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Lucinda A. Low
Steptoe & Johnson LLP

Sarah R. Lamoree
Steptoe & Johnson LLP

John London
Steptoe & Johnson LLP

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THE “DEMAND SIDE” OF TRANSNATIONAL BRIBERY AND CORRUPTION: WHY LEVELING THE PLAYING FIELD ON THE SUPPLY SIDE ISN’T ENOUGH

Lucinda A. Low,* Sarah R. Lamoree** & John London***

INTRODUCTION

The domestic and international legal framework for combating bribery and corruption (“ABC laws”), including both private and public corrupt practices that are transnational (cross border) in character, has dramatically expanded over the last twenty years. Despite these developments, major gaps remain. This Article examines one of the largest systemic gaps: the absence of effective tools to control the demand side of transnational bribery and corruption—the corrupt solicitation of a benefit¹—especially when it involves a public official.

Virtually every country has laws criminalizing bribery and corruption of public officials in the domestic context. Many of these laws are demand-side (also known as “passive” bribery) laws—meaning that they focus on the person who solicits or receives a bribe.² Others are supply-side (also known as “active” bribery) laws—meaning that they focus on the person who offers, promises, authorizes, or pays a bribe.³ Some countries’

* Partner, Steptoe & Johnson LLP, Washington, D.C. This Article is part of a symposium entitled *Fighting Corruption in America and Abroad* held at Fordham University School of Law. For an overview of the symposium, see Jed Handelsman Shugerman, *Foreword: Fighting Corruption in America and Abroad*, 84 *FORDHAM L. REV.* 407 (2015). Portions of this Article are derived from previous publications of the author.

** Of Counsel, Steptoe & Johnson LLP, Washington, D.C.

*** Associate, Steptoe & Johnson LLP, Washington, D.C.

1. Transparency International defines corruption as the “abuse of entrusted power for private gain.” *How Do You Define Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/what-is-corruption#define> (last visited Oct. 21, 2015) [<http://perma.cc/K7VE-C4EP>].

2. *See, e.g.*, Código Penal Federal [CPF], art. 222(I), Diario Oficial de la Federación [DOF] 05-01-1983, últimos reformas DOF 12-03-2015 (Mex.), *translated in* INT’L BAR ASSOC., REPORT ON THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 207 n.1 (Apr. 14, 2009) [hereinafter TASK FORCE] (providing that bribery is committed when “a public servant, or a person acting on their . . . behalf, improperly requests or receives, for themselves or on behalf of another person, money or any other gift, or accepts a promise for doing or omitting to do something legal or illegal in relation to their duties”).

3. *See, e.g., id.* art. 222(II) (providing that bribery is committed when “[a] person spontaneously gives or offers money or any other gift to the persons mentioned in the foregoing paragraph, in order that a public servant might do or omit to do something legal or illegal related to their duties”).

legislation targets other actors as well, such as persons who are engaged in “trading in influence” and intermediaries.⁴

Prior to the mid-1970s, ABC legislation focused on domestic (national) acts of corruption. The adoption of the U.S. Foreign Corrupt Practices Act of 1977⁵ (FCPA) criminalized transnational bribery—the bribery of foreign public officials—as well. Although the FCPA was the sole transnational bribery (TNB) statute in existence until the late 1990s, international anticorruption standards have developed rapidly since its adoption. Of particular significance is the Organisation for Economic Co-operation and Development’s Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”), a targeted instrument that focuses exclusively on the issue of TNB from the supply side by requiring its criminalization in national laws.⁶ Other international treaties, broader in scope, also require criminalization of TNB.⁷ Today, as a consequence, dozens of countries have statutes that prohibit TNB in international business.⁸

At the same time that capital-exporting countries have moved to criminalize TNB, many countries have expanded and updated their domestic ABC laws, particularly in relation to the public sector. These developments are by no means exclusive to the criminal or penal arena; the prevention, detection, or punishment of corruption is also a focus of civil and administrative measures at the national and international levels, including in the areas of accounting standards,⁹ eligibility for government benefits (e.g., contracts or public financing),¹⁰ tax laws (generally affecting the availability of tax benefits such as deductions),¹¹ and others.¹²

4. See GRP. OF STATES AGAINST CORRUPTION, FIRST EVALUATION ROUND: EVALUATION REPORT ON FRANCE 39–40 (2001) (discussing French Penal Code Articles 433-1 and 433-2 involving active and passive trading in influence, respectively).

5. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977), amended by Pub. L. No. 100-418, 102 Stat. 1107 (1988), and Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended in scattered sections of 15 U.S.C.).

6. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention].

7. See, e.g., U.N. Convention Against Corruption, opened for signature Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) [hereinafter U.N. Convention]; Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173 [hereinafter CoE Convention]; Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (1996) [hereinafter OAS Convention].

8. The countries with TNB statutes are not limited to the forty-one signatories to the OECD Convention. Nonparties, notably including the People’s Republic of China, have enacted or amended their criminal laws so as to cover TNB. See Zhong hua ren min gong he guo xing fa xiu zheng an (ba) (中华人民共和国刑法修正案(八)) [Eighth Amendment to the Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 2011, effective May 1, 2011), <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law> [http://perma.cc/5MUX-A2JD].

9. See OECD Convention, *supra* note 6, art. 8. Article 8 of the OECD Convention, for instance, requires countries to take steps to prohibit slush funds, off-book accounts, and similar accounting devices and to establish effective, proportionate, and dissuasive civil, administrative, or criminal penalties for accounting offenses. See *id.* Other ABC conventions have similar provisions.

10. See Org. for Econ. Co-operation & Dev. [OECD], *OECD Council Recommendation on Bribery and Officially Supported Export Credits*, at 2–4, TD/ECG(2006)24 (Dec. 18,

Enforcement of TNB laws is uneven. Only a handful of OECD Convention countries have demonstrated active enforcement since the treaty's adoption.¹³ In the United States, however, enforcement of the FCPA has been at record levels for several years.¹⁴ In 2014, the U.S. Department of Justice (DOJ) imposed the largest sanction to date—a \$772 million criminal penalty on Alstom S.A. for bribery in the pursuit of power contracts in Indonesia and elsewhere.¹⁵ Furthermore, in 2014, the DOJ and Securities and Exchange Commission (SEC), the two entities that enforce the FCPA, cumulatively collected \$1.56 billion in penalties.¹⁶

2006), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/ecg\(2006\)24](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/ecg(2006)24) (discussing government export credits) [<http://perma.cc/25GW-CT82>]; European Bank for Reconstruction and Dev. [EBRD], *Sound Business Standards and Corporate Practices: A Set of Standards*, at 5–8, Pub. No. 2829 (Sept. 1997), <http://www.ebrd.com/documents/comms-and-bis/pdf-sound-business-standards.pdf> (discussing ABC rules in international financial institutions (IFIs)) [<http://perma.cc/6WZQ-TVHJ>]; World Bank, *Guidelines: Procurement Under IBRD Loans and IDA Credits*, at 7 (Jan. 1999), <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-01-99-ev3.pdf> (same) [<http://perma.cc/LR9A-MLE8>].

11. Pursuant to OECD, *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*, C(97)123/FINAL (May 30, 1997), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C\(97\)123/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C(97)123/FINAL&docLanguage=En) [<http://perma.cc/Y3X7-NHF9>], which urges prompt implementation of OECD, *Recommendation on Tax Deductibility of Bribes to Foreign Public Officials*, C(96)27/FINAL (Apr. 17, 1996), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=c\(96\)27/final](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=c(96)27/final) [<http://perma.cc/RAJ8-5XHP>], virtually all OECD countries have eliminated the tax deductibility of bribes. Other treaties call for the elimination of tax deductibility as well. *See, e.g.*, U.N. Convention, *supra* note 7, art. 12(4).

12. *See, e.g.*, 22 C.F.R. 130.9 (2014). U.S. export controls applicable to military goods and technology require the reporting, inter alia, of commissions paid to intermediaries. *See id.* A number of countries prohibit altogether the use of intermediaries in certain types of procurement, e.g., defense. *See, e.g.*, Royal Decree No. M12 dated 21/1/1398H (Saudi Arabia), reprinted in *Saudi Arabia: Royal Decree No. M/12, Dated 13 Jamada L'ula 1412 AH*, 8 ARAB L.Q. 62, 62–71 (1993).

13. *See* OECD, *Annual Report of the OECD Working Group on Bribery 2014*, at 18 (2014), <http://www.oecd.org/daf/anti-bribery/WGB-AB-AnnRep-2014-EN.pdf> [<http://perma.cc/9Z9G-D75H>]; OECD, *Working Group on Bribery: 2013 Data on Enforcement of Anti-Bribery Convention*, at 4–6 (Sept. 2014), <http://www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2013.pdf> [<http://perma.cc/XU5C-QFR9>]; TRANSPARENCY INT'L, EXPORTING CORRUPTION: PROGRESS REPORT 2014: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 2 (2014), http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd [<http://perma.cc/N87R-TA8V>].

14. STEPTOE & JOHNSON LLP, 2014 FCPA YEAR IN REVIEW i–ii, 1–4 (2015), http://www.steptoel.com/assets/htmldocuments/Steptoel_2014_FCPA_YIR.pdf [<http://perma.cc/PTK6-RXRD>].

15. Press Release, U.S. Dep't of Justice, Alstom Pleads Guilty & Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> [<http://perma.cc/UQ7Q-GRWB>]. Like a number of major FCPA cases against foreign companies, this case was settled as a books and records and internal control case, not as an antibribery case. *See id.*

16. STEPTOE & JOHNSON LLP, *supra* note 14, at i, 2.

Additionally, some other countries have brought major enforcement actions.¹⁷ Moreover, the World Bank (or “Bank”) has begun to hold contractors and consultants on Bank-financed projects responsible for corrupt practices through sanctions that include ineligibility to participate in such projects permanently or for a term of years.¹⁸

TNB statutes can provide broad jurisdiction over nationals and nonnationals, companies and individuals, and intermediaries, but they typically do not cover the bribe recipient, even where the recipient has solicited or extorted the bribe payment.¹⁹ Prosecution of the demand side of bribery is generally left to the host country, particularly when the recipient is a public official.²⁰ However, weak enforcement mechanisms, the lack of political will, official immunities, and other barriers leave the vast majority of bribe recipients unprosecuted.²¹ This Article reviews the domestic and international legal framework that has arisen to combat bribery and corruption and the mechanisms to recover the proceeds of bribery and corruption. Part I examines the supply side of this framework. Part II reviews the demand side. Part III considers the various steps that could be taken to bring greater balance to the system and accountability to the demand side.

I. THE FCPA AND OTHER TNB REGIMES

Beginning with the FCPA, the progenitor of all transnational bribery laws and norms, this part traces the emergence of international standards, with a particular focus on their jurisdictional reach. After reviewing the FCPA’s several antibribery provisions in Part I.A, each of which has its own distinct scope, the Article examines the international treaty regime in Part I.B, national implementing legislation in Part I.C, and the harmonized standards of the international development institutions in Part I.D.

17. See, e.g., Press Release, SBM Offshore, SBM Offshore Achieves Settlement with Dutch Public Prosecutor’s Office Over Alleged Improper Payments. United States Department of Justice Closes Out the Matter (Nov. 12, 2014), <http://www.sbmoffshore.com/?press-release=sbm-offshore-achieves-settlement-dutch-public-prosecutors-office-alleged-improper-payments-united-states-department-justice-closes-matter> (describing enforcement in the Netherlands) [<http://perma.cc/4RK4-R4JR>]; Press Release, Serious Fraud Office, UK Printing Co. & Two Men Found Guilty in Corruption Trial (Dec. 22, 2014), <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found-guilty-in-corruption-trial.aspx> (describing enforcement in the United Kingdom) [<http://perma.cc/JL4C-YH9S>]; Press Release, Steptoe & Johnson LLP, Int’l Law Advisory—Record US & German Settlements of the Siemens Case Reflect New Realities of Corruption Cases (Jan. 8, 2009), <http://www.steptoelaw.com/resources-detail-5819.html> (describing enforcement in Germany) [<http://perma.cc/ST7E-KPKV>].

18. Lucinda A. Low & Brigida Benitez, *Another Context—The Sanctions Regime of the World Bank and Other IFIs*, WORLD ECR, Sept. 2014, at 30.

19. Economic extortion is typically not a defense to paying a bribe. See CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE & THE ENF’T DIV. OF THE SEC., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 27 (2012) [hereinafter FCPA RESOURCE GUIDE], <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [<http://perma.cc/9FN5-D9S7>].

20. But see *infra* Part II.C (discussing notable exceptions to this trend).

21. See *infra* Part II.B.

A. The FCPA

The FCPA's enactment in 1977 represented the first attempt to criminalize TNB in international business.²² The FCPA focuses on the bribery of foreign public officials (defined autonomously) and certain other categories of specified recipients.²³ Its prohibitions apply to companies as well as natural persons.²⁴ Since 1988, the law has permitted corporate employees to be prosecuted whether or not their employer is prosecuted.²⁵

The FCPA's concept of bribery is transactional—meaning that it is based on the concept of *quid pro quo*. For the elements of bribery under the FCPA to be satisfied, “anything of value” must be “corruptly” given to a covered recipient, directly or indirectly, for the purpose of securing action, inaction, advantage, or influence in order to “obtain[] . . . retain[] . . . , or direct[] business to, any person.”²⁶

Although all of the elements of bribery under the FCPA are broad in scope, the FCPA does not cover all acts of TNB. The FCPA is a supply-side statute; it only focuses on those offering, promising, making, authorizing, or furthering an improper payment, but not on those receiving, soliciting, or agreeing to receive one.²⁷ Moreover, through its limited exception for so-called “facilitating payments,” the drafters made clear their intention to focus on grand, not petty, corruption.²⁸ Additionally, a 1988 amendment to the statute created an affirmative defense for legal payments under the written laws of the host country and also took into account local standards of conduct.²⁹

Despite these limitations on its reach *rationae materiae*, the FCPA's antibribery provisions represent a unilateral assertion of jurisdiction over extraterritorial conduct. For so-called “issuers”—companies with a class of listed securities subject to federal securities laws—the FCPA not only prohibits bribery, but also imposes positive accounting requirements for a company's books, records, and internal accounting controls.³⁰ Although

22. However, previously, the United States eliminated the tax deductibility of bribes, including foreign bribes. I.R.C. § 162(c) (2014).

23. These include political parties, party officials, candidates for political office, and persons “acting in an official capacity.” 15 U.S.C. § 78dd-3(a)(2), (f)(1) (2012). The 1998 amendments added officials of public international organizations. *Id.* § f(1).

24. *Id.* § g(2).

25. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (eliminating the so-called “Eckhardt amendment”); see H.R. REP. NO. 100-576, at 923–24 (1987).

26. 15 U.S.C. § 78dd-1(a).

27. *Id.* §§ 78dd-1 to -3.

28. *Id.* § 78dd-2(b). The exception is for payments to secure “routine governmental action.” *Id.* §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). This exception has created conflicts with both host country domestic laws and, more recently, other TNB laws, most of which treat such payments as bribes.

29. *Id.* §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1). Payments consistent with local custom and/or practice do not qualify for this defense.

30. *Id.* § 78dd-1 (describing antibribery prohibition for issuers). These provisions are enforced civilly and administratively by the SEC and criminally (for willful violations) by the DOJ. FCPA RESOURCE GUIDE, *supra* note 19, at 4–5. The term “issuers” includes foreign companies that qualify as issuers as well as U.S. firms. *Id.* at 10–11. All of the

the FCPA's antibribery provisions—unlike some other laws and regulations from the same time period of its enactment—do not treat foreign subsidiaries as persons subject to U.S. jurisdiction,³¹ the FCPA nonetheless revolutionized the compliance practices of U.S. multinationals.³² Moreover, because the FCPA makes parent companies strictly liable for their majority-owned U.S. and foreign subsidiaries' compliance with the FCPA and establishes certain responsibilities even with respect to minority-owned affiliates,³³ the accounting provisions have had even more profound implications for multinational “issuers.”

The FCPA's jurisdictional provisions were originally strictly territorial, requiring the “use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of” the improper payment.³⁴ This provision, similar to those found in other federal antifraud statutes,³⁵ provided an expansive jurisdictional basis that permitted prosecutions to take place on the basis of telephone calls or email transmissions with a U.S. nexus, or use of the U.S. banking system.³⁶ In other words, the entirety of the conduct did not have to take place in the United States; a single act “in furtherance of” the bribery that touched U.S. interstate or foreign commerce would suffice.

Nonetheless, this jurisdictional reach proved limiting in some cases. Upon the United States's adherence to the OECD Convention in 1998, the FCPA's jurisdictional provisions were expanded to:

- authorize alternative jurisdiction over “U.S. persons” (a term defined to include U.S. citizens, permanent resident aliens, and all forms of business enterprises organized under U.S. law) based on nationality as an alternative to territorial jurisdiction;
- establish a new antibribery prohibition, 15 U.S.C. § 78dd-3, which prohibits corrupt practices by “any person” (effectively

provisions of the FCPA applicable to “issuers” are part of the federal securities laws. *See id.* at 38. The accounting provisions are not limited to transactions implicating the antibribery provisions, but apply to all transactions and recordkeeping of the issuer. *See id.* at 38–41.

31. Compare 15 U.S.C. § 78dd-2(h)(1) (defining “domestic concern” under the FCPA), with 15 C.F.R. § 769.1(b) (1989) (defining “United States person” under antiboycott regulations).

32. This is a function of several factors: its vicarious liability provisions, which have transformed how companies need to approach relationships with an ever-expanding group of third parties, vicarious liability standards for the acts of employees, enforcement expectations regarding corporate compliance programs, and the benefits of an effective program in an enforcement context.

33. 15 U.S.C. § 78m(b)(6). The internal control provisions of the FCPA require “issuers” to use good faith efforts to cause minority-owned affiliates to comply with these requirements. *See id.*

34. *Id.* § 78dd-3(a).

35. *See, e.g.*, 18 U.S.C. § 1341 (2012) (providing jurisdiction for mail fraud); *id.* § 1343 (providing jurisdiction for wire fraud).

36. *Legislative History*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal-fraud/legislative-history> [<http://perma.cc/X5FE-NEAF>]; FCPA RESOURCE GUIDE, *supra* note 19, at 11–12.

non-U.S. persons not covered as issuers) based on an act in furtherance of the improper payment “while in the territory of the United States”; and

- permit penalties to be imposed on officers, directors, shareholders, employees, and agents of domestic concerns or issuers without those parties being “otherwise subject to the jurisdiction of the United States”—thereby permitting personal jurisdiction to be asserted over foreign nationals based on, for example, solely transitory connections to U.S. territory.³⁷

The FCPA has never asserted universal jurisdiction over foreign supply-side bribery, nor has its enforcement been based, with perhaps one exception, on “effects” jurisdiction.³⁸ Nor has passive personality been the basis for jurisdiction.³⁹ Finally, as the absence of language referencing the solicitation, receipt, or demand for an improper payment makes clear, it does not reach the demand side of a bribery transaction.

B. Treaty Regimes

Beginning in the mid-1990s, the international community began to collectively act against corruption. The result has been dramatic: the negotiation, rapid entry into force, and almost universal acceptance of anticorruption treaties resulted in a host of new civil and criminal ABC measures at the national level, a new architecture for international cooperation in investigations and enforcement, new ABC rules in international financial institutions, the elimination of tax deductibility of bribes in many countries, the promulgation as “soft law” of compliance standards, new civil liability provisions, and other measures. The prohibition of transnational bribery, domestic bribery, and corruption, particularly in business activities, can therefore be seen as an emerging international public policy norm.

37. Lucinda A. Low & Timothy P. Trenkle, *U.S. Antibribery Law Goes Global: Standards Tightening Up*, 8 BUS. L. TODAY 14, 16–20 (1999) (quoting 15 U.S.C. §§ 78dd-3, 78dd-2(g) and citing *id.* §§ 78dd-1(g), 78dd-2(i)).

38. In 2001, the SEC and DOJ jointly prosecuted the Indonesian affiliate of KPMG and one of its named partners, Sonny Harsono, for actions taken in Indonesia, which the government argued were intended to induce action by personnel of a KPMG client located in the United States. Litigation Release No. 17127, SEC, SEC and Department of Justice File First-Ever Joint Civil Action Against KPMG Siddhartha Siddhartha & Harsono and Its Partner Sonny Harsono for Authorizing the Payment of a Bribe in Indonesia (Sept. 12, 2001), <https://www.sec.gov/litigation/litreleases/lr17127.htm> [http://perma.cc/D66P-EM5W]. The case was settled, Order, *In re Baker Hughes, Inc.*, No. 44784 (SEC Sept. 12, 2001), <https://www.sec.gov/litigation/admin/34-44784.htm> [http://perma.cc/SNZ2-QHY7], so the government’s theory of jurisdiction, derived from other provisions of the federal securities laws, was not tested judicially.

39. Thus, the fact that a U.S. person is a victim of foreign bribery, e.g., by a competitor, does not confer FCPA jurisdiction. However, a victim may bring a civil suit and may seek to recover penalties collected by the government in a criminal case. *See infra* note 46 and accompanying text (discussing the asset recovery provisions of U.N. Convention).

Today, there are at least six major ABC treaties:

1. The OECD Convention (1997);
2. The Inter-American Convention Against Corruption (“OAS Convention”) (1996);
3. The Civil Law Convention on Corruption (“CoE Convention”) (1999) and its Additional Protocol;⁴⁰
4. The Convention Drawn Up on the Basis of Article K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union dated 25 June 1997 (“E.U. Convention”);⁴¹
5. African Union Convention on Preventing and Combating Corruption of July 11, 2003 (“A.U. Convention”);⁴² and
6. The United Nations Convention Against Corruption (“U.N. Convention”) (2003).⁴³

The scopes of these treaties range from narrow to sweeping. At one end of the spectrum, the OECD Convention focuses narrowly on measures to combat TNB, primarily through supply-side criminalization (or equivalent civil liability) requirements.⁴⁴ At the other end of the spectrum, the U.N. Convention encompasses preventing and sanctioning—through civil, criminal, and other means—a wide range of practices on both the supply and demand sides,⁴⁵ as well as establishing a new set of mechanisms for international asset recovery.⁴⁶

40. Additional Protocol to the Criminal Law Convention on Corruption, *opened for signature* May 15, 2003, E.T.S. No. 191 (entered into force Feb. 1, 2005); *see supra* notes 6–7 and accompanying text (discussing the OECD Convention, OAS Convention, and CoE Convention).

41. The Convention Drawn Up on the Basis of Article K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, June 25, 1997, 1997 O.J. (C 195), [hereinafter E.U. Convention], [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625(01):EN:HTML) [<http://perma.cc/Z4X8-CFKP>].

42. African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (2004) (entered into force Aug. 5, 2006) [hereinafter A.U. Convention].

43. *See supra* note 7 and accompanying text (discussing the U.N. Convention).

44. OECD Convention, *supra* note 6, art. 1.1 (stating that “[e]ach Party shall” establish a criminal offense for any person to “offer, promise or give” an “undue pecuniary or other advantage” to a “foreign public official”). The OECD Convention contains additional provisions designed to harness anti-money laundering laws for the prosecution of corruption and accounting requirements (primarily civil). *Id.* arts. 7–8. Related OECD initiatives have focused on the elimination of tax deductibility of bribes and measures to combat bribery in officially supported export credits. *See supra* note 10.

45. *See, e.g.*, U.N. Convention, *supra* note 7, art. 9.1 (requiring “States Part[ies]” to “establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making”); *id.* art. 10(a) (requiring “States Part[ies]” to “enhance transparency in its public administration” by “[a]dopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration”); *id.* art. 12 (requiring “States Part[ies]” to “enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil administrative or criminal penalties”); *id.* art. 15(a)–(b) (requiring “State Part[ies]” to adopt legislation criminalizing both the “promise, offering or giving, to a public

The regional treaties' scopes are closer to the U.N. Convention's scope because they include criminalization, preventive, and cooperative provisions.⁴⁷ For example, the CoE Convention has a separate treaty on civil liability.⁴⁸

Moreover, all of these treaties contain mechanisms for international cooperation in investigations and enforcement, including enhanced mutual legal assistance and extradition standards.⁴⁹ While the international cooperation provisions of these treaties are generally self-executing, the criminalization provisions generally require implementation at the national level within the parameters of each country's domestic legal system.⁵⁰

All of these treaties, like the FCPA, require countries to criminalize supply-side TNB.⁵¹ Other acts of corruption are subject to either mandatory or permissive criminalization requirements of varying scope, depending on the terms of the treaty. These include:

- domestic official bribery (both active and passive) (U.N., A.U., CoE, E.U., and OAS Conventions);⁵²
- private sector bribery (both the supply and the demand sides) (U.N., A.U., and CoE Conventions);⁵³

official . . . an undue advantage" and the "solicitation or acceptance by a public official . . . of an undue advantage").

46. U.N. Convention, *supra* note 7, ch. V.

47. However, only the A.U. Convention, Article 16 includes provisions on asset recovery. *See* A.U. Convention, *supra* note 42, art. 16.

48. Civil Law Convention on Corruption, *opened for signature* Nov. 4, 1999, E.T.S. No. 174 (entered into force Nov. 1, 2003).

49. U.N. Convention, *supra* note 7, ch. IV; A.U. Convention, *supra* note 42, arts. 15, 18; CoE Convention, *supra* note 7, ch. IV; E.U. Convention, *supra* note 41, art. 9; OECD Convention, *supra* note 6, arts. 9, 10; OAS Convention, *supra* note 7, arts. XIII, XIV.

50. U.N. Convention, *supra* note 7, arts. 15, 16 (stating "Part[ies] . . . shall adopt such legislative and other measures . . ."); A.U. Convention, *supra* note 42, art. 5 (stating that Parties will "[a]dopt legislative and other measures that are required to establish as offenses" certain corrupt acts); CoE Convention, *supra* note 7, arts. 4, 5 ("Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences . . ."); E.U. Convention, *supra* note 41, arts. 2(2), 3(2) ("Each Member State shall take the necessary measures to ensure that conduct of the type referred to in paragraph 1 is made a criminal offence."); OECD Convention, *supra* note 6, art. 1 (stating "[e]ach [p]arty shall take measures as may be necessary to establish it is a criminal offence . . ."); OAS Convention, *supra* note 7, art. VII ("The State Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law . . .").

51. U.N. Convention, *supra* note 7, art. 16; A.U. Convention, *supra* note 42, art. 4(1)(b); CoE Convention, *supra* note 7, art. 5; E.U. Convention, *supra* note 41, art. 3(1); OECD Convention, *supra* note 6, art. 1; OAS Convention, *supra* note 7, art. VIII. *But see infra* Part II.A. (discussing the treatment of demand-side TNB by these treaties).

52. U.N. Convention, *supra* note 7, art. 15; A.U. Convention, *supra* note 42, art. 4(1)(b); CoE Convention, *supra* note 7, arts. 2, 3; E.U. Convention, *supra* note 41, arts. 2, 3; OAS Convention, *supra* note 7, art. VI.

53. U.N. Convention, *supra* note 7, art. 21; A.U. Convention, *supra* note 42, arts. 4(1)(e), 11; CoE Convention, *supra* note 7, arts. 7, 8. Although the E.U. Convention only addresses public corruption, other E.U. instruments focus on private-sector corruption. *See*,

- trading in influence (both the supply and the demand side) (U.N., A.U., and CoE Conventions);⁵⁴
- money laundering based on corruption as a predicate offense (persons transacting in the proceeds of bribery can include officials on the demand side of the bribery transaction) (U.N., CoE, and OECD Conventions);⁵⁵
- illicit enrichment of public officials (U.N., A.U., and OAS Conventions);⁵⁶
- conspiracy, aiding, and abetting (supply and demand side, depending on the treaty and the offense) (U.N., A.U., CoE, OECD, and OAS Conventions);⁵⁷ and
- others, including many on the demand side.⁵⁸

With the exception of the OECD Convention,⁵⁹ these treaties' jurisdictional provisions are not specifically tied to particular ABC offenses, but are general jurisdictional provisions. Some jurisdictional provisions may be less apposite for particular offenses than others. This section will review the various provisions for jurisdiction in the Conventions. First, it describes the general approach that the conventions take regarding ABC and other offenses. It will then discuss three types of

e.g., Council Framework Decision 2003/568/JHA of 22 July 2003, On Combating Corruption in the Private Sector, 2003 O.J. (L 192) 54–56.

54. U.N. Convention, *supra* note 7, art. 18; A.U. Convention, *supra* note 42, art. 4(1)(f); CoE Convention, *supra* note 7, art. 12.

55. U.N. Convention, *supra* note 7, art. 23; CoE Convention, *supra* note 7, art. 13; OECD Convention, *supra* note 6, art. 7.

56. U.N. Convention, *supra* note 7, art. 20; A.U. Convention, *supra* note 42, art. 8; OAS Convention, *supra* note 7, art. IX.

57. U.N. Convention, *supra* note 7, art. 27; A.U. Convention, *supra* note 42, art. 4(1)(i); CoE Convention, *supra* note 7, art. 15; OECD Convention, *supra* note 6, art. 1(2); OAS Convention, *supra* note 7, art. VI(1)(e).

58. The OAS Convention includes among its “acts of corruption” the fraudulent use/concealment of property (which is broader but could include money laundering), improper acts or omissions by public officials, improper use of state information or property by public officials, diversion of state property for personal benefit, and others. OAS Convention, *supra* note 7, arts. VI(1), XI. The U.N. Convention defines a wide range of acts of corruption in Chapter 3, including embezzlement, misappropriation, or other division of property by a public official, U.N. Convention, *supra* note 7, art. 17; abuse of functions, *id.* art. 19; concealment, *id.* art. 24; and obstruction of justice, *id.* art. 25. The CoE Convention requires the adoption of accounting offenses. COE Convention, *supra* note 7, art. 14. The A.U. Convention treats as “acts of corruption” abuses of authority, division of property for personal benefit, and concealment of proceeds. A.U. Convention, *supra* note 42, art. 4(c)–(d), (h).

59. The OECD Convention, as indicated earlier, is a targeted instrument focused on supply-side TNB. *See supra* note 6 and accompanying text.

jurisdictional provisions: territory, nationality, and other mandatory bases of jurisdiction.

1. General Approach

Territoriality is the primary jurisdictional basis for these treaties' ABC offenses. Each convention contains a provision for territorial jurisdiction⁶⁰ and some degree of jurisdiction based on nationality.⁶¹ All of the treaties except the A.U. Convention call for participating countries to adopt measures in national laws that implement the convention's standards on jurisdiction.⁶² Where the underlying convention language is mandatory ("shall"), these bases of jurisdiction must be adopted; in other cases it will be permissive ("may").⁶³ However, virtually all of the treaties adopt a "floor" approach, whereby a country may adopt more extensive bases of jurisdiction than those required by the treaty.⁶⁴

2. Territorial Jurisdiction Provisions

Most of these treaties require the establishment of jurisdiction over ABC offenses where the offense is committed "in whole or in part" in a country's territory.⁶⁵ However, two of the treaties—the OAS Convention and the U.N. Convention—omit the "or in part" language, requiring that jurisdiction be established when "the offense is committed in" the territory of the state party.⁶⁶ Because ABC offenses are typically complex, with multiple elements, the latter may permit countries to establish a narrow basis for territorial jurisdiction that is ill-suited to the prosecution of TNB in

60. A.U. Convention, *supra* note 42, art. 13(1)(a); OECD Convention, *supra* note 6, art. 4(1); E.U. Convention, *supra* note 41, art. 7(1)(a); OAS Convention, *supra* note 7, art. V(2).

61. U.N. Convention, *supra* note 7, art. 42(2)(a) (permitting nationality jurisdiction subject to the principles of the territorial sovereignty of other states); CoE Convention, *supra* note 7, art. 17(1)(b); A.U. Convention, *supra* note 42, art. 13(1)(b); OECD Convention, *supra* note 6, art. 4(2) (permitting nationality jurisdiction to the extent the state concerned has jurisdiction to prosecute its nationals for offenses committed abroad); E.U. Convention, *supra* note 41, art. 7(1)(b); OAS Convention, *supra* note 7, art. V(2) (permitting, but not mandating, states to establish nationality jurisdiction over corruption offenses).

62. U.N. Convention, *supra* note 7, art. 42 (stating "[e]ach State Party shall adopt such measures . . ."); A.U. Convention, *supra* note 42, art. 13 (stating "[e]ach State Party has jurisdiction over . . ."); CoE Convention, *supra* note 7, art. 17 (stating "[e]ach Party shall adopt such legislation . . ."); E.U. Convention, *supra* note 41, art. 7 (stating "[e]ach Member State shall take the measures necessary to establish its jurisdiction . . ."); OECD Convention, *supra* note 6, art. 4 (stating "[e]ach Party shall take such measures . . ."); OAS Convention, *supra* note 7, art. V(1), (2) (establishing that it is mandatory to adopt territorial jurisdiction and permitted to adopt nationality jurisdiction).

63. Compare OAS Convention, *supra* note 7, art. XIII(4) (using mandatory language), with *id.* art. XIII(3) (using permissive language).

64. U.N. Convention, *supra* note 7, art. 42(2); CoE Convention, *supra* note 7, art. 17(2); E.U. Convention, *supra* note 41, art. 7(2); OECD Convention, *supra* note 6, art. 4(2); OAS Convention, *supra* note 7, art. V(1)–(2).

65. CoE Convention, *supra* note 7, art. 17(1)(a); A.U. Convention, *supra* note 42, art. 13(1)(a); OECD Convention, *supra* note 6, art. 4(1); E.U. Convention, *supra* note 41, art. 7(1)(a).

66. U.N. Convention, *supra* note 7, art. 42(1)(a); OAS Convention, *supra* note 7, art. V(1).

particular. The former, in contrast, permit territorial jurisdiction to be established in a much wider array of circumstances and will result in a higher incidence of concurrent jurisdiction (assuming conduct occurs in multiple countries). Indeed, to promote enforcement, similar to the FCPA's requirement of an "act in furtherance," the OECD Convention requires states to ensure that the territorial basis of jurisdiction is broad.⁶⁷

3. Nationality Jurisdiction

These treaties also take different approaches to nationality jurisdiction. Three of these treaties require countries to establish jurisdiction over offenses committed by their nationals.⁶⁸ One of these treaties requires it only of countries that already exercise nationality jurisdiction.⁶⁹ Two of these treaties make it permissive but not mandatory to do so.⁷⁰ This variety may reflect the fact that nationality is a less well-established basis of jurisdiction in criminal law systems generally.⁷¹ However, the availability of nationality jurisdiction in the context of prosecution for international business activities makes the likelihood of extraterritorial application virtually certain.

4. Other Mandatory Bases of Jurisdiction

Other mandatory bases of jurisdiction found in certain of these Conventions are: (1) where the offender is present in the territory of a country and extradition is refused on the basis of nationality (the *aut dedere aut judicare* rule of international law);⁷² (2) where the offense involves a public official who is a national of a country;⁷³ and (3) where the offense is committed on a vessel or aircraft of the country.⁷⁴ The latter may be seen as an extension of territoriality, while the second could be an extension of nationality (either active or passive, depending on what "involved" means), or protective.

67. OECD Convention, *supra* note 6, art. 4(1); OECD, (*OECD Commentaries on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, art. 4, para. 25, DAF/IME/BR(97)17/REV1 (Nov. 26, 1997), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/combtribe2.pdf> [<http://perma.cc/877E-H7JN>].

68. CoE Convention, *supra* note 7, art. 17(1)(b); A.U. Convention, *supra* note 42, art. 13(1)(b); E.U. Convention, *supra* note 41, art. 7(1)(b).

69. OECD Convention, *supra* note 6, art. 4(2).

70. U.N. Convention, *supra* note 7, art. 42(2)(a); OAS Convention, *supra* note 7, art. V(2).

71. See Mark Pieth, *Jurisdiction*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* §§ 3.2–3.4, at 339–44 (Pieth, Low & Bonucci eds., 2d ed. 2014).

72. U.N. Convention, *supra* note 7, art. 42(4) (not limiting jurisdiction to nationals); CoE Convention, *supra* note 7, art. 17(3); A.U. Convention, *supra* note 42, art. 13(1)(c); OAS Convention, *supra* note 7, art. V(3).

73. CoE Convention, *supra* note 7, art. 17(1)(c); E.U. Convention, *supra* note 41, art. 7(1)(c).

74. U.N. Convention, *supra* note 7, art. 42(1)(b).

C. National TNB Implementing Legislation

As a result of these treaties, particularly the OECD Convention, many countries today have enacted TNB legislation. The OECD Convention's parties include some emerging countries, such as Brazil and South Africa, as well as traditional capital-exporting countries.⁷⁵ The TNB legislation enacted by these countries, while consistent with the scope of the OECD Convention, generally focuses on the supply side.

For example, section 6 of the U.K. Bribery Act defines the TNB offense to cover situations where a company gives or offers any "financial or other advantage" to a "foreign public official," either directly or indirectly, with the intent to influence the foreign official and to "obtain or retain" "business" or "an advantage in the conduct of business."⁷⁶ The Canadian Corruption of Foreign Public Officials Act makes it an offense to "obtain or retain an advantage in the course of business" by giving or offering "a loan, reward, advantage or benefit of any kind to a foreign public official" in exchange for either "an act or omission by the official" in connection with that official's duties or "to induce the official to use his or her position to influence any acts" of that official's organization.⁷⁷ Finally, the Brazilian Clean Company Act, enacted in 2013, provides for strict civil and administrative liability for companies that act "against the domestic or foreign Public Administration."⁷⁸

D. World Bank

Prior to the late 1990s, the World Bank considered it an infringement of its member countries' sovereignty to pursue the fraud or corruption in the projects it financed.⁷⁹ In 1996, President James Wolfensohn, in his now famous "cancer of corruption" speech,⁸⁰ introduced a paradigm-shifting element. Coupled with a change in position regarding its legal authority, the Bank embarked on a process of embedding into its lending regime new

75. See OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status As of 21 May 2014*, at 1 (2014), <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> [<http://perma.cc/G4P9-4G5D>].

76. Bribery Act 2010, c. 23, § 6 (UK). Section 2 of the Act introduces a demand-side offense that prohibits, among other things, the act of requesting, agreeing to receive or accepting "a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly . . ." *Id.* § 2.

77. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 3 (Can.).

78. Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013, arts. 1, 5 (Braz.), translated in TRENCH, ROSSI E WATANABE ADVOGADOS, LAW NO. 12,846 OF AUGUST 1, 2013 1-2 (2013), <http://www.corporatecomplianceforum.com/files/Uploads/Documents/Spain/Compliance/Ley%20Brasil.pdf> [<http://perma.cc/VEN8-X7C9>].

79. Heather Marquette, *The Creeping Politicisation of the World Bank: The Case of Corruption*, 52 POL. STUDS. 413, 414 (2004).

80. John D. Wolfensohn, Address at World Bank Annual Meeting (Oct. 1, 1996), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTPRESIDENT/EXTPASTPRESIDENTS/PRESIDENTEXTERNAL/0,,contentMDK:20025269~menuPK:232083~pagePK:159837~piPK:159808~theSitePK:227585,00.html> [<http://perma.cc/93SK-RPXL>].

norms and remedies for these types of misconduct and created institutions to investigate, prosecute, and adjudicate cases of misconduct.

The Bank's guidelines for consultants and contractors were amended to include prohibitions on fraud and corruption.⁸¹ Project lending documents were amended to ensure that countries receiving Bank loans or grants incorporated the Bank's standards of conduct, including flowing them down into third-party contracts awarded using those proceeds.⁸² Additionally, the occurrence of misconduct on a Bank-financed project could lead to suspension or even termination of Bank support.⁸³

Unlike the TNB statutes discussed earlier, the World Bank's anticorruption norm is both supply and demand side focused. A "corrupt practice" is defined as the "offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party."⁸⁴ While actions have been taken against Bank personnel, the World Bank's enforcement focuses on the supply side, with the principal sanction consisting of debarment of contractors or consultants from eligibility for some period of time.⁸⁵

The World Bank's sanctions are publicly listed on its website.⁸⁶ As of publication, the sanctions list includes over 700 companies and individuals from over 100 countries that have been debarred or otherwise sanctioned for a range of misconduct, primarily, however, fraud and corruption.⁸⁷

81. See generally World Bank, *Guidelines: Procurement of Goods, Works, and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers* (July 2014), http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement_GLs_English_Final_Jan2011_revised_July1-2014.pdf [<http://perma.cc/5N4U-VZQ5>]; World Bank, *Guidelines: Selection and Employment of Consultants Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers* (July 2014), http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Consultant_GLs_English_Final_Jan2011_Revised_July1_2014.pdf [<http://perma.cc/DA83-JAQS>].

82. World Bank, *Guidelines: Procurement of Goods, Works, & Non-Consulting Services Under IBRD Loans & IDA Credits & Grants by World Bank Borrowers*, § 1.16 (Jan. 2011), http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Procurement_GLs_English_Final_Jan2011.pdf [<http://perma.cc/R6MM-EDQ2>].

83. *Id.* § 1.16(c).

84. WORLD BANK SANCTIONS PROCEDURES app. 1, (A) (WORLD BANK 2012), <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf> [<http://perma.cc/VV5R-E3TH>]. This is a harmonized definition, used by all of the IFIs. See INT'L FIN. INSTS. ANTI-CORRUPTION TASK FORCE, UNIFORM FRAMEWORK FOR PREVENTING AND COMBATING FRAUD AND CORRUPTION 1 (2006), http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Uniform_Framework_for_Combatting_Fraud_and_Corruption.pdf [<http://perma.cc/M2V3-JMGU>].

85. WORLD BANK SANCTIONING GUIDELINES § II.A (WORLD BANK 2011), <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf> [<http://perma.cc/33LS-LU8D>].

86. See *World Bank Listing of Ineligible Firms & Individuals*, WORLD BANK, <http://www.worldbank.org/debarr> [<http://perma.cc/97TY-HW8V>].

87. See *id.* tbl.1. Table 2 lists firms and individuals that have been conditionally non-debarred. See *id.* tbl.2.

From published debarment statistics, the current average length of debarment sanction is approximately six years.⁸⁸

In 2010, five leading International Financial Institutions (IFIs)—the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the World Bank—agreed to mutually recognize each other’s sanctions.⁸⁹ The cross-debarment agreement applies to debarments with terms of more than one year.⁹⁰

While many sanctions cases are adjudicated,⁹¹ in recent years settlement has also become an option. A number of multinational companies have made headlines by negotiating resolutions with the World Bank that have included significant monetary elements.⁹² In 2009, in what remains the largest World Bank case in monetary terms, Siemens, in response to bribery allegations, reached a settlement with the World Bank in which Siemens agreed to make \$100 million available for anticorruption projects over the next several years, to forgo bidding on World Bank projects for two years, and to have its Russian subsidiary debarred for four years.⁹³ In 2012, two of Alstom’s subsidiaries, Alstom Hydro France and Alstom Network Schweiz AG in Switzerland, paid \$9.5 million and agreed to be barred from bidding on World Bank contracts for three years.⁹⁴ Finally, in 2013, SNC Lavalin Inc. and more than 100 of its affiliates, in connection with alleged misconduct in Bangladesh, reached a settlement in which they would be

88. Data provided by the World Bank was calculated by this Article’s authors to provide an average debarment length, as of September 21, 2015, exclusive of permanent debarments and ongoing cases, of 6.06 years. *See id.*

89. Agreement for the Mutual Enforcement of Debarment Decisions (Apr. 9, 2010), <http://www.ebrd.com/downloads/integrity/Debar.pdf> [<http://perma.cc/FM49-9R7S>].

90. *Id.* art. 4(c). Additional criteria are: (1) the debarment decision must be based on sanctionable practices contained in the Uniform Framework; (2) the sanctioning IFI must have made the decision publicly available; (3) the debarment decision must have been made after the cross-debarment agreement was entered into force; (4) the debarment decision must have been made within ten years of the sanctionable practice; and (5) the debarment was not imposed in recognition of a decision of a national or other international forum. *Id.* art. 4(a)–(b), (d)–(f). An opt-out provision permits a participating IFI not to enforce a debarment based on legal or policy considerations. *Id.* art. 7.

91. There is a two-level quasi-administrative process, involving at the first level a review of the case by a Suspension and Debarment Officer and an internal World Bank official and at the second level a review of the case by a majority-external Sanctions Board. *See Low & Benitez, supra* note 18, at 30–31.

92. The World Bank has no authority to impose fines. It may, however, require restitution. WORLD BANK SANCTIONS PROCEDURES, *supra* note 84, § 9.01(b), (e).

93. Press Release, World Bank, Siemens to Pay \$100m to Fight Corruption As Part of World Bank Group Settlement (July 2, 2009), http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Siemens_World_Bank_Settlement_WB_PR_Jul_2_2009.pdf [<http://perma.cc/ML7J-2549>].

94. Press Release, World Bank, Enforcing Accountability: World Bank Debars Alstrom Hydro France, Alstrom Network Schweiz AG & Their Affiliates (Feb. 22, 2012), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~menuPK:51062075~pagePK:34370~piPK:34424~theSitePK:4607,00.html> [<http://perma.cc/5MA6-LCKW>].

debarred for 10 years.⁹⁵ The terms of the SNC Lavalin settlement represent the longest debarment period agreed to in a World Bank-negotiated resolution to date.⁹⁶

The World Bank also refers cases to national authorities for prosecution. These referrals may involve their own officials,⁹⁷ companies or their personnel,⁹⁸ or officials of the Bank's Member States.⁹⁹ The World Bank made forty-nine referrals to countries and other multilateral development banks in the 2014 fiscal year.¹⁰⁰ The Bank's statistics do not break down the referrals, so there is no transparency regarding how many demand-side referrals have been made, but there is little evidence that the countries receiving these referrals have taken action against the implicated officials.

II. THE DEMAND-SIDE LEGAL FRAMEWORK

Having reviewed the supply-side legal framework for transnational bribery, this Article now turns to the demand-side framework, with a particular focus on public officials. This part starts with treaty provisions and national implementing legislation that has a transnational dimension, then reviews some examples of territorially focused host country national legislation and challenges to enforcement, including official immunities and a lack of political will, as well as some examples of enforcement efforts. Finally, this part considers other legal tools that are relevant to demand-side enforcement, including anti-money laundering laws and asset recovery mechanisms.

95. Press Release, World Bank, World Bank Debars SNC-Lavalin Inc. & Its Affiliates for 10 Years (Apr. 17, 2013) [hereinafter *SNC-Lavalin*], <http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years> [<http://perma.cc/PXJ9-WUV7>].

96. *Id.*

97. *See, e.g.*, Press Release, U.S. Dep't of Justice, Former World Bank Employee Sentenced for Taking Kickbacks & Assisting in the Bribery of a Foreign Official (Apr. 25, 2008), <http://www.justice.gov/archive/opa/pr/2008/April/08-crm-341.html> [<http://perma.cc/C57V-4NUJ>]; *United States v. Guatam Sengupta Court Docket Number: 02-CR-040-RWR*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal-fraud/case/united-states-v-gautam-sengupta-court-docket-number-02-cr-040-rwr> (last visited Oct. 21, 2015) [<http://perma.cc/CFX4-V5GK>].

98. *See, e.g.*, *SNC-Lavalin*, *supra* note 95.

99. For example, the World Bank provided information to Canada and the Bangladeshi government related to "a high-level corruption conspiracy" by SNC Lavalin and certain Bangladeshi government officials for the Padma Bridge project. Press Release, World Bank, World Bank Statement of Padma Bridge (June 29, 2012), <http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge> [<http://perma.cc/T8Z7-7Q82>].

100. World Bank Group [WBG], *The World Bank Group Integrity Vice Presidency Annual Update: Fiscal Year 2014*, at 33 (2014), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/10/09/000442464_20141009092921/Rendered/PDF/912470BR0SecM2090Box385330B00OU0090.pdf [<http://perma.cc/BE48-JVFN>]. In fiscal year 2012, this number was forty-six. *Id.*

A. Treaty Provisions and National Implementing Laws

While many of the treaties discussed above require countries to criminalize acts of corruption by public officials in the domestic arena, as well as oblige to preventive measures to be taken for such officials, few of the treaties address the demand (or passive) side of TNB. U.N. Convention Article 16.2 permits, but does not require, countries to criminalize the solicitation or acceptance of a bribe in a transnational context.¹⁰¹ The CoE Convention requires that its parties criminalize the involvement of a foreign public official in either active or passive bribery.¹⁰²

A number of countries have implemented laws criminalizing demand-side TNB. An online tool of the United Nations Office on Drugs and Crime, Tools and Resources for Anti-Corruption Knowledge¹⁰³ (TRACK), contains a searchable database of national laws implementing provisions of the U.N. Convention, including Article 16.2. As of publication, TRACK lists nearly fifty states that have provisions relating to U.N. Convention, Article 16.2.¹⁰⁴ Unsurprisingly, many are parties to the CoE Convention.¹⁰⁵ For example, section 2 of the U.K. Bribery Act does not limit the demand-side bribery offense to domestic officials only, although prosecution of a foreign official would require that the conduct satisfy the Act's jurisdiction provisions.¹⁰⁶ Similarly, Germany's antibribery laws include demand-side provisions.¹⁰⁷ Furthermore, both European countries—such as France,¹⁰⁸ Poland,¹⁰⁹ Serbia,¹¹⁰ and Sweden¹¹¹—and several non-European

101. U.N. Convention, *supra* note 7, art. 16(2) (“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”).

102. CoE Convention, *supra* note 7, art. 5 (“Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 [active bribery of domestic public officials] and 3 [passive bribery of domestic public officials], when involving a public official of any other State.”).

103. TRACK: *On Track Against Corruption*, UNODC, <http://www.track.unodc.org/Pages/home.aspx> (last visited Oct. 21, 2015) [<http://perma.cc/C57D-9SVA>].

104. *Id.* (follow “Legal Library” hyperlink; then follow “Legal Library Search” hyperlink; search in “UNCAC Article” search bar for “16.2”). Not all of these laws relating to Article 16.2 are demand-side TNB provisions, however. *Id.*

105. *Id.*

106. Bribery Act 2010, c. 23, § 2 (UK).

107. See T. Markus Funk & Jess A. Dance, *Germany's Increasingly Robust Anticorruption Efforts*, 38 LITIG. 56, 56 (2012) (“In contrast to the [FCPA], which does not outlaw the receipt of a bribe, German law specifies that accepting or granting an advantage and offering or receiving a bribe are all punishable.”).

108. CODE PÉNAL [C. PÉN.] [PENAL CODE] arts. 435-1, 435-3 (Fr.).

109. KODEKS KARNY [K.K.] [PENAL CODE] art. 228 (Pol.).

110. Krivični Zakon [K.Z.] [CRIMINAL CODE] art. 367 (Serb.).

111. See BROTTSBALKEN [BrB] [CRIMINAL CODE] ch. 20, § 2 (Swed.).

countries—such as the Republic of Congo,¹¹² Bolivia,¹¹³ and Algeria¹¹⁴—criminalize demand-side TNB.

However, even with the promulgation of demand-side TNB laws, there have yet to be cases of foreign officials prosecuted for TNB. Under the current system, the prosecution of the solicitation or acceptance of a bribe by a public official of a particular country is left to that country, except in the unusual cases where movement of the proceeds of the bribery to another country enables that country to prosecute the individual using other legal tools.

B. Host Country Local Laws

As noted earlier, virtually every country has domestic ABC laws covering its public officials.¹¹⁵ Indeed, some countries have multiple laws. These laws typically reach the demand side as well as the supply side.

For example, Indonesia criminalizes a wide range of demand-side conduct by public officials.¹¹⁶ Among other conduct, it is an offense for “any public officer” to accept a “gift or promise, knowing that it is given to him in order to move him, contrary to his duty, to do or to admit something in his service.”¹¹⁷ Additionally, Guatemala has numerous statutes on the books regulating corruption; for example, its extortion statute prohibits officials or public employees, for profit, from using their influence to obtain, among other things, the decision of any authority.¹¹⁸ Furthermore, Nigeria’s Corrupt Practices and other Related Offences Act of 2000 prohibits the “[o]ffence of accepting gratification,” which prohibits a person from, among other things, “corruptly” asking, receiving, or obtaining any property or benefit “on account of” anything to be done or not done “in the discharge of his official duties.”¹¹⁹

112. See Loi 5-2009 du 22 septembre 2009 sur la corruption, la concussion et la fraude et les infractions assimilées en République du Congo [law 5-2009 of September 22, 2009 on corruption, bribery, fraud and similar offenses in the Republic of Congo] art. 8.

113. See Ley de lucha contra la corrupción, enriquecimiento ilícito e investigación de fortunas “Marcelo Quiroga Santa Cruz” [law on combating corruption, illicit enrichment and investigation of [the] fortunes [of] “Marcelo Quiroga Santa Cruz”] art. 31 (Bol.).

114. See Loi 06-01 du 21 Moharram 1427 correspondant au 20 février 2006 relative à la prévention et à la lutte contre la corruption [law 06-01 of 21 Moharram 1427 corresponding to February 20, 2006 on the prevention and fight against corruption] art. 28 (Alg.).

115. See *supra* INTRODUCTION. A compilation of anticorruption laws is maintained by the Int’l Assoc. of Anti-Corruption Auths., *Anti-Corruption Laws by Countries and Regions*, IAACA, <http://www.iaaca.org/AntiCorruptionLaws/ByCountriesandRegions/> (last visited Oct. 21, 2015) [<http://perma.cc/7MDN-BF7Q>].

116. See Makarim & Taira S., *Indonesia: Indonesia’s Anti-Corruption Laws*, MONDAQ, <http://www.mondaq.com/x/160720/White+Collar+Crime+Fraud/Indonesias+AntiCorruption+Laws> (last updated Jan. 18, 2012) [<http://perma.cc/6YKW-JVJF>].

117. Wetboek van strafrecht voor Indonesië of 15 Oct 1915 [W.I.] [Indonesian Penal Code of October 15, 1915] art. 419, translated in U.N. OFFICE ON DRUGS & CRIME, *INDONESIAN CRIMINAL CODE* 68, https://www.unodc.org/res/cld/document/idn/indonesian_penal_code_html/I.1_Criminal_Code.pdf (last visited Oct. 21, 2015) [<http://perma.cc/M7QY-TD3A>].

118. Código Penal de Guatemala [C.P.G.] [Guatemalan Penal Code] art. 449.

119. The Corrupt Practices and other Related Offences Act of 2000 No. (5) (2000), § 8 (Nigeria).

Despite these provisions, significant barriers to demand-side enforcement remain, both in terms of the legal framework and the enforcement of the norms that have been enacted.

1. Immunities

Public officials typically benefit from immunity from suit and the execution of judgment in domestic courts while in office.¹²⁰ For instance, section 308 of the Nigerian 1999 Constitution protects elected officials from civil and criminal charges during their tenure in office.¹²¹ The rationale for immunity is that it protects officials from the distractions that a prosecution would create and permits them to focus on the performance of their duties while in office.¹²² In many countries, however, immunity receives criticism for fostering corruption and preventing good government.¹²³ It is not uncommon for an official to leave office and then to be appointed by his political allies to a new official position that will confer immunity anew, simply to prevent prosecution for acts of corruption committed in his or her prior service.¹²⁴

2. Political Will and Capacity

Beyond the legal framework, public corruption is political. The prosecution of corruption requires both political will and institutional capacity. This political will is more readily present with political rivals than officials of one's own party. In addition, the opportunity to prosecute corruption may not present itself for many years in countries where a despot holds power for a long time. Furthermore, in countries where the rule of law is underdeveloped and institutional capacity, including in the courts, is weak, the challenges are multiplied: the prosecution of corruption often

120. These individual immunities are entirely separate from the immunities enjoyed by states.

121. CONSTITUTION OF NIGERIA 1999, § 308; *see also* Solomon Kehinde, *The Immunity Clause Under the Nigerian 1999 Constitution: A Curse or Blessing*, LAW. CHRON., <http://thelawyerschronicle.com/the-immunity-clause-under-the-nigerian-1999-constitution-a-curse-or-blessing/> [http://perma.cc/7BHL-39LS].

122. *Nixon v. Fitzgerald*, 457 U.S. 731, 744–45 (1982). Immunity for public officials is widespread throughout both the developed and developing world. In the United States, absolute immunity is extended to public officials performing judicial, legislative, and prosecutorial functions, although the scope of such broad immunity is limited. *See Burns v. Reed*, 500 U.S. 478, 487–88 (1991). All other public officials are extended qualified immunity in the exercise of their duties. *See id.*

123. *See, e.g.,* Kehinde, *supra* note 121. Nigeria has considered proposals to limit executive immunity only to civil suits. *See* Ini Ekott, *Nigerians Demand Immunity Clause Amendment*, PREMIUM TIMES (Apr. 18, 2013), <http://www.premiumtimesng.com/news/130272-nigerians-demand-immunity-clause-amendment.html> [http://perma.cc/QSZ2-MCCW].

124. *See, e.g.,* Maïa de la Baume, *A French Shift on Africa Strips a Dictator's Son of His Treasures*, N.Y. TIMES (Aug. 23, 2012), <http://www.nytimes.com/2012/08/24/world/europe/for-obiangs-son-high-life-in-paris-is-over.html> [http://perma.cc/Z6GY-E4HH].

results in the threat of violence or actual violence against those seeking accountability.¹²⁵

Against this array of challenges, some notable exceptions in recent years stand out. The Peruvian government sentenced ex-President Alberto Fujimori to a twenty-five-year sentence for human rights abuses related to his role in death squad killings during the 1990s and continues to pursue criminal charges against him.¹²⁶ Mr. Fujimori's third term in office ended abruptly after journalists recorded his top aid, Vladimiro Montesinos, paying bribes in exchange for the support of news outlets.¹²⁷ In addition to his conviction for human rights abuses, Mr. Fujimori has been found guilty of several corruption charges.¹²⁸

There have also been widespread corruption crackdowns in Brazil, China, and Indonesia. As noted earlier, Brazil recently passed the Clean Company Act¹²⁹ and is engaged in Operação Lava Jato, investigating an alleged bid-rigging scheme in which funds from contracts with Brazil's state-owned oil company, Petrobras, were diverted to political parties in the Brazilian President's coalition.¹³⁰ To date, more than twenty-five individuals have been arrested and investigations have inquired into the affairs of forty-eight current or former legislators.¹³¹ The investigation touches officials at the highest level: Brazilian lawmakers are considering impeachment of Brazil's first female president, Dilma Rousseff, based on allegations that she knew of the corruption at Petrobras.¹³²

China has placed concerted emphasis on capturing public officials believed to have used their position for personal gain. After assuming office, President Xi Jinping made anticorruption a public priority by pursuing both "flies and tigers" in the government.¹³³ By late 2012, China

125. See, e.g., Simon Butt & Tim Lindsey, Comment, *Joko Widodo's Support Wanes As Indonesia's Anti-Corruption Agency KPK Rendered Toothless*, AGE (Apr. 11, 2015), <http://www.theage.com.au/comment/joko-widodos-support-wanes-as-indonesias-anticorruption-agency-kpk-rendered-toothless-20150401-1mdaww.html> [http://perma.cc/ESS5-PBSV].

126. Robert Kozak, *Peru Court Gives Fujimori a Fifth Prison Sentence*, WALL STREET J. (Jan. 9, 2015, 2:12 PM), <http://www.wsj.com/articles/peru-court-gives-fujimori-a-fifth-prison-sentence-1420817941> [http://perma.cc/PM5N-JJWN].

127. Ryan Dube, *New Corruption Trial for Former Peruvian Leader Begins*, WALL STREET J. (Oct. 17, 2013, 4:06 PM), <http://www.wsj.com/articles/SB10001424052702303680404579141580669311764> [http://perma.cc/E95Q-MESH].

128. *Id.*

129. See *supra* note 78 and accompanying text.

130. Will Connors & Luciana Magalhaes, *How Brazil's 'Nine Horsemen' Cracked a Bribery Scandal*, WALL STREET J. (Apr. 6, 2015, 4:44 PM), <http://www.wsj.com/articles/how-brazils-nine-horsemen-cracked-petrobras-bribery-scandal-1428334221> [http://perma.cc/DTV9-SC3D].

131. *Id.*

132. John Lyons & Paulo Trevisani, *Brazil's Economic Downturn, Corruption Scandals Shake Leader*, WALL STREET J. (May 21, 2015, 10:30 PM), <http://www.wsj.com/articles/brazils-economic-downturn-corruption-scandals-shake-leader-1432261803> [http://perma.cc/KRN2-P2XU].

133. Tania Branigan, *Xi Jinping Vows to Fight 'Tigers' and 'Flies' in Anti-Corruption Drive*, GUARDIAN (Jan. 22, 2013, 12:44 PM), <http://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption> [http://perma.cc/4GNH-ECZG].

reported that it had disciplined roughly 414,000 officials for corruption and prosecuted 201,600 officials for corruption offenses.¹³⁴ This corruption crackdown has reached a number of high level officials: China has indicted Zhou Yongkang, a former security chief and member of the Politburo Standing Committee,¹³⁵ and is conducting investigations of sixteen major generals of the People's Liberation Army.¹³⁶

In 2002, after Indonesia's transition to democracy following the 1998 resignation of ex-President Suharto led to worsening corruption, Indonesia formed the Corruption Eradication Commission¹³⁷ (KPK). In addition to providing education and support for local government officials, the KPK has investigated and prosecuted sixty-eight members of parliament and a number of government ministers, chief executive officers, and judges.¹³⁸ In 2014, Indonesian civil society hailed the election of Joko Widodo (who goes by "Jokowi"), who reformed Indonesia's oil and gas sector and reduced opportunities for petty bribery by moving government services online.¹³⁹

The KPK does not, however, operate in an environment free from political pressure or retribution, and the organization regularly clashes with police and judiciary officials. In 2009, the police retaliated to the investigation of the Head of Police Criminal Investigations by arresting two KPK commissioners on charges of fraud, although the commissioners were reinstated after evidence arose that the charges were fabricated.¹⁴⁰ A 2012 investigation of the chief of traffic police led to a standoff in police headquarters during the execution of a KPK search that was only resolved by the direct intervention of the prior president, Susilo Bambang Yudhoyono.¹⁴¹

Although ostensibly the election of Jokowi provided high-level support for the KPK, struggles with the police have increased. In February 2015, President Jokowi, at his political party's behest, nominated a candidate for

134. Macabe Keliher and Hsinchao Wu, *How to Discipline 90 Million People*, ATLANTIC (Apr. 7, 2015), <http://www.theatlantic.com/international/archive/2015/04/xi-jinping-china-corruption-political-culture/389787/> [<http://perma.cc/7P6Y-43A5>].

135. *Id.*

136. Minnie Chan, *16 PLA Major Generals, Many of Them Newly Promoted, Under Investigation for Military Corruption*, S. CHINA MORNING POST (Mar. 2, 2015, 8:48 AM), <http://www.scmp.com/news/china/article/1727199/16-pla-major-generals-many-them-newly-promoted-under-investigation> [<http://perma.cc/6UQK-QRSS>].

137. Andrew Manners, *Some Progress, but Corruption Remains Endemic in Indonesia*, FUTURE DIRECTIONS INT'L (Dec. 18, 2013), <http://www.futuredirections.org.au/publications/indonesia/45-indonesia-swa-articles/1495-some-progress-but-corruption-remains-endemic-in-indonesia.html> [<http://perma.cc/W8C5-J2ZB>].

138. Daniel Sagalyn, *Corruption Challenges Indonesia's Government*, PBS (May 26, 2011, 10:05 AM), http://www.pbs.org/newshour/updates/world-jan-june11-indonesia_05-26/ [<http://perma.cc/2MCD-36HJ>].

139. *Corruption in Indonesia: A Damnable Scourge*, ECONOMIST (June 6, 2015), <http://www.economist.com/news/asia/21653671-jokowis-arduous-task-cleaning-up-government-damnable-scourge> [<http://perma.cc/24SM-9ULY>].

140. Butt & Lindsey, *supra* note 125.

141. *Id.*

the position of national police chief.¹⁴² The KPK, however, named President Jokowi's nominee as a suspect in an ongoing investigation of public corruption.¹⁴³ Amid public criticism, President Jokowi retracted the nomination, but suspended the KPK head and deputy after the police arrested them.¹⁴⁴ As a result, the KPK has limped through the last several months waiting for the appointment of new commissioners in December.¹⁴⁵

*C. Following the Money:
Use of Anti-Money Laundering Statutes and Asset Recovery*

Some of the national efforts mentioned above have generated transnational activity, both in the form of cooperative efforts and in the form of non-host country prosecutions or asset recovery efforts.

1. Anti-Money Laundering Efforts

Although the FCPA does not reach the demand side of TNB, where the corrupt officials have brought the proceeds of bribery into the United States, the United States has used its anti-money laundering (AML) laws to prosecute the officials involved. Other federal laws may be useful as well, particularly where the official's conduct in soliciting or receiving the bribe has a territorial connection to the United States. There have been several cases to date where such laws have been used to go after foreign officials for TNB.¹⁴⁶ The following sections discuss these cases in turn.

a. Elgawhary

In December 2014, Asem Elgawhary, a former Principal Vice President of Bechtel Corporation and dual U.S. and Egyptian citizen pled guilty in connection with a \$5.2 million kickback scheme designed to manipulate the competitive bidding process for state-run power contracts in Egypt.¹⁴⁷ Elgawhary admitted that from 1996 to 2011, he was the general manager of

142. *Corruption in Indonesia: A Damnable Scourge*, *supra* note 139.

143. Carol Giacomo, Editorial, *Indonesia's Corruption Fighters in the Fight of Their Lives*, N.Y. TIMES (Feb. 20, 2015), http://www.nytimes.com/2015/02/20/opinion/indonesias-corruption-fighters-in-the-fight-of-their-lives.html?_r=0 [<http://perma.cc/XGY9-DR82>].

144. *Id.*

145. *Corruption in Indonesia: A Damnable Scourge*, *supra* note 139.

146. The United States has also used its AML laws to prosecute foreign officials accused only of domestic bribery, not TNB. The former Prime Minister of Ukraine, Pavel Lazarenko, was convicted of multiple money laundering counts related to corrupt extortion plots against Ukrainian citizens that generated millions of dollars of corrupt funds that were ultimately laundered through the United States. Press Release, FBI, Former Ukrainian Prime Minister Sentenced to 97 Months in Prison Fined \$9 Million for Role in Laundering \$30 Million of Extortion Proceeds (Nov. 19, 2009), <https://www.fbi.gov/sanfrancisco/press-releases/2009/sf111909a.htm> [<http://perma.cc/XGY9-DR82>]. Lazarenko was sentenced to nine years in prison, fined \$9 million, and ordered to pay almost \$23 million in restitution. *Id.*

147. Press Release, U.S. Dep't of Justice, Former Bechtel Exec. Pleads Guilty in Connection with a \$5.2 Million Kickback Scheme (Dec. 4, 2014), <http://www.justice.gov/opa/pr/former-bechtel-executive-pleads-guilty-connection-52-million-kickback-scheme> [<http://perma.cc/T8V7-NHJR>].

a joint venture between Bechtel, a U.S. corporation engaged in engineering, construction, and project management, and Egypt's state-owned and state-controlled electricity company, a position that made him a "foreign official" for FCPA purposes.¹⁴⁸ The joint venture assisted the Egyptian electricity company in identifying and awarding contracts to subcontractors to perform power projects for the company.¹⁴⁹ Elgawhary admitted to accepting a total of \$5.2 million from three power companies in exchange for his assistance in securing an unfair advantage in the bidding process.¹⁵⁰ Elgawhary attempted to conceal the kickback scheme by routing the payments through offshore bank accounts and making false statements to Bechtel executives, which certified that he had no knowledge of any fraud at the joint venture.¹⁵¹ Elgawhary pled guilty to mail fraud, conspiracy to commit money laundering, and obstruction and interference with the administration of tax laws.¹⁵² Elgawhary was sentenced to forty-two months in prison in March 2015.¹⁵³

b. Gonzalez

In 2013, Maria de los Angeles Gonzalez de Hernandez, Vice President of Banco de Desarrollo Economico y Social de Venezuela (BANDES), accepted bribes to direct bond trading work to a U.S. broker-dealer, Direct Access Partners.¹⁵⁴ Gonzalez pled guilty to conspiracy to violate the Travel Act and to commit money laundering, as well as substantive counts in relation to those offenses.¹⁵⁵ As of publication, Gonzalez has not yet been sentenced.

c. Antoine and Duperval

Robert Antoine, a former director of international affairs at Telecommunications D'Haiti ("Haiti Teleco"), pled guilty to money laundering for channeling more than \$800,000 in bribes he received from a U.S. company.¹⁵⁶ According to the government, he disguised the origin of

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Press Release, U.S. Dep't of Justice, Former Bechtel Exec. Sentenced to 42 Months in Prison & Ordered to Forfeit \$5.2 Million in Connection with Kickback Scheme (Mar. 23, 2015), <http://www.justice.gov/opa/pr/former-bechtel-executive-sentenced-42-months-prison-and-ordered-forfeit-52-million-connection> [<http://perma.cc/CH3C-MKKH>].

154. Nate Raymond, *Two NY Broker-Dealer Execs Plead Guilty in Venezuelan Bribery Case*, REUTERS (Dec. 17, 2014, 1:16 PM), <http://www.reuters.com/article/2014/12/17/us-venezuela-corruption-usa-idUSKBN0JV2EY20141217> [<http://perma.cc/Z44P-LGKF>].

155. Press Release, U.S. Dep't of Justice, High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme (Nov. 18, 2013), <http://www.justice.gov/opa/pr/high-ranking-bank-official-venezuelan-state-development-bank-pleads-guilty-participating> [<http://perma.cc/AC2C-WRFN>].

156. Press Release, U.S. Dep't of Justice, Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme

the bribes by passing them through intermediaries in the United States, thereby providing the United States with criminal jurisdiction.¹⁵⁷ Antoine was sentenced to four years in prison and ordered to pay over \$3.4 million in restitution and forfeiture.¹⁵⁸ Jean Rene Duperval, another former director of international relations for Haiti Teleco, was found guilty of money laundering and conspiracy related to the same bribery scheme.¹⁵⁹ Duperval was sentenced to nine years in prison and ordered to forfeit almost \$500,000.¹⁶⁰

d. Siriwan

Juthamas Siriwan, the former head of the Tourism Authority of Thailand, has been charged with seven counts of money laundering as well as related conspiracy and aiding and abetting counts for her receipt of bribes connected to the activities of the Greens, a Hollywood producer couple.¹⁶¹ The couple was sentenced in 2010 for bribing foreign officials, including Ms. Siriwan, to obtain lucrative film festival contracts.¹⁶² The DOJ is also seeking forfeiture of approximately \$1.8 million in funds that the Greens paid Ms. Siriwan and her daughter.¹⁶³ The United States claims jurisdiction based on its allegation that Siriwan conspired with and persuaded the Greens to transfer money from the United States to a foreign country for the purpose of paying a bribe.¹⁶⁴ Though the charges were brought in 2009, the case has been stayed for several years, pending the outcome of Thai proceedings against the Siriwans.¹⁶⁵

(June 2, 2010), <http://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-prison-his-role-money-laundering-conspiracy> [<http://perma.cc/JKN4-MZCF>].

157. *Id.*

158. *Id.*

159. Press Release, U.S. Dep't of Justice, Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes (May 21, 2012), <http://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes> [<http://perma.cc/N8HX-QRT4>].

160. *Id.*

161. Indictment at 7, 16, *United States v. Siriwan*, No. 09-00081 (D.C. Cal. Jan. 28, 2009).

162. Joe Palazzolo, *Prosecutors Drop Appeal in Bribery Case Against Hollywood Producers*, WALL STREET J. (Aug. 24, 2011, 1:43 PM), <http://blogs.wsj.com/corruption-currents/2011/08/24/prosecutors-drop-appeal-in-bribery-case-against-hollywood-producers/> [<http://perma.cc/99FZ-M8FX>].

163. Indictment, *supra* note 161, at 18–19.

164. *Id.* at 7, 16–17.

165. In 2013, Siriwan's case was stayed for one year. Samuel Rubinfeld, *Judge Stays Siriwan Case for One Year*, WALL STREET J. BLOGS: CORRUPTION CURRENTS (March 27, 2013, 6:16 PM), <http://blogs.wsj.com/corruption-currents/2013/03/27/judge-stays-siriwan-case-for-one-year/> [<http://perma.cc/99FZ-M8FX>]. A status conference is currently scheduled for October 13, 2015 to determine whether the stay should be maintained, although the conference has been continued numerous times. Joint Stipulation to Continue Status Conference at 2–3, *Siriwan*, No. 09-00081. Two matters potentially could complicate removal of the stay. First, Siriwan recently was indicted in Thailand. Patrick Frater, *Juthamas Siriwan to Be Indicted As Recipient of Bangkok Festival Bribes*, VARIETY (Aug. 7, 2015, 5:32 AM), <http://variety.com/2015/film/asia/juthamas-siriwan-indicted-bangkok-festival-bribery-1201559001/> [<http://perma.cc/UB9P-XZZ5>]. Second, Mr. Green recently

e. Ibori

The United States is not the only country to use its AML laws to prosecute foreign officials. The United Kingdom prosecuted James Ibori, ex-governor of Delta State, Nigeria, under its AML statutes.¹⁶⁶ Ibori was extradited to the United Kingdom from Dubai after Nigeria's Economic and Financial Crimes Commission asked the United Kingdom to examine the ex-governor's financial affairs.¹⁶⁷ Mr. Ibori pled guilty to money laundering related to a \$37 million fraud involving the sale of Delta State's share in a Nigerian phone company.¹⁶⁸

2. Asset Recovery Efforts

In addition to individual countries prosecuting foreign officials, there has been increased cooperation by states in cross-border actions to recover proceeds of corruption. For example, the Cayman Islands created an Anti-Corruption Commission in 2008 whose mandate includes the ability to "obtain [c]ourt [o]rders to freeze the assets of those suspected of committing corruption offenses."¹⁶⁹

International organizations have also taken up the cause. In particular, a joint World Bank and United Nations Office on Drugs and Crime initiative, the Stolen Asset Recovery Initiative (StAR), has since 2007 supported "international efforts to end safe havens for corrupt funds."¹⁷⁰ StAR works to prevent money laundering related to grand corruption and to assist countries in repatriating ill-gotten gains from corruption.¹⁷¹ While StAR does not prosecute or bring cases of asset recovery, it trains developing countries, assists in building capacity, and provides other technical assistance in asset recovery efforts.¹⁷² StAR also maintains a database of

passed away. Richard L. Cassin, *Hollywood Producer, Once Jailed for FCPA Offenses, Dies in LA*, FCPA BLOG (Aug. 25, 2015, 10:08 AM) <http://www.fcplib.com/blog/2015/8/25/hollywood-producer-once-jailed-for-fcpa-offenses-dies-in-la.html> [<http://perma.cc/F2B7-MBM9>].

166. See *Nigeria Ex-Delta State Governor James Ibori Guilty Plea*, BBC NEWS (Feb. 27, 2012) [hereinafter *James Ibori*], <http://www.bbc.com/news/world-africa-17181056> [<http://perma.cc/4RE5-SBT4>].

167. *Id.* After his assets were frozen in the United Kingdom, Mr. Ibori returned to Nigeria and was arrested; a Nigerian court, however, dismissed the charges, and Mr. Ibori was only arrested after traveling to Dubai based on an outstanding British warrant. *Id.* Nigerian courts have since reinstated the charges. Press Release, Econ. & Fin. Crimes Comm'n, Money Laundering: Ibori Has Case to Answer—Appeal Court (Aug. 19, 2014), http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Ibori_Nigeria_Appeals_Ct_EFCC_May_15_2014_0.pdf [<http://perma.cc/ESC7-XQKK>].

168. *James Ibori*, *supra* note 166.

169. *What We Do*, CAYMAN IS. GOV'T, http://www.anticorruptioncommission.ky/portal/page?_pageid=2421,1&_dad=portal&_schema=PORTAL (last visited Oct. 21, 2015) [<http://perma.cc/4N9T-ZMHT>].

170. *Our Vision*, STOLEN ASSET RECOVERY INITIATIVE, <http://star.worldbank.org/star/about-us/our-vision> (last visited Oct. 21, 2015) [<http://perma.cc/UX58-8Y7V>].

171. *Id.*

172. *Our Mission*, STOLEN ASSET RECOVERY INITIATIVE, <http://star.worldbank.org/star/about-us/our-vision> (last visited Oct. 21, 2015) [<http://perma.cc/MFJ4-CTFV>].

over 750 corruption cases, with over 200 having an asset recovery component.¹⁷³

Perhaps the largest international recovery efforts to date relate to the tracking and seizing of the assets of former Nigerian military dictator Sani Abacha, which resulted in over \$1 billion being returned to Nigeria.¹⁷⁴ As of now, over \$175 million in funds from Fujimori's crony, Vladimiro Montesinos, have been seized and returned to Peru from a number of countries, including Switzerland, the United States, and the Cayman Islands.¹⁷⁵ The United States, for example, returned \$20 million to Peru, after Peru agreed to spend the money on anticorruption efforts.¹⁷⁶ One way in which future acts of corruption can be combated is to require the repatriated funds to be spent on further anticorruption efforts.

Despite these examples of domestic and transnational prosecution, they remain the exception rather than the rule. The imbalance between supply- and demand-side TNB prosecution is a problem that is likely only to increase as supply-side prosecution increases. While the international community may hope that preventive measures being implemented by countries, including greater transparency in the extractive industries through both voluntary initiatives and new disclosures requirements in certain countries,¹⁷⁷ will decrease the extent of demands, the supply-side experience teaches that a credible enforcement capacity is essential to induce effective preventive efforts.

III. TOWARD A NEW DEMAND-SIDE FRAMEWORK

There are multiple options for addressing this problem, ranging from enhanced criminal jurisdiction over the demand-side offender, to remedies against the offender's state based on expanded theories of state responsibility, to strengthened efforts to address the structural conditions that lead to systemic corruption. These tools are not mutually exclusive and differential approaches may be appropriate for so-called "grand" corruption (which may or may not be systemic) than for "petty" corruption (which is more likely to be systemic).

173. *StAR Corruption Cases Search Center*, STOLEN ASSET RECOVERY INITIATIVE, <http://star.worldbank.org/corruption-cases/?db=All> (last visited Oct. 21, 2015) [<http://perma.cc/EGB8-4YRY>].

174. Cynthia O'Murchu, *Asset Tracing: Follow the Money*, FIN. TIMES: BIG READ (Aug. 13, 2014, 7:21 PM), <http://www.ft.com/intl/cms/s/0/3a6cf942-222e-11e4-ad60-00144feabd00.html#axzz313oh4YXC> [<http://perma.cc/MJ2S-HFUW>].

175. See Guillermo Jorge, *The Peruvian Efforts to Recover Proceeds from Montesino's Criminal Network of Corruption*, in RECOVERING STOLEN ASSETS 111–12 (Mark Pieth ed., 2008).

176. *Id.* at 120.

177. See, e.g., 15 U.S.C. § 78m(q)(1)(A)-(q)(2)(E) (2012) (requiring issuers that engage in "significant actions" related to commercial development of natural resources to disclose payments to the U.S. or foreign governments in connection with resource development); Extractive Industry Transparency Initiative [EITI], *EITI Rules, 2011 Edition*, at 10 (Apr. 2011), https://eiti.org/files/EITI_Rules_Validations_April2011_1.pdf [<http://perma.cc/8JM7-YRBA>].

A. *An International Criminal Tribunal
for Transnational Economic Crime*

One option to combat demand-side bribery would be a new international criminal tribunal for transnational economic crime with jurisdiction over grand corruption, money laundering, fraud, and other serious organized criminal activities of a transnational nature, whether on the supply or the demand side. Any agreement establishing such a tribunal would need to touch upon issues of immunities.¹⁷⁸ As with some other international tribunals, less serious cases could be left to national tribunals,¹⁷⁹ or its jurisdiction could be limited to cases in which national authorities failed to act after a period of time.¹⁸⁰

178. See *supra* Part II.B.1. For instance, the African Union rejects the International Criminal Court's (ICC) interpretation of immunity under customary international law, which has led to significant hurdles in the arrest and surrender of President Omar Hassan al Bashir of Sudan. See Press Release, African Union, On the Decisions of Pre-Trial Chamber I of the Int'l Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad & the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest & Surrender of President Omar Hassan al Bashir of the Republic of the Sudan (Jan. 9, 2012), <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf> [<http://perma.cc/Z8XV-TBAX>].

By way of background, the ICC was established by the Rome Statute, which was entered into force in 2002. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 37 I.L.M. 999 (1998) [hereinafter Rome Statute]. Presently, 123 countries are State Parties to the Rome Statute. *The States Parties to the Rome Statute*, ICC, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rom e%20statute.aspx (last visited Oct. 21, 2015) [<http://perma.cc/C7PE-CZT8>].

The ICC has subject-matter jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (although the crime of aggression is not defined in the Rome Statute). Rome Statute, *supra*, art. 5. The ICC may exercise jurisdiction over these crimes if they are committed in the territory of or by a national of a Party to the Rome Statute. *Id.* art. 12(1)–(2). There are, however, several limitations on ICC jurisdiction, including temporal limitations (crimes must have occurred after the relevant State became a Party to the statute) and limits on admissibility of cases (e.g., “the case has been investigated by a State which has jurisdiction of it and the State has decided not to prosecute”). *Id.* art. 17(1)(b); see *id.* art. 11(2).

This Article focuses primarily on the ICC when citing examples of international tribunals; however, there are a number of other international tribunals that may serve as models to combat demand-side bribery, such as The International Criminal Tribunal for the former Yugoslavia, The International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone.

179. For example, the prosecutor for the ICC has discretion to “analyse the seriousness of the information received [from a referral of a crime within the ICC’s jurisdiction].” *Id.* art. 15(2). Similarly, the ICTR provides local tribunals with jurisdiction over less serious cases while the ICTR retains jurisdiction over serious cases. Statute of International Tribunal for Rwanda art. 1, Nov. 8, 1994, 33 I.L.M. 1598 (1994) (stating the ICTR has “the power to prosecute persons responsible for serious violations of international humanitarian law. . .”). This arrangement has led to some anomalies because the Statute of the ICTR excludes the death penalty, which local tribunals imposed in some cases before Rwanda abolished the death penalty in 2007. *Rwanda: Justice After Genocide—20 Years On*, HUMAN RIGHTS WATCH (Mar. 28, 2014), <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years> [<http://perma.cc/GCP6-GJWK>].

180. A case before the ICC is inadmissible when the case is “being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” Rome Statute, *supra* note 178, art. 17(1)(a).

Alternatively, the jurisdiction of the International Criminal Court (ICC) could be expanded.¹⁸¹ However, because the ICC is still gathering support,¹⁸² and given the differing capabilities of a tribunal that deals with economic crime versus the types of crimes covered by the ICC,¹⁸³ a specialized court might be preferable. This, of course, requires the commitment of resources and the willingness of countries, including those who may stand the most to lose by the establishment of such a court.¹⁸⁴ The likelihood of this option gathering traction in either form anytime soon therefore seems remote.

B. *International Technical Assistance*

International efforts today primarily focus on increasing enforcement of domestic anticorruption legislation and strengthening the rule of law in general and specifically around these issues. Traditional capacity building focuses on training, technical assistance, and policy dialogues with local agencies or commissions responsible for enforcing anticorruption legislation.¹⁸⁵ However, capacity building is a long-term effort and can be largely ineffective, especially in countries where corruption is particularly pervasive.¹⁸⁶ Regardless, targeted efforts focused on particular sectors that are important to international business and may benefit from increased transparency, funding, and the like, such as customs and immigration, may nonetheless be beneficial.

181. See *supra* note 178 (discussing the jurisdictional reach of the ICC).

182. The Rome Statute allows the ICC to initiate cases on its own accord “on the basis of information” and without the referral of a party. Rome Statute, *supra* note 178, art. 15(1). As a result, the ICC is criticized for the politicization of its exercise of prosecutorial discretion, whether that be in the ICC’s investigation of the Israeli-Palestinian war in Gaza, its focus on the prosecution of African leaders, or its general potential to infringe on a Party State’s sovereignty. See, e.g., Aminta Ossom, *An African Solution to an African Problem? How an African Prosecutor Could Strengthen the ICC*, 52 VA. J. INT’L L. DIG. 68, 69 (2011) (“[T]he increasing influence of the ICC reflects a deepening commitment among many Western states despite greater reservations among the African countries whose enthusiasm had originally buoyed the Court.”); Peter Beaumont, *ICC Urges Israel to Cooperate in Inquiry into Possible Breaches in Palestine*, GUARDIAN (May 13, 2015, 7:24 PM), <http://www.theguardian.com/law/2015/may/13/icc-urges-israel-to-cooperate-in-inquiry-into-possible-breaches-in-palestine> (“Israel, however, has denounced the Palestinian action as ‘scandalous,’ with prime minister Binyamin Netanyahu warning that it turns the ICC ‘into part of the problem and not part of the solution.’”) [<http://perma.cc/SDYM-7JG4>].

183. See *supra* note 178.

184. Numerous hurdles prevent such an expansion at the current time, not least of which is disagreement as to what constitutes public corruption. Although an international consensus may be developing related to the core conduct that constitutes public corruption, consensus seems unlikely for behavior on the margins. It takes only mild imagination to envision a foreign court indicting U.S. legislators who exchange votes on contested legislation for campaign support or district-specific appropriations. See *supra* note 45 and accompanying text (discussing definitional difficulties in the context of the U.N. Convention).

185. See Int’l Dev. Law Org., *Anti-Corruption: A Capacity Building Approach*, DEV. LAW UPDATE, no. 7, at 6 (2006).

186. See Anna Persson et al., *Why Anticorruption Reforms Fail—Systemic Corruption As a Collective Action Problem*, 26 GOVERNANCE 449, 454 (2013).

C. Special Commissions

A third way exists to combat demand-side bribery for countries willing to cede some amount of prosecutorial discretion. International organizations can establish, by agreement, independent prosecutorial commissions to target organized crime and public corruption.

One such example is the International Commission against Impunity in Guatemala (CICIG), established in a 2006 agreement between Guatemala and the United Nations.¹⁸⁷ The CICIG, with U.N. assistance, works with the Guatemalan Public Prosecutor's Office and National Civil Police to investigate crimes committed by members of illegal security forces and clandestine security "structures."¹⁸⁸ The CICIG wields exceptional power, including the ability to join criminal proceedings as a complementary prosecutor and to "[s]elect and supervise an investigation team made up of national and foreign professionals of proven competence and moral integrity"¹⁸⁹ As of September 2013, the CICIG had participated in twenty cases that resulted in guilty verdicts.¹⁹⁰ Although CICIG investigations focus primarily on members of the National Civil Police and members of the judiciary, two CICIG prosecutions related to public corruption.¹⁹¹ For example, CICIG obtained an October 2013 conviction of five individuals, including the mayor of La Antigua, Guatemala, for diverting municipal funds slated for construction.¹⁹² Recently, the CICIG worked with Guatemalan prosecutors in an investigation of Guatemala's then-sitting President, Otto Perez Molina, regarding allegations of graft and bribery.¹⁹³ As a result, Molina was indicted and jailed pending disposition of the charges.¹⁹⁴

Guatemala is experiencing a period of sustained, organized violence and members of the National Police, military, and judiciary are implicated in many killings.¹⁹⁵ The CICIG represents an unusual response: inviting

187. Agreement Between the United Nations and the State of Guatemala on the Establishment of an Institutional Commission Against Impunity in Guatemala, Dec. 12, 2006, [hereinafter CICIG Agreement], http://www.cicig.org/uploads/documents/mandato/cicig_acuerdo_en.pdf [<http://perma.cc/C7SG-Z2FF>].

188. *Mandate: Agreement to Establish CICIG*, CICIG, <http://www.cicig.org/index.php?page=mandate> (last visited Oct. 21, 2015) [<http://perma.cc/KTR7-ENVM>].

189. CICIG Agreement, *supra* note 187, art. 3(1)(j).

190. CICIG, *Convictions in Proceedings Supported by CICIG*, at 1 (Sept. 11, 2013), <http://www.cicig.org/uploads/documents/2013/SENT-20131018-01-EN.pdf> [<http://perma.cc/5DBZ-5H6N>].

191. *See id.* at 2 (detailing Case 001076-2012-0025); *id.* at 11–12 (detailing Criminal Case 01070-2010-00309).

192. *See id.* at 2 (detailing Case 001076-2012-0025).

193. Sonia Perez D., *Guatemala's Rock Star: Quiet Jurist Who Took Down President*, YAHOO! NEWS (Sept. 12, 2015, 7:19 PM), <http://news.yahoo.com/guatemalas-rock-star-quiet-jurist-took-down-president-040531388.html> [<http://perma.cc/4GMC-XV5E>].

194. Sonia Perez D., *Judge Orders Guatemala Ex-President Perez Molina Jailed While Facing Fraud and Bribery Charges*, U.S. NEWS & WORLD REPORT (Sept. 8, 2015, 6:44 PM), <http://www.usnews.com/news/world/articles/2015/09/08/judge-orders-ex-guatemalan-president-jailed-on-fraud-charge> [<http://perma.cc/CR7A-NP9Z>].

195. *See* David Grann, *A Murder Foretold: Unravelling the Ultimate Political Conspiracy*, NEW YORKER (Apr. 4, 2011), <http://www.newyorker.com/magazine/2011/>

foreign, impartial experts to investigate and prosecute expansive crime that domestic constituencies are unable to accomplish themselves. The organization is alternatively lauded for its impact on the country or criticized for the unchecked and unbridled use of power.¹⁹⁶

While the impetus for CICIG derived from human rights concerns, its model has potential application for economic crime as well.¹⁹⁷ Partnerships between countries and international organizations could allow enforcement of domestic demand-side laws in consultation with domestic prosecutors. Under these partnerships, the host country would maintain prosecutorial discretion, build enforcement capacity, and gain public credibility. These international organizations would stand outside normal government channels and yet still be an effective means for increasing government legitimacy in states facing grand and petty corruption. The perception of corruption in the justice system often can be as debilitating as actual corruption, and therefore the presence of an impartial international investigative and prosecutorial organization would preserve the appearance of propriety if a country's investigation of high-level public officials yielded no evidence of corruption. Of course, this approach requires the consent of the host country—for example, in the CICIG accord, the Guatemalan government requested assistance from the United Nations.¹⁹⁸ Nonetheless, a special commission could be a useful tool for strengthening the capacity of a willing state.

D. Transnational Prosecution of Demand-Side Bribery

Another alternative to combat demand-side bribery is transnational prosecution, particularly of “grand” corruption, based on universal or other enhanced jurisdiction standards. As noted above, the U.N. Convention permits but does not require countries to assert jurisdiction on this basis.¹⁹⁹ The implementation of this provision requires legislation at the national level, and a number of countries have done so to date.²⁰⁰ An effective international effort would require implementation by an even greater number of countries, particularly those countries that are attractive destinations for tourism, business travel, and the like. However, there are

04/04/a-murder-foretold [<http://perma.cc/8BG8-EDND>]; CICIG, *supra* note 190, at 9 (detailing Case 01070-2009-00883).

196. *See* Grann, *supra* note 195.

197. There is increasing appreciation of the linkages between corruption and human rights. Corruption can affect the use and enjoyment of a variety of human rights, perhaps most importantly access to justice. *See* Human Rights Council, Progress Rep. of the Human Rights Council Advisory Comm. on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights, at 5 ¶ 12, U.N. Doc. A/HRC/26/42 (May 14 2014), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_42_ENG.DOC [<http://perma.cc/F9XL-R9SF>]; Param Kumaraswamy, Speech at U.N. Conference on Anti-Corruption Measures: Good Governance and Human Rights: Integrity and Ethics 11 (Nov. 8–9, 2006), <http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Kumaraswamy.pdf> [<http://perma.cc/9BBY-PRR8>].

198. CICIG Agreement, *supra* note 187, pmb1.

199. *See supra* note 70 and accompanying text.

200. *See supra* Part I.C.

still significant practical and legal hurdles that this alternative must overcome before gaining traction and widespread acceptance.

First, even if countries criminalize demand-side TNB as a substantive crime, one of the key obstacles to actually prosecuting that crime will be exercising jurisdiction over the foreign public official. As discussed above, the various anticorruption conventions take different views as to what bases of jurisdiction are mandatory or permissive.²⁰¹ Territorial jurisdiction, as required by all conventions, is the easiest, but requires the foreign official to have acted in the prosecuting nation,²⁰² which may not always occur. Nationality jurisdiction, where the prosecuting nation takes jurisdiction over the acts of its nationals overseas, will not be helpful for prosecuting those who are, by definition, not nationals of the country.²⁰³

In addition to territorial and nationality jurisdiction, international law recognizes additional bases for jurisdiction—protective, passive personality, and universal jurisdiction—that might be used to prosecute demand-side TNB.²⁰⁴ It is unclear, however, how effective these additional bases of jurisdiction would be. For example, while acts of grand corruption might be prosecutable under a theory of universal jurisdiction,²⁰⁵ certainly there is no such consensus as to acts of petty corruption.²⁰⁶ A new instrument would likely be necessary.

In addition to jurisdictional hurdles, considerations of comity also arise in prosecutions of demand-side TNB, as well the treatment of immunities under national and international law. Furthermore, questions of double jeopardy arise. Due to this, before starting a prosecution of demand-side TNB, a nation should be required to determine if the home country of the foreign official is unable or unwilling to prosecute the offense itself. If the answer is negative, the prosecuting nation should defer to the home state. If the answer is positive, then the prosecuting nation should proceed with its prosecution.

There also may be specific resistance in the United States to prosecuting foreign officials in U.S. courts. Opening U.S. courts to disputes that have

201. *See supra* Part I.B.

202. *See supra* Part I.B.2.

203. *Cf.* Part II.C.1.a (discussing the case of Elgawhary, where a U.S. citizen was considered a foreign official). Additionally, to the extent a national from the prosecuting nation is an official with an international institution, nationality also could be the basis of exercising jurisdiction over that individual. However, these situations would seem to be exceptional.

204. Protective jurisdiction allows a state to punish a limited set of offenses that “threaten[] the integrity of governmental functions that are generally recognized as crimes by developed legal systems, e.g., espionage, counterfeiting of the state’s seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.” RESTATEMENT OF THE LAW (THIRD): THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f (AM. LAW INST. 1986) (emphasis omitted). The passive personality principle allows a state to apply its criminal laws to an extraterritorial act committed by a nonnational when the victim of the crime is a national. *Id.* § 402 cmt. g.

205. This proposition is lamentably still debatable.

206. Facilitating payments, which are permitted under U.S. law but prohibited under U.K. law, is the prime example of this. *See supra* notes 28, 76 and accompanying text.

no nexus with the United States has been a recent concern of the U.S. Supreme Court.²⁰⁷ Additionally, at least one U.S. court has held that, as currently written, foreign officials cannot be prosecuted for conspiracy to violate the FCPA because “Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power.”²⁰⁸ Due to the current state of the law, any criminalization of demand-side TNB in the United States would necessarily involve amendments to the FCPA or other legislative action in order to make the cases that interpret the current version of the FCPA moot.

Given the lack of progress in recent years to amend the FCPA in ways intended to limit its reach,²⁰⁹ and given the concerns of U.S. business about the lack of demand-side enforcement,²¹⁰ the prospects of legislation that would “level the playing field” between the supply and demand sides may be more favorable than would appear at first blush. Concerns should be anticipated, however, regarding the reciprocity impact of such legislation, as well as the issues highlighted above. Therefore, conditioning such jurisdiction on a clear nexus of the conduct to the United States (for example, through the impact that bribe solicitation had on U.S. firms or persons) would be an important limitation.

*E. National Law Measures Targeting Individuals:
Building on “No Safe Haven”*

When taken in concert with other countries, domestic restrictions targeting foreign public officials guilty of demand-side bribery can have a significant impact. The United States’s best-known action is the “no safe haven” policy implemented in Presidential Proclamation 7750 on January 12, 2004.²¹¹ The proclamation restricted, “[i]n light of the importance of legitimate and transparent public institutions,” international travel and suspended entry into the United States of persons “who have committed, participated in, or are beneficiaries of corruption in the performance of public functions” if the corruption has “serious adverse effects” on U.S. businesses, foreign assistance or national security, or on “the stability of democratic institutions and nations.”²¹² Since 2004, U.S. Immigration and Customs Enforcement has denied over 139 individuals obtainment of entry

207. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (holding that the Alien Tort Statute does not apply extraterritorially).

208. *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) (citing H.R. REP. NO. 95-640, at 12 n.3) (“United States has power to reach conduct of noncitizens under international law.”).

209. *See, e.g.*, ANDREW WEISSMAN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 28 (2010), <https://www.uschamber.com/restoring-balance-proposed-amendments-foreign-corrupt-practices-act> [<http://perma.cc/CM3P-JND4>].

210. *See* Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV 781, 795–800 (2011).

211. Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 12, 2004).

212. *Id.*

visas to the United States and has compiled over 66,000 “subject records” for blocked individuals.²¹³

Prior to 2010, the United States did not vigorously enforce Presidential Proclamation 7750.²¹⁴ Several sources criticized the United States for allowing the continued entry of Teodoro Nguema Obiang, the President of Equatorial Guinea, even though “most if not all” of his assets were believed to be derived from corruption involving Equatorial Guinea’s oil and gas reserves.²¹⁵ Under pressure, the Obama Administration increased enforcement thereafter. In 2010, then-Attorney General Eric Holder announced the Kleptocracy Asset Recovery Initiative at the African Union Summit to combat “large-scale foreign official corruption” and recover “public funds for their intended—and proper—use.”²¹⁶ After filing suit against Mr. Obiang’s son’s property in 2012, the United States entered into a settlement in October 2014, which required the liquidation of assets found in the United States.²¹⁷ The funds were placed in a settlement account and distributed to a charity chosen jointly by Mr. Obiang’s son and the United States.²¹⁸

Compounding the lack of enforcement, Proclamation 7750 has little deterrent effect because enforcement records are not released. Visa determinations and corresponding rationales are required by statute to remain confidential, even from the applicant.²¹⁹ Simply because enforcement actions are not made public, however, does not mean Proclamation 7750 has had no effect. For example, a confidential August 27, 2004 telegram from the U.S. embassy in Jakarta to Washington, D.C., disclosed by WikiLeaks, “established an interagency working group to identify major Indonesian corruptors” and stated that “Indonesian officials

213. *Human Rights Violators & War Crimes Unit: Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/human-rights-violators-war-crimes-unit> (last visited Oct. 21, 2015) [<http://perma.cc/3QRZ-PWE6>].

214. Prior to 2010, the State Department had only one part time official working on Proclamation 7750. See Joe Palazzolo, *State Department ‘Broadening Efforts’ to Deny Corrupt Officials U.S. Entry*, WALL STREET J. BLOGS: CORRUPTION CURRENTS (Oct. 13, 2010, 4:47 PM), <http://blogs.wsj.com/corruption-currents/2010/10/13/state-department-broadening-efforts-to-deny-corrupt-officials-us-entry/> [<http://perma.cc/3CM2-55SZ>].

215. Ian Urbina, *Taint of Corruption Is No Barrier to U.S. Visa*, N.Y. TIMES (Nov. 16, 2009) (quoting Memorandum from the U.S. Dep’t of Justice, Criminal Div. to the Cent. Auth. of Fr. (Sept. 4, 2007), <http://documents.nytimes.com/investigating-teodoro-nguema-obiang#p=1> [<http://perma.cc/2LZW-MM6C>]) http://www.nytimes.com/2009/11/17/us/17-visa.html?_r=2&hp& [<http://perma.cc/EH26-EJGT>]; see also Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives*, 26 AM. U. INT’L L. REV. 315, 364 (2011).

216. Eric Holder, Attorney Gen., Attorney General Holder at the African Union Summit (July 25, 2010), <http://www.justice.gov/opa/speech/attorney-general-holder-african-union-summit> [<http://perma.cc/J6NG-GFKL>].

217. Stipulation and Settlement Agreement at 5, *In re One Michael Jackson Thriller Jacket*, No. 2:11-cv-03582-GW-SS (D.D.C. Oct. 10, 2014).

218. *Id.* at 18–20.

219. See 8 U.S.C. § 1202(f) (2012); see also U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 1 (2014), <http://www.state.gov/documents/organization/86926.pdf> [<http://perma.cc/NZ83-BRKR>].

indicate that the GOI [Government of Indonesia] welcomes the judicious implementation of PP7750.”²²⁰

Existing legal authorities would allow for the public disclosure of those denied entry under this policy. The President has the authority to make a proclamation, as he or she “may deem to be appropriate,” to suspend the entry of aliens into the United States if their entry “would be detrimental to the interest of the United States.”²²¹ This power allows the President to circumvent restrictions on the publication of visa determinations and has been used in numerous instances to publicly deny entry into the United States of Specially Designated Nationals and other blocked persons. For example, on March 8, 2015, President Obama signed Executive Order 13,692, which blocks the property and suspends entry of seven individuals named in the Annex to that Executive Order believed to be responsible for or complicit in human rights abuses in Venezuela.²²²

The United States has access to stronger policy measures as well. When endemic corruption’s impact threatens the national security, foreign policy, or economy of the United States,²²³ the President can declare a national emergency and invoke the powers in the International Emergency Economic Powers Act²²⁴ (IEEPA). The President regularly invokes IEEPA to block the property of individuals, such as Specially Designated Nationals, when their property enters the custody of a U.S. person.²²⁵ Publishing the names of foreign officials guilty of grand corruption would place them alongside specially designated terrorists and human rights abusers. All U.S. persons, including banks, businesses, and service providers, would be prohibited from dealing with those individuals.²²⁶

The use of IEEPA complements international efforts to publicly track and block the assets of high-ranking public officials guilty of demand-side bribery. As noted above, StAR keeps a database of active corruption cases.²²⁷ To prevent money laundering and facilitate the identification of corrupt officials, StAR lobbies for additional due diligence in the banking sector for individuals identified as Politically Exposed Persons (PEPs)—

220. *Fighting Corruption Using Presidential Proclamation 7750*, WIKILEAKS (Aug. 27, 2007, 4:09 AM), https://wikileaks.org/plusd/cables/07JAKARTA2339_a.html [<http://perma.cc/HUL2-8LCH>].

221. 8 U.S.C. § 1182(f).

222. Exec. Order No. 13,692, 80 Fed. Reg. 12,747, 12,747, 12,751 (Mar. 8, 2015).

223. Such a threat is not farfetched. Corruption undermines both economic growth and leads to the creation of powerful organized criminal networks. See Keith Thompson, *Does Anti-Corruption Legislation Work?*, 16 INT’L TRADE & BUS. L. REV. 99, 119 (2013) (“If corruption is not systematically addressed, increasing despair that legal and social justice can ever be achieved, [sic] could see the whole world descend into a state of endless crime and violence.”).

224. 50 U.S.C. § 1701(a) (2012).

225. See, e.g., Exec. Order 13,692, *supra* note 222.

226. For a database of all screening lists, see *Consolidated Screening List*, EXPORT, <http://apps.export.gov/csl-search/> (last visited Oct. 21, 2015) [<http://perma.cc/957R-R4MY>].

227. See *supra* note 173 and accompanying text.

those officials in a position capable of engaging in large-scale corruption.²²⁸ The Senate Permanent Subcommittee on Investigations has recommended implementing those reforms through legislation to reduce the opportunities corrupt foreign public officials have to use the United States to hide assets.²²⁹ Groups such as Transparency International have made disclosure of corporate beneficial ownership a major priority as part of its initiative to “[u]nmask the [c]orrupt.”²³⁰

The United States could also use its voice and vote in the World Bank and other IFIs to push those institutions to take concerted steps against countries that are systemically failing to prevent and remediate bribery and corruption in their development projects. This would be most effective, obviously, if done in conjunction with other countries. U.S. legislation already directs the use of voice and vote in these institutions toward certain policy objectives, so this would simply be an extension of that approach.²³¹ The World Bank and other IFIs are uniquely positioned to influence country behavior, especially of the poorest countries that are the focus of their lending.

F. National Law Measures Targeting Countries: Naming and Shaming

Beyond measures targeting individuals, the United States also has tools to bring diplomatic pressure to countries in the bribery and corruption arena. Such “naming and shaming” strategies are similar to those employed by nongovernmental organizations, such as Transparency International’s Corruption Perceptions and Bribe Payers Indices.²³²

The United States already publishes some reports for similar purposes, such as the Special 301 Report, in which the U.S. Trade Representative identifies foreign countries that “deny adequate and effective protection of intellectual property rights, or deny fair and equitable market access to U.S.

228. See THEODORE S. GREENBERG ET AL., *POLITICALLY EXPOSED PERSONS: PREVENTIVE MEASURES FOR THE BANKING SECTOR* xv–xvi (2012) (ebook), https://star.worldbank.org/star/sites/star/files/Politically%20Exposed%20Persons_0.pdf [<http://perma.cc/Y66T-GPRH>].

229. COMM. ON HOMELAND SEC. & GOV. AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, 111TH CONG., *KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES* 6 (2010), <http://www.hsgac.senate.gov/download/psi-staff-report-keeping-foreign-corruption-out-of-the-us> [<http://perma.cc/2SE3-XMUS>].

230. *Unmask the Corrupt*, TRANSPARENCY INT’L, http://www.transparency.org/unmask_the_corrupt/en/ (last visited Oct. 21, 2015) [<http://perma.cc/4E4Z-9G6C>].

231. 22 U.S.C. § 262d (2012) (directing the use of voice and vote in human rights and U.S. assistance policies with international financial institutions).

232. See *Bribe Payers Index: Overview*, TRANSPARENCY INT’L, <http://www.transparency.org/research/bpi/overview> (last visited Oct. 21, 2015) [<http://perma.cc/4E4Z-9G6C>]; *Corruption Perceptions Index: Overview*, TRANSPARENCY INT’L, <http://www.transparency.org/research/cpi/overview> (last visited Oct. 21, 2015) [<http://perma.cc/UFG5-LCNP>]. The World Bank’s Ease of Doing Business Index and the American Bar Association’s Rule of Law Initiative have similar objectives. See *ABA Rule of Law Initiative*, AM. BAR ASS’N., http://www.americanbar.org/advocacy/rule_of_law.html (last visited Oct. 21, 2015) [<http://perma.cc/B23W-J975>]; *Economy Rankings*, WORLD BANK GRP., <http://www.doingbusiness.org/rankings> (last visited Oct. 21, 2015) [<http://perma.cc/8CRP-HDBC>].

persons that rely upon intellectual property protection.”²³³ Those reports classify countries on “Priority” and “Watch” lists and include an investigative section on each country that summarizes the status of its individual intellectual property protections.²³⁴ The purpose of the Special 301 Report is not enforcement: sanctions cannot be invoked unless consistent with a ruling of the World Trade Organization Dispute Settlement Body.²³⁵ Rather, the Special 301 Report provides visibility about the status of intellectual property protections and publicly places diplomatic pressure on other countries to comply with that country’s obligations.

Since 2002, the U.S. Millennium Challenge Corporation has conditioned development assistance support on countries’ satisfaction of certain governance and anticorruption criteria.²³⁶ The publication of watch lists with a particular focus on the anticorruption policies and current enforcement environment in countries that present demand-side bribery challenges would complement this approach. A focus on the domestic capacity and willingness of foreign countries to prosecute demand-side bribery can serve the dual purposes of providing visibility to corruption risks and placing diplomatic pressure on those countries to implement reforms.

G. State Responsibility

Finally, consideration could be given to establishing as a ground of state responsibility in international law the sustained and systematic failure of a state to prevent, detect, and remediate bribery and corruption. While a full examination of this topic is beyond the scope of this Article, the emergence of an international consensus, as reflected in the treaties discussed earlier, that states have duties to take measures to combat corruption is an important first step in developing such a theory.²³⁷ Analogies may be found in other areas of law, such as health, safety, and the environment, where a “failure to prevent” theory has been used as a basis for state

233. 19 U.S.C. § 2242 (2012).

234. See AMBASSADOR MICHAEL G. FROMAN, U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 2015 SPECIAL 301 REPORT 32, 59 (2015), <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf> [<http://perma.cc/84XE-A4SX>].

235. World Trade Organization [WTO], *United States—Sections 301–310 of the Trade Act of 1974*, at 1, WTO Doc. WT/DS152/R (Jan. 25, 2000), https://www.wto.org/english/tratop_e/dispu_e/wtds152r.pdf [<http://perma.cc/B3AR-33MM>].

236. See *Control of Corruption Indicator*, MILLENNIUM CHALLENGE CORP., <https://www.mcc.gov/who-we-fund/indicator/control-of-corruption-indicator> (last visited Oct. 21, 2015) [<http://perma.cc/JY84-5T3A>]. The indicator is a “hard hurdle” for MCC development assistance, and MCC has stated that fighting corruption is one of its highest priorities. Millennium Challenge Corporation, *Building Public Integrity Through Positive Incentives: MCC’s Role in the Fight Against Corruption* 1, 3 (Millennium Challenge Corp., Working Paper, Apr. 2007). Because a recipient country must be in the top half of its peer countries to qualify for development assistance, the indicator has come under some scrutiny for being imprecise. See Casey Dunning et al., *Hating on the Hurdle: Reforming the Millennium Challenge Corporation’s Approach to Corruption*, MCA MONITOR, Mar. 2014, at 1.

237. See *supra* Part I.B.

responsibility.²³⁸ Such a theory would allow a state whose interests have been harmed by another country's persistent unremedied corruption to bring a state-to-state claim in international tribunals.

CONCLUSION

As enforcement of supply-side TNB statutes increases, the need for effective enforcement on the demand side increases as well. While a legal framework for demand-side prosecution is emerging, additional tools are needed. Some tools may be better focused on grand corruption with transnational impacts, while others focus on petty corruption, whose structural causes may be more easily remedied through technical assistance and other similar strategies. Some tools may be national in origin, while others would require action at the international level. This Article has endeavored to outline preliminarily a range of potential tools for further consideration.

238. *See generally* Trail Smelter Case (United States v. Canada), 3 U.N. REP. INT'L ARB. AWARDS 1905 (1941).