreign official, so long as he did not "directly or indirectly represent that he [was] acting on behalf of the Royal Family or in his capacity as a member of the Royal Family."¹⁴⁵ The DOJ emphasized that this royal family member had no direct or indirect power to award any business sought by the company from the foreign government.¹⁴⁶ Moreover, there were no factors suggesting that the decision-makers who *were* in a position to award business would be influenced by any benefits given to the royal family member.¹⁴⁷

Of the various factors identified in that opinion, perhaps the one most likely to result in an indigenous leader's characterization as a "foreign official" would be his or her ability, directly or indirectly, to affect governmental decision-making relating to a development project. Indigenous leaders should have at least some such ability because many countries' domestic laws, as well as international human rights instruments, require governments to take the views of indigenous peoples' representatives into account.¹⁴⁸ Accordingly, unless the indigenous people would not be impacted by the project, or the individuals in question did not actually represent the people, then these individuals may well be in a position to influence governmental decision-making.

140. *Id.* at 1–3. For a description of the Justice Department's FCPA opinion procedure, see Westbrook, *supra* note 2, at 564.

141. Opinion Procedure Release No. 12-01, *supra* note 139, at 5.

142. *Id.*

143. *Id.* at 6.

144. *Id.* at 6–7.

145. *Id.* at 7.

146. *Id.*

147. *Id.*

148. See HINDERY, *supra* note 19; VÁSQUEZ, *supra* note 19; Foster, *supra* note 19.

Authority that interprets the concept of an “instrumentality” of a foreign government also provides insight into how someone who does not have a position in government can be treated as operating in an official capacity. As noted previously, the FCPA defines “foreign official” to include any officer or employee of a foreign government or “any department, agency, or *instrumentality* thereof,” as well as anyone acting on behalf of such an entity.¹⁴⁹ The FCPA does not define the term “instrumentality,” but case law indicates that, to qualify as an instrumentality for purposes of the FCPA, the entity must be owned or controlled by a foreign government, and must carry out some policy or function of the foreign government.¹⁵⁰ Relevant factors include whether the entity has a monopoly over the activity it exists to carry out; whether the government subsidizes its activities; whether the entity provides services to the public at large; and whether the entity is generally perceived to be acting on behalf of the government.¹⁵¹ Applying this standard, courts and enforcement authorities have characterized a number of state-owned entities as “instrumentalities,” including hospitals¹⁵² and telecommunications,¹⁵³ electricity,¹⁵⁴ and oil¹⁵⁵ companies.

149. 15 U.S.C.S. §§ 78dd-1(f)(1)(A), 78dd-3(f)(2)(A) (1998) (emphasis added).

150. See, e.g., *United States v. Carson*, 2011 U.S. Dist. LEXIS 88853 (C.D. Cal. May 18, 2011) (noting the Justice Department view that an “instrumentality” for purposes of the FCPA is “an entity through which a government achieves an end or purpose or carries out the functions or policies of the government”); *id.* at *10–16 (identifying state ownership or control as a factor in characterizing an entity as an “instrumentality,” but asserting that, in addition, the entity must “carry out governmental functions or objectives”); *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (defining the term as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own”).

151. See *Esquenazi*, 752 F.3d at 926; *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

152. See Alexander L. Harisiadi, Comment, *Foreign Official, Define Thyself: How to Define Foreign Officials and Instrumentalities in the Face of Aggressive Enforcement of the Foreign Corrupt Practices Act*, 62 CATH. U.L. REV. 507, 522–23 (2013) (summarizing several cases in which the SEC has initiated FCPA proceedings against companies based on their alleged bribery of physicians or other employees of state-owned hospitals).

153. See *Esquenazi*, 752 F.3d at 928–29 (affirming sufficiency of evidence supporting jury verdict that Haitian state-owned telecommunications company was an instrumentality).

154. See, e.g., *Aguilar*, 783 F. Supp. 2d at 1120 (denying motion to dismiss charges involving alleged bribes to executives of Mexican state-owned electricity company based on conclusion that the entity could qualify as an instrumentality).

155. See FCPA RESOURCE GUIDE, *supra* note 89, at 20–21 (describing a case in which a California company paid bribes to executives of a Mexican state-owned oil company); *Carson*, 2011 U.S. Dist. LEXIS 88853 (denying motion to dismiss charges involving alleged bribes to executives of Chinese state-owned oil companies based on conclusion that the

By analogy, indigenous leaders could qualify as “foreign officials” even if they hold no formal governmental office, provided that the state exerts control over a tribal governing body to which the leaders belong, and the body is performing some sort of function on the state’s behalf. In particular, two commentators have argued that under the FCPA, a tribal government might be treated as an instrumentality if the tribal government receives subsidies from the state. This analysis is based on language in the case law that makes subsidization a factor in the instrumentality analysis.¹⁵⁶ Put another way, if the foreign state uses a tribal government to help with negotiating or delivering the compensation due to an indigenous people for a development project, or otherwise for delivering social services, then this could potentially lead to the tribal government’s members being treated as “foreign officials.”

ii. Other Sources Bearing on the Distinction Between Public and Private Conduct

Other sources provide further insight into how someone lacking a formal position in the state apparatus can be deemed a state actor. One such source is case law concerning 28 U.S.C. § 1983, which provides remedies for deprivations of federal rights committed under color of law.¹⁵⁷ Another is the ILC Articles, which identify when conduct may be attributed to a state under public international law.¹⁵⁸ Both the case law interpreting § 1983 and the ILC Articles recognize that private individuals or entities can be treated as state actors if they (i) were performing a traditionally public function, or (ii) were encouraged, directed, or controlled by the state. Indigenous leaders often perform functions that fall within these categories.

(1) Public Function Tests

Under federal case law, the public function test asks whether

entities could qualify as instrumentalities).

156. Cohen & Funk, *supra* note 8, at 4 (observing that the government could argue “that tribes administered or subsidized by their governments are mere proxies and that tribal leaders are therefore ‘foreign officials’ for purposes of the FCPA’s anti-bribery provisions”).

157. 42 U.S.C.S. § 1983 (1996); *see also* Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012) (explaining that although § 1983 makes liable only those who act under color of law, a private entity can be subject to liability under that provision if the conduct allegedly causing the deprivation of a federal right was fairly attributable to the state).

158. ILC Articles, *supra* note 138.

the challenged action is a “traditional and exclusive” or “nearly exclusive” function of the state.¹⁵⁹ Courts have found that the following conduct, *inter alia*, qualifies as functions of the state: arresting or imprisoning individuals as punishment for crimes¹⁶⁰; taking private property under the eminent domain power¹⁶¹; regulating access to, or speech in, public property¹⁶²; setting eligibility criteria for political elections¹⁶³; and sterilizing animals without their owners’ consent under authority delegated by state law.¹⁶⁴

Similarly, the ILC Articles provide that conduct may be attributed to a state if the person or body has exercised “elements of governmental authority,” whether under powers granted by law¹⁶⁵ or “in the absence or default of the official authorities.”¹⁶⁶ The ILC Articles’ Commentaries provide examples that are similar to activities treated as traditional public functions under federal case law. These examples include a situation in which a private firm supplies prison guards,¹⁶⁷ and another situation in which a private airline is tasked with immigration control.¹⁶⁸

Indigenous leaders and representative institutions often perform roles comparable to those considered traditional public func-

159. *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5 (1st Cir. 2005) (“[I]n accordance with the public function test, a private party is viewed as a state actor if the plaintiff establishes that, in engaging in the challenged conduct, the private party performed a public function that has been ‘traditionally the exclusive prerogative of the State.’”) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982)).

160. *Payton v. Rush-Presbyterian St. Luke’s Med. Ctr.*, 184 F.3d 623, 628–29 (7th Cir. 1999); *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 151 (2d Cir. 2004); *see also United States v. Boots*, 80 F.3d 580, 591 (1st Cir. 1996) (holding that the police chief of the Passamaquoddy Tribe was “performing a governmental function” within the meaning of Maine’s public bribery statute because he “was charged with enforcing state laws and tribal ordinances within the reservation”), *overruled on other grounds by Pasquantino v. United States*, 544 U.S. 349, 354–55 (2005).

161. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–53 (1974); *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005).

162. *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002) (regulating free speech within a public forum); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Jesús*, 634 F.3d 3, 10 (1st Cir. 2011) (“Regulating access to and controlling behavior on public streets and property is a classic government function.”).

163. *Terry v. Adams*, 345 U.S. 461, 469–70 (1953).

164. *Fabrikant v. French*, 691 F.3d 193, 209 (2d Cir. 2012).

165. ILC Articles, *supra* note 138, at art. 5.

166. *Id.* at art. 9.

167. *Id.*

168. *Id.*

tions under federal case law and the ILC Articles, even if the leaders and representative institutions have not been formally integrated into the state apparatus. These roles may result from self-government arrangements that indigenous groups have negotiated with the state.¹⁶⁹ These roles may also result from the fact that, in many areas occupied by indigenous peoples, the formal state apparatus has little or no presence and thus indigenous leaders take on a de facto state leadership role.¹⁷⁰

For example, certain aboriginal groups in Canada have negotiated agreements with the federal and provincial governments that give their representative institutions primary authority over matters such as property rights, use of community lands, child and family services, education, and cultural property, including the power to make laws with respect to these matters.¹⁷¹ Whether these arrangements are characterized as delegations of state authority or recognition of the aboriginal groups' inherent sovereignty,¹⁷² the relevant representative institutions are plainly exercising governmental functions at the local level.

Leaders of the Achuar people of South America provide another example. They are responsible for organizing communal work projects, resolving disputes, and imposing punishments on community members who commit offenses.¹⁷³ These functions appear quite similar to those performed by *alcaldes* among the Maya of Belize, who—as previously noted—are treated as formal government officials under Belize's laws. Moreover, responsibility for law enforcement is plainly identified as a public function in U.S. case law and the Commentary to the ILC Articles. Indeed, in the *Boots* case discussed in Part II.A, the First Circuit held that the police chief of the

169. See Imai, *supra* note 122, at 295–96 (discussing self-government agreements between the Canadian government and various First Nations).

170. VÁSQUEZ, *supra* note 19, at 65 (“One of the main complaints of local communities affected by hydrocarbons projects is the lack of state presence in their territories, which are usually remote or neglected areas far from the capital city, where most decisions are made.”).

171. Imai, *supra* note 122, at 295–96; Lisa Dufraimont, *Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty*, 35 U.B.C. L. REV. 455, 455–60 (2002) (describing one such agreement involving the Nisga'a First Nation, and noting that, among other things, it “recognizes the law-making power of Nisga'a government”).

172. Dufraimont, *supra* note 171, at 469–71 (explaining that the self-government provisions of the agreement with the Nisga'a First Nation can be seen as a delegation of powers from the federal and provincial governments, but arguing that “these rights find their source in the pre-existing rights of the Aboriginal nation”).

173. DON KRAFT, VOICES FROM THE FOREST: LEADERSHIP REVEALED THROUGH CARE, SHARED UNDERSTANDING, AND IMAGINATION 86–87 (2009).

Passamaquoddy Tribe qualified as a “public servant” within the meaning of Maine’s public bribery statute because—as someone responsible for “enforcing state laws and tribal ordinances within the reservation”—he was performing a “governmental function.”¹⁷⁴ Finally, if Achuar leaders have the power to resolve disputes *without* party agreement to their jurisdiction, then this is arguably a public function as well.¹⁷⁵ Although there are private forms of dispute resolution, these require party consent.¹⁷⁶

Traditional leaders in Papua New Guinea play similar roles despite not being part of the formal state apparatus. In particular, the vast majority of the country’s land is held communally and administered by clan leaders.¹⁷⁷ Sometimes, these leaders are authorized by the community to make decisions on behalf of the clan regarding land use, although they may operate autonomously from state institutions and policies.¹⁷⁸ Clan leaders and community elders also play a

174. *United States v. Boots*, 80 F.3d 580, 591 (1st Cir. 1996).

175. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 982 (2000) (referring to “the state’s monopoly on coercive dispute resolution—only dispute resolution through the public courts can force the other party to the table”); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 997 (2000) (arguing that “[t]he binding resolution of disputes is, of course, a traditionally exclusive public function”); *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) (referring to “the State’s monopoly over techniques for binding conflict resolution”).

176. See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 597–98 (2001) (discussing the distinction between different types of private alternative dispute resolution and noting “[a] basic tenet of ADR is that both arbitration and mediation are consensual processes”); Harold Brown, *Alternative Dispute Resolution: Realities and Remedies*, 30 SUFFOLK U. L. REV. 743, 745 (1997) (“Alternative dispute resolution principally consists of mediation or arbitration of disputes by consenting parties.”).

177. See Tim Anderson, *Land Registration, Land Markets and Livelihoods in Papua New Guinea*, in IN DEFENCE OF MELANESIAN CUSTOMARY LAND 11, 12 (Tim Anderson & Gary Lee eds., 2010), <http://milda.aidwatch.org.au/sites/default/files/In%20Defence%20of%20Melanesian%20Customary%20Land.pdf> (“Commentators generally accept that 97 percent of [Papua New Guinea’s] land is owned by families and administered by clan leaders under customary law. This form of ownership, recognised by law, is recorded in local knowledge and tradition, not in a government register or database.”).

178. See Gina Koczberski et al., *Changing Land Tenure and Informal Land Markets in the Oil Palm Frontier Regions of Papua New Guinea: The Challenge for Land Reform*, 43 AUSTL. GEOGRAPHER 181, 182 (2012) (noting land use management in Papua New Guinea takes place in a void created by ineffective government institutions and that “government efforts in land reform often lag behind what is happening informally as customary landowners and migrants develop their own systems of tenure for land transactions regardless of state policies”); *id.* at 190 (noting that particular individuals or families are

key role in resolving land disputes and otherwise maintaining security in their communities.¹⁷⁹ As noted above, land use management and keeping the peace are classic public functions, and dispute resolution can be as well.

Indigenous leaders may perform a number of the public functions described above in connection with development projects. For example, a project developer may approach an indigenous people's representatives to secure their consent to operate on communal lands, or resolve a dispute over whether the lands in question were properly transferred or leased to the developer. Or a developer may ask traditional leaders to help remove protestors or punish community members who have engaged in acts of sabotage against the project. If the developer offered a bribe to a leader to secure his assistance with any such matter, it might violate the FCPA—whether or not that leader held any formal position in the state apparatus.

(2) Direction or Control Tests

U.S. case law further recognizes that a private person may be treated as a state actor if the state has given significant encouragement to the person's conduct, the person has operated as a willful participant in joint activity with the state, or the state is entwined in the person's management or control.¹⁸⁰ Similarly, the ILC Articles provide that conduct of a person or body lacking any formal governmental position can be attributed to the state if the person or body was acting on the instructions of—or under the direction or control of—the state in carrying out the conduct.¹⁸¹

These tests suggest that indigenous leaders should be treated as state actors if, for example, these leaders work with the state to regulate or facilitate a development project, or if the state appoints these leaders to represent the indigenous people in consultations. On some occasions states have intervened in the selection of indigenous peoples' representatives for such purposes, albeit controversially.¹⁸²

typically “authorised and identified by the community to deal in land matters”).

179. *Papua New Guinea: Tackling Clan Conflict*, IRIN (Jan. 7, 2011), <http://www.irinnews.org/report/91559/papua-new-guinea-tackling-clan-conflict> (explaining that land disputes are common and often result in violence, and discussing one dispute involving a coffee plantation that was resolved through the intervention of both formal officials and tribal elders).

180. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001) (citing various theories for treating someone as a state actor).

181. ILC Articles, *supra* note 138, at art. 8.

182. *See Wetzlmaier, supra* note 57, at 338 (“Village leaders report that conflicts have

Whether the state is justified in making such an appointment or not, if the state makes this appointment then the designated representatives arguably act on the state's behalf when participating in consultations, and any benefits that a project developer offers to the appointed representatives could violate the FCPA.

c. Complicating Factor: The Possibility of Competing or Disputed Representation

As the above discussion has demonstrated, there are a number of circumstances under which an indigenous people's representatives could qualify as "foreign officials" for purposes of the FCPA. However, there could be competing groups or factions within any given indigenous community, and each faction may believe that it represents the group as a whole or is entitled to choose its representatives.¹⁸³ This division may make it difficult for project developers or enforcement authorities to ascertain who constitutes an indigenous people's representatives for purposes of consultations,¹⁸⁴ and consequently whether or not individuals with whom they deal qualify as

been provoked by local government officials who, following their own business interests, assigned an 'alternative' council of elders that—in opposition to the traditional leaders—acts in favour of mining.”); Schilling-Vacaflor, *supra* note 25, at 14 (asserting that the Bolivian government excluded one indigenous representative body from consultations over a proposed project “and instead a parallel organization that was more supportive of the planned project, composed of the communities directly affected by the seismic tests, was given an important role”).

183. See Hartmut Holzknecht, *Problems of Articulation and Representation in Resource Development: The Case of Forestry in Papua New Guinea*, 7 ANTHROPOLOGICAL F. 549, 564 (1997) (observing that indigenous landowner groups in Papua New Guinea are sometimes divided, and that, “as in all human societies, there are factions within groups, opportunists and entrepreneurs, conservatives and avant-garde elements, leaders and followers”); Roper, *supra* note 130, at 151 (noting that many indigenous communities in Bolivia have been hampered by “hostilities within and between communities, distrust between communities and representative organizations and leaders, factionalism within indigenous organizations, and power struggles between indigenous organizations”).

184. See Shalanda H. Baker, *Why the IFC's Free, Prior and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects*, 30 WIS. INT'L L.J. 668, 687–88 (2012) (noting the risk of corruption during the consultation process, and the difficulty that project developers could encounter in seeking to “identify the appropriate voices in the community in order to obtain their consent”); Special Rapporteur 2013 Report, *supra* note 23, ¶ 71 (“It may be that in some circumstances ambiguity exists about which indigenous representatives are to be engaged [in consultations], in the light of the multiple spheres of indigenous community and organization that may be affected by particular extractive projects, and also that in some instances indigenous representative institutions may be weakened by historical factors.”).

“foreign officials.”

In these situations, the question should not be whether the putative representatives enjoy universal recognition, but whether the representatives meet the criteria for official status with respect to at least a *portion* of the community. It should be sufficient, for example, if the leader or body performs a public function for particular families, or has influence over the foreign state’s decision-making in relation to the project, even if others have competing claims to leadership. As noted above, the FCPA’s definition of “foreign official” requires only that the person be an officer or employee of the government or one of its departments, agencies or instrumentalities, or otherwise act in an official capacity.¹⁸⁵ The FCPA does not require that the representative hold office at any particular level or exercise public functions with respect to any minimum percentage of society.

4. When Benefits Are Given or Offered “Corruptly”

For a project developer’s payment or offer to violate the FCPA, not only must the developer make this payment or offer to a proscribed recipient, the developer must do so “corruptly.”¹⁸⁶

a. The Distinction Between Corrupt Payments and Payments Made for Charitable or Other Legitimate Reasons

Although the FCPA does not define the term “corruptly,” the statutory text indicates that offers or payments violate the FCPA when they are made to influence any official act, decision, or omission of a foreign official or governmental entity, or otherwise to secure an improper advantage.¹⁸⁷ Courts and enforcement agencies have interpreted this to mean that offers or payments are made “corruptly” when they are given for one of these purposes.¹⁸⁸ By contrast, offers or payments are not corrupt when they are given to a

185. 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2014) (defining “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization”).

186. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2014).

187. *Id.*

188. See FCPA RESOURCE GUIDE, *supra* note 89, at 107–08 n.75 (quoting S. REP. NO. 95-114, at 10 (1977), and H.R. REP. NO. 95-640, at 7 (1977)).

genuine charitable cause¹⁸⁹ or to the state itself (rather than an individual official).¹⁹⁰

Notwithstanding this exception for charitable or public expenditures, covered persons are expected to use due diligence and employ appropriate controls to mitigate the risk that these funds could be misappropriated by leaders for their personal use.¹⁹¹ Toward that end, the DOJ has identified a number of steps that may be prudent. These include, for example, concluding a written agreement with the recipient restricting the use of the funds; ensuring that the funds are transferred to an account that a foreign official cannot access for his or her personal use; and monitoring the relevant community benefit program over time to make sure the funds are serving their intended purpose (rather than being siphoned off by proscribed recipients for their personal use).¹⁹²

Applying the foregoing principles to the allegations discussed above in Part I, some of the reported payments or offers to indigenuous leaders might qualify as corrupt (assuming, for purposes of discussion, that they were attributable to a covered person and could be proven in a court of law). For example, the alleged offer of money and vehicles to Maya *alcaldes* by a subsidiary of U.S. Capital Energy, in an effort to induce the *alcaldes* to support the use of lands claimed by the community, could potentially be construed as corrupt.¹⁹³ The benefits were allegedly offered to the officials themselves, rather than the community as a whole. Moreover, as noted above, allocating access to communal lands is arguably a public function, and the statute deems offers to be made “corruptly” if intended to influence the recipient in the performance of his or her official duties.

Other benefits reported in the media, scholarly literature, or NGO publications arguably would *not* qualify as corrupt, because—

189. See FCPA RESOURCE GUIDE, *supra* note 89, at 16 (“Companies often engage in charitable giving as part of legitimate local outreach. The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.”).

190. *Id.* at 20 (“The FCPA prohibits payments to foreign officials, not to foreign governments. That said, companies contemplating contributions or donations to foreign governments should take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials.”).

191. See *id.* at 19 (discussing the need for due diligence and controls and describing procedures that have been deemed adequate).

192. *Id.*

193. See *supra* Part I.A.

according to the reports—they were given for the benefit of the community as a whole. An example would be the alleged payments by a U.K. company to Ogoni chiefs to finance “a local development programme in areas such as education and health.”¹⁹⁴ Provided these benefits were indeed for a community development program and not for the chiefs’ personal benefit, they would likely be construed as permissible charitable or public contributions, rather than as corrupt payments within the meaning of the statute.

Finally, any effort by a law enforcement agency or court to determine whether an offer or payment was made corruptly would need to take into account the FCPA’s “reasonable and bona fide expenditure” affirmative defense.¹⁹⁵ Specifically, this defense treats as per se non-corrupt any payments that represent a “reasonable and bona fide expenditure . . . incurred by or on behalf of” a proscribed recipient, provided the payment is directly related to “the promotion, demonstration, or explanation of products or services,” or “the execution or performance of a contract with a foreign government or agency thereof.”¹⁹⁶ This defense was added to the FCPA in order to permit a company to pay legitimate travel and other business expenses when promoting the company’s goods and services or negotiating or performing a contract with the state or a state-owned entity.¹⁹⁷ The DOJ and SEC have emphasized, however, that application of this affirmative defense requires a highly fact-specific analysis, and that expenditures will not qualify for the defense if they are “designed to corruptly curry favor with the foreign government officials.”¹⁹⁸

To assist companies in navigating the distinction between bona fide expenditures and corrupt payments, the DOJ has offered examples of the types of expenditures that can fall within this defense. Examples of bona fide expenditures include travel and expenses to visit company facilities or operations; travel and expenses for training; and product demonstration or promotional activities, including travel and expenses for meetings.¹⁹⁹ DOJ guidance indicates further that any payments associated with trips whose purpose is predominantly entertainment or leisure will not qualify for this defense, because of the likelihood that the payments were intended to curry fa-

194. PEEL, *supra* note 76, at 14.

195. See *supra* Part II.B.1.

196. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2014).

197. MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 123–24 (2014).

198. *Id.*

199. FCPA RESOURCE GUIDE, *supra* note 89, at 24.

vor with the officials involved.²⁰⁰ Thus sightseeing trips to vacation destinations like Hawaii, Las Vegas, or the Grand Canyon have prompted enforcement action.²⁰¹

With these principles in mind, it appears that some of the dealings between project developers and indigenous leaders described in Part I could potentially fall within this affirmative defense (again assuming, for discussion purposes, that the payments or offers were made and were attributable to a covered person). For example, consider the Chinese company's alleged financing of a trip by Namibian tribal leaders to tour a dam constructed by the company in China. These payments might fit within the reasonable and bona fide expenditure defense provided the travel arrangements were not extravagant and the leaders' tour of the dam would have assisted the leaders in evaluating the merits of the company's proposal to construct a dam in Namibia.²⁰²

Consider also the alleged payments by Newmont Ghana to Akyem chiefs, which the company claims were made to traditional councils to compensate them for "attend[ing] meetings and manag[ing] issues that come about due to Newmont Ghana's presence."²⁰³ If the payments were reasonable in amount and directly related to responsibilities that the chiefs were obliged to perform under a contract with the government or one of its instrumentalities, then it is possible that the payments could fit within the defense. Significantly, however, to be subject to this defense the payments could not have been intended to curry favor with the chiefs or influence the leaders in the performance of any official duties on behalf of the Akyem people.

b. Payments to Indigenous Leaders for Services Performed in Their Private Capacities

One scenario that could be difficult for an enforcement agency or court to evaluate is when benefits are purportedly given to an

200. *Id.* at 15–16; KOEHLER, *supra* note 197, at 125–26.

201. FCPA RESOURCE GUIDE, *supra* note 89, at 15–16; KOEHLER, *supra* note 197, at 125–26.

202. *See* FCPA RESOURCE GUIDE, *supra* note 89, at 24 (noting that "travel and expenses to visit company facilities or operations" generally would not violate the FCPA, so long as they are reasonable and bona fide and certain safeguards are employed, such as "[p]rovid[ing] no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred").

203. *See* FACT SHEET: NEWMONT GHANA'S AKYEM PROJECT, *supra* note 68.

indigenous people's representatives in their *personal or private* capacities, such as in exchange for their agreements to assign or lease their individual property rights, or in payment for services they have performed for a project separate from their official duties. The FCPA does not cover benefits or offers made for purely personal matters,²⁰⁴ but it can be difficult to distinguish between personal and official conduct, and benefits purportedly given for personal matters could influence the leader in his or her official role.²⁰⁵ For example, if a project developer offers a leader (or a company he or she controls) a lucrative job or contract that is connected with the project—such as assisting with language translation or road construction—then this could incentivize the leader to support the project in his official capacity.²⁰⁶ Indeed, several of the allegations highlighted in Part I involve attempts to “co-opt” indigenous leaders in this manner—that is, to preempt leaders' opposition to a project by hiring them to work for it.²⁰⁷

At the same time, project developers may have legitimate reasons for hiring community leaders to provide services for the project. In some cases, one of the most important benefits that an indigenous community can obtain from a development project is a commitment by the developer to hire local personnel as employees or give preference to indigenous-owned businesses when soliciting bids for construction work or other services.²⁰⁸ Moreover, leaders within the

204. Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 202 (1994) (“The FCPA requires that the foreign official be engaged in an official capacity or lawful duty when the alleged illegal conduct occurs.”); SEAN R. O'BRIEN & DEANA DAVIDIAN, 4 BUS. CRIME ¶ 18.04 (2015), LexisNexis (“It is often difficult to distinguish an individual's ‘official capacity’ from his or her business or personal capacity. In many foreign countries officials can continue to operate private ventures while holding public office . . .”).

205. O'BRIEN & DAVIDIAN, *supra* note 204.

206. See Ryan L. Lambrecht, *The Big Payback: How Corruption Taints Offset Agreements in International Defense Trade*, 70 A.F. L. REV. 73, 96 (2013) (noting that a payment to a business controlled by a foreign official could violate the FCPA); ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK* 7 (2d ed. 2012) (same).

207. See, e.g., Schilling-Vacaflor, *supra* note 25, at 13 (discussing allegations that a subsidiary of French energy company Total gave lucrative jobs to community leaders during consultations over a project to secure their support); *Conflict in Indonesia's Papua Region*, *supra* note 60 (reporting that Wilmar International Group “often co-opt[s] tribal leaders [in Indonesia], paying them a salary to convince the other villagers to sell their land”).

208. See *What Are Impact and Benefit Agreements (IBAs)?*, MININGFACTS.ORG, <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-%28IBAs%29/> (last visited Oct. 25, 2015) (describing agreements negotiated between indigenous communities in Canada and mining companies and noting that these agreements typically secure for the community “various economic and social advantages such as

community may be the best suited to provide services required by the developer, given that leaders may have more education, experience, or resources than others. Requiring the developer to employ outsiders instead of these leaders could defeat the goal of maximizing community benefits accruing from the development project.²⁰⁹ Indeed, the utilization of outsiders to perform services (rather than local individuals or companies) can be a source of considerable tension with local stakeholders.²¹⁰ And even if there are other community members who could perform the services in question, it may not be in the community's best interest to disqualify leaders from submitting a bid or accepting offered positions. Talented individuals might be deterred from serving their communities in leadership positions if doing so would disqualify these individuals from accepting economic opportunities likely to result from a contemplated development project.

There is no DOJ or SEC guidance regarding transactions between project developers and indigenous leaders, but the DOJ has released opinions regarding prospective transactions with more conventional foreign officials.²¹¹ These indicate that hiring a foreign official in his private capacity is potentially acceptable, provided cer-

employment, investment, and funding among other things"); GINGER GIBSON & CIARAN O'FAIRCHEALLAIGH, WALTER & DUNCAN GORDON FOUND., IBA COMMUNITY TOOLKIT: NEGOTIATION AND IMPLEMENTATION OF IMPACT AND BENEFIT AGREEMENTS 144–50, 156–57 (2010), http://www.ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_high_resolution.pdf (outlining different ways that agreements between indigenous communities and project developers can provide for employment of community members and preferences for community-owned businesses).

209. See ANDRÉS LIEBENTHAL, ROLAND MICHELITSCH & ETHEL TARAZONA, WORLD BANK GROUP, EXTRACTIVE INDUSTRIES AND SUSTAINABLE DEVELOPMENT: AN EVALUATION OF WORLD BANK GROUP EXPERIENCE 200 (2005), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/06/21/000090341_20050621121829/Rendered/PDF/32671.pdf (asserting that the best development projects seek “to maximize economic opportunities for the local community”); INT’L FIN. CORP., INVESTING IN PEOPLE: SUSTAINING COMMUNITIES THROUGH IMPROVED BUSINESS PRACTICE 18 (2000), <http://www.ifc.org/wps/wcm/connect/1dc2e10048865811b3fef36a6515bb18/CommunityGuide.pdf?MOD=AJPERES> (“One way to maximize the local employment impact of a project is to give preference to people from the local area for all open jobs.”).

210. See, e.g., Norimitsu Onishi, *Riches May Not Help Papua New Guinea*, N.Y. TIMES (Oct. 26, 2010), <http://www.nytimes.com/2010/10/26/world/asia/26papua.html> (reporting that Exxon-Mobil has encountered demands by local communities in Papua New Guinea that it employ local companies for construction and waste management services or risk acts of violence).

211. See *FCPA Opinion Releases Index*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal-fraud/opinion-releases-index> (last updated Oct. 14, 2015).

tain safeguards are employed.²¹² Among other things, the transaction must be permissible under local law and the rules of whatever entity employs the official, the official must disclose the transaction to his employer, and the official must be “walled off” from any governmental decisions that could impact the company.²¹³

Most of these safeguards would apply quite logically in the context of a business arrangement between a project developer and an indigenous leader. Indeed, some indigenous groups’ internal conflict-of-interest policies require leaders to disclose any transactions they may have with third parties with which the group is dealing, and give the community or its governing body an opportunity to approve or reject it.²¹⁴ The “walling off” requirement, however, might not always be appropriate in this context. Specifically, if the developer hired a large number of community members or indigenous-owned businesses to work for the project—arguably a laudable goal—then so many leaders might need to recuse themselves that the quality and diversity of the community’s leadership could be undermined.

Accordingly, it would be useful if the DOJ and the SEC would promulgate guidance specific to indigenous communities that would identify criteria that could be used for screening out transactions motivated by a corrupt intent, but not necessarily require leaders who enter into transactions with the developer to be walled off from all decision-making relating to the project. Were such guidance

212. See U.S. Dep’t of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 10-03 (Sept. 1, 2010), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/09/01/1003.pdf> (“The FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials. In such cases, the Department typically looks to determine whether there are any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the general public, whether the arrangement is in conformity with local law, and whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal.”).

213. *Id.*; see also U.S. Dep’t of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 94-01 (May 13, 1994), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/9401.pdf> (declining to take enforcement action in relation to a proposed consulting arrangement between a U.S. company and an officer for a state-owned enterprise, where the arrangement complied with local law and the rules of the enterprise, and the officer agreed to disclose the arrangement and recuse himself from decision-making at the enterprise regarding the U.S. company, and not to advocate on behalf of the U.S. company before the enterprise or any governmental authority).

214. See, e.g., ATTAWPISKAT FIRST NATION, ATTAWPISKAT FIRST NATION CONFLICT OF INTEREST POLICY, <http://www.attawapiskat.org/wp-content/uploads/Attawapiskat-First-Nation-Conflict-of-Interest-Policy.pdf>; ADVISORY COMMITTEE CODE, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION (Sept. 10, 2012), <http://ctuir.org/system/files/AdvisoryCommitteeCode.pdf>.

to be developed, it should retain the requirements that the transaction be disclosed and comply with local law and the community's own internal rules. It should also treat it as relevant whether or not the transaction satisfied an arm's length standard. Namely, if the consideration offered by the developer to a community leader for services was consistent with fair market value, and a competitive bidding process was employed in awarding the contract, then this would make it less likely that the developer was employing the transaction as a way to enrich the leader unfairly.²¹⁵ Another potentially relevant factor would be whether the contract or transaction with an indigenous leader was unusual in type or amount as compared to benefits offered by the project developer to *other* community members. For example, if the project developer offered employment or service contracts to numerous community members and companies—most of which were *not* leaders or controlled by them—and the amounts offered to the leaders or their companies were commensurate with those offered to non-leaders, then this would arguably weigh against treating the transactions as corrupt. By contrast, if the project developer proposed to hire *only* leaders or their companies, or to award them disproportionately lucrative contracts, this might tend to support an inference of corrupt intent. Finally, the timing of any transactions with community leaders could be significant. If the developer awarded business to leaders or their companies immediately prior to an important decision relating to the project, then this could be more suggestive of a corrupt quid pro quo arrangement than awards made at other times.

215. Some existing DOJ opinions concerning transactions with foreign officials in their private capacity have treated the size of the compensation paid to the leader as a potentially relevant factor. See U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 80-02 (Oct. 29, 1980), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/r8002.pdf> (treating a proposed transaction as permissible under the FCPA because, inter alia, the salary to be paid to the foreign official would be "based on the amount of time he actually work[ed] for the corporation"); U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 86-01 (July 18, 1986), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/r8601.pdf> (observing that the salary to be paid to the foreign official would be reasonable in amount); U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 95-02 (Sept. 14, 1995), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/9502.pdf> (treating it as relevant that the compensation for services under a proposed transaction with foreign officials would be at a "standard commercial rate").

5. How Project Developers Could Violate the FCPA's Accounting Provisions

The FCPA not only prohibits corrupt dealings with foreign officials, it also requires companies whose securities are publicly traded in the United States (known as “issuers”) to comply with certain accounting requirements. In particular, the FCPA requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”²¹⁶ The statute also requires issuers to employ internal controls adequate to provide reasonable assurances that transactions are recorded properly.²¹⁷

Publicly traded companies that violate the FCPA's anti-bribery provisions often also violate the statute's accounting requirements, because companies rarely record corrupt transactions accurately on their books.²¹⁸ Charges under the accounting provisions are usually brought in connection with bribery schemes,²¹⁹ but an issuer can violate these rules even without having engaged in bribery, and even if any bribes that were paid were given to private individuals rather than to foreign officials. On a number of occasions, the SEC has brought civil enforcement proceedings against issuers under the FCPA's accounting provisions based on the allegation that a foreign subsidiary (which was not itself covered by the FCPA) paid bribes and failed to record them properly, and the subsidiary's books were then consolidated with those of the issuer.²²⁰ The SEC has brought such charges even when the issuer parent did not know about or authorize the bribes.²²¹ In addition, the SEC sometimes brings

216. 15 U.S.C. § 78m(b)(2)(A).

217. 15 U.S.C. § 78m(b)(2)(B).

218. See FCPA RESOURCE GUIDE, *supra* note 89, at 39 (“Bribes, both foreign and domestic, are often mischaracterized in companies' books and records Bribes are often concealed under the guise of legitimate payments, such as commissions or consulting fees.”).

219. *Id.* (“DOJ's and SEC's enforcement of the books and records provision has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery.”).

220. See, e.g., Allianz SE, Exchange Act Release No. 68448, 105 SEC Docket 825 (Dec. 17, 2012), <http://www.sec.gov/litigation/admin/2012/34-68448.pdf> [hereinafter Allianz Order]; The Goodyear Tire & Rubber Co., Exchange Act Release No. 3640, 2015 WL 758872 (Feb. 24, 2015), <https://www.sec.gov/litigation/admin/2015/34-74356.pdf> [hereinafter Goodyear Order].

221. See Allianz Order, *supra* note 220, at 5 (asserting that Allianz did not have the ability to access its foreign subsidiary's accounting system and therefore did not detect the corrupt payments).

charges under the accounting provisions based on the improper recording of corrupt payments to *private* individuals; enforcement has not been limited to transactions involving foreign officials.²²²

In light of the foregoing, if a project developer has securities that are publicly traded in the United States, and either the developer or one of its subsidiaries bribes an indigenous leader in a foreign country and fails to record the transaction correctly, then the developer can potentially be found liable under the FCPA's accounting provisions—whether or not the leader qualifies as a “foreign official,” and whether or not the issuer itself knows about the bribes. Accordingly, the accounting provisions could provide an important supplemental basis for targeting improper dealings with indigenous leaders in some cases.

C. Other Anti-Corruption Statutes and Their Potential Applicability

Because the FCPA's anti-bribery provisions cover only public corruption and its accounting provisions apply only to publicly traded companies, law enforcement agencies may need to rely on other legislative resources in order to target bribery of any indigenous leaders who do not qualify as foreign officials. As explained in the sections that follow, the Travel Act and mail and wire fraud statutes could be useful in some such cases.²²³ In fact, even in situations covered by the FCPA, prosecutors may bring charges under these statutes, so long as their statutory elements are satisfied.²²⁴

1. The Travel Act

The Travel Act criminalizes certain unlawful activity that

222. See Goodyear Order, *supra* note 220, at 9 (asserting that the improperly-recorded transactions at issue included payments made by foreign subsidiaries to employees of private companies).

223. Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1269–70 (1999) (describing the mail and wire fraud statutes and noting that they “can play a particularly important anti-bribery role in cases in which out-of-country payments are legal under the FCPA because they were not made to a ‘foreign official’”).

224. Clark, *supra* note 6, at 2286 (“The Travel Act, the ‘little brother’ of the FCPA, and the mail and wire fraud statutes can individually, or as a tag-along to FCPA actions, prosecute all acts of bribery, whether public or private.”); *id.* at 2296–97 (describing a case in which the government prosecuted a California company, Control Components Inc., under both the FCPA and the Travel Act).

crosses state or national borders. Specifically, the elements of a Travel Act violation are: (i) travel in or use of the instrumentalities of interstate or foreign commerce, (ii) with intent to promote, direct, or manage a specified unlawful activity, and (iii) a subsequent overt act in furtherance of the unlawful activity.²²⁵ One of the unlawful activities covered by the Travel Act is “bribery . . . in violation of the laws of the State in which committed or of the United States.”²²⁶ There is no federal law that specifically prohibits private-sector bribery, so the DOJ can target this form of corruption via the Travel Act only if a developer commits the act in a state that has a statute prohibiting the activity.²²⁷

At least twenty-nine states have statutes prohibiting private-sector bribery.²²⁸ These statutes vary in their wording, but the basic elements remain largely consistent from state to state.²²⁹ One common requirement is that the bribe recipient owed a “duty of fidelity” toward another—typically an employer, principal, or beneficiary in a fiduciary relationship.²³⁰ Generally, the bribe recipient need not be a formal or traditional employee, agent, or fiduciary; he or she simply must owe a duty of trust and confidence to a third party and violate this duty by accepting the bribe.²³¹ Consequently, bribes to indigenous leaders may be covered by a state private-sector bribery statute

225. 18 U.S.C.S. § 1952(a) (2014); *United States v. Wander*, 601 F.2d 1251, 1258 (3d Cir. 1979); *United States v. Childress*, 58 F.3d 693, 719 (D.C. Cir. 1995); *United States v. Tragas*, 727 F.3d 610, 618 (6th Cir. 2013).

226. 18 U.S.C.S. § 1952(b) (2014).

227. Clark, *supra* note 6, at 2295.

228. *Id.*

229. See Corr & Lawler, *supra* note 223, at 1269–70 (noting state commercial bribery statutes “generally prohibit a person from conferring or agreeing to confer a benefit upon an employee, agent, or fiduciary without the consent of that person’s employer, if such benefit is intended to influence the employee’s conduct with respect to the employer’s affairs”); Boles, *supra* note 28, at 132–33 (summarizing the standard elements of state commercial bribery statutes).

230. Boles, *supra* note 28, at 147–48 (“Legislatures and the judiciary have specified that the purpose of commercial bribery statutes is to criminalize conduct in relationships where a duty of fidelity is owed, and the statutes . . . typically indicate that a duty of fidelity violation is a principal element of the offense.”) (internal quotation marks omitted).

231. See *United States v. Milovanovic*, 678 F.3d 713, 722 (9th Cir. 2012) (“A fiduciary is generally defined as a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor.”) (quoting BLACK’S LAW DICTIONARY (9th ed. 2009)); *In re Monnig’s Dep’t Stores, Inc.*, 929 F.2d 197, 201 (5th Cir. 1991) (“Confidential relationships arise not only from technical fiduciary relationships, but also from partnerships, joint ventures, and other informal relationships.”).

if the community or a subset thereof has entrusted the leader as its representative in dealings with the project developer or related matters, and the developer gives the bribe to influence the leader's conduct in that capacity.²³²

It bears noting that these state statutes usually are applied to the actual or attempted bribery of employees or agents of private-sector *business enterprises*,²³³ whereas indigenous leaders typically represent communities or informally-organized groups. Nevertheless, prosecutors have successfully applied these state statutes outside the typical business enterprise context on a number of occasions, including to bribery of attorneys,²³⁴ union representatives,²³⁵ and boxing federation officials.²³⁶ Moreover, in some cases the bribery of indigenous leaders may fit the pattern of a more conventional case. Many indigenous groups have organized companies to hold their property interests or pursue development initiatives, and these groups' leaders may serve as corporate officers or employees of these companies.²³⁷

In any event, a potential obstacle to applying these statutes to an act of bribery involving a foreign indigenous leader would be establishing a territorial connection with the relevant U.S. state. The required nexus varies from state to state, but frequently prosecutors must show that the bribe or some significant act in furtherance

232. It bears noting that state private-sector bribery statutes may not cover bribery of indigenous leaders who have a public function for their community. See *United States v. Tonry*, 837 F.2d 1281 (5th Cir. 1988) (holding that Louisiana's private-sector bribery statute did not cover bribery of the Chairman of Louisiana's Chitimacha Tribe because he was a public official for the Tribe). In that event, the leader would likely qualify as a "foreign official" within the meaning of the FCPA, and there would be no need to invoke one of these state statutes.

233. See, e.g., *Perrin v. United States*, 444 U.S. 37 (1979) (bribery of employees of a geological data company); *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (bribery of claims adjusters employed by insurance companies); *United States v. Carson*, 2011 U.S. Dist. LEXIS 154145 (C.D. Cal. Sept. 20, 2011) (bribery of employees of various private foreign companies).

234. *Ex parte Mattox*, 683 S.W.2d 93 (Tex. App. 1984).

235. *United States v. Parise*, 159 F.3d 790 (3d Cir. 1998).

236. *United States v. Lee*, 359 F.3d 194 (3d Cir. 2004).

237. See Special Rapporteur 2013 Report, *supra* note 23, ¶ 10 ("There are several notable cases in North America, for example, in which indigenous nations or tribes own and operate companies that engage in oil and gas production, manage electric power assets, or invest in alternative energy. In many such cases they have partnered with non-indigenous companies to develop extractive enterprises in which they have or eventually gain majority ownership interests.").

thereof took place within the state's borders.²³⁸ For example, in the recent *Carson* case, the DOJ was able to employ the Travel Act to prosecute the representatives of a U.S. company for bribing private-sector employees in foreign countries because the defendants wired the bribes from bank accounts in California.²³⁹

2. The Mail and Wire Fraud Statutes

The mail and wire fraud statutes make it a crime to participate in a scheme to defraud or obtain money by means of false pretenses, representations, or promises effected through the U.S. mail or interstate wire, radio, or television communications.²⁴⁰ Courts have treated bribery schemes as a form of fraud actionable under these statutes. Their application to private-sector bribery is “based on the belief that the employer is the victim of a fraud when the employee has used her position to obtain illegal benefits in exchange for making or influencing certain decisions affecting the employer’s business.”²⁴¹ Moreover, Congress added a provision to clarify that the statutes are not limited to schemes seeking to deprive someone of money or tangible rights, but also cover bribe or kick-back schemes that deprive someone of the intangible right to “honest services.”²⁴²

The DOJ has invoked the mail and wire fraud statutes on sev-

238. See Nika A. Antonikova, *Private Sector Corruption in International Trade: The Need for Heightened Reporting and a Private Right of Action in the Foreign Corrupt Practices Act*, 11 *BYU INT'L L. & MGMT. REV.* 93, 102 (2015) (“[M]any statutes apply only to acts of bribery committed within the state’s territory or by the state’s residents. This makes it impossible to apply those laws to commercial bribery abroad, even when it is a U.S. company that has committed the bribery.”).

239. *United States v. Carson*, 2011 U.S. Dist. LEXIS 154145, at *24–31 (C.D. Cal., Sept. 20, 2011).

240. 18 U.S.C.S. §§ 1341, 1343, 1346 (2008); see Corr & Lawler, *supra* note 223, at 1269.

241. Corr & Lawler, *supra* note 223, at 1269–70; see also *United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997) (“[P]rivate individuals . . . may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual.”).

242. 18 U.S.C.S. § 1346 (2014) (“For the purposes of this chapter [18 U.S.C.S. §§ 1341 et seq.], the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”); *Skilling v. United States*, 561 U.S. 358, 400–02 (2010) (explaining that Congress enacted the “honest services” provision in response to an earlier U.S. Supreme Court case that had restricted application of the mail and wire fraud statutes to situations in which the person defrauded had suffered a loss of “tangible rights”). *But see Skilling*, 561 U.S. at 368 (holding that § 1346 may not constitutionally be applied to loss of intangible rights beyond the context of bribes and kickbacks).

eral occasions to prosecute acts of bribery not covered by the FCPA, often in conjunction with the Travel Act. One notable example is the *Boots* case, discussed above in Part II.A, involving the attempted bribery of the police chief of the Passamaquoddy Tribe.²⁴³ Namely, the government successfully prosecuted several defendants for having devised a scheme to defraud residents of the reservation of the honest services of their police chief, and having knowingly caused the wires to be used in interstate commerce in furtherance of the scheme.²⁴⁴

Moreover, as with the Travel Act, the DOJ has recently started using the mail and wire fraud statutes to combat bribery of private-sector employees overseas. For example, in one case the DOJ charged SSI International Far East (SSIFE), the foreign subsidiary of an Oregon company, with wire fraud in connection with bribes allegedly paid to officers of private and state-owned companies in China and South Korea.²⁴⁵

To date, the DOJ's application of the mail and wire fraud statutes to private-sector bribery abroad has been limited to cases involving officers or employees of *business enterprises*. However, these statutes also could, in theory, be applied to bribery of traditional leaders. In such cases, the government would need to make several showings regarding the defendant (whether claims were brought against the bribe payer, the bribe recipient, or both).

First, the government would have to establish the defendant's intent to participate in a bribery scheme. Second, the government would have to show that the defendant used an instrumentality of interstate commerce, such as by making a telephone call or sending an e-mail. Additionally, prosecutors would have to show that the scheme caused or threatened some detriment, although courts differ in how they apply this element.²⁴⁶ Some courts find that the detriment requirement is satisfied if the bribe recipient made a material misrepresentation or omission, such as failing to disclose the bribe to

243. *United States v. Boots*, 80 F.3d 580, 592–94 (1st Cir. 1996) (upholding convictions of several individuals based on their attempted bribery of the police chief of the Passamaquoddy Tribe), *overruled on other grounds by* *Pasquantino v. United States*, 544 U.S. 349, 354–55 (2005) (affirming conviction for wire fraud).

244. *Boots*, 80 F.3d at 592–94.

245. See Indictment ¶¶ 15–19, *United States v. SSI International Far East, Ltd.* (No. 06-CR-398), <http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl.html> [hereinafter *SSIFE Information*].

246. *United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc) (describing the competing tests for honest services fraud in cases involving private-sector bribery); *United States v. Milovanovic*, 678 F.3d 713, 726 (9th Cir. 2012) (same).

the person to whom a duty of fidelity was owed.²⁴⁷ In cases involving bribery of an indigenous leader, this test should readily be satisfied as long as the bribe was not disclosed to the leader's community, and was large enough that the community would have considered it important to know about the benefit.²⁴⁸ Other courts require a different showing: that the defendant could have reasonably foreseen that the bribery scheme could cause economic or pecuniary harm.²⁴⁹ This test likewise should not be difficult to satisfy, because a project developer presumably should be able to foresee that bribes to an indigenous people's representatives could result in economic or pecuniary harm to the community. After all, a corrupted leader might not be as aggressive in negotiating concessions and maximizing community benefits.

Significantly, the government also would have to show that the bribery scheme was effectuated at least in part in the United States.²⁵⁰ For example, in the SSIFE case, the wire fraud conviction was based on the alleged payment of the bribes via wire transfers from the United States.²⁵¹ Similarly, in a recent case against RJR Nabisco, the Second Circuit upheld application of the wire fraud statute to an international money laundering conspiracy because the company allegedly orchestrated the conspiracy via regular communications, orders, and payments sent from the United States.²⁵² In cases involving bribery of indigenous leaders in foreign countries, it is certainly possible that a project developer would send payments or communications in furtherance of the scheme from the United States. Yet this might not always happen, so this requirement could be a significant obstacle in some cases.

247. *Rybicki*, 354 F.3d at 145–46; *Milovanovic*, 678 F.3d at 726–27.

248. *Rybicki*, 354 F.3d at 145–46 (“[T]he misrepresentation or omission at issue for an honest services fraud conviction must be ‘material,’ such that the misinformation or omission would naturally tend to lead or is capable of leading a reasonable employer to change its conduct.”). In the case of an indigenous people's representative, the community itself is the “employer” or victim of the scheme.

249. *United States v. deVegter*, 198 F.3d 1324, 1330–31 (11th Cir. 1999) (holding that reasonably foreseeable economic harm is an element of honest services fraud in the private sector context); *United States v. Sun-Diamond Growers of Calif.*, 138 F.3d 961, 973 (D.C. Cir. 1998) (holding the same).

250. *See European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 141 (2d Cir. 2014) (determining that the presumption against extraterritoriality applies to the mail and wire fraud statutes); *cf. Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (holding that the application of the wire fraud statute to a scheme to defraud the Canadian government of tax revenue was not extraterritorial, because the scheme was executed inside the United States).

251. *See SSIFE Information*, *supra* note 245, ¶ 17.

252. *RJR Nabisco, Inc.*, 764 F.3d at 141–42.

In sum, both the Travel Act and the mail and wire fraud statutes could cover some bribery schemes involving indigenous leaders, but other bribery schemes would be outside of the scope of these statutes—particularly those implemented entirely outside of the United States.

III. FACTORS INHIBITING APPLICATION OF ANTI-CORRUPTION LAWS TO INDIGENOUS LEADERS, AND HOW THEY COULD BE OVERCOME

Given that the FCPA and other federal legislation clearly could cover some acts of bribery of foreign indigenous leaders, the question arises why law enforcement authorities have not yet targeted the phenomenon. While several factors, explored below, may have contributed, it is becoming more likely that the SEC or the DOJ will initiate enforcement proceedings when the statutory elements are satisfied in a particular case.

One possible explanation for the lack of enforcement to date is that some of the allegations recounted in Part I involve companies that seemingly are not covered by the FCPA. Other allegations have been reported only in scholarly literature or foreign media, and might not have come to the attention of investigators. Or, if investigators do know about these events, they may not have recognized the leaders in question as potential “foreign officials” under the FCPA. In some cases, investigators may not be familiar with the roles that indigenous leaders play in their communities and the relationships that these leaders have with the states in the countries where they reside. Consequently, the more these issues are explored by scholars and practitioners and publicized, the better equipped investigators will be to identify traditional leaders as foreign officials.

Moreover, in some cases investigators might feel that they do not have enough evidence of the alleged statutory violations, and that the costs and difficulty of pursuing such evidence would be prohibitive. Notably, many of the reported incidents are said to have taken place in remote foreign locations and prosecutors could face language barriers in seeking to interview witnesses and otherwise gather evidence. Therefore, investigators may be more likely to pursue a case if indigenous stakeholders, NGOs, or corporate insiders were to present them with concrete evidence of misconduct and otherwise help establish the elements that the government would be required to prove.²⁵³ Significantly, in light of newly-available whistleblower

253. See Corr & Lawler, *supra* note 223, at 1275 (“Violations of the FCPA are generally

bounties, would-be informants now have a strong incentive to provide evidence of this type to investigators. Specifically, pursuant to SEC rules adopted in 2011, when an informant provides original information about securities law violations that leads to a successful SEC enforcement action, the informant is entitled to a bounty ranging from ten to thirty percent of the amount collected, provided that the sanctions exceed one million dollars.²⁵⁴ Since this program was adopted,²⁵⁵ the frequency of tips has already increased by nearly forty percent,²⁵⁵ and some commentators predict that the number will rise even further as awareness of the program grows, especially overseas.²⁵⁶

Enforcement action may also become more likely the better it comes to be understood that bribery of indigenous leaders threatens U.S. national interests to the same extent as does bribery of more conventional foreign officials and business employees. One justification for the FCPA is that a foreign state or its citizenry will discover and be offended by corrupt bribery actions by U.S. companies, and the reputation of the United States could be tarnished as a result.²⁵⁷ It might seem that this risk is not as acute in cases involving indigenous leaders because indigenous leaders typically do not hold positions of great power within the broader state apparatus, and their communities are often politically and economically marginalized.²⁵⁸ The simple

brought to the attention of authorities by whistleblowers or disgruntled former employees.”); Vlasic & Atlee, *supra* note 92, at 457 (“Corporate insiders and employees are the most likely to be aware of FCPA violations—whether through general corporate knowledge, personal knowledge, or internal compliance and reporting mechanisms . . .”).

254. Kaiser, *supra* note 32, at 207.

255. David M. Stuart & Omar K. Madhany, *Preparing for the Increasing Role of Whistleblowers in FCPA Enforcement*, 4(2) FCPA REP. 1, 2 (Jan. 20, 2015) http://www.cravath.com/files/uploads/Documents/Publications/3515253_1.pdf (“This past year, the Whistleblower Office reported having received 3,620 tips—a 21% increase from two years prior. During the same period, tips alleging FCPA violations increased by nearly 40%.”).

256. Max Stendahl, *FCPA Whistleblower Bounty May Turn Tide For SEC Program*, LAW360 (Aug. 20, 2013), <http://www.law360.com/articles/466008/fcpa-whistleblower-bounty-may-turn-tide-for-sec-program>.

257. See H.R. REP. NO. 95-640, at 5 (1977) (“Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.”).

258. VÁSQUEZ, *supra* note 19, at 36 (“Indigenous populations . . . [are] the poorest and most marginalized in Peru and Ecuador, and to a lesser extent in Colombia . . . Indigenous Peoples remain largely underrepresented in the domestic political and institutional life of all

truth, however, is that bribery of indigenous peoples' representatives is *at least* as harmful to U.S. national interests as other forms of corruption, and warrants being assigned a comparable enforcement priority. This is true for several reasons.

First, the United States—like all countries—has an interest in promoting respect for human rights, including those of indigenous groups.²⁵⁹ President Obama explicitly acknowledged this when he endorsed UNDRIP,²⁶⁰ an international instrument adopted by the U.N. General Assembly that articulates a broad range of rights of indigenous peoples.²⁶¹ Among other things, UNDRIP calls for indigenous peoples to be consulted in good faith in connection with any projects affecting them,²⁶² and bribery is of course antithetical to the principle. If a project developer employs bribery to gain access to the lands or natural resources of a vulnerable indigenous community without legitimate consent and proper safeguards, this can have devastating and irreparable impacts upon the community. This bribery could undermine the community's rights to subsistence, self-determination, development, culture and environmental protection—all of which are recognized in UNDRIP.

Second, if a project developer employs bribes to secure approval for a project, then the developer is unlikely to have satisfied local stakeholders regarding the project's merits, and the market for

three countries.”); *id.* at 47–50 (discussing particular ways in which indigenous populations in Latin America are economically and socially disadvantaged).

259. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT'L L.* 1, 32–35 (2001) (discussing a variety of ways that the United States has sought to deter human rights violations since the 1970s, when Congress announced that “a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries”) (quoting Foreign Assistance Act § 502(b), 22 U.S.C. § 2304(a)(1)).

260. UNDRIP, *supra* note 17; Barack Obama, The White House, Office of the Press Sec'y, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference> (“[T]oday I can announce that the United States is lending its support to this declaration. . . . The aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples—are one we must always seek to fulfill.”).

261. See WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 3–4 (2013) (“Drawing directly on contemporary international human rights law, the Declaration comprehensively covers the full range of property, civil, political, economic, social, cultural, religious, and environmental rights of indigenous peoples. It compiles human rights from the corpus of international law and formulates them into minimum standards for protecting the survival, dignity, and well-being of indigenous peoples.”).

262. See UNDRIP, *supra* note 17, at art. 32(2).

the developer's services has not operated effectively. This undermines the U.S. government's goal of promoting economic efficiency and market integrity in international business—another key policy rationale for the FCPA.²⁶³

Third, bribery of indigenous leaders can undermine the stability and security of the host state's investment climate to the detriment not only of local stakeholders, but also of U.S. business interests. In particular, if bribery enables a developer to undertake a project without the environmental and social controls and benefit-sharing that impacted communities would have demanded, this heightens the risk that the project will generate social conflict.²⁶⁴ And conflict of this sort can threaten *all* investments in the area—not only the investment that may have triggered the conflict.²⁶⁵ These conflicts should be of concern to the U.S. government, which has worked to promote stability and security for its nationals investing in the developing world.²⁶⁶

263. See Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), <http://www.justice.gov/criminal/fraud/documents/> (“We are enforcing the FCPA to root out global corruption and preserve the integrity of the world's markets.”); see also S. REP. NO. 95-114, at 4 (1977) (“In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business.”).

264. VÁSQUEZ, *supra* note 19, at 11–35 (discussing social conflicts in several Andean countries triggered by natural resource projects, adverse environmental impacts, and inadequate benefit sharing); Chris Ballard & Glenn Banks, *Resource Wars: The Anthropology of Mining*, 32 ANN. REV. ANTHROPOLOGY 287, 295 (2003) (“Mining can become a source of conflict over the control of resources and resource territories, the right to participate in decision making and benefit sharing, social and environmental impacts, and the means used to secure access to resources . . .”); Victoria E. Kalu, *State Monopoly and Indigenous Participation Rights in Nigeria*, 26 J. ENERGY & NAT. RESOURCES L. 418, 422–23 (2008) (describing a spiraling social conflict in Nigeria that began with protests over operations by foreign oil companies, their adverse environmental impacts, and inadequate benefit sharing).

265. See *Market Size Cannot Hide Infrastructure Risks*, BUS. MONITOR ONLINE (May 12, 2014) (describing opportunities for foreign investors in Nigeria—including in a booming construction industry—but noting that “the risks in Nigeria are such that the rewards on offer are significantly less attractive,” in part because “[t]he Niger Delta, the heartland of Sub-Saharan Africa's largest oil industry, has historically been the centre of a militant campaign demanding a greater share of oil revenues for the region”).

266. Among other things, the United States has negotiated a vast network of investment treaties, designed to encourage host states to open their economies to investment and mitigate risks associated with long-term investment projects. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 7, 22 (2nd ed. 2012) (discussing the U.S. investment treaty program and explaining that “the purpose of

While many of the U.S. government's efforts have focused on encouraging *host states* to uphold standards of conduct necessary for a favorable investment climate,²⁶⁷ the same goal is served by deterring *private-sector* behavior that has a destabilizing effect—including corruption. Indeed, concerns about corruption's potential to undermine social and political stability abroad is one of the reasons that law enforcement agencies have been aggressive in applying U.S. law to bribery of more conventional foreign officials and business employees.²⁶⁸ The same reasoning would support vigorous efforts to combat bribery of indigenous leaders.

CONCLUSION

Despite having intensified their campaign against foreign corrupt practices, U.S. law enforcement agencies have not yet targeted bribery of indigenous peoples' representatives. However, this Article has demonstrated that anti-corruption statutes could—and should—be applied to this form of bribery in appropriate cases.

At the same time, it is important to keep in mind that not all benefits conferred by a project developer in order to obtain leaders' support for the project would qualify as corrupt. Benefits offered to the community itself—rather than to individual leaders—would likely be deemed permissible, provided the developer took adequate steps to ensure that leaders did not misappropriate the funds. Even some payments made specifically to community leaders may not be construed as corrupt under the relevant legislation, so long as these payments had a legitimate basis. Among other things, leaders may bear unique burdens or expenses during consultations over a project

investment treaties is to address the typical risks of a long-term investment project, and thereby to provide stability and predictability in the sense of an investment-friendly climate”).

267. *Id.*; George K. Foster, *Recovering “Protection and Security”*: *The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT'L L. 1095, 1103 (2012) (discussing the “protection and security” standard typically set forth in U.S. investment treaties, which “obliges the host state to act with due diligence as reasonably necessary to protect foreigners' persons and property, as well as to possess and make available an adequate legal system, featuring such protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation”).

268. Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 328 (2012) (explaining that one of the problems with bribery—and the rationales for anti-corruption efforts—is that it degrades social and political institutions and inflicts social ills on polities and economies).

or when implementing any agreement that may be reached with the developer, and compensating these leaders for those burdens or expenses should not give rise to liability. In addition, leaders may have as much or more to offer than others in the way of services required by the developer, and hiring these leaders to provide those services may be perfectly acceptable. This Article has therefore outlined a number of factors that can be used to distinguish between corrupt and legitimate exchanges.

When navigating and applying the statutory requirements, project developers, indigenous leaders, and governmental authorities should be mindful of the critical need to maintain the integrity of consultations with impacted communities. The developer should be allowed and encouraged to make use of local expertise and human resources, but should avoid any arrangements that risk influencing leaders inappropriately in the performance of their duties.

While indigenous communities may often be politically and economically marginalized, their interests are just as deserving of protection as any other segment of society—and, indeed, the costs of corruption can be greater for indigenous stakeholders than for any others. Accordingly, if a project developer crosses the line between legitimate and corrupt conduct and comes within DOJ or SEC enforcement jurisdiction, these agencies should not hesitate to hold the developer accountable.