Beyond Bribery: Rethinking the Form of Corruption in Sub-Saharan Africa’s Extractive Industries

By

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Abstract: There has been a rise in foreign direct investment (FDI) in Sub-Saharan Africa’s extractive industries. Currently, the relationship between graft and FDI is widely perceived as one in which FDI inflows are either positively or negatively affected by bribery corruption. With the focus on bribery corruption, legal measures have been implemented to combat graft in this area, yet less attention is being paid to other forms of corruption that relate to FDI and Sub-Saharan Africa’s extractive industries. This thesis will argue that the definition of ‘corruption’, with respect to FDI and extractives in SSA, should not be understood only as bribery corruption, but should include graft of other forms.
Acknowledgements

This thesis is dedicated to my mother, whose path I have always aspired to follow, and to Hayden, for his overwhelming support. I would also like to thank my SJD supervisor, Daniele Bertolini, for helping me develop the very broad idea I started with, into the hypothesis that later became the main concept of this paper. Lastly, I would like to thank Michael Trebilcock, for his patience, and for providing me with the corrections and suggestions that have made this thesis what it is today.
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Introduction

The resource-rich region of Sub-Saharan Africa is rife with opportunities for foreign direct investment (FDI). In its 2013 World Investment Report, the United Nations Conference on Trade and Development indicated that in 2012, investment inflows in the Sub-Saharan African region increased by 5% over the previous year to 50 billion dollars. The rapid rate of growth in the region is clear, with FDI projects in the area having increased at a rate of 22% since 2007. Although the rise in foreign direct investment is attributable to numerous industries including agriculture, manufacturing and infrastructure, natural resources continue to draw in major investors, with ‘investment in extractive industries [remaining] the most important driver of FDI to Africa.’

Canada’s presence in the region is significant in the mining sector. Currently, 185 Toronto Stock Exchange listed mining companies are active in Africa. With oil and gas, the United States has established a strong presence in SSA nations such as Cameroon, Nigeria, and Angola through its major resource enterprises including, but not

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3 ibid at 4.
limited to, Exxon Mobil,\textsuperscript{7} Chevron,\textsuperscript{8} and ConocoPhillips.\textsuperscript{9} Despite the economic growth in many Sub-Saharan African nations, development in the region is not reflecting this success.\textsuperscript{10} Corruption is a formidable force within the legal and political frameworks in the region, and is partially to blame for the continued poverty of many of the people.\textsuperscript{11}

The relationship between corruption\textsuperscript{12} and FDI has often been perceived as one in which the former has acted as a hindrance to potential investment ventures. This stems from the notion that corporations are reluctant to invest in regions where exploitation runs rampant, in fear of having to pay additional fees through bribes to corrupt officials who oversee deals and permits.\textsuperscript{13} Thus, bribery corruption has remained a prevailing focus for anti-corruption measures, with regards to FDI and international business transactions in Sub-Saharan Africa. Through the enforcement of the United States’ Foreign and Corrupt Practices Act (FCPA), and its Canadian equivalent the Corruption of Foreign Public Officials Act (CFPOA), at the very least, significant mechanisms have been implemented to combat this form of corruption, hereinafter ‘bribery corruption’.

\textsuperscript{7} Exxon Mobil, Exxon Mobil in Africa, online: Exxon Mobil <http://www.exxonmobil.com/Europe-English/Files/africa_brochure.pdf> at 3-9.
\textsuperscript{11} Greg Mills, Why Africa is Poor and what Africans can do about it (Johannesburg: Penguin, 2010) at 1.
\textsuperscript{12} ‘Corruption’ in this context can be construed as bribery.
Despite these positive changes, the relationship between extractive foreign direct investment in Sub-Saharan Africa, and corruption ought to be viewed from another perspective. Although FDI inflows are still subject to bribery corruption, foreign direct investments, and business transactions with host governments are also subject to other forms of corruption. These alternate forms of graft affect development in SSA nations, but are not receiving as much international attention as bribery corruption. The most notable of these forms of corruption is the embezzlement of FDI royalties and other resource revenues by corrupt government officials of host nations. In other words, currently, the main focus regarding the relationship between corruption and FDI has been on bribery corruption, and international statutory and organizational measures have been implemented in response to this issue. While the focus bribery corruption has garnered is warranted, attention must also be paid to other forms of corruption that occur in the extractive industries within host nations; or more particularly, the graft that follows, but still stems from, the completion of an international business transaction.

By rethinking the form of corruption, as well as its relationship to FDI, as one that includes but does not only amount to bribery, international focus can spur reforms and the establishment of stronger anti-corruption measures that would vastly mitigate graft in SSA.

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14 In this context, other forms of corruption amount to embezzlement, exploitation, patriarchy, and abuse of office for personal gain.
15 ‘More particularly, as opportunities for the elite to (reap benefits from funds and institutions to take what belongs to the people). who have used the proceeds from oil and other commodities to line their own pockets, letting their nations go into financial decay and even ruin in the process...’ Mark Watson, *America, Africa and Oil*, online: Watson’s Web <http://www.markswatson.com/afrioil.html>.
This thesis will focus on three natural resource rich nations\(^\text{16}\) that are frontrunners for foreign direct investment inflows in Sub-Saharan Africa, and are hosts to both American and Canadian companies.\(^\text{17}\) These nations, Nigeria, Angola and the Democratic Republic of Congo also carry particularly low scores on the Worldwide Governance Indicators’ corruption index.\(^\text{18}\)

In Part I, it will be argued that the enforcement of the Foreign Corrupt Practices Act, the Corruption of Foreign Public Officials Act and other international anti-bribery instruments, illustrates the strong international response to bribery corruption, and efforts by governments to effectively mitigate this form of graft. Part II of this essay will argue for a new perspective on the form of corruption with regards to extractive FDI: as one that is not exclusive to bribery, but includes embezzlement, by providing further opportunities and incentives to the powerful to engage in corrupt practices.\(^\text{19}\) Examples will be drawn from the three aforementioned nations to illustrate how the oil and mining industries have fueled corruption amongst the elite within those countries. Part III, will address why the relationship between FDI and corruption ought to be viewed from a new perspective. Suggestions to mitigate state and institutional corruption in SSA will also be discussed. Part VI will conclude.


\(^{17}\) *Supra* note 2 at 32.


\(^{19}\) *Supra* note 15.
Part I: Developments in the Fight against Bribery Corruption

i. What is Corruption?

Prior to exploring the effect the *Foreign Corrupt Practices Act* and the *Corruption of Foreign Public Officials Act* have had on the relationship between corruption, and foreign direct investment and the extractive industries, the definition of corruption in this context must be elucidated. ‘Corruption’ is a term that is not easily defined, as whether an act or institution is corrupt, is dependent on numerous factors. Generally speaking, however, corruption can be described as ‘the abuse of public office for private gain.’\(^{20}\) The Swedish Development Cooperation Agency is more specific, narrowing its definition of corruption, as follows: ‘...when institutions, organizations, companies or individuals profit improperly through their position in an activity and thereby cause damage or loss.’\(^{21}\) Drawing from these two assertions, corruption in this context, can amount to an array of dishonest acts on the part of parties in power for personal benefits that they obtain by virtue of their positions.

Corruption that occurs in the form of bribery of foreign officials has been a longstanding issue. The establishment of multi-national corporations and international trade agreements led to the globalization of the problem,\(^{22}\) as companies began to foster more transnational business relationships with foreign host countries. In order to obtain procurement contracts, permits or licenses in foreign nations and influence political decision


making in a manner that would improve their business prospects, corporations succumb to requests for bribes as a means of fulfilling those ends. The act of bribing a foreign official, which can be defined as companies giving ‘any article of value to foreign government officials, in exchange for any act or omission in performance of that official’s function’, was once largely condoned, provided no bribes occurred in a corporation’s home jurisdiction.

The international perception on bribery of foreign officials has dramatically changed in recent years and the United States is no longer the only nation that prohibits its companies from bribing international officials. The detrimental effects stemming from bribery are arguably what have led to the prohibition of the practice amongst companies based in the United Kingdom, Canada, and the U.S. When addressing the recent CFPOA amendments enacted by Parliament, the Canadian Foreign Affairs Minister, John Baird, conveyed the government’s expectations that Canadian companies ‘continue to act in good faith’, ‘play by the rules’ and ‘compete with the best and win fairly’ when engaging in business abroad. Bribery effectively undermines these underlying aims that comprise the spirit of anti-corruption legislation. Through its distortion of the market and its fostering of unfair competition, it has been widely perceived as the main issue of focus regarding the term

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24 Supra note 3, at 553.
26 Britain, Canada and all other OECD countries now have statutes prohibiting companies and individuals from bribing foreign officials, as required by the OECD Anti-Bribery Convention.
28 Supra note 4.
‘corruption’ in the context of foreign business dealings. Although bribery continues to remain a problem, measures have been implemented to improve the enforcement of anti-bribery laws, as will be seen, below.

Corruption in the form of bribery has had two arguable effects on foreign direct investment. One view is that requests by domestic officials for bribes inhibit foreign investors from pursuing business in certain host nations.\(^3^9\) Propositions for bribes result in reluctance on the part of prospective investors, who would rather avoid the additional costs and expenses that accompany ‘paying off’ foreign officials.\(^3^0\) The alternate view, advanced by Kolstad and Wiig, is that corruption in host countries affects extractive FDI by attracting certain investors who favour using bribery to access resources.\(^3^1\) In their empirical study, evidence was drawn from 81 countries to support the conclusion that an ‘an increase in host country corruption is associated with an increase in extractive FDI inflows.’\(^3^2\) They advance that multinational companies have a preference for nations that experience an ‘increase in corruption.’\(^3^3\) Despite the costs that are accrued when bribing a foreign official, companies are given ample opportunity to acquire more resource rents when the nation hosting them is more corrupt.\(^3^4\) The rewards companies obtain when bribing foreign officials are two-fold and arguably outweigh the costs of a bribe itself. Companies can reap the benefits of higher resource rents,
while also securing lucrative contracts and by-passing their competition, who may be less inclined to pay a hefty sum to a requesting official.

It is not easy to gauge in which way companies will react when faced with the opportunity to bribe officials, however. Whether these corrupt practices attract or repel investment is likely reliant on how competitive the business prospect is and the incentives of the member of the investing company who is confronted with the request for a bribe. In U.S. Securities and Exchange Commission v. Weatherford International Ltd., requests made by a representative of the Angolan government oil company, Sonangol, for unauthorized payments were promptly denied by the area manager who worked for the defendant company. Several other employees in the company subsequently paid the government official bribes when the request was made again. This case evidences the complexity of the dynamic of a large corporation, where some employees are less willing than others to engage in corrupt practices, while some likely view bribery as a mere side effect of doing business in Africa. Whether corruption encourages or curtails investors, however, both arguments acknowledge that FDI is subject to corruption and negatively or positively affected by it as a result.

ii. Current Measures Implemented to Combat Bribery Corruption

When viewing the relationship between FDI and corruption, as one in which the occurrence of foreign investment is affected by graft, the term ‘corruption’ is used interchangeably with bribery; the latter of the two entailing the payment of large sums of

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35 Securities and Exchange Commission v Weatherford International Ltd, 13 CV (4) 3500 (SD Tex 2013).
36 Ibid, at 5.
37 (whether it is through the occurrence of corrupt practices in host nations attracting foreign investors or repelling them)
money on the part of businesses directly to foreign officials, in exchange for the issuance of licenses or permits that are necessary for investing companies to engage in extractive projects.\textsuperscript{38} This corruption is associated with business and transactional exchanges between companies and host nation officials.\textsuperscript{39} Following the enactment of the FCPA, however, there has been significant enforcement of anti-bribery laws and substantial penalties for the ‘paying off’ of foreign officials.\textsuperscript{40} The FCPA\textsuperscript{41} stipulates that it is unlawful for American citizens, companies listed on an American Stock Exchange, or companies that have a substantial link to the U.S., to make ‘an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to’ foreign officials\textsuperscript{42} with the purpose of influencing an act by that official or inducing them into exerting their influence in a certain way.\textsuperscript{43} The Securities and Exchange Commission (SEC), and the U.S. Department of Justice have brought several cases against companies operating in Nigeria, most of which dealt with the bribery of officials in exchange for land permits.\textsuperscript{44} The recent \textit{Weatherford}\textsuperscript{45} case deals with bribery corruption in Angola and the Congo, where

\begin{footnotesize}
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\item \textsuperscript{38} There is a great deal of SEC/FCPA jurisprudence highlighting the prevalence of this bribery. For a list on FCPA cases, see: Securities and Exchange Commission, \textit{SEC Enforcement Actions: FCPA Cases}, online: U.S. Securities and Exchange Commission <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.
\item \textsuperscript{39} This is contrasted to the corruption referred to in Part 2, which is corruption \textit{within} host nations and separate of business dealings with foreign companies.
\item \textsuperscript{40} As per Weatherford, previous and subsequent SEC cases.
\item \textsuperscript{41} \textit{Foreign and Corrupt Practices Act}, 15 USC §§ 78dd-1 (1977).
\item \textsuperscript{42} \textit{Ibid}, at section (1)(A).
\item \textsuperscript{43} \textit{Ibid}.
\item \textsuperscript{44} See: \textit{Securities and Exchange Commission v ENI, S.p.A. and Snamprogetti Netherlands}, BV, 10 CV (4) 02414 (SD Tex 2010) and; \textit{Securities and Exchange Commission v Willbros Group, Inc., et al}, 08 CV (4) 01494 (USDC/SD Tex 2008).
\item \textsuperscript{45} \textit{Supra} note 35.
\end{itemize}
\end{footnotesize}
penalties of $87.2 million dollars were imposed on the company for infringing the anti-corruption provisions.\textsuperscript{46}

The climate for corruption in the 1970s before the FCPA was enacted by Congress differed from the disciplinary approach that has been adopted by governments today.\textsuperscript{47} As such, FDI deals and inflows, while influenced by corruption, are no longer affected by it to the extent they once were. An investigation by the SEC in the mid-1970s led to the discovery of bribes issued by over 400 American companies to foreign officials.\textsuperscript{48} Since this date, numerous companies have been prosecuted with penalties for infringements ranging from $4 million dollars to $300 million dollars.\textsuperscript{49} The U.S. was the first nation to enact anti-bribery provisions that dealt with graft practices concerning foreign officials. The American Act, established in 1977, predates Canada’s CFPOA by over twenty years. Naturally, the number of cases the SEC has prosecuted under the FCPA substantially surpasses the number of Canadian CFPOA cases. This is arguably by virtue of the first statute’s longevity and the litigious approach employed by the Securities and Exchange Commission.

iii. CFPOA-Specific Anti-Bribery Advancements

At present, Canada has prosecuted only two cases under the CPPOA. In Griffiths\textsuperscript{50} an Albertan oil company was charged\textsuperscript{51} with violating section 3(1)(b) of the CFPOA\textsuperscript{52} when it


\textsuperscript{48} Ibid.

\textsuperscript{49} Supra note 38. (For cases highlighting this range).

\textsuperscript{50} R v Griffiths \textit{Energy International}, 2013 ACJ 412 (available on QL).

\textsuperscript{51} Ibid, at 5.
bribed the Ambassador of Chad to exert his influence so that the company’s contract dictating the amount of oil it was permitted to extract could be altered.\textsuperscript{53} This case holds that even if companies do not benefit from the bribery, or if only an offer is made but no actual payment occurs, they are still subject to sanctions under the Act. \textit{Griffiths} is only one of two cases in Canada, in comparison to the decades of cases prosecuted in the U.S. under the FCPA. For this reason, Canada has recently been criticized by the Organization for Economic Co-operation and Development (OECD) for the lack of cases enforcement agencies have brought under the CFPOA.\textsuperscript{54} The widened scope of what amounts to an offence under the Act, and recent CFPOA amendments, however, effectively evidence Parliament’s intention to ensure that companies are deterred from and punished for an array of acts that were once condoned under Canadian law.

Under the recent CFPOA amendments, the following changes have been made.

a. An increase in the maximum imprisonment offences for ss. 3(1) bribery offences:

   Subsection 3(2) of the CFPOA stipulates that the maximum sentence for a ss. 3(1) bribery offence cannot exceed 14 years.\textsuperscript{55} This is a notable shift from the previous 5 year maximum imprisonment term for bribery offences.\textsuperscript{56}

\begin{footnotesize}
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\item \textsuperscript{52} \textit{Corruption of Foreign Public Officials Act}, S.C. 1998, c. 34, s. 3(1).
\item \textsuperscript{53} Paul Michael Blyschak & John W. Boscariol, \textit{A Closer Look at the Griffiths Energy Case: Lessons and Insights on Canadian Anti-Corruption Enforcement}, online; McCarthy Tetrault <http://www.mccarthy.ca/article_detail.aspx?id=6176>.
\item \textsuperscript{55} \textit{Supra} note 52, at ss. 3(2).
\end{itemize}
\end{footnotesize}
under the Act was, and still is, considered an indictable offence. Raising the maximum penalty reflects the government’s adoption of a more punitive approach to the sentencing of offences.

b. An additional offence under the Act for falsification of records of hidden bribe payments to officials:

Pursuant to ss. 4(1)(a) of the CFPOA, it is now an offence under the Act to ‘[establish or [maintain] accounts which do not appear in any of the books and records [companies] are required to keep.’ Additional offences recently implemented include making transactions that are not adequately identified in company books, recording non-existent expenditures, using false documents, and unlawfully destroying accounts books. This, in effect, means that companies are punishable under the law and offending individuals can face a sentence of 14 years in prison, not for bribing officials, but for attempting to conceal the bribery. This indicates that dual liability is possible under the Act for a ss. 3(1) offence of bribery, and a ss. 41) offence of covering up the bribe. Company officers and officials who engage in both offences can face up to 28 years of imprisonment. The amendments also ensure that officer and directors who do not engage in actual

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57 Supra note 52, at ss. 4(1)(a).  
58 Ibid, at ss. 4(1)(b).  
59 Ibid, at ss. 4(1)(c).  
60 Ibid, at ss. 4(1)(e)  
61 Ibid, at ss. 4(1)(f).
bribery but are involved in a subsequent cover-up are not absolved from liability.

This amendment effectively lengthens the maximum period for possible imprisonment for offenders of both ss. 3(1) and ss. 4(1), and also widens the scope of possible offenders through the latter provision.

c. Removal of the ‘real and substantial’ link requirement with respect to the prosecution of bribery offences:

Canadian prosecutors are normally not permitted to exert their prosecutorial powers with regards to offences committed outside the country. In order for an offence committed outside of Canada to be prosecuted by the Crown, the offence must have a ‘real and substantial link’ to Canada. Foreign bribes, prior to the CFPOA amendments, would likely fail the ‘real and substantial link’ test, and offenders could evade prosecution for this reason. The amendments have rectified this issue by expanding Canada’s prosecutorial jurisdiction with respect to foreign bribery offences. Canadian citizens, permanent residents and companies incorporated, formed or organized under Canadian laws, are now subject to the Act, even if the bribe did not occur in Canada.

d. Removal of the exception for facilitation payments:

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62 Pain, Tushar, *Bad Behaviour Abroad: Beyond the Reach of the Canadian Criminal Justice System?*, online: Tushar K Pain Criminal Defence Lawyer <http://torontocriminaldefence.com/>, citing the Canadian Criminal Code: Criminal Code, RSC 1985, c C-46 at ss. 6(2).
63 Ibid; citing the following case: *R v Libman* [1985] 2 SCR 178.
64 *Supra* note 52, at ss.5(1).
At present, Canadian companies are prohibited from bribing foreign officials, but facilitation payments do not fall under the ambit of a ss. 3(1) offence.\(^{65}\) The government intends to eradicate this exception and ban facilitation payments in a future amendment of the CFPOA. Facilitation payments are payments made by companies to ‘expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions.’\(^{66}\) These payments are given to an official so that the official can carry out, or ‘speed up’ their duties.\(^{67}\) The UK Bribery Act currently prohibits facilitation payments, while under the FCPA, there is an exception for them.\(^{68}\)

While facilitation payments can be given in good faith, it is clear from their definition in the CFPOA, that the line between a payment and bribery is not easily discernable. By prohibiting facilitation payments, the Canadian government can effectively ensure that companies do not cross the line, or make bribes under the pretence of innocent payments.

iv. What Recent Advances Mean for the Fight Against Bribery

These enactments have a significant impact on the fight against bribery. While Canadian enforcement agencies are not quite as litigious as their counterparts south of the border, these amendments have opened the door to far more circumstances under which

\(^{65}\) Ibid, at ss. 3(4).

\(^{66}\) Ibid.

\(^{67}\) United Kingdom Serious Fraud Office, Facilitation payments, online: Serious Fraud Office <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx>.

CFPOA action can be taken. By widening its jurisdiction, enacting new provisions prohibiting facilitation payments and certain bookkeeping practices, and almost tripling the maximum prison sentences for convicted individuals, the Canadian government is moving more forcefully to combat the issue. Not only do these new changes arguably act as deterrents for prospective offenders, they also ensure that questionable actions by companies that were once tacitly approved through the Act’s silence on certain matters, are no longer acceptable. The best examples of this are perhaps the removal of the real and substantial link test and the barring of dubious bookkeeping practices.

Part II: Beyond Bribery- Corruption in the Extractive Industries of SSA

There are several perceived underlying causes of corruption; however, measuring graft in a particular region often presents difficulties. How these theories and arguments, concerning the causes of corruption, apply to the climate of corruption in Sub-Saharan Africa will be addressed, below. It is necessary to convey a clear portrait of corruption in the SSA region prior to arguing that other forms of corruption are prevalent in and result from FDI transactions and the extractive industries.

i. Causes of Corruption

There are numerous perceived causes of corruption, ranging from low economic development to high state intervention in a nation’s economy, the effectiveness of a

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70 Ibid, at 406.
country’s legal system, Daniel Treisman develops several hypotheses concerning corruption, namely, the abovementioned factors, but also that nations with continuous and established democracies are less corrupt, as are former British colonies and nations with more literate and educated populaces. Trebilcock and Prado argue that poor countries have fewer avenues through which they can combat corruption, and that a lack of resources leads to more graft.

Each of these hypotheses is relevant when assessing the climate of corruption in African nations. With regards to the effectiveness of a nation’s legal system, the more effective it is, the higher the likelihood that there will be lower rates of corruption. This is largely due to an increase in the probability of graft practices being caught, but also in the ‘degree of protection and the opportunities for recourse’ offered to citizens harmed by corrupt acts committed by government officials. Treisman’s subsequent argument that former British colonies are less corrupt stems from the notion that procedural propriety is so engrained in the British legal system, that former colonies of Britain will reflect similar respect for legal institutions and laws. How well this theory applies to Nigeria is questionable, however.

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71 Ibid, at 405.
72 Surpra note 69, at 406.
73 Surpra note 69, at 433.
74 Surpra note 69, at 418.
75 Surpra note 69, at 405.
78 Surpra note 69, at 403
79 Nigeria was a colony of Britain from 1800-1960, but today is considered relatively corrupt.
Poorer countries are perceived to be more corrupt than richer nations, and economic development has been proven to reduce corruption. Treisman supports the notion of a causal link between higher development and lower corruption by arguing that economic development leads to an increase in education and literacy amongst a nation’s populations, which in turn increases the likelihood of citizens noticing graft practices and lowers the likelihood of their tolerance for them. The merits of these arguments are illustrated through reading Norway’s development, literacy and corruption statistics in combination. Regarded as the fourth richest nation in the world, Norway’s literacy rate is 100% and unsurprisingly, it ranks 5/177 nations on Transparency International’s Corruption Perceptions Index. Similar trends are exhibited in the statistics of the world’s two most developed nations: Qatar and Luxembourg.

Democracy is also a relevant factor concerning the perceived levels of corruption a nation possesses. Trebilcock and Prado advance the argument that functional democratic regimes inhibit corruption. Treisman’s research concludes that countries that ‘had been

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80 Surpra note 69, at 430.
81 Surpra note 69, at 404.
82 Ibid.
84 Index Mundi, Norway Literacy, online: Index Mundi <http://www.indexmundi.com/norway/literacy.html>.
85 2013: http://www.transparency.org/cpi2013/results
86 Index Mundi, Qatar Literacy, online: Index Mundi <http://www.indexmundi.com/qatar/literacy.html>.
87 ‘Corruption in Qatar is generally low and is one of the lowest compared to neighboring Arabic countries.’; Business Anti- Corruption Portal, A Snapshot of Corruption in Qatar, online: Business Anti-Corruption Portal <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/qatar/snapshot.aspx>.
88 Index Mundi, Luxembourg Literacy, online: Index Mundi <http://www.indexmundi.com/luxembourg/literacy.html>.
89 Supra note 76, at 185.
democracies...continuously since 1950 tended to be perceived as less corrupt.\textsuperscript{90} How long a country had maintained a democracy is deemed more important than whether or not a country is currently a democracy, when assessing corruption within that nation.\textsuperscript{91} The link between established democracy and lower corruption appears to be a valid one. Autocracy in a nation often entails a lack of resistance amongst the general populous, which would inevitably lead to fewer challenges of misconduct by state officials. The mere façade of a democracy can also mask the extent of the government’s control of and interference in the economy, as well as officials’ abilities to exploit their offices. Both a lack of democracy, and the presence of a contrived democracy can foster graft in the absence of opposition by a nation’s inhabitants.

Corruption tends to be more prevalent in countries rich in high resource endowments, supporting the notion that natural resources foster corruption.\textsuperscript{92} Treisman argues that the natural resource curse effects are dissipated when ‘economic development and democracy are accounted for.’\textsuperscript{93} This suggests that in the absence of economic development and democracy, there are more opportunities for exploitation of resources, and for corruption to occur through that avenue. The natural resource curse is a prevalent issue in developing nations around the world. Of the numerous causes of the resource curse, corruption is arguably a dominant one.

ii. Issues With Measuring Corruption

It is worth noting the difficulties associated with measuring how corrupt a nation is. Accurately determining levels of corruption proves difficult as often graft practices need to be

\begin{itemize}
\item \textsuperscript{90} Supra note 69, at 433.
\item \textsuperscript{91} Ibid.
\item \textsuperscript{93} Supra note 69, at 429.
\end{itemize}
observed in order to be quantified.\textsuperscript{94} In order to obtain an estimation of the number of graft practices and exchanges that occur amongst officials within a nation, observers would have to be aware of each occurrence - a task that is quite impossible to achieve, as corruption mostly occurs covertly. That said, this does not prevent researchers from determining the general climate of corruption in a nation state. Organizations such as Transparency International and the World Bank Group collect data that is compiled into subjective ratings of corruption. These data are comprised of contributions from surveys and observations from think tanks, private sector firms and international organizations.\textsuperscript{95}

iii. A Portrait of Corruption in Sub-Saharan Africa

As noted above, the more effective a legal system, the more difficult it is for graft to go undetected and unpunished. A legal system is comprised of a framework of statutes and other legal instruments, constitutional principles, legal obligations and institutions that ensure effective enforcement and compliance with laws. It is crucial that institutions within a legal framework operate efficiently and with integrity so corruption can be controlled. African legal systems face several issues that prevent them from adequately combatting corruption. Two institutional issues will be focused on in this section: corruption within judiciaries that assists in the flourishing of misconduct, and ineffective law enforcement on the part of police (that are often also corrupt) that also contributes to lack of control of corruption.

\textsuperscript{94} Supra note 69, at 438.
It is the primary role of a judiciary to try cases with impartiality, as a body independent of any external influence. Many African nations lack independent judiciaries that are not governed by self-interest. Political influence also hampers the legitimacy of rulings. In Angola, judges are ‘appointed to life terms by the president, and are subject to ‘extensive political influence, particularly from the executive.’ The Democratic Republic of Congo (DRC) faces similar issues, with the UN reporting in the past that the legal system has been plagued with ‘lack of independence of the courts and tribunals from the executive, legislative and administrative powers of the state.’ A subsequent overhaul of the system, which entailed the firing of 10% of the nation’s judges, did little to rectify these problems; regions are still affected by bad practices and corruption within the judiciary. Nigeria does not fare any better with regards to the integrity of its judiciary; ‘high profile cases involving [notable people] in the country… were handled by the Nigerian judiciary with total disregard for [public sensibilities] and the rule of law’.

These examples, while derived from only three nations, are illustrative of the state of judiciaries across SSA. The American Bar Association reports that judicial corruption is

97 Ibid.
widespread throughout the region. Two inferences can be drawn from the aforementioned aspects of the judiciary; the courts are often corrupt in their rulings and practices, but they also foster external corruption on the part of executives. Because they often lack independence from the state, courts and tribunals are more likely to rule in favour of offending officials; thus inadequately punishing corruption that occurs. Lack of independence and failures to deter corruption worsen the climate for graft throughout the region.

The law enforcement bodies throughout SSA are also corrupt and inadequate at executing their tasks efficiently. Police are the worst offenders; in East Africa alone, they accounted for over half of corruption cases. The Afrobarometer surveyed citizens over 34 countries in Africa and subsequently rated the police forces as the most corrupt institutions on the continent. Nigeria fared second-worst on the survey results, next to Egypt. Corrupt police forces present a number of difficulties in the fight against corruption; if the police too are corrupt, how can arrests be made and charges laid for graft within other institutions? Police, like the judiciary, have a hand in fostering corruption amongst officials through their lack of action when it comes to arrests. Bribery is perhaps the most prevalent example of police corruption in the region. Bribing a police officer to avoid an arrest, or prevent law enforcement from occurring are widespread acts of police bribery.

104 Ibid.
The roles that both low economic development, and low literacy and education can have in fostering corruption have already been noted. Development and literacy statistics in Sub-Saharan Africa support the contention that corruption is more prevalent in regions where these two factors are low. The World Bank reports that the average GNI per capita for Sub-Saharan Africa is just $1,350 USD. The region is plagued by low development. Of the 912 million inhabitant of the SSA region, only 69% complete their primary school educations. The literacy rate in Angola is 70.4%, the DRC follows with 68%. Nigeria’s literacy rate is currently at 51%. Secondary school participation in Nigeria amounts to just over half the youth population; in Angola, about 20%. School life expectancy in the DRC is averaged at 8.5 years (half that of Canada’s 17 year school life expectancy). These figures indicate that illiteracy is an issue in the abovementioned nations, and that many citizens do not continue their education past secondary school, and even primary school. With all these nations scoring relatively poorly on corruption indexes, Treisman’s argument about low education and development contributing to corruption seems supported.

106 Ibid.
107 Literacy rates based on total adult literacy rates from 2008-2012.
109 Index Mundi, Democratic Republic of the Congo Literacy, online: Index Mundi <http://www.indexmundi.com/democratic_republic_of_the_congo/literacy.html>.
111 Ibid.
112 See below.
114 See below.
The theory that a lack of democracy can lead to more corruption can be corroborated by observing the states of democracy in SSA. While Nigeria, the DRC and Angola prima facie appear to be democracies, this does not necessarily mean that citizens possess the political rights true democracies confer. Freedom House publishes a scale that illustrates political rights and civil liberties in researched nations. A score of ‘1’ indicates citizens ‘enjoy a wide range of political rights, including free and fair elections’; while score of ‘7’ indicates that a country has ‘few or no political rights because of severe government oppression.’ The DRC and Angola both score ‘6’ on the scale and are considered countries with ‘very restricted political rights.’ Nigeria scores a moderate ‘4’ on the scale. Political rights, as defined by Freedom House, entail the freedom to vote in legitimate elections, to have adequate political representation and to ‘participate freely in the political process.’

There are several recognized causes of corruption. While corruption is often difficult to quantify and the abovementioned causes contribute in combination to the problem. It is not easy to determine how much corruption each factor may cause. How natural resources and FDI in these resources relate to corruption in the region will be explored, next.

116 Ibid.
118 Supra note 115.
119 Supra note 117. Nigeria scored ‘4’.
120 Ibid.
iv. Corruption, the Extractive Industries and FDI

As demonstrated in Part I, a great deal of attention has been paid to the issue of bribery corruption and its relationship with foreign direct investment. The focus on bribery is so prevalent, that in defining business corruption, several organizations have limited the scope of their explanations of ‘corruption’ to bribery alone. For example, the United Kingdom’s Serious Fraud Office describes corruption as ‘two or more people entering into a secret agreement... to pay a financial inducement to a public official for securing favour of some description in return.’ While the Business Anti-Corruption Portal acknowledges a number of forms of corruption in its ‘About Business Corruption’ section, it focuses in detail on bribery, listing numerous international legislative resources that deal exclusively with the issue.

The prevailing focus on this form of corruption has led to the establishment of the OECD, a Convention with the objective of preventing bribery. Similarly, the United Kingdom established its *Bribery Act 2010* and the European Union implemented its *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU*. There has been strong legislative response by various countries as means of combatting bribery. While this action is warranted, a narrowed focus on bribery as a

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123 Ibid.
125 UK Bribery Act, 2010, c.23.
126 *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU*, 26 May 1997 (Entered into force 28 September 1999).
prevailing form of corruption, has detracted attention from other forms of corruption concerning both foreign direct investment and the extractive industries that also need to be combatted as vigorously. The consequences of these other forms of corruption not being addressed with the same intensity bribery has, are arguably more detrimental than the developmental hindrances resulting from bribery corruption. Attention must also be paid to the corruption that occurs following the closing of business transactions, (more particularly, the graft associated with the royalties stemming from deals with a multi-national corporation), as well as the corruption that does not amount to bribery but is fostered in the extractive industries, nonetheless.

With this in mind, this section will focus on the relationship between FDI and the extractive industries, and other forms of corruption; more particularly on how theft by state officials of public funds and other types of bureaucratic graft within host nations are serious issues of concern for SSA nations that are rich with natural resources. The growth in FDI and resource extraction, and contrasting low development amidst these nations, as well as the embezzlement and corrupt practices within the respective governments, will be depicted to support the argument that bribery is not the only form of corruption in SSA that warrants strong international and legislative responses.

Foreign direct investment in Africa has seen steady growth in the past decade.\textsuperscript{127} Angola and Nigeria are both listed amongst the top ten destinations in Africa by Ernst and Young, based on the number of new FDI projects started in 2012.\textsuperscript{128} The Democratic Republic

\textsuperscript{127} Supra note 2 at 31.
\textsuperscript{128} Ibid, at 31.
of Congo is also ranked as a frontrunner in Sub-Saharan Africa with a 47.6% growth rate in FDI projects. There is a contrast between the success of these nations and their developmental states, however. Although Angola is the largest oil producer in the region, second only to Nigeria, 70% of its population survives on under 2 dollars a day. Global Finance Magazine has consistently ranked the Democratic Republic of Congo as the poorest country in the world, with a GDP of 394.25 U.S. dollars. The World Bank revealed in 2010 that 68% of Nigerians live below the poverty line (a rise from the 63% in 2004). This percentage translates to 112 million of the 168 million inhabitants in the country.

These dismal developmental statistics evidence the extent to which these nations are subject to the ‘natural resource curse’. The resource curse is described as a situation ‘in which countries with an abundance of non-renewable resources experience stagnant growth.’ These nations will often focus their attention largely on one sector, to the detriment of their fragile economies. Jeffrey Sachs argues that not only is growth stagnated in these nations, but that they tend to grow even more slowly than other developing nations that are resource-

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129 Ibid.
132 (Contrast this to Canada’s GDP of $43,593.74). Ibid.
poor’.\textsuperscript{136} This further probes the question as to how there can be poverty in nations with plenty. Graft has a hand in flourishing under or enticing a resource curse. Lacking income distribution frameworks for the royalties a nation amasses from its resources can also result in government corruption and poor industry regulation.\textsuperscript{137} Consequently, a resource curse can be said to arise as embezzlement by public officials and poor management of royalties from extractive foreign investments result in less money being put toward development. While the causes of a resource curse are many\textsuperscript{138} and it is not always clear to which to attribute a country’s misfortune, it is clear that the curse demonstrates a ‘paradox of plenty’\textsuperscript{139} where nations that ought to be endowed with riches are instead plagued by poverty.

Angola is regularly regarded as one of the most corrupt countries in the world, with Transparency International ranking it 153rd out of the 177 nations on the globe.\textsuperscript{140} Similar figures were conveyed by Transparency International in regards to Nigeria (144th/177),\textsuperscript{141} and DRC (154/177).\textsuperscript{142} For 15 consecutive years, the World Bank has given Angola, Nigeria and DRC consistently low scores on its Control of Corruption index that ‘reflects perceptions of the extent to which public power is exercised for private gain, including both

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item War, poor governance and greed are examples of causes of a resource curse.
\item Ibid.
\item Transparency International, 2013 Corruption Perceptions Index, online: <http://cpi.transparency.org/cpi2013/>.
\item Ibid.
\item Ibid.
\end{enumerate}
\end{footnotesize}
petty and grand forms of corruption.’ Institutional corruption in the region is rampant, and it stems largely from the executive branches or the elite in each state.

While corruption is only one amongst many factors impeding development in Sub-Saharan African nations, it arguably plays a prominent role when it comes to low development. An example of this is the fact that 80% of Nigeria’s oil wealth is distributed amongst the ‘1%’ of the population. This inevitably leads to the question of how distribution is determined, and why the general populations of most of these nations have not benefitted from the inflows stemming from foreign investment. Greg Mills argues that a great deal of poverty in the region is attributable to poor governance, and more particularly, corruption within institutions. The following will illustrate how embezzlement and other forms of graft are widespread in an industry that affords the elite more opportunities to appropriate national funds stemming from FDI inflows.

a. Nigeria

At present, Nigeria is Africa’s largest oil producer, with exports of almost 600 million barrels between 2012 and 2013. Oil exploration in the region commenced in 1958 by Shell and other transnational oil companies (TNOCs) that maintain a

143 Supra note 18.
144 Supra note 11, at 2.
145 Ibid, at 1.
presence in the country today. Shortly after the TNOCs began exploring the region, the nation faced an oil boom in the 1970s.\textsuperscript{149} Since then, the ‘principal stakeholders have remained the elites that dominate the state system.’\textsuperscript{150} As oil exploration in Nigeria is controlled by the government, multi-national companies that invest in and explore the region do so in joint ventures with the Nigerian National Petroleum Corporation (NNPC).\textsuperscript{151} The funds the NNPC acquires from crude oil sales and its multi-national partners is considered public and are meant to be remitted to the Central Bank of Nigeria’s state Federal Account.\textsuperscript{152} The country relies heavily on royalties and the money that stems from crude oil sales and FDI inflows. Kenneth Omeje describes Nigeria as a ‘rentier-state’ that is ‘largely dependent on oil mining rents, taxes and royalties paid by multi-national oil companies.’\textsuperscript{153} Despite the requirement that funds accrued from crude oil sales and oil royalties be deposited as state capital, the NNPC has been accountable several times for billions of lost naira that belong to the public.\textsuperscript{154}

In his paper \textit{Global Corruption and Governance in Nigeria},\textsuperscript{155} Taiwo Makinde argues that through their ‘purchase of concessions in third world countries, to exploit natural deposits of oil, copper, gold, diamonds and the like’, multinationals

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\textsuperscript{149} \textit{Supra} note 146, at 46.  \\
\textsuperscript{150} \textit{Ibid.}  \\
\textsuperscript{151} NNPC, \textit{About NNPC}, online: Nigerian National Petroleum Corporation \textltt{<http://www.nnpcgroup.com/AboutNNPC/CorporatelInfo.aspx>}.  \\
\textsuperscript{153} \textit{Supra} note 148, at 212.  \\
\textsuperscript{154} See below.  \\
\textsuperscript{155} Taiwo Makinde, ‘Global Corruption and Governance in Nigeria’ (2013) JSD 6(8) 108.
\end{flushleft}
induce corruption by paying rulers who violate domestic laws and ‘embezzle a lot of money’.\textsuperscript{156} Makinde associates this with corruption on a global scale, deeming investing companies and their foreign governments as equally corrupt as the officials of host nations who steal public funds.\textsuperscript{157} There is veracity to this assertion. Multinational companies are largely profit-driven and are likely aware of the widespread corruption Nigeria faces. This would lead one to surmise that when investing in the oil industry, multinationals are not only aware of graft but complicit with it by supporting officials who use state funds for their own benefits.

In the autumn of 2013, the Central Bank of Nigeria’s Governor Lamido Sanusi wrote to the nation’s president, Goodluck Jonathan, imploring him to compel the NNPC to remit $50 billion to the country’s Federal Account.\textsuperscript{158} Mr. Sanusi wrote that the Corporation lifted $65 billion worth of oil (600 million barrels) but ‘repatriated only $15, 528,410,098.77... 24% of the value’ to the National Bank. Mr Sanusi further wrote:

...you will recall that as far back as late 2010, I had verbally expressed deep concern about what appeared to be huge shortfalls in remittances to the Federation Account in spite of the strong recovery in oil price... I also expressed a strong view that while Government needs to continue its effort to combat oil thieves, vandals and illegal refineries in the Niger-Delta, the major problem is transactions taking place under legal cover with huge revenue leakages embedded therein.\textsuperscript{159}

Sanusi alluded to corruption ‘under legal cover’ with regards to the missing funds, implicating the NNPC in the process. He has subsequently been suspended by the

\textsuperscript{156}\textit{Ibid}, at 110. 
\textsuperscript{157}\textit{Ibid}. 
\textsuperscript{158}\textit{Supra} note 147. 
\textsuperscript{159}\textit{Ibid}. 
president from his post and the NNPC has stated that his allegations exhibited ‘little understanding of the technicalities of the oil industry.’ Mr. Sanusi’s allegations convey, at best, gross negligence on the part of the NNPC. His cedibility cannot easily be called into question, however, as KPMG released an audit report similarly conveying the Corporation was accountable for billions in missing funds from crude oil sales. The Group found that the NNPC was making deductions from crude oil sales that grossly exceeded the recommendations made by the nation’s petroleum regulator. These over-deductions amounted to ₦15 billion over a 2 month period, however, ‘only ₦4.2bn was swept into the Federal Account by NNPC as adjustment for subsidy claimable in the two months.’ This demonstrates another instance where billions of Naira were not accounted for by the NNPC. Nigerian journalist Daye Okebola reports that analysts believe the ‘lion’s share’ of crude oil earnings has ‘found its way into private pockets.’

The belief that state officials are stealing public funds for their own financial gain is corroborated by the past dealings of Nigeria’s elite. In 2008, a widely publicized scandal emerged in the government when it was revealed that ₦300 million remaining from the 2007 Health Ministry budget was not returned to the

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162 Ibid.
163 Ibid.
treasury, but was shared as a Christmas bonus amongst officials in the
department.\textsuperscript{165} Subsequently, in 2012, chief members of Nigeria’s oil regions
accused the state government officials of illegally depositing oil derivation funds
that were meant to be distributed amongst all levels of government, into specific
state accounts.\textsuperscript{166} Embezzlement is a common practice amongst Nigeria’s elite. Can
it be said that these practices have not extended to the pilfering of crude oil sales
and royalties from FDI as demonstrated above?

Embezzlement is but one additional form of corruption that correlates to
foreign direct investment, the extractive industries and dealings with multi-national
companies. Political corruption has also occurred as a response to growth in the oil
industry. When Olusegun Obasanjo, the former president of Nigeria, was elected
for his first term in office in 1999, he devoted his work to human rights and
combating corruption.\textsuperscript{167} At this time, oil in Nigeria was priced at $25 dollars a
barrel; following the rise in FDI in the region and the increase to $60 a barrel,
Obasanjo tried to alter the constitution to allow him to retain office for an
additional term.\textsuperscript{168} In an attempt to secure a new stint in office, he allegedly bribed

\begin{footnotes}
\item[168] \textit{Ibid.}
\end{footnotes}
lawmakers $1 million dollars per vote to extend his term.\textsuperscript{169} This is an example of political corruption that stems from the oil wealth FDI prompts. With increases in revenues stemming from foreign investments, politicians are seduced by the power and money that accompany growth.

b. Angola

Sonangol is Angola’s largest company and ‘the state’s major source of revenue.’\textsuperscript{170} Government-owned, the company oversees the nation’s oil production. The Organization of the Petroleum Exporting Countries reports that Angola exports and produces 25,500 and 1.7 million barrels of crude oil a day respectively.\textsuperscript{171} Angola is also the world’s fourth largest producer of diamonds, with sales of over one billion dollars a year.\textsuperscript{172} The nation is heavy reliance on non-renewable resource revenues leaves it vulnerable to slow development.\textsuperscript{173}

Issues of transparency in the oil industry are perhaps at their worst in Angola. The oil revenues arising from FDI have afforded the elite of the nation ample opportunity to steal government funds. For example, in 2000, a Houston based oil company, Marathon Oil, agreed to pay Sonangol a bonus in exchange for rights to

\begin{itemize}
\item \textsuperscript{169} Ibid.
\item \textsuperscript{171} OPEC, Angola, online: Organization of the Petroleum Exporting Countries <http://www.opec.org/opec_web/en/about_us/147.htm>.
\end{itemize}
pump the country’s oil reserves.\footnote{Phillip Van Niekerk and Laura Peterson, \emph{Greasing the skids of corruption} (4 November 2002), online: International Consortium of Investigative Journalists < http://www.icij.org/project/making-killing/greasing-skids-corruption>.} One third of the bonus ($13,717,989.31) was sent to an account in Jersey. Later that day, the funds were transferred to a different Sonangol bank account with an unknown location. Subsequently, ‘over the course of that summer, large sums of money travelled from the Jersey account to, among others, a private security company owned by a former Angolan minister, a charitable foundation run by the Angolan president, and a private Angolan bank...’\footnote{\emph{Ibid.}} This transaction is illustrative of a circumstance where the transfer of FDI royalties, rightfully belonging to the state, to the accounts and initiatives of Angola’s elite. Raphael Marques de Morais, an internationally lauded Angolan journalist and human rights advocate, has written extensively on corruption in Angola and the graft practices of the nation’s public servants. Marques argues that Sonangol is the ‘main source of illegal self-enrichment for the top state officials’, whose dealings ‘acknowledge no distinction between public and private affairs.’\footnote{\emph{Supra} note 170, at 3.} Corruption is rife in Angola’s oil industry, and the missing government funds and misallocated royalties from FDI are largely attributable to it. Improved transparency, which would curtail graft, is thwarted by extreme opacity in the Angolan extractive industries sectors.

Angola has faced issues, concerning missing oil revenues, similar to those of Nigeria’s. Between 1997 and 2002, ‘approximately $4.2 billion disappeared from
government coffers.\textsuperscript{177} Five years later, from 2007 to 2010, the amount of missing government funds, associated with Sonangol skyrocketed to $32 billion dollars.\textsuperscript{178} While Forbes reports that the lost funds were later tracked by the IMF to what the Angolan government purported to be ‘quasi-fiscal operations’, Forbes also contends that the funds were likely stolen.\textsuperscript{179} In its damning article on President dos Santos’ daughter, Africa’s only female billionaire Isabel dos Santos, Forbes highlights how the leader has garnered himself a large fortune through his eldest child. As Angolan law precludes public officials from engaging in business dealings with the state to enrich themselves,\textsuperscript{180} President dos Santos has strategically involved his daughter in various transactions involving the state and foreign investors to foster his own fortune.

The president persuaded state-owned diamond company Endiama to enter into a joint venture with Israeli investors.\textsuperscript{181} When the company was later wound-up, the government retained 50%, the Israeli merchants, 24.5%, and the president’s daughter, 24.5%. The nation’s Council of Ministers signed off on the deal despite the fact that it was established to unjustly enrich the president through his family.\textsuperscript{182} This is but one documented example of corruption by the president of Angola that directly relates to FDI and the extractive industries.

\textsuperscript{179} \textit{Supra} note 172.
\textsuperscript{180} \textit{Supra} note 170, at 19.
\textsuperscript{181} \textit{Ibid.}
\textsuperscript{182} \textit{Ibid.}
c. Democratic Republic of the Congo

The Democratic Republic of the Congo possesses unrivalled mineral wealth. In 2009, it was reported that the country’s wealth amounted to $24 trillion.\textsuperscript{183} The nation has the ‘world’s largest reserves of cobalt and significant quantities of the world’s diamonds, gold and copper.’\textsuperscript{184} Despite its high resource wealth, the DRC is marred by poverty and is still recovering from the damage of its previous leader, Mobutu Sese Seko.\textsuperscript{185} Formerly Zaire, the DRC was subject to a vast array of bureaucratic abuses at the hands of its leaders. In 1997, at the close of Mobutu’s tenure, Transparency International reported the president had embezzled a total of $4 billion that had been remitted to Swiss accounts throughout his term.\textsuperscript{186}

Although the DRC’s current president, Joseph Kabila, has proven a far more capable leader than Mobutu, the DRC was still wrought with conflict and subject to resource exploitation by its neighbours\textsuperscript{187} at the beginning of the new millennium.\textsuperscript{188} Conflict in the region continues and Global Witness reports that ‘revenues from the extraction and trade of these natural resources... can provide off budget funding to

\textsuperscript{184} *Ibid.*
\textsuperscript{187} Uganda; Rwanda and Angola. *Infra.*
State security forces and corrupt officials.'189 While the bureaucratic corruption that the DRC experienced under Mobutu’s regime was far more evident, this does not necessarily mean that the nation does not face similar issues under its current government. A complicated regulatory system has allowed corruption to occur regularly in business dealings, and ‘hundreds of millions of dollars are embezzled every year.190 Lack of transparency is also a major issue. The African Progress Panel’s paper *Equity in Extractives* addresses how the DRC government lost $1.36 billion in revenues after ‘underpricing mining assets that were sold to offshore companies.’191 The assets were sold at an under-value to phantom companies, which has raised concerns that officials ‘received kick-backs from the profits of the deals’192 and that graft was involved. While this cannot be proven, the International Monetary Fund and World Bank both withdrew loans from the DRC for the government’s failure to publish all oil and mining contracts and promote transparency.193 This implies a degree of suspicion by organizations of the DRC government and its officials.

The preceding examples illustrate how corruption with regards to both foreign investment and the extractive industries entails not only bribery, but graft in other forms. The

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192 ONE, How phantom firms have robbed the DRC of billions, online: ONE <http://www.one.org/us/2013/10/24/how-phantom-firms-have-robbed-the-drc-of-billions/>.
193 Supra note 191, at 58.
relationship between these forms of corruption and the presence of multi-nationals in the region is clear, despite the fact that the main perpetrators of these types of graft are host state officials. The following section will explore current measures, both international and domestic, that are in place to combat the abovementioned forms of corruption. Suggestions for mitigating graft in host nations will also be advanced.

Part III: The Importance of Acknowledging Non-Bribery Corruption, and Proposals for Improving Current Anti-Corruption Measures

i. The Importance of Recognizing Non-Bribery Corruption

In order for graft in resource rich nations that stems from transnational business transactions and the extractive industries to be effectively combatted, stronger international acknowledgement of these forms of corruption is paramount. Presently, a larger focus has been on bribery corruption, and a multi-state response to inducement graft has resulted from this attention. International recognition of bribery-related corruption is perhaps most evident in the presence of the *OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*\(^{194}\) (hereinafter, the Convention). The Convention requires its 40 member states to ‘take such measures as may be necessary to establish that it is a criminal offence under its laws for any person to [bribe]… a foreign public official.’\(^{195}\) The

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\(^{195}\) Ibid, at Article 1(1).
organization itself ensures that states party to the Convention comply with what is stipulated in it, which includes requirements of each nation to enforce anti-bribery laws regardless of national economic interests, and to impose criminal sanctions on offenders of the Convention.

While no SSA countries are party to the Convention, it still serves as an example of strong international response to the bribery issue, which has gained global notoriety. Many nations in which mining, oil and gas companies are based, subject various multinationals to the anti-bribery laws that stem from the Convention. This response perhaps reinforces the importance of highlighting the prevalence of the other forms of corruption discussed in Part II. Widespread understanding of, and subsequent exposure to, these types of graft, may attract more attention from the international business community, and other transnational organizations. Presently, there are a number of global groups that identify, measure and publicize the forms of corruption associated with the extractive industries and foreign investment. The efforts by these groups to combat non-bribery corruption in resource-rich host nations would be far more effective if these forms of graft were recognized internationally.

ii. Issues with International Efforts to Curb Corruption

Two separate, yet affiliated, international initiatives that are particularly involved in promoting transparency and combatting corruption in resource-rich host nations are Publish What You Pay (PWYP) and the Extractive Industries Transparency Initiative (EITI). The former

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196 Ibid, at Article 5.
197 Ibid, at Article 3.
network is comprised of about 800 organizations ‘united in their call for an open and accountable extractive sector, so that oil, gas and mining revenues improve the lives of women, men and youth in resource-rich countries.\textsuperscript{198} PWYP has branches in three SSA nations, and affiliates in 18;\textsuperscript{199} it requires that the governments of these nations publish the revenues they receive from extractive companies, and that extractive companies publish what they pay to host governments.\textsuperscript{200} The numbers are subsequently matched, and any disparities are expected to be evident because all the information is made public. This process is applied to foster transparency of contracts and payments in the extractive sectors.

While an organization like PWYP is certainly advantageous in the fight for more transparency in the extractive sector, it is not without its limitations when it comes to anti-corruption. The first shortcoming of the scheme is that it is a measure taken to reveal corruption that has already occurred, rather than a pre-emptive scheme that prevents corruption from occurring. Much of the damage resulting from the embezzlement of state funds can occur before what is paid is published. For example, PWYP works largely by campaigning for governments to publish oil revenues following the receipt of funds, but does little to discourage the embezzlement that precedes the publication. By the time the revenues are made public knowledge, funds could already have been misappropriated by public officials.\textsuperscript{201} It can be argued that PWYP has a deterrent effect; that if governments are expected to publish and are accountable to their constituents, they will not engage in illegal

\textsuperscript{198} PWYP, \textit{About Us}, online: Publish What You Pay <http://www.publishwhatyoupay.org/about>.
\textsuperscript{199} PWYP, \textit{Africa}, online: Publish What You Pay <http://www.publishwhatyoupay.org/where/africa>.
\textsuperscript{201} For example, the examples of embezzlement in Part II involved revelations of corruption that followed the misconduct.
transactions, for fear of being detected. As demonstrated in Part II, however, there are ways in which governments can conceal embezzlement and disguise missing funds as state expenditures.\textsuperscript{202} PWYP extends to the principle ‘publish what you spend’, reinforcing the requirement that governments are expected to publish what they are using revenues for as well.\textsuperscript{203} This can effectively mitigate the problem of missing revenues. Once the information is made public, however, public pleas to account for funds may not yield any results from the government, as demonstrated with Nigeria, above.

The latter shortcoming of PWYP is that even though campaigns are pursued for the publication of revenues, governments can ignore demands for more transparency and accountability in the extractive sector. The missing $50 billion in Nigeria illustrates this concern; instead of addressing the large sum of missing oil revenues, President Goodluck Jonathan fired bank governor Sanusi and failed to adequately account for the missing money.\textsuperscript{204} There is a culture of corruption amongst many SSA nations, and circumstances like this are arguably common enough that they are expected, and almost condoned, by the public. In order for a stronger response from the people, they need to be shown not only the injustice of their leaders’ behaviour, but what exactly they are losing, or stand to lose, because of that corruption. It is not enough to simply publish what has been paid and spent. The people are likely well aware that their governments are corrupt. To induce action and more demands for

\textsuperscript{202} See Part II on Angola’s ‘quasi-fiscal’ expenditures that provided explanation for missing oil revenues. \textit{Supra} note 175.  
\textsuperscript{203} \textit{Supra} note 200.  
accountability, it must be made known to the constituents of SSA nations, how exactly their needs and welfare are being thwarted by graft.\textsuperscript{205}

The EITI is the second international organization that deals with corruption in the extractive industries. The EITI is a voluntary ‘coalition of governments, companies and civil society’ with the objective of fostering transparency in the extractive industries sectors.\textsuperscript{206} Companies are expected to adhere to the EITI Standard which requires ‘full disclosure of taxes and other payments made by oil, gas and mining companies to governments.’\textsuperscript{207} Countries are also expected to publish reports about the extractive industry that are comprehensible and accessible to the public.\textsuperscript{208} While this is an effective method for fostering transparency throughout SSA’s extractive industry, there are some concerns with regards to the efficacy of the initiative. Firstly, the EITI is a voluntary organization and governments choose to adhere to the Standard at their own volitions.\textsuperscript{209} Angola is currently not part of the EITI, thus rendering the organization completely ineffective in that region.

A second issue is that because signing on to the initiative is voluntary, failure to adhere to its Standard leads only to a changed status in the system; normally from ‘compliant/candidate’ to ‘suspended’.\textsuperscript{210} The breadth of the EITI’s authority extends to it rendering a country’s failure to publish as behaviour averse to the organization’s aims and requirements. While this ‘name and shame’ tactic is effective for publicizing a nation as one

\begin{itemize}
\item\textsuperscript{205} More on this, below.
\item\textsuperscript{206} EITI, \textit{What is the EITI?}, online: Extractive Industries Transparency Initiative <http://eiti.org/eiti>.
\item\textsuperscript{207} Ibid.
\item\textsuperscript{208} EITI, \textit{The EITI Standard} (11 July 2013), online: Extractive Industries Transparency Initiative <http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf> at 9.
\item\textsuperscript{209} Supra note 200.
\item\textsuperscript{210} EITI, \textit{EITI Countries}, online: Extractive Industries Transparency Initiative <http://eiti.org/countries>.
\end{itemize}
that lacks transparency, this is not likely to dissuade profit-driven multinationals from investing.\textsuperscript{211} Finally, the effectiveness of the EITI in gauging and combatting corruption, not simply fostering transparency, can also be called into question. A country may be ‘compliant’ but this does not necessarily mean that it is any less corrupt that its counterparts. As demonstrated in Part II, Nigeria is relatively as corrupt as the DRC based on Transparency International’s assessment.\textsuperscript{212} The former currently holds ‘compliant’ status, while the latter is ‘suspended’ under the EITI.\textsuperscript{213} Yet ‘compliant’ Nigeria continues to struggle with transparency, with its government still responsible for billions of dollars’ worth of lost oil revenues. How effective the organization is, both at measuring a nation’s corruptness, and preventing further graft and embezzlement, is questionable when taking into consideration the case of Nigeria. While the EITI and PWYP are making significant strides to foster transparency, international anti-corruption measures that extend beyond simply broadcasting the prevalence of graft, are lacking.

iii. Issues With Domestic Efforts to Curb Corruption

Several legislative and institutional advances have been made by the domestic governments of Angola, the DRC and Nigeria, to curb corruption in their respective nations.

a. Legislation

\textsuperscript{211} Note the DRC’s suspension from the EITI, and its rise in FDI. \textit{Ibid.}
\textsuperscript{212} \textit{Supra} notes 141 and 142.
\textsuperscript{213} \textit{Supra} note 210.
Progress in each nation with regards to anti-corruption is perhaps most evident in the legislative response by the state parliaments. The efficacy of the anti-corruption laws is questionable, however, as poor enforcement remains an obstacle to the success of legal reform. In 2004, the DRC passed an anti-corruption law, as well as its 2004 Money Laundering Act,\textsuperscript{214} in an effort to curb state graft.\textsuperscript{215} Following international pressure, the DRC established a strong legislative framework to fight corruption.\textsuperscript{216} However, there is ‘little political will’ to actually enforce the measures to ensure they have legal effect.\textsuperscript{217}

Similarly, the Nigerian legal framework has been regarded as ‘very strong’.\textsuperscript{218} However, the legal system lacks both a robust rule of law, and tough enforcement action for graft. In 2000, the Nigerian government passed the Corrupt Practices and Other Related Offences Act\textsuperscript{219} that includes a provision prohibiting officers from using their positions to ‘gratify or confer any corrupt or unfair advantage upon [themselves] or any relation or associate.’\textsuperscript{220} This would effectually ban acts of patronage, embezzlement, and more broadly, any form of corruption that would enable the offending officer to benefit in any way. Alas, as demonstrated in Part II,

\begin{footnotesize}
\begin{enumerate}
\item Money Laundering Act, 2004
\item Marie Chene, Overview of Corruption and Anti-Corruption in the Democratic Republic of the Congo (DRC), online: U4 < http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-the-drc/>.\textsuperscript{216}
\item Ibid, at 1.\textsuperscript{217}
\item Ibid, at 6.\textsuperscript{218}
\item Corrupt Practices and Other Related Offences Act, No 5 2000.\textsuperscript{220}
\item Ibid, at section 19.
\end{enumerate}
\end{footnotesize}
this legislation has not effectively curbed several instances of large-scale corruption in Nigeria’s public sector.

Unlike the DRC and Nigeria, Angola’s legal anti-corruption framework is considered ‘poor’. The Law of the High Authority Against Corruption endowed the president with the power to create an independent anti-corruption agency that would work with the nation’s National Assembly. The High Authority Against Corruption organization has not been formed, nor have any strategies been developed to promote its formation.

While legislative reforms to combat corruption have been implemented, there are clear failures in the actual enforcement of these provisions; rendering most advances in this context quite tenuous. This leads one to question if legislative reforms in the aforementioned countries are simply for appearances’ sake, rather than to mitigate graft. In addition to changes in legislation, anti-corruption agencies and organizations have also been established by the governments.

b. State Organizations

The anti-corruption state implemented organizations established in Angola, Nigeria and the DRC are marred by inefficiencies. With regards to the Angola, the SIGFE (Integrated Financial Management System) was established to ‘track all

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222 Ibid.
223 Ibid.
government revenues and expenditures at both a national and local level’, however not all government expenditures are entered, and the information is not made public. Nigeria’s ICPC (Independent Corrupt Practices and Other Related Offences Commission) is responsible for initiating investigations on corruption. While it does investigate often, ‘few high level prosecutions have taken place with few or no consequences.’ The ICPC, while protected legally from political influence, is not entirely immune from interference by the executive. The DRC’s former Ethics and Anti-Corruption Commission was also implemented to combat graft but was later shut down after facing ‘major resource and logistical problems.’

Primary concerns for anti-corruption agencies in SSA are lack of independence, insufficient resources, and hindrances in both the publicizing of findings of corruption and the commencement of prosecutions against offenders. Proposals for how these issues can be addressed are outlined below.

c. Other Anti-Corruption Measures

The aforementioned nation states have all implemented codes of conduct and other requirements compelling officials to disclose their wealth and property.

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224 Supra note 221.
225 Ibid.
227 Supra note 218.
228 Ibid; citing Global Witness in 2010.
229 Supra note 215, at 6.
Angola presently has a Public Probity Law. The DRC’s Code of Ethics of Public Officials which requires the disclosure of assets, is largely inaccessible to the public and is rarely implemented. Similarly, Nigeria’s Code of Conduct Bureau and Tribunal Act does not focus on all civil servants, and declarations by officials subject to it are also unavailable to the general population.

One form of anti-corruption strategy, which often leaves its instigators unprotected from persecution, is whistleblowing. In the DRC, journalists critical of corrupt officials are ‘harassed, intimidated, arrested or imprisoned.’ There are currently no forms of legal protection for whistleblowers in Angola or Nigeria; a bill was sent to the latter nation’s Parliament, but whether or not it will be ratified remains to be seen. Without adequate standards for officials regarding disclosure of funds and protection for parties exposing corruption, efforts to foster transparency and curb corruption respectively, are far less effective. The following subsection will outline a number of suggestions in response to the limitations the aforementioned anti-corruption and transparency measures face.

iv. Proposals for Improving Anti-Corruption Measures

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230 Public Probity Law, N.o 3/10 2010
232 Supra note 215, at 6.
233 Code of Conduct Bureau and Tribunal Act, 1990, Chapter 56 LFN.
234 Supra note 218.
235 Supra note 215, at 7.
236 Supra note 221.
The aforementioned issues with anti-corruption measures and transparency initiatives can be addressed in three ways: by extending transparency efforts to include the publication of specific consequences that stem from corruption (rather than simply making that corruption known); by restructuring the enforcement of legislative instruments under the jurisdiction of a supranational watchdog, and; by encouraging multinationals to adopt anti-corruption measures in their CSR structures. These changes would have the effect of inducing stronger action and response from domestic organizations and civilians of SSA nations.

a. Beyond Transparency: Elucidating Consequences That Stem from Corruption

Establishing transparency is an effective method for publicizing the corruption that stems from the extractive industry. With no evidence of corrupt activities, it is far more difficult for citizens to challenge graft. The Nigerian Extractive Industries Transparency Initiative is an example of an effective agency that promotes transparency, while remaining free from the influence and control of the nation’s public sector officials. Because it reports to the international division, NEITI is an effective body for measuring corruption and transparency in the region. As demonstrated above, the objective of EITI is to ‘[achieve transparency in payments by extractive industries companies to governments.’\(^{237}\) While this certainly suffices for the reporting of corruption, more needs to be done to elucidate the consequences that stem from the reported corruption. Politicians are only as corrupt as their constituents allow, and informed constituents are far less tolerant about graft practices; but in order to elicit a

\(^{237}\) Ibid.
stronger response from the people, the civilians need to be informed of what exactly the losses from state embezzlement entail.

For example, the Nigerian government allocates roughly 200 million-300 million Naira (approximately $1.2m-$1.8m USD) to each of each of its federally funded schools. While tuition to these schools is only about $100 USD, entry is based entirely on merit. Students who are not able to attend these schools are left with the option of enrolling in state-owned institutions, and are expected to pay for their books and uniforms. The $200 USD tuition fee for state schools is a remarkably high sum for poor Nigerians, which perhaps explains why secondary school participation rates are roughly 54% for Nigerian youth. By campaigning with comparisons between low developmental figures and missing oil revenues, the extent of the corruption that is revealed through transparency initiatives would resonate further with the people. A ‘Campaign Through Comparison’ would entail a connection between an act of alleged misconduct and a loss. For example: ‘$20 billion in lost oil revenues would fund four full years of secondary education for 25,000,000 Nigerian youth.’ While the funds would not necessarily have been allocated to education, a campaign showing losses with descriptive examples would put into perspective the sums of money that have been misappropriated. The people need clear examples and figures, and emotional appeals, which emphasize the extent of corruption and will induce enough anger for them to demand more government

240 Ibid.
241 Ibid.
242 Supra note 108.
243 Based on the figures of $200 a year for secondary school education expenses.
responsibility. Otherwise, simple reports of how much money has been taken or lost, will continue to be perceived as common consequences of state corruption that is already so prevalent in Africa.

b. Restructuring Enforcement

As argued above, graft practices in the SSA extractive industries are employed by the elite of SSA nations. Many of the anti-corruption measures implemented in the region are controlled by government agencies and officials, the very bodies that are in turn, corrupt. For example, in Angola, the Law of the High Authority Against Corruption\textsuperscript{244} gives the power of creating anti-corruption measures, to the president.\textsuperscript{245} President Jose Eduardo dos Santos has assumed office for almost 35 years, and is alleged to have retained his lengthy tenure through political corruption.\textsuperscript{246} The chairman of Nigeria’s Economic and Financial Crimes Commission is also appointed by Nigeria’s president, and complaints to this anti-corruption agency often lead to politically motivated arrests.\textsuperscript{247} Centralized government control over all anti-corruption measures hampers the efficacy of the implemented measures. Reform of corruption in SSA nations will have little, if any, effect if officials are not disciplined for their corrupt acts; and this cannot be done if the officials themselves control enforcement. In addition to strong

\textsuperscript{244} Angola High Authority Against Corruption, No 3 1996 (1\textsuperscript{st} Series No 14, Diario da Republica de Angola)
government control, the judicial systems in the region are afflicted with corruption. Judges are appointed according to political influence, and are subject to executive control.\textsuperscript{248}

By mitigating central government influence and power from anti-corruption enforcement, graft stemming from the political elite can be constrained. One method of mitigating domestic government control, and increasing the number of prosecutions of offending officials, is through the implementation of a supranational anti-corruption enforcement agency that has legal jurisdiction over host nations. This body would enforce anti-graft legislation and measures and hold officials accountable for their misconduct. Presently, the African Union adopted the \textit{Convention on Preventing and Combating Corruption}.\textsuperscript{249} However, compliance with the Convention can be achieved by simply implementing anti-corruption laws required by the Union.\textsuperscript{250} Enforcement powers are left solely to the states and their respective governments, which effectively strengthens central government control. By affording the Union enforcement powers, the anti-graft terms of the agreement would be far more effective. Article 4, ss. (1)(g) and (c) both prohibit public office holders from obtaining illicit benefits through their positions,\textsuperscript{251} and Article 6 prohibits money-laundering.\textsuperscript{252} While these Convention requirements have led to legislative reform with regards to anti-corruption measures, as demonstrated above, enforcement of these measures remains a problem, and corruption in the region is still prevalent. Enacting adequate legislation is but one of several
forms of action that need to be taken in order for effective prosecution of graft practices to occur.

It is recommended that the African Union adopt an anti-corruption enforcement division, the Extractive Industries Anti-Corruption Agency (EIACA), to deal exclusively with enforcement of Convention articles; more particularly, with the monitoring and prosecution of offences. The force would include a tribunal and an investigative committee; both composed of EITI members, analysts, auditing groups, and non-politicians who would be required to meet the high standards of transparency. Sanctions for misconduct would be issued accordingly, and restitution for traced funds would be ordered.

One of the prevailing issues with anti-corruption agencies is their lack of resources. The AU EIACA would obtain funding from the member states of the African Union who have ratified the Convention, as well as from the penalties for Convention breaches and other acts of non-compliance. One might question what would incentivize governments to participate in the initiative. However, a strong response to corruption like the EIACA, would be beneficial to host nations that sign on. This initiative, or one similar to it, would assist in transforming the image of Africa’s business environment into one that is lower risk. For example, Africa’s current ‘operating environment remains one of the most difficult in the world’, with corruption as one factor that has contributed to this volatility.²⁵³ By investing in strong and effective anti-corruption measures, such as the EIACA, nations can draw in more multinationals that are

concerned to avoid violations of FCPA provisions and are more dedicated to avoiding ramifications for bribery corruption. The Agency would impart an image of anti-corruption and stability that is arguably lacking in SSA’s business environment. Mitigating government control over the enforcement of anti-corruption laws and codes would assist in combating graft, but also in stabilizing Africa’s business environment.

c. Canada’s Role in Fighting Corruption in SSA Extractive Industries

To some degree, foreign companies that profit from the resource wealth of their host nations should be responsible for rectifying the corruption they help induce. Canada arguably has the strongest presence in the international mining community, with the Canadian government reporting that in 2008, over 75% of the world’s mining and exploration companies were based in this country.\(^{254}\) Perhaps some of this influence can be exerted over its mining companies and their corrupt host governments. Thus far, the Canadian government and Canadian mining companies have been open to adopting rules on reporting payments to government officials that will improve transparency in the extractive industry.\(^{255}\) The response to CFPOA provisions, and the wariness by companies of the ramifications for non-compliance, have both also resulted in adherence to anti-bribery rules.\(^{256}\) With almost $15 billion invested in Africa,\(^{257}\) it may sometimes be the case that Canada is profiting from SSA’s natural resource


\(^{256}\) See Part I.

\(^{257}\) Supra note 254.
wealth at the expense of the region’s inhabitants. Strong CSR initiatives that focus also on corruption, can ensure that the people also can benefit from the revenues of foreign direct investment.

Canadian companies are currently engaging in CSR initiatives that entail ‘voluntary activities undertaken by a company to operate in an economically, socially and environmentally sustainable manner.’\textsuperscript{258} The CSR programs invest in:

- Infrastructure (potable water, electricity, schools, roads, hospitals, hospital equipment, drainage repairs, etc.),
- building social capital (providing high school and university education, providing information on HIV prevention, workshops on gender issue, information on family planning, improving hygiene, etc.),
- and building human capital (training local people to be employed by the mining enterprise or to provide outsourced services, promote and provide skills on microbusiness, aquaculture, crop cultivation...etc.).\textsuperscript{259}

As demonstrated, there is an array of methods companies employ to assist the communities in which their exploration is based. While these efforts can promote sustainable development, the effects are often confined to the communities where the mining and rigging occur. Multinationals ought to broaden their efforts to rectify issues that extend beyond the areas in which they mine, but are still connected to the corruption that results from natural resource revenue embezzlement. One way of broadening their efforts is by establishing charitable funds that assist in nation-wide development. Perhaps by consolidating initiatives amongst all the multinationals based in a particular country, sufficient funds can be raised to help assist locals in non-mining regions, who are denied the benefits that their neighbours enjoy. One overriding objective of this scheme is the incentive for multinationals involved. By

\textsuperscript{258} Ibid.
\textsuperscript{259} Mining Facts, What is Corporate Social Responsibility?, online: Mining Facts <http://www.miningfacts.org/communities/what-is-corporate-social-responsibility/#sthash.VPbQZHw1.dpuf>.
assisting with development that goes beyond simply maintaining amicable relations with mining communities, companies can impart a sense of respect and concern for the people whose lives they affect so heavily. Focusing more on development aid could foster more goodwill amongst miners and improve a company’s image, while placating ethically minded stakeholders.

The government of Canada has shown serious commitment toward assisting host nations with natural resource management. Recently, Stephen Harper announced Canada’s intention to work in Tanzania; the government is presently assisting in improving Tanzania’s auditing agency, ‘supporting the development of petroleum policy and a legal framework for the gas sector’, and assisting in making information on revenues more accessible and comprehensive. Perhaps the Canadian government, as well as other foreign governments, could extend its efforts to Tanzania’s SSA neighbours in which its nation’s companies are present. With foreign government assistance in natural resource management, host nations would be able to equip themselves with adequate tools to build effective governance infrastructures.

Part IV: Conclusion

With the rise in extractive FDI in SSA, the relationship between foreign direct investment, natural resources and corruption is often scrutinized. On the part of businesses assessing the risks of investing in SSA, corruption through the form of bribery is seen as a factor that either negatively affects or improves investment prospects. This has given rise to

the argument that FDI and FDI inflows are affected by bribery corruption either positively or negatively. With the focus on bribery corruption, less attention is being paid to other forms of corruption within Sub-Saharan Africa’s extractive industries. Part I of this thesis advanced the argument that with stricter enforcement of the FCPA and the scope of practices considered corrupt under the CFPOA, bribery corruption in the extractive industries has received strong international, organizational and legislative responses. As such, more attention should be paid to the other forms of corruption that pervade Sub-Saharan Africa’s extractive industries. Part II highlighted these forms of corruption; more particularly, but not limited to, embezzlement. By viewing the relationship between FDI and corruption in this manner, more focus can be put on implementing measures to combat forms of graft that do not amount to bribery, but are deserving of the same level of global attention. Part III reviewed proposals for measures that could be employed to mitigate these other forms of corruption; namely, by depoliticizing control of anti-corruption measures by host governments, and by eliciting stronger responses and less tolerance for graft by the people of SSA. By acknowledging and subsequently addressing other forms of corruption associated with FDI and the extractive industries the people of Sub-Saharan Africa can benefit from the revenues stemming from FDI, leading to broader development.
BIBLIOGRAPHY

LEGISLATION


Angola High Authority Against Corruption, No 3 1996 (1st Series No 14, Diario da Republica de Angola).

Code of Conduct Bureau and Tribunal Act, 1990, Chapter 56 LFN.

Code of Ethics of Public Officials.


Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, s. 3(1).


Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU, 26 May 1997 (Entered into force 28 September 2005).

Criminal Code, RSC 1985, c C-46 at ss. 6(2).


Public Probity Law, N.o. 3/10 2010.

UK Bribery Act, 2010, c.23.

JURISPRUDENCE


Securities and Exchange Commission v Weatherford International Ltd, 13 CV (4) 3500 (SD Tex 2013)

Securities and Exchange Commission v ENI, S.p.A. and Snamprogetti Netherlands, BV, 10 CV (4) 02414 (SD Tex 2010)

Securities and Exchange Commission v Willbros Group, Inc., et al, 08 CV (4) 01494 (USDC/SD Tex 2008).

SECONDARY SOURCES


Index Mundi. *Qatar Literacy*, online: Index Mundi <http://www.indexmundi.com>.


Kolstad, Ivar, Arne Wiig & Aled Williams. ‘*Tackling corruption in oil rich countries: The role of transparency*,’ (February 2008), online: U4 Anti-Corruption Resource Centre <http://www.u4.no>.


Omeje, Kenneth. 'The Rentier State: Oil-related Legislation And Conflict in the Niger Delta, Nigeria’ (2006) 6(2) CSD 211.

ONE. How phantom firms have robbed the DRC of billions, online: ONE <http://www.one.org>.


PWYP. About Us, online: Publish What You Pay <http://www.publishwhatyoupay.org>.


Serious Fraud Office. What is Corruption? online: Serious Fraud Office <http://www.sfo.gov.uk>.


 United Kingdom Serious Fraud Office, Facilitation payments, online: Serious Fraud Office <http://www.sfo.gov.uk>.

This source highlights the level of poverty in Nigeria.